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*SPECIAL ISSUE: SOUTHERN CALIFORNIA WATER—
ESSAYS IN HONOR OF NORRIS L. HUNDLEY, JR.*

Guest Editor: Peter L. Reich

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Cover photo: Hoover Dam played a pivotal role in the geographic and economic development of the West. (Courtesy of the U.S. Bureau of Reclamation, Lower Colorado Region, PERM-No-5135, 1940)

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NEW STUDIES IN WESTERN WATER LAW: FROM REGIONAL TO LOCAL FOCUS

PETER L. REICH, GUEST EDITOR

For *Western Legal History*'s 1996 special issue on western water law, I contributed an introductory essay, "Studies in Western Water Law: Historiographical Trends."¹ There I cited books by the late Norris C. Hundley, Jr. (1935–2013), who served on my doctoral committee at UCLA and to whom this current *Western Legal History* issue is dedicated, and by Donald J. Pisani, who offers his remembrance of Professor Hundley here.² In contrast to previous scholarship, Hundley's and Pisani's work marked a maturity in western water studies, arguing that no single factor—the environment, private initiative, or governmental control—was dominant in shaping legal doctrine.³ Following this comprehensive approach, the four articles in the 1996 issue treated various

¹Peter L. Reich, "Studies in Western Water Law: Historiographical Trends," *Western Legal History* 9:1 (Winter/Spring 1996): 1–7.

²Ibid. 4, citing Norris C. Hundley, Jr., *The Great Thirst: Californians and Water, 1770s–1990s* (Berkeley, CA, 1992), and Donald J. Pisani, *To Reclaim a Divided West: Water, Law, and Public Policy, 1848–1902* (Albuquerque, 1992).

³Ibid.

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aspects of the legal history of water in New Mexico, Colorado, Texas, and California, respectively.⁴

In the two decades since, scholarship on this topic has proliferated, particularly on geographical areas crossing state lines and international boundaries.⁵ In fact, two of the 1996 articles on interstate compacts have now been expanded into important books.⁶ These works and two others will be summarized here to demonstrate the widening range of the field in terms of regional coverage, archival research, and interpretive depth. Space constrains my focus to multistate and international studies, which implicate broader issues, but I will also briefly mention some state-specific scholarship that makes significant contributions. These and the three articles in this issue build upon Norris Hundley's lifetime evaluation of the dialectic between private rights and government water control over a range of geographic contexts from the local to the transnational.

Douglas R. Littlefield's *Conflict on the Rio Grande: Water and the Law, 1879–1939* covers the earliest period.⁷ The 1904 National Irrigation Congress' allocation of the Rio Grande, confirmed by federal statute in 1905, was the first stream agreement affecting two or more states or territories—Colorado, New Mexico, and Texas—and two nations as well, in its influence on the 1906 Mexico-U.S. water treaty. The settlement made possible the Bureau of Reclamation's Elephant Butte Dam and the 1938 Rio Grande Compact that resolved the U.S. Supreme Court litigation between New Mexico and Texas. Littlefield draws on a comprehensive reading of public and private records, including those of the Bureau of Reclamation,

⁴David A. Reichard, "The Politics of Village Water Disputes in Northern New Mexico, 1882–1905," *Western Legal History* 9:1 (Winter/Spring 1996): 9–33; Daniel Tyler, "Delph E. Carpenter and the Principle of Equitable Apportionment," *Western Legal History* 9:1 (Winter/Spring 1996): 35–53; G. Emlen Hall, "The Mismeasure of the Pecos River: Royce Tipton and the 1948 Pecos River Compact," *Western Legal History* 9:1 (Winter/Spring 1996): 55–74; Alan M. Paterson, "Water Quality, Water Rights, and History in the Sacramento-San Joaquin Delta: A Public Historian's Perspective," *Western Legal History* 9:1 (Winter/Spring 1996): 75–96.

⁵For anthologies containing a number of such studies, see Gordon Morris Bakken, ed., *Law in the Western United States* (Norman, OK, 2000), 131–204, covering the misinterpretation of Hispanic water law, irrigation and property, and Indian rights; and Char Miller, ed., *Fluid Arguments: Five Centuries of Western Water Conflict* (Tucson, 2001), including Hispanic land and water, Native Americans, agriculture, and dam issues.

⁶G. Emlen Hall, *High and Dry: The Texas-New Mexico Struggle for the Pecos River* (Albuquerque, 2002); and Daniel Tyler, *Silver Fox of the Rockies: Delphus E. Carpenter and Western Water Compacts* (Norman, OK, 2003).

⁷Douglas R. Littlefield, *Conflict on the Rio Grande: Water and the Law, 1879–1939* (Norman, OK, 2008).

various compact commission papers, and archives of prominent participants like El Paso attorney and water user representative Richard Burges. In contrast to Donald Worster's thesis of a monolithic hydraulic empire created by economic and bureaucratic elites,⁸ Littlefield's approach sees diverse local and state authorities; quasi-governmental entities like irrigation districts; the private sector; and Mexican officials combining to facilitate these agreements in "a fusing process . . . that has involved fragments from countless conflicts and compromises."⁹

In *Silver Fox of the Rockies: Delphus E. Carpenter and Western Water Compacts*, Daniel Tyler expands his 1996 *Western Legal History* essay to produce the definitive biography of the architect of the comprehensive 1922 Colorado River Compact.¹⁰ Based on his voluminous personal papers, this biography of water lawyer and Colorado Interstate Streams commissioner Carpenter provides a fascinating window into the impetus for successive compacts, the negotiating techniques that produced them, and their limitations. Carpenter was the driving force in crafting the 1922 compact, using the principles of equitable apportionment developed in a series of U.S. Supreme Court decisions, and was a major influence on later compacts as well. Wanting to forestall expensive and time-consuming litigation, he consciously cultivated negotiating techniques to sway his opponents incrementally. But Tyler does not idolize his subject. He notes that the Colorado River Compact relied on a major miscalculation of the river's flow, neglected to make apportionments among the lower basin states, hindered water marketing, and encouraged inefficient use. Nevertheless, Carpenter left a "legacy of river compacts, negotiation over litigation, local control over natural resources, modification of the prior appropriation doctrine, and defense of states' rights [that] helped shape the West of the twenty-first century."¹¹

Like Tyler's book, G. Emlen Hall's *High and Dry: The Texas-New Mexico Struggle for the Pecos River* builds on an essay appearing in the 1996 *Western Legal History* issue, although in this case the earlier piece became a background chapter rather than a précis of the entire work.¹² Hall has written a history of

⁸See Donald Worster, *Rivers of Empire: Water, Aridity, and the Growth of the American West* (New York, 1985).

⁹Littlefield, *Conflict on the Rio Grande*, 220.

¹⁰Tyler, *Silver Fox of the Rockies*. The "silver fox" moniker was a colleague's tribute to Carpenter's qualities of patience and persistence in pursuit of specific goals. *Ibid.*, 21.

¹¹*Ibid.*, 25. Prior appropriation means first in time, first in right.

¹²Hall, *High and Dry*.



Water lawyer and Colorado Interstate Streams commissioner Delphus E. Carpenter was the architect of the comprehensive 1922 Colorado River Compact. (Courtesy of Papers of Delph Carpenter and Family, Water Resources Archive, Colorado State University, Archives and Special Collections)

the 1948 Pecos River Compact and subsequent litigation over its interpretation, as well as a personal memoir. He was a staff attorney for the New Mexico state engineer from the mid-1970s through the mid-1980s, most of the pivotal period when the compact's meaning was being litigated before the U.S. Supreme Court. His direct involvement gives him particular

insight into the case which, after many procedural gyrations and three special masters, established that both New Mexico's and Texas' positions on the compact were wrong, but that the former nevertheless owed its downstream neighbor 10,000 more acre-feet per year at the state line than it had been delivering, as well as repayment for previous shortfalls.¹³ According to Hall, this formula "mechanically solved the river's interstate problems" but did not preserve the "subtle, nature-based system" by which the original compact took the river's actual condition into account.¹⁴ Retired from law practice and teaching to grow chili and basil on tiny irrigated plots, Hall considers that his gardening reflects in miniature the public-private conflicts characterizing the Pecos dispute and not put to rest by years of litigation.

Like the other regionally focused books discussed here, Evan R. Ward's *Border Oasis: Water and the Political Ecology of the Colorado River Delta, 1940–1975* takes in water law and policy in several states, and, like Littlefield's work, includes a significant emphasis on Mexico.¹⁵ As Ward emphasizes, "U.S.-Mexican relations played a transcendent role in the marriage of water and soil in the arid delta."¹⁶ Combining environmental and legal history, he tells how bi-national agricultural investment transformed the delta landscape from the late nineteenth century to the late twentieth, replacing the lush "green lagoons" observed by Aldo Leopold in the 1920s with the desolate moonscape of today.¹⁷ Intensive irrigation, dams, and desalination all played their parts, despite the diplomatic mechanism of the International Boundary and Water Commission which, while reducing the Colorado's salinity through its "minutes," or specific agreements, did not prevent its flow from drying up and depriving the Cocopah Indians of their farming and fishing livelihood. Capital investment and bi-national accords at the federal level are the principal factors here, and law appears

¹³New Mexico argued that it was entitled to continue water "uses" established in 1947 prior to the compact, while Texas maintained that its engineering studies showed the river's flow to have been depleted since that time; both analyses ignored the river's actual condition. *Ibid.*, 136–54.

¹⁴*Ibid.*, 225–26.

¹⁵Ward, *Border Oasis*.

¹⁶*Ibid.*, xxviii.

¹⁷Canoeing the delta in 1922, Leopold observed how the river "meandered in awesome jungles." Aldo Leopold, *A Sand County Almanac* (1949; repr. ed., New York, 1970), 150.

impotent against larger economic and political trends.¹⁸ Ward concludes with a dramatic image of locals using dead, dried fish to dig their stranded vehicle out of the delta mudflat.¹⁹ This dystopian landscape epitomizes his point that the overuse of water by agribusiness and cities has pushed the region to the brink of ecological collapse.

Other studies of water issues within specific territories or states have a more limited scope than do the books discussed above, but all offer solid research and original interpretations. Malcolm Ebright's "Sharing the Shortages: Water Litigation and Regulation in Hispanic New Mexico, 1600–1850" shows how water allocation and adjudication criteria that developed in the colonial period carried over into the early territorial days, and survive to some extent within the *acequia* (community ditch) system.²⁰ John O. Baxter traces this story up to statehood in *Dividing New Mexico's Water, 1700–1912*, stressing that the earlier system was largely supplanted in the late nineteenth century as aggressive Anglo developers were able to privatize water rights in the courts, and using the 1911 *Tularosa* case as an example.²¹ David Schorr stakes out another key western state as his bailiwick in *The Colorado Doctrine: Water Rights, Corporations, and Distributive Justice on the American Frontier*. He maintains that distributional equity, not economic efficiency, was the primary basis for legislative passage and judicial elaboration of the prior appropriation doctrine.²² Twentieth-century Nevada, a state relatively slighted in

¹⁸Ward notes a parallel example of irrigation infrastructure disaster in the Soviet Union's diversion of two rivers from the Aral Sea for cotton production, leading to drastic depletion of that water body. See Frank Westernmark, *Engineers of the Soul: In the Footsteps of Stalin's Writers* (London, UK, 2011), discussing how massive Soviet canal projects under Stalin resulted in catastrophic desertification, pollution, and health crises, notwithstanding official propaganda to the contrary.

¹⁹Ward, *Border Oasis*, 154.

²⁰Malcolm Ebright, "Sharing the Shortages: Water Litigation and Regulation in Hispanic New Mexico, 1600–1850," *New Mexico Historical Review* 76:1 (January 2001): 3–45.

²¹John O. Baxter, *Dividing New Mexico's Water, 1700–1912* (Albuquerque, 1997).

²²David Schorr, *The Colorado Doctrine: Water Rights, Corporations, and Distributive Justice on the American Frontier* (New Haven, 2012). Schorr's work is at odds with Donald J. Pisani's "Enterprise and Equity: A Critique of Western Water Law in the Nineteenth Century," *Western Historical Quarterly* 18:1 (January 1987): 15–37. According to Pisani, prior appropriation's purpose was to "develop resources as rapidly as possible" in order to facilitate mining and agriculture. *Ibid.*, 37. Schorr and Pisani use similar evidence to arrive at opposite conclusions; the former's focus on Colorado in contrast to the latter's coverage of several states, especially larger and more corporate-dominated California, may explain their differing analyses.

the historiography of western water law, receives attention in Leah Wilds' *Water Politics in Northern Nevada: A Century of Struggle*.²³ Using extensive oral history interviews and public documents, Wilds explains how their advocacy for Public Law 101-618 in 1990 allowed Nevada political leaders like Senator Harry Reid and Pyramid Lake Paiute chair Joe Ely to resolve the three-way Truckee River conflict among their state, California, and Native American tribes. Wilds' book illustrates how one state can become a regional player through negotiation and legislation as alternatives to litigation.

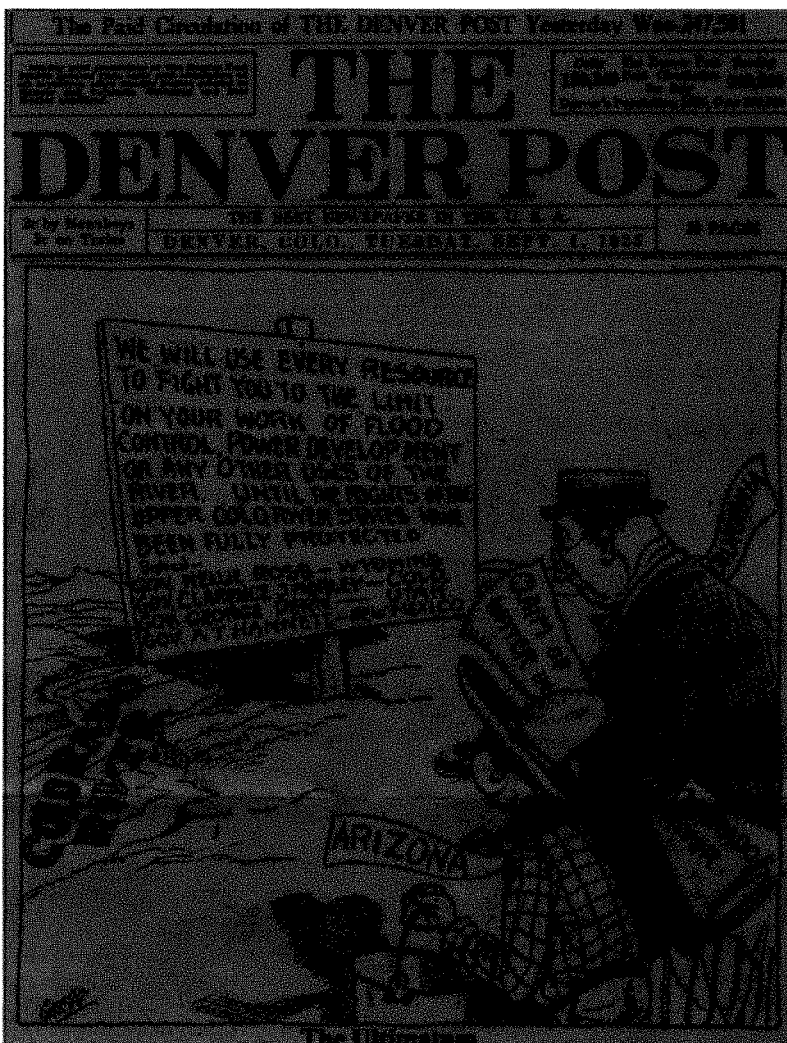
The articles in this issue, revised versions of papers presented at a 2014 Western History Association panel, "The Legal and Physical Infrastructure of Southern California Water,"²⁴ look below the state level at an area sufficiently varied in geography and politics to reflect broader trends well beyond its borders. In 1934 an analyst of Southern California water issues framed the regional debate as between "existing water rights" and the need for government control to further "the complete use of the water resources of the state."²⁵ All three contributions included here flesh out aspects of this essential paradigm, dealing, respectively, with continuing disputes over the Colorado River, the Mexico-U.S. water relationship, and Native American water rights. Tanis Thorne's "Indian Water Rights in Southern California in the Progressive Era: A Case Study" illuminates an almost forgotten 1920s attempt by the Indian Office to quantify the water rights of San Diego County's Capitan Grande people in line with the *Winters* doctrine, revealing an unusual early recognition of Indian claims within the context of policy reform and infrastructural development.²⁶ In "Colorado River Water in Southern California: Evolution of the Allocation Framework, 1922–2014," Jason Robison divides the history of the "Law of the River" governing the distribution process into six periods tracking basin-wide, interstate, and intrastate milestones, from the original compact through recent litigation over the Quantification Settlement Agree-

²³Leah J. Wilds, *Water Politics in Northern Nevada: A Century of Struggle* (Reno, 2010).

²⁴The panel was sponsored by the Ninth Judicial Circuit Historical Society.

²⁵Ernest L. Bogart, *The Water Problem of Southern California* (Urbana, IL, 1934), 104.

²⁶See also *Winters v. United States*, 207 U.S. 564 (1908), in which the U.S. Supreme Court held that the creation of an Indian reservation includes water rights not limited by the amount of actual use. For a detailed analysis of the case and its implications, see Norris Hundley, Jr., "The 'Winters' Decision and Indian Water Rights: A Mystery Reexamined," *Western Historical Quarterly* 13 (January 1982).



The Denver Post published a cartoon illustrating the continuing dispute over Colorado River water rights. (Courtesy of Water Resources Archive, Colorado State University, Archives and Special Collections)

ment. He notes that the various apportionment methods have emerged without a fully shared understanding of their meaning and intended operation. And in "The All-American Canal and the Civil-Common Law Divide," I discuss how doctrinal disconnects between Mexico and the United States have impeded adjudication of their shared water sources, exemplified by litigation over the Colorado River's supply of groundwater to the Mexicali and Imperial Valleys, and suggest conceptual meeting places in common principles of usufruct or incorporation of foreign law into national legal systems. All of these essays demonstrate the continuation of historic conflicts over water among key actors and the multiple factors shaping the law. Equally important, they do homage to Norris Hundley by expanding on topics he studied and by examining them in the context of his long-time home base of Southern California.



Norris Hundley, 1935–2013 (Courtesy of Carol Hundley)

REMEMBERING NORRIS HUNDLEY

DONALD J. PISANI

Norris Hundley, to whose memory this special issue of *Western Legal History* is dedicated, died on April 28, 2013. Each of the essays in this special issue focuses on one of the central concerns of Hundley's career: the allocation of the Colorado River, water disputes between the United States and Mexico, and the neglected rights of Native Americans.

A leading historian of the American West, Hundley spent most of his career studying the relationship between the law, public policy, and the environment. The eldest of seven children, he was born in Houston, Texas, on October 26, 1935, and spent his teenage years in West Covina, California. He attended San Gabriel Mission High School, where he met the great love of his life, Carol Marie Beckquist, whom he married on June 8, 1957. Hundley graduated from Whittier College in 1958 and entered the Ph.D. program at the University of California, Los Angeles, where he worked under the direction of John Caughey. He received his Ph.D. degree in 1963 and, after a year teaching at the University of Houston, returned to UCLA, where he spent the rest of his career, "retiring" from the faculty in 1994. In addition to his teaching and research responsibilities, from 1982 to 1994 he chaired the UCLA Program on Mexico, and he directed the university's Latin American Center from 1990 to 1997, including three years following his formal retirement.

Norris was a regional historian with an international perspective. His first book, *Dividing the Waters: A Century of Controversy Between the United States and Mexico*, published by the University of California Press in 1966, focused on conflicts over three rivers shared by the United States and Mexico: the Tijuana, the Rio Grande, and the Colorado. The latter two streams originated in the United States, whose soaring twentieth-century population and demand for water far outstripped

Donald J. Pisani is the Merrick Professor of Western American History emeritus at the University of Oklahoma.

urban and agricultural development south of the border. In 1944, following lengthy negotiations, the two nations ratified a treaty allocating the water. But in the decades after World War II, the construction of storage reservoirs in the United States, and American diversions that limited return flow, reduced the volume and quality of water that crossed the border. This raised the question of whether Mexico had a right to "virgin [unused] water," or to the same quality of water enjoyed by American farmers, or simply to whatever salt-laden liquid managed to escape the United States.

Dividing the Waters exhibited the qualities that came to characterize all of Hundley's work: meticulous and extensive research in archival sources; a devotion to issues involving social justice and the public welfare; and a profound understanding of how American federalism disperses power to the federal government, states, local institutions, and interest groups. Above all, the book showcased Hundley's ability to unravel complicated stories and make them intelligible to the literate public. *Dividing the Waters* set the stage for Hundley's later work on the Colorado River. It demonstrated, for example, that negotiations to divide up streams often rested on inadequate or false assumptions about the quantity of water available, the demand for that water, or how it would be used in the future. Even the most carefully planned water negotiations inevitably led to unintended policy consequences.

Hundley's second book, *Water and the West: The Colorado River Compact and the Politics of Water in the American West* (1975, 2009), established his reputation as the West's leading historian of water. It focuses mainly on the law and politics, but it never loses sight of the human beings who negotiated the Colorado River Compact of 1922 and sponsored subsequent legislation to allocate the river, including the Boulder Canyon Act (1928). These include Arthur Powell Davis, an early director of the Bureau of Reclamation who, as early as 1902, conceived of building a string of storage reservoirs along the Colorado; Phil Swing, the Southern California congressman who fought for the legislation that led to Boulder Dam; Delph Carpenter, the Colorado politician considered to be the father of the water compact of 1922; and Herbert Hoover, who, as secretary of commerce, presided over the interstate commission that drafted that agreement. The Colorado River runs through seven states, each of which has some claim to its water. But the main force behind demands to allocate the river came from California, particularly the city of Los Angeles and the Imperial Irrigation District. *Kansas v. Colorado* (1907) mandated an "equitable apportionment of benefits" among the states that shared interstate streams, but water rights remained under the

control of the states. The paramount question was how to find a way to share water within a federal system of governance. The 1922 compact took three years to negotiate, six years to ratify, and many more years to implement. The Supreme Court did not pass judgment on the compact until 1963, by which time conditions along the river had changed dramatically since the 1920s. As part of his research for *Water and the West*, Hundley interviewed many of the major actors in this drama and combed through more than sixty manuscript collections scattered from Mexico City to Montana and Wyoming. The book has become a classic in the historiography of the American West. Among its many virtues is the analysis of the interest groups that shaped Colorado River water policy, such as the League of the Southwest, the Imperial Irrigation District, and the Metropolitan Water District. But the larger story is how one state's growing power over an interstate stream shaped the economic development of Southern California and much of the rest of the West.

Hundley's third monograph, *The Great Thirst: Californians and Water, A History*, first appeared in 1992, followed by a revised and expanded edition in 2001. A monumental synthesis, it has few equals in American historiography. The second edition's eight hundred pages extend from the "aboriginal water-scape" to the end of the "high dam era" during the last decades of the twentieth century. *The Great Thirst* not only tells the story of California's major water projects, it looks at the Native American and Hispanic water systems that preceded the gold rush. The Indians, Spanish, and Mexicans lived in relative harmony with nature and put the welfare of their communities before the pursuit of individual wealth. Their patterns of life contrasted starkly with the Argonauts who flooded into California after the gold rush. The latter sought to remodel nature and defy the basic constraints of aridity that the Native Americans, Spanish, and Mexicans recognized and accepted. After the gold rush, Americans considered California a place where they could secure great fortunes from buying and selling land, water, fish, timber, gold, silver, and furs. It was a land of few legal impediments or constraints. *The Great Thirst* is a case study in the pitfalls of the American dream, which assumes that technology can answer the vexing problems of population growth and guarantee an ever-increasing stream of consumer goods and an ever-rising standard of living. The book appeared at the end of the dam-building era in the history of the American West, when concerns of scarcity began to replace dreams of endless abundance and when both liberal and conservative critics came to question the wisdom of the federal government's subsidizing the growth of such giant desert cities as Los Angeles, San Diego,

Phoenix, and Las Vegas. Little wonder that in the twentieth century, no American state better embodied the bright and the dark side of the American dream than California.

Hundley understood that the past should be treated on its own terms, not used as a whipping boy for concerns of the present. He was as judicious and fair-minded as he was prolific. *The Great Thirst* addresses Donald Worster's thesis in *Rivers of Empire* (1985). Worster argued that in the American West, a marriage between government and private capital created a "Leviathan" that served the rich and powerful at the expense of common citizens. Not only did the great water projects of the twentieth century transform the face of California and create an unsustainable economy that centralized people in a few great cities; those projects also subverted the region's democratic promise. Worster branded the West a "hydraulic society" and likened it to the empires of the ancient Middle East, all of which assumed that they could engineer deserts out of existence but learned otherwise.

The Great Thirst raised profound and depressing questions about the future of natural resource planning and management in the United States, not just in California. To some extent, Hundley agreed with Worster. He recognized that the arrogance, greed, and conceit of water planners played a huge role in the history of California, and that the state's great wealth had come at a very high price. He also acknowledged the power of the federal government in water development. Huge agricultural water subsidies, for example, had promoted social inequalities, including a permanent underclass of farm laborers and their families in the San Joaquin Valley. But Hundley denied that the water kings conned an unwary public into supporting water projects, or that the problem was too much government. Indeed, the public consistently welcomed such projects and voted for them as a tool of economic growth and greater wealth. He thought that a more centralized, unified power over water might serve the public interest better than the splintered authority characterized by dozens of governing boards and local districts.

It should be no surprise that a historian who, in 1965, participated in the civil rights march from Selma to Montgomery maintained a lifelong commitment to equality and social justice. His first published article, "Katherine Philips Edson and the Fight for the California Minimum Wage, 1912-1923," appeared in the August 1960 issue of the *Pacific Historical Review*. It recounted the efforts of one of the state's leading Progressive reformers—a member of the state's Industrial Welfare Commission—to promote minimum wage legislation as part of her crusade to improve the condition of workers in California.

Hundley's research also included ethnic minorities and the dispossessed. For example, in two prize-winning articles in the *Western Historical Quarterly*—"The Dark and Bloody Ground of Indian Water Rights: Confusion Elevated to Principle" (1978) and "The 'Winters' Decision and Indian Water Rights: A Mystery Reexamined" (1982)—he explored the nature and history of Indian water rights and explained why they had been neglected before the 1960s, despite their seeming affirmation in the famous case of *Winters v. U.S.* (1908). Hundley also edited a series of volumes on Indians, Chicanos, Asian Americans, African Americans, and women, as well as on the environment and agriculture. In addition, he revised and expanded the standard history of California originally written by his mentor, John Caughey.

The scope and originality of Hundley's books and articles won him a reputation as a first-rate historian of the United States, the American West, and California. From 1968 to 1997 he also contributed to scholarship as editor of the *Pacific Historical Review*. He encouraged historians to break new ground as he had himself. In the 1960s and 1970s, the *Western Historical Quarterly* followed the lead of Frederick Jackson Turner by focusing most of its attention on the nineteenth-century frontier experience. But Hundley encouraged historians of the West to study twentieth-century topics. And later the journal became a congenial home to "Pacific Rim history." He took joy and pride in promoting the work of young scholars in established fields, such as Native American history, as well as in new fields, including environmental history and ethnic studies.

As a historian of water myself, I can attest to Hundley's great skill as an editor. I published three articles in the *Pacific Historical Review* while he was editor, and he was unfailingly kind and helpful. No one provided me with more useful criticism or more valued praise. Yet he maintained very high standards. I was particularly proud of an article I submitted in 1981 about the efforts of the Bureau of Reclamation in the early decades of the twentieth century to establish national water rights above and beyond state control. But I wrote too much and thought too little. My manuscript weighed in at fifty-five pages, and the discursive notes alone occupied about twenty pages. Norris sent back a very encouraging and cordial cover letter explaining that my essay would be published in due course with only "minor" revisions. But my jaw dropped when I looked through the manuscript itself and found line after line crossed out. My thirty-five pages of text had become thirteen pages, and throughout the pages that had survived his editorial scalpel, there were pithy comments, suggestions, and ques-

tions. After my initial shock, I realized how much I owed to Hundley for taking the time to give me the benefit of his astute criticism—and I became a more humble historian. No editor before or since has provided me with such assistance. He was a gentleman, but he did not patronize people. He wanted only each person's best.

As I recall, I first met Norris Hundley in 1976, when the Pacific Coast branch of the American Historical Association held its annual meeting in La Jolla. When first I saw him, I thought that a Hollywood movie star had somehow wandered into our hotel by mistake. He was a strikingly handsome man, at least compared to most of the historians I knew. I later learned that as a young man he had worked in a haberdashery, and his natty sport coats and striking ascot ties reflected that experience. But those who met him found that he had the manners to match his notable appearance. He was soft-spoken, modest, unpretentious, witty, and always gracious. He was also a strong family man, and I noted that his wife Carol usually attended meetings with him, which, given the dullness of many academic gatherings, suggested that she shared many of Norris' fine qualities, including patience and good humor.

It should be noted that although Norris Hundley has left us, his last book, written with the historian Donald C. Jackson, will appear in fall 2015, jointly published by the University of California Press and the Huntington Library Press. *Heavy Ground: William Mulholland and the St. Francis Dam Disaster* will reassess the 1928 collapse of the St. Francis Dam and the resulting flood that killed more than four hundred people in the Santa Clara Valley of Southern California. The book is a far-ranging study of the relationship of the dam to Mulholland's vision for Los Angeles. Mulholland served as chief engineer of the Los Angeles water system for most of the early twentieth century. He was one of a handful of men who laid the economic foundation for modern Los Angeles and Southern California. The book is more than an account of what happened to a badly designed dam constructed without adequate state supervision. It is also a story closely linked to the construction of Hoover (formerly Boulder) Dam. Originally, this dam at Black Canyon was to be a curved-gravity structure similar in design to the St. Francis Dam. The collapse gave new ammunition to members of Congress opposed to the construction of any high dam on the Colorado River, at least at Black Canyon. But it also reinforced the idea that only the federal government could build such a dam, rather than the state of California, Los Angeles, or a private company. It is fitting that Hundley's last book will focus on Los Angeles water politics, a subject inextricably connected to his earlier research and writing.

Norris Hundley was a superb scholar and a fine man. He is survived by his wife, two daughters, and four grandchildren, and by the legion of historians whose work he directed, promoted, and influenced. There are few other men like him, and we all miss him.

COLORADO RIVER WATER IN SOUTHERN CALIFORNIA: EVOLUTION OF THE ALLOCATION FRAMEWORK, 1922–2015¹

JASON A. ROBISON

There was no paucity of vision in secretary of the interior Ray Lyman Wilbur's statement on July 7, 1930, announcing the commencement of construction on Boulder (now Hoover) Dam. Erection of the colossus would, in the words of the secretary, signify nothing less than "our national conquest over the Great American Desert."² By means of the dam, the nation would "build a great natural resource . . . make new geography, and start a new era in the southwestern part of the United States."³ The secretary's message was bold and prophetic, as emphatic in its description of the pivotal role

¹I am very grateful to *Western Legal History* for sponsoring the Western History Association conference panel from which this article extends. Many thanks also to my colleagues on that panel: Donald Pisani, Peter Reich, and Tanis Thorne. Funding for this article was generously provided from the George Hopper and Carl M. Williams Faculty Research Funds. Any errors or omissions are solely my own. This article is dedicated to Rachel St. John, the western historian who initially fostered my interests as a legal scholar in the Colorado River Basin, the Law of the River, and the opus of Norris Hundley, Jr.

²Ray Lyman Wilbur and Northcutt Ely, *The Hoover Dam Power and Water Contracts and Related Data with Introductory Notes* (Washington, DC, 1933), 439. For an excellent account of Hoover Dam's construction, see Michael Hiltzik, *Colossus: Hoover Dam and the Making of the American Century* (New York, 2010).

³Wilbur and Ely, *The Hoover Dam Power and Water Contracts*, 439.

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to be played by the dam in regional development as it was in its account of the vital economic function to be performed by the dam within Southern California. Imperial Valley would "no longer be menaced by floods" proclaimed the secretary, facilitating "new hope and new financial credit to one of the largest irrigation districts in the West."⁴ So, too, would the dam grow the coastal plain. "By increasing the water supply of Los Angeles and the surrounding cities, homes and industries [would be] made possible for many millions of people."⁵

Signed into law on December 21, 1928, roughly a year-and-a-half prior to Secretary Wilbur's statement, the Boulder Canyon Project Act had authorized Hoover Dam's construction and thereby had given rise to the vision articulated by the secretary of a "conquered" Colorado River making "new geography" and dawning a "new era" in the seven western states with portions of territory located in the Colorado River Basin ("Basin States").⁶ The Project Act originated at a clutch moment in the early stages of an evolutionary process that over the next century would generate a labyrinthine legal framework to allocate and manage the basin's water. This framework is colloquially called the "Law of the River." In addition to the Project Act, it embodies an international treaty, two interstate compacts, a Supreme Court decree issued in the historic case of *Arizona v. California*, and dozens of statutes and regulations.⁷ These nested international, interstate, and intrastate components make the Law of the River one of the most complex legal regimes of its kind in the world.

California's use of Colorado River water—or, more precisely, the evolution of the complex legal framework governing this water use—can be viewed as progressing in six periods that track seminal basin-wide, interstate, and intrastate milestones. Rich themes appear across these periods for citizens, historians, legal scholars, policymakers, and practitioners alike to consider with regard to the iterative and provisional way in which water laws evolve and the diverse forms water laws assume. The conclusion examines these themes. As will become

⁴Ibid.

⁵Ibid.

⁶Charles Wilkinson has coined the apropos term *Big Buildup* to refer to the transformative development facilitated by the Colorado River in the U.S. Southwest throughout the mid-twentieth century. Charles F. Wilkinson, *Fire on the Plateau: Conflict and Endurance in the American Southwest* (Washington, DC, 1999), xii.

⁷For a useful overview of the Law of the River, see Lawrence J. MacDonnell, "Colorado River Basin," in *Waters and Water Rights*, ed. Robert E. Beck (Dayton, OH, 2009): 5–54.

evident, California has emerged through the evolutionary process surveyed below with a relatively secure entitlement to Colorado River water in modern times—a claim that cannot be made to a comparable extent by other Basin States. Nearly 40 million people basin-wide rely on the flows associated with this entitlement,⁸ and roughly half of this population resides within Southern California.⁹ Given this scale of reliance, it is unsurprising that an unprecedented imbalance between water supplies and demands now faces the Colorado River Basin.¹⁰ A clear understanding of the evolution and nature of California's legal rights to Colorado River water is, in this author's view, essential for addressing future interstate and intrastate tensions surrounding the coveted flows.

A NASCENT BASIN-WIDE FRAMEWORK

At the base of the allocation framework for Colorado River water in Southern California is an interstate compact that underlies the entire Law of the River: the Colorado River Compact.¹¹ Signed by members of the Colorado River Commission on November 24, 1922, the compact was the first interstate compact formed in U.S. history for purposes of water allocation. It has been aptly described as the “constitution” of the Law of the River,¹² and the varied events that have shaped California's legal rights to use water from the Colorado River during the past century uniformly have transpired with the compact as a backdrop.

⁸U.S. Department of the Interior, Bureau of Reclamation, Colorado River Basin Water Supply and Demand Study, Study Report (2012), SR-2, <http://www.usbr.gov/lc/region/programs/crbstudy.html>.

⁹U.S. Department of the Interior, Bureau of Reclamation, Colorado River Basin Stakeholders *Moving Forward* to Address Challenges Identified in the Colorado River Basin Water Supply and Demand Study, Phase 1 Report (2015), 3-3, <http://www.usbr.gov/lc/region/programs/crbstudy/MovingForward/Phase1Report/Chpt3.pdf>.

¹⁰The Bureau of Reclamation summarized this imbalance as follows in its lengthy basin study released in December 2012: “Although a range of future imbalances is plausible, when comparing the median of water supply projections to the median of the water demand projections, the long-term imbalance in future supply and demand is projected to be about 3.2 maf [million acre-feet] by 2060.” Colorado River Basin Water Supply and Demand Study (2012), SR-36.

¹¹The seminal account of the Colorado River Compact's formation remains Norris Hundley, Jr., *Water and the West: The Colorado River Compact and the Politics of Water in the American West* 2^d ed. (Oakland, CA, 2009).

¹²Robert Adler, “Revisiting the Colorado River Compact: Time for a Change?” *Journal of Land, Resources, and Environmental Law* 28 (2008): 21.

The compact's genesis can be traced to a resolution passed by a regional booster organization, the League of the Southwest, at a meeting held in Denver on August 25–27, 1920.¹³ A proposal introduced at this meeting by Colorado water lawyer Delph Carpenter—later hailed as the “Father of Interstate River Compacts”—called for using the “treaty-making power of the states” to address the competing legal rights of the Basin States and the United States to water in the Colorado River and its tributaries.¹⁴ Expressing the league's conviction that these legal rights should be “settled and determined by compact or agreement between said States and the United States,” the resolution requested the appointment of commissioners by the Basin States' legislatures in order to negotiate a compact or agreement that would subsequently be ratified by those legislatures and eventually the U.S. Congress.¹⁵

Myriad events had taken place in the Basin States—particularly, in Southern California—during the first two decades of the twentieth century leading up to the League of the Southwest's resolution. The essential dynamic stemming from these events involved allocational tensions between states (and water users therein) located in the upper versus lower parts of the Colorado River Basin.

Water users in the Lower Basin gradually had mobilized to solicit the federal government's assistance with funding and construction of infrastructure that would ultimately emerge in the form of Hoover Dam and the All-American Canal. Irrigators in California's Imperial Valley had begun exhausting the Colorado River's summer flows around the turn of the century,¹⁶ and they also had endured devastating floods from 1905 to 1907 that formed the Salton Sea.¹⁷ Their interests eventually aligned with those of Arthur Powell Davis—director of

¹³Ray Lyman Wilbur and Northcutt Ely, *The Hoover Dam Documents* (Washington, DC, 1948), 18.

¹⁴*Ibid.* Delph Carpenter is said “to have suggested the use of the treaty-making power by the states as a method for settlement of interstate water rights” as early as 1912. *Ibid.*, 17. For excellent scholarship on Delph Carpenter, see Daniel Tyler, *Silver Fox of the Rockies: Delphus E. Carpenter and Western Water Compacts* (Norman, OK, 2003); Daniel Tyler, “Delph E. Carpenter and the Principle of Equitable Apportionment,” *Western Legal History* 9:1 (1996): 39–53.

¹⁵Wilbur and Ely, *The Hoover Dam Documents*, 18.

¹⁶Norris Hundley, Jr., “The West Against Itself: The Colorado River—An Institutional History,” in *New Courses for the Colorado River: Major Issues for the Next Century*, ed. Gary D. Weatherford and F. Lee Brown (Albuquerque, NM, 1986), 12.

¹⁷William DeBuys and Joan Myers, *Salt Dreams: Land & Water in Low-Down California* (Albuquerque, NM, 1999), 63–70.

the U.S. Reclamation Service from 1914 to 1923—to generate a vociferous call for Lower Basin water infrastructure—specifically, a large-scale dam and reservoir for flood protection and storage, and a canal system located wholly within the United States that would run from the Colorado River's mainstem to the Imperial Valley.¹⁸ Also notable at this time was Los Angeles' budding interest, initially expressed in 1920, in utilizing hydro-power produced by the dam.¹⁹

Upstream in the basin's headwaters, the prospect of large-scale Lower Basin water infrastructure was viewed with apprehension, as it presented the possibility that water use facilitated by this infrastructure would preclude the Upper Basin states from utilizing the same resources. The western water law doctrine of prior appropriation was the culprit in this regard.²⁰ Apportioning water resources among parties according to temporal priority ("first in time, first in right"), interstate application of the prior appropriation doctrine portended to enable water users in the Lower Basin states to secure senior rights to Colorado River water that would foreclose the exercise of junior rights by parties in the slower-developing Upper Basin states. Hence Delph Carpenter's proposal. If the Basin States could agree on a compact that would render prior appropriation inoperative on an interstate scale, such an agreement would quell Upper Basin concerns about the coveted Lower Basin infrastructure. As summed up by Norris Hundley, Jr., "The Lower Basin wanted a dam, the Upper Basin wanted protection, and each concluded they could probably best reconcile their interests in a compact."²¹

¹⁸Hundley, "The West Against Itself," 12–13.

¹⁹Ibid., 13–14.

²⁰Excellent accounts of the prior appropriation doctrine's history can be found in Robert Dunbar, *Forging New Rights in Western Waters* (Lincoln, NE, 1983), 59–85; Donald J. Pisani, "Enterprise and Equity: A Critique of Western Water Law in the Nineteenth Century," *Western Historical Quarterly* 18:1 (1987): 15–37; Donald J. Pisani, *To Reclaim a Divided West: Water, Law, and Public Policy, 1848–1902* (Albuquerque, NM, 1992), 11–38; and Charles W. Wilkinson, *Crossing the Next Meridian: Land, Water, and the Future of the West* (Washington, DC, 1992), 231–35.

²¹Hundley, *Water and the West*, 108. The state of California described this dynamic similarly thirty years later in its pleadings in *Arizona v. California*: "The Upper States . . . objected that if such storage works were built, the additional rights which would be acquired through priority of appropriation by water users in the lower States would preclude the future expansion of uses by projects in the Upper Basin." In light of this prospect, "[t]he Upper States insisted that [their] rights for . . . future development be protected before the project was authorized; and out of this demand came the Colorado River Compact." California's Original Answer in *Arizona v. California*, 16–17 (May 19, 1953).

Nearly a year-and-a-half elapsed between passage of the League of the Southwest's resolution in August 1920 and commencement of compact negotiations in January 1922. From February to May 1921, each of the Basin States enacted legislation authorizing these negotiations,²² which was followed by federal legislation in August 1921.²³ Congress imposed January 1, 1923, as a deadline for the compact's ultimate formation, articulating as the instrument's essential purpose the "equitable division and apportionment among said States of the water supply of the Colorado River and of the streams tributary thereto."²⁴ As reflected in this text, Congress' vision of a state-based allocation framework for the Colorado River Basin subsequently would prove infeasible as the negotiations unfolded. All told, in conjunction with the enactment of this enabling legislation over the course of 1921, state commissioners were appointed for each of the Basin States,²⁵ then secretary of commerce Herbert Hoover was appointed as a federal commissioner, and out of these appointments emerged the Colorado River Commission as a negotiating body.

The negotiations that followed the Colorado River Commission's empanelment spanned a roughly ten-month period during 1922, beginning with initial sessions in Washington, D.C., in January, and concluding with an intensive series of sessions in November at Bishop's Lodge outside Santa Fe, New Mexico.²⁶ Among other notable events propelling these negotiations was the U.S. Supreme Court's decision in *Wyoming v. Colorado* on June 5, 1922, which applied the prior appropriation doctrine to resolve an interstate dispute between these states over their respective rights to water from the Laramie River. Unsurprisingly, "the final negotiation of the compact took

²²Citations for the state legislation can be found in appendix 202 of Wilbur and Ely, *The Hoover Dam Documents*.

²³Act of August 19, 1921, ch. 72, 42 Stat. 171.

²⁴*Ibid.*

²⁵The following commissioners were appointed for the respective Basin States: W.S. Norviel for Arizona, W.F. McClure for California, Delph E. Carpenter for Colorado, J.G. Scrugham for Nevada, Stephen B. Davis, Jr. for New Mexico, R.E. Caldwell for Utah, and Frank C. Emerson for Wyoming. Wilbur and Ely, *The Hoover Dam Documents*, 19.

²⁶Colorado River Commission, Minutes and Record of the First Eighteen Sessions of the Colorado River Commission Negotiating the Colorado River Compact of 1922 (1922); Colorado River Commission, Minutes and Record of Sessions Nineteen Thru Twenty Seven of the Colorado River Commission Negotiating the Colorado River Compact of 1922 (1922). An electronic copy of the negotiation minutes can be found at <http://www.riversimulator.org/Resources/LawOfTheRiver/MinutesColoradoRiverCompact.pdf>.

place in the atmosphere produced by that decision."²⁷ "The doctrine so announced," described Delph Carpenter, "leaves the Western States to a rivalry and a contest of speed for future development."²⁸ Upper Basin states like Colorado had "but one alternative" under these circumstances—namely, "using every means to retard development" in Lower Basin states "until the uses within the upper State have reached their maximum."²⁹ As Carpenter had proposed two years earlier at the League of the Southwest's Denver meeting, "[t]he States may avoid this unfortunate situation by determining their respective rights by interstate compact."³⁰

But how exactly should this remedy, an interstate water compact for the Colorado River Basin, be composed? Faced with an impasse over the viability of a state-based allocation framework—again, as Congress initially had contemplated when authorizing the compact negotiations—the commission had to grapple with an alternative structure for the agreement. This turning point in the negotiations took place at the commission's eleventh meeting on November 11, 1922, extending from Delph Carpenter's introduction of a draft compact that would emerge in modified form a week-and-a-half later as the Colorado River Compact.³¹ The draft compact called for splitting the Colorado River Basin into two divisions, an "Upper Division" and a "Lower Division," at a point along the Colorado River's mainstem in northern Arizona called Lee's Ferry (see figure 1).³² The Upper Division would consist of territory above Lee's Ferry within the states of Arizona, Colorado, New Mexico, Utah, and Wyoming, and the Lower Division would consist of territory below Lee's Ferry within the states of Arizona, California, Nevada, New Mexico, and Utah. In lieu of establishing individual entitlements that would control each state's use of water from the Colorado River and its tributaries, the draft compact "equitably divided and apportioned" this water by imposing two flow obligations on the Upper Division states, with

²⁷Wilbur and Ely, *The Hoover Dam Documents*, 22.

²⁸This statement from Commissioner Carpenter regarding *Wyoming v. Colorado* and its relation to the compact appeared in a report submitted to Colorado governor Oliver Henry Shoup on December 15, 1922. A copy of this report can be found in appendix 210 of Wilbur and Ely, *The Hoover Dam Documents*, A97–A98.

²⁹*Ibid.*, A98.

³⁰*Ibid.*

³¹This draft compact appears in Colorado River Commission, Minutes of the Eleventh Meeting (November 11, 1922), 13–20.

³²*Ibid.*, 14.

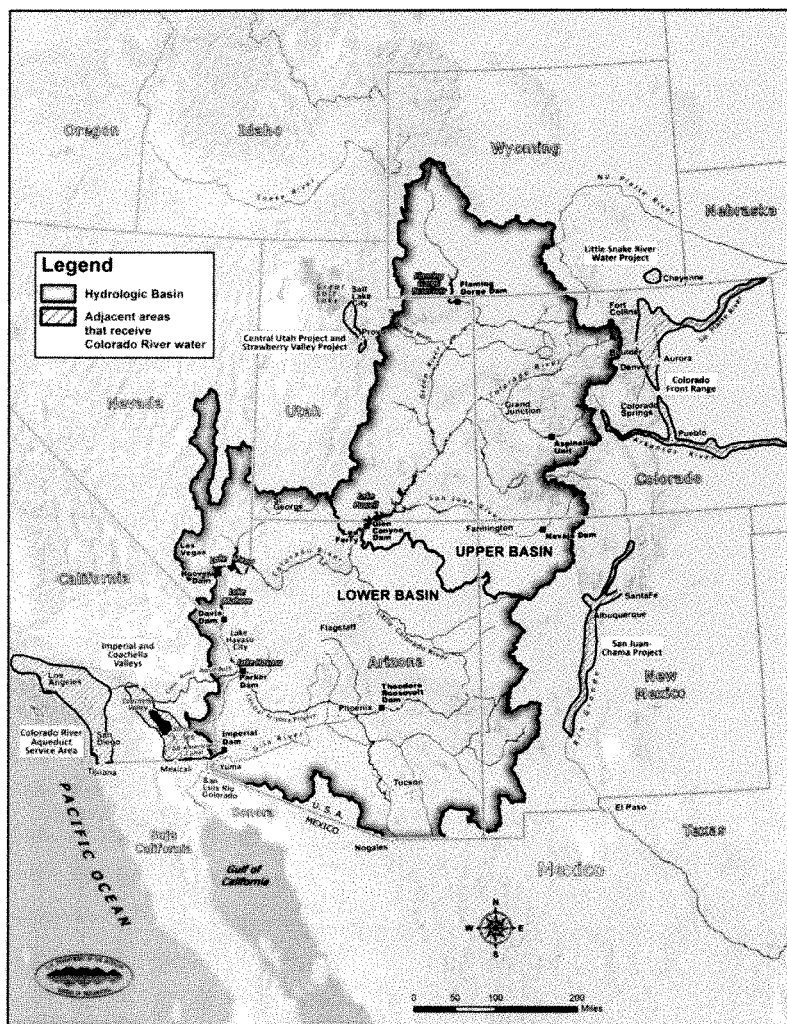


FIGURE 1. Colorado River Basin and Adjacent Export Areas (Courtesy of U.S. Department of the Interior, Bureau of Reclamation, Colorado River Basin Water Supply and Demand Study, Study Report [2012],SR-10)

Arizona excepted.³³ These states would commit to (1) avoiding depleting the "average annual flow of the Colorado River at Lee's Ferry over any period of ten (10) consecutive years" below 6,264,000 acre-feet, and (2) augmenting these minimum average flows by "an amount of water equivalent to one-half the annual requirement for delivery to the Republic of Mexico."³⁴

As embodied in Delph Carpenter's draft compact, the two-division allocation framework for the Colorado River Basin ultimately would prove precedential as mentioned above. Before turning to its adoption, however, we will highlight two additional aspects of its genesis.

As an initial matter, the origin of the two-division framework appears to have predated Delph Carpenter's introduction of the draft compact on November 11, 1922, by at least two years and perhaps longer. According to Sims Ely, who served on the League of the Southwest's subcommittee from which Carpenter's compact proposal issued in August 1920, Carpenter "outlined not only the general scheme of an interstate compact" at that time, but also "a basis for division between the four upper States, as one group, and the three lower States, as another."³⁵ On his own account, Carpenter described the two-division framework at the eleventh meeting as having been "advanced before this Commission by Director Davis" (i.e., Arthur Powell Davis) in an earlier form that involved a division point below the mouth of the San Juan River.³⁶ Arizona commissioner W.S. Norviel likewise attributed the two-division "principle" to a study "prepared by the Geological Survey in connection with the Reclamation Service."³⁷ What appears clear from the historical record is that, as Norris Hundley, Jr., graciously put it, Herbert Hoover's memory was "playing tricks on him" when he later claimed credit for the two-division idea in his memoirs in 1951.³⁸

In a related vein, it also should be noted that, although the two-division framework of Delph Carpenter's draft compact ended up having staying power, this allocational approach was not the only one envisioned for the Colorado River Basin. The state-based model reflected in Congress' enabling legislation was an obvious alternative if an acceptable basis for calculat-

³³Ibid., 15.

³⁴Ibid., 15–16.

³⁵Wilbur and Ely, *The Hoover Dam Documents*, 18.

³⁶Colorado River Commission, Minutes of the Eleventh Meeting, 39.

³⁷Ibid., 47.

³⁸Hundley, *Water and the West*, 182.

ing the respective states' water rights (e.g., irrigable acreage) could be agreed upon by the commissioners. Since no such basis could be found, however, this dynamic favored the two-division framework, notwithstanding concerns expressed by some of the commissioners at the eleventh meeting.³⁹ New Mexico commissioner Stephen B. Davis, Jr., was noticeably hesitant in this regard, viewing a state-based approach as "contemplated by the law under which we are constituted. . . ."⁴⁰ There must be a definite allocation as among the individual states rather than among the groups," he opined.⁴¹ "All that I see in the group idea . . . is that we shove off to the future that much responsibility."⁴² Arizona commissioner Norviel offered similar remarks, indicating that a two-division approach was not what the commission had been "appointed for," and that such an approach would fail to "arrive at any conclusion" and leave "the two divisions to work out their own salvation on whatever plan they may choose in the future."⁴³ Yet Delph Carpenter was not alone in suggesting that a two-division framework was desirable as a pragmatic matter. Utah commissioner R.E. Caldwell also introduced a draft compact at the eleventh meeting that entailed dividing the basin into an Upper Basin and a Lower Basin for purposes of a basin-wide apportionment.⁴⁴ To these two proposals were added distinct compacts offered by Commissioner Norviel and the city attorney of Long Beach, California, George L. Hoodenpyl.⁴⁵

Thus, at the end of the day, the interstate compact formed by the commission on November 24, 1922—a little more than a month before the end-of-year deadline—did not fully comport with Congress' aspiration for an instrument that would effect "an equitable division and apportionment" of water from the Colorado River system among the individual Basin States. Instead, the most the commission was able to accomplish

³⁹Wyoming commissioner Frank C. Emerson described the impasse over the state-based model as follows in his post-negotiation report to Wyoming governor William B. Ross and the Wyoming legislature: "After extended consideration this plan was found to be impractical by reason of the facts that accurate determination could not now be made as to the possibilities of development in the different States, and agreement could not be reached upon any relative figures." This report appears in appendix 214 of Wilbur and Ely, *The Hoover Dam Documents*.

⁴⁰Colorado River Commission, Minutes of the Eleventh Meeting, 45.

⁴¹*Ibid.*, 33.

⁴²*Ibid.*

⁴³*Ibid.*, 34.

⁴⁴*Ibid.*, 26–28.

⁴⁵*Ibid.*, 4–9, 56.

was to craft an apportionment scheme that aimed at this goal of equity in a manner closely resembling that of Delph Carpenter's draft. As shown above in figure 1, this scheme split the basin into an "Upper Basin" and a "Lower Basin" at Lee's Ferry. The Upper Basin encompassed parts of Colorado, New Mexico, Utah, and Wyoming, plus a small section of north-eastern Arizona. The Lower Basin extended primarily to parts of Arizona, California, and Nevada, with particular sections of New Mexico and Utah also included. To a similar effect, the compact designated Arizona, California, and Nevada as the "Lower Division" states, and Colorado, New Mexico, Utah, and Wyoming as the "Upper Division" states.

Considered in relation to Southern California's legal rights to Colorado River water, the upshot of the compact was at least threefold:⁴⁶ First, given California's location within the Lower Basin, Article III(a) of the compact authorized California to share in the beneficial consumptive use of 7.5 million acre-feet (maf) of water per year from the Colorado River system, an amount apportioned to the Lower Basin as a whole without individual state entitlements. Article III(b) authorized an additional 1.0 maf of such use annually. One acre-foot equals 325,851 gallons of water.⁴⁷ Second, mirroring Delph Carpenter's draft, the compact in Article III(d) proscribed the Upper Division states from depleting mainstream flows at Lee's Ferry below a specified level, 75.0 maf, during any consecutive ten-year period. This critical obligation secured the primary source of flows within the Lower Colorado River on which California water users would rely. Third, and cutting the other way, Article III(c) of the compact also obligated California and the other Lower Division states to contribute half of the flows needed to satisfy any future treaty entitlement recognized for Mexico, if surplus waters were unavailable for this purpose. It is imperative to highlight that the nascent basin-wide framework outlined by these four paragraphs of Article III was founded on an erroneous estimate of 16.4 maf of average annual Lee's Ferry flows that had been reported by the Bureau of Reclamation based on limited data.⁴⁸ The commissioners' "strong desire" to form a compact caused them not to challenge the accuracy of

⁴⁶An electronic copy of the compact can be accessed on the website of the Bureau of Reclamation's Lower Colorado River Regional Office at <https://www.usbr.gov/lc/region/pao/pdfiles/crcompact.pdf>.

⁴⁷United States Geological Survey, *Water Science Glossary of Terms* (2014), <http://water.usgs.gov/edu/dictionary.html>.

⁴⁸Hundley, "The West Against Itself," 18.

this figure,⁴⁹ however, and several commissioners actually presumed even higher flow estimates.⁵⁰ Nearly one hundred years later, the historical record reveals that average annual Lee's Ferry flows have been approximately 15.0 maf.⁵¹ Nonetheless, "the consequences of the compact remain with us."⁵²

CONDITION PRECEDENT: A CEILING FOR CALIFORNIA

Signing of the compact by the esteemed members of the Colorado River Commission did not contemporaneously result in the instrument's entry into force. Both federal and state ratification of the compact had to be obtained moving forward from Bishop's Lodge. Extending from the signing ceremony in November 1922, a roughly six-and-a-half-year ratification process ensued, culminating in a proclamation by newly elected president Herbert Hoover of the Boulder Canyon Project Act's effectiveness on June 25, 1929. It was during this prolonged ratification process that the U.S. Congress inserted text into the Project Act conditioning federal ratification of the compact on the imposition of a ceiling on California's use of Colorado River water. This ceiling delineated the pool of water available to agricultural and municipal water users within Southern California, although it would not be until four decades later in *Arizona v. California* (1963) that the ceiling's precise contours would become fully clear.

Ratification of the compact as a seven-state equitable apportionment of water from the Colorado River system was not a protracted process in most of the Basin States following the negotiations. From January to April 1923, six states enacted ratification legislation, including California, Colorado, Nevada, New Mexico, Utah, and Wyoming.⁵³ Unable to follow suit at this time, however, was California's neighbor to the east: Ari-

⁴⁹Ibid.

⁵⁰For example, Colorado commissioner Delph Carpenter, Utah commissioner R.E. Caldwell, and Wyoming commissioner Frank E. Emerson all estimated average annual Lee's Ferry flows of more than 18.0 maf in post-negotiation reports to their respective state governors and legislatures. Copies of these reports appear in appendix 210 (Carpenter), appendix 213 (Caldwell), and appendix 214 (Emerson) of Wilbur and Ely, *The Hoover Dam Documents*.

⁵¹U.S. Department of the Interior, Bureau of Reclamation, Colorado River Basin Water Supply and Demand Study, Technical Report B–Water Supply Assessment (2012), B-22, <http://www.usbr.gov/lc/region/programs/crbstudy.html>.

⁵²Hundley, *Water and the West*, 352.

⁵³Wilbur and Ely, *The Hoover Dam Documents*, 35.

zona. The Arizona legislature considered a slew of ratification measures in early 1923, including, as the last in this line, a bill introduced in the Arizona House in March 1923 calling for unconditional ratification. This bill failed by a tie vote of 22-22, however, and "[b]y this margin the Compact was subjected to a quarter century of conflict."⁵⁴ Arizona ultimately would not ratify the instrument until 1944.

The Basin States' lack of unanimity regarding the compact led to attempts at a workaround and varied efforts to bring Arizona into the fold. Delph Carpenter lobbied from 1923 to 1925 for ratification of the compact as a six-state agreement, but these efforts were only partly successful. A similar result followed from a governors' conference held in Denver in 1927 to facilitate seven-state ratification. Arizona and California rejected a proposal made by the Upper Division states' governors at this conference for an apportionment of water from the Colorado River system among the Lower Division states.⁵⁵

Paralleling the ratification processes in the Basin States' legislatures was the federal ratification process in the U.S. Congress—a process subjected to the fate of a series of four bills introduced between 1922 and 1927 by Representative Phil Swing and Senator Hiram Johnson of California ("Swing-Johnson bills"). Each of these bills called for congressional authorization of the Lower Basin water infrastructure that had animated the compact negotiations: a large-scale dam and storage reservoir, and the All-American Canal. It was the fourth of the Swing-Johnson bills that sealed this deal.⁵⁶ Signed into law by President Coolidge on December 21, 1928, the Boulder Canyon Project Act was devised with the Imperial Valley and Southern California coastal plain as major beneficiaries.

Although the Project Act conferred congressional approval on the compact, it was a nuanced blessing to be sure. Congress' ratification hinged on the Project Act's taking legal effect, which in turn was conditioned, in section 4 of the act, on one of two scenarios. On one hand, the Basin States could unanimously ratify the compact and thereby render the Project Act effective. On the other hand, if unanimous ratification proved impossible within six months of the Project Act's enactment, six-state ratification also could bring the act into effect, so long as California was one of the ratifying states and its legislature

⁵⁴Ibid., 35–36.

⁵⁵Ibid., 37–38.

⁵⁶An electronic copy of the Project Act can be accessed on the website of the Bureau of Reclamation's Lower Colorado River Regional Office at <http://www.usbr.gov/lc/region/pao/pdf/files/bcpact.pdf>.

would agree to the imposition of a ceiling on the state's annual use of Colorado River water. That ceiling was set at "four million four hundred thousand acre-feet of the waters apportioned to the Lower Basin States by paragraph (a) of Article III of the Colorado River compact, plus not more than one-half of any excess or surplus waters unapportioned by said compact."⁵⁷

Accompanying the Project Act's provisions conferring federal ratification and limiting California's water use were others that proved equally significant in later years. Although the invitation was declined, Congress authorized the Lower Division states to enter into an agreement that would have apportioned to Arizona and Nevada, respectively, the consumptive use of 2.8 maf and 300,000 acre-feet of the 7.5 maf apportioned to the Lower Basin by Article III(a) of the compact. Of equal importance, Congress provided that any storage and delivery of water in and from the reservoir authorized by the Project Act (Lake Mead) for use in the Lower Division states would be permitted only under contracts formed with the secretary of the interior for this purpose. Congress similarly hinged appropriations for the construction of Hoover Dam and the All-American Canal on the secretary of the interior's forming water contracts, and related contracts for hydropower, deemed adequate to ensure repayment of this infrastructure within fifty years.

Given Arizona's recalcitrance toward the compact at this time, the Basin States were forced to secure federal ratification (and the coveted Lower Basin infrastructure) via the six-state ratification option in the Project Act. California's ratification was the last to fall into place during the six-month period following the statute's passage on December 21, 1928.⁵⁸ This ratification occurred on March 4, 1929, the same date on which the California legislature satisfied the second condition precedent in the Project Act by enacting the California Limitation Act.⁵⁹ The 4.4 maf limitation agreed to in this act incorporated the text quoted above in section 4 of the Project Act. With these two pieces of the statutory puzzle in place, and the requisite six-month period having passed, the former chairman and federal commissioner of the Colorado River Commission,

⁵⁷Ibid.

⁵⁸Citations to the basin state legislatures' ratifications of the compact as a six-state agreement can be found in appendix 501 of Wilbur and Ely, *The Hoover Dam Documents*.

⁵⁹A copy of the California Limitation Act can be found in appendix 502 of Wilbur and Ely, *The Hoover Dam Documents*.

President Herbert Hoover, proclaimed the Project Act effective as of June 25, 1929.⁶⁰

APPORTIONING CALIFORNIA'S SHARE OF COLORADO RIVER WATER

President Hoover's proclamation of the Boulder Canyon Project Act's effectiveness thus simultaneously brought into effect the compact's basin-wide allocation framework and laid the foundation for an intrastate framework to take shape within California across the next decade. At the core of this intrastate scheme was the ceiling on annual Colorado River water use agreed to by California in the Project Act and the Limitation Act: 4.4 maf of the waters apportioned to the Lower Basin by "paragraph (a) of Article III of the Colorado River compact, plus not more than one-half of any excess or surplus waters unapportioned by said compact." Southern California agricultural and municipal water users had to reach consensus about how the Colorado River water subsumed within this limitation would be parsed out among them. Moreover, in light of the Project Act's contractual requirements for water storage and delivery, the secretary of the interior necessarily would play a major role in the negotiation and formation of California's intrastate framework and contracts effectuating it.

Initial attempts to devise an intrastate framework for Colorado River water in Southern California took place roughly six months after the Boulder Canyon Project Act had gone into effect so as to impose the California limitation. Agricultural groups and the Metropolitan Water District of Southern California (MWD) formed a preliminary agreement for this purpose on February 21, 1930.⁶¹ This agreement served as a valuable precedent to be sure, but it involved a loose allocation scheme that classified Colorado River water into three categories and apportioned 4.95 maf of it in specified amounts between the "Agricultural groups" collectively and the MWD individually. Two months passed between the formation of this agreement and the secretary of the interior's adoption of initial regulations for water contracts on April 23, 1930. The secretary formed

⁶⁰*Ibid.*, 42. A copy of President Hoover's proclamation declaring the Project Act effective can be found in appendix 503 of this source.

⁶¹Wilbur and Ely, *The Hoover Dam Documents*, appendix 1001.

the first such contract on the same date—a contract with the MWD for 1.05 maf of Colorado River water per year.⁶²

The “necessity of a more definite division of the California water” than that provided in the preliminary agreement became increasingly apparent in subsequent negotiations over contracts pertaining to the All-American Canal.⁶³ On November 5, 1930, the secretary of the interior submitted a formal request for such specificity to California contractors, including the Imperial Irrigation District, MWD, Coachella Valley County Water District, and Palo Verde Irrigation District (see figure 2).⁶⁴ Included with this request was a draft recommendation for an intrastate allocation scheme that was prescient when considered in relation to later conflicts in which these parties would become ensnared. Two features of this framework were remarkable. First, it categorized the water available to the contractors into three classifications rooted in the compact’s apportionment scheme—namely, Article III(a) water, Article III(b) water, and “water which may be available to California over and above the foregoing.” Second, while leaving blank the respectively permitted amounts of water use, the framework called for establishing water use entitlements for individual contractors, rather than lumping contractors into groups (e.g., an “Agricultural group”) that would share collective entitlements as the preliminary agreement had done.

Yet the secretary’s recommended framework ultimately would not see the light of day. California contractors did oblige the secretary’s request for more specificity by engaging in nine months of negotiations regarding the intrastate allocation scheme. Emerging on August 18, 1931, as the Seven-Party Agreement, however, the final version of this framework only partially remedied the shortcomings of the preliminary agreement.⁶⁵ Table 1 and figure 3 below summarize the Seven-Party Agreement’s intrastate system of allocation priorities for Colorado

⁶²*Ibid.*, appendix 1007.

⁶³Wilbur and Ely, *The Hoover Dam Power and Water Contracts*, 32.

⁶⁴Wilbur and Ely, *The Hoover Dam Documents*, appendix 1002. Figure 2 identifies the respective geographic areas that fall within these contractors’ boundaries. Their titles are abbreviated as acronyms.

⁶⁵An electronic copy of the Seven-Party Agreement can be accessed on the website of the Bureau of Reclamation’s Lower Colorado River Regional Office at <http://www.usbr.gov/lc/region/pao/pdfiles/ca7pty.pdf>.

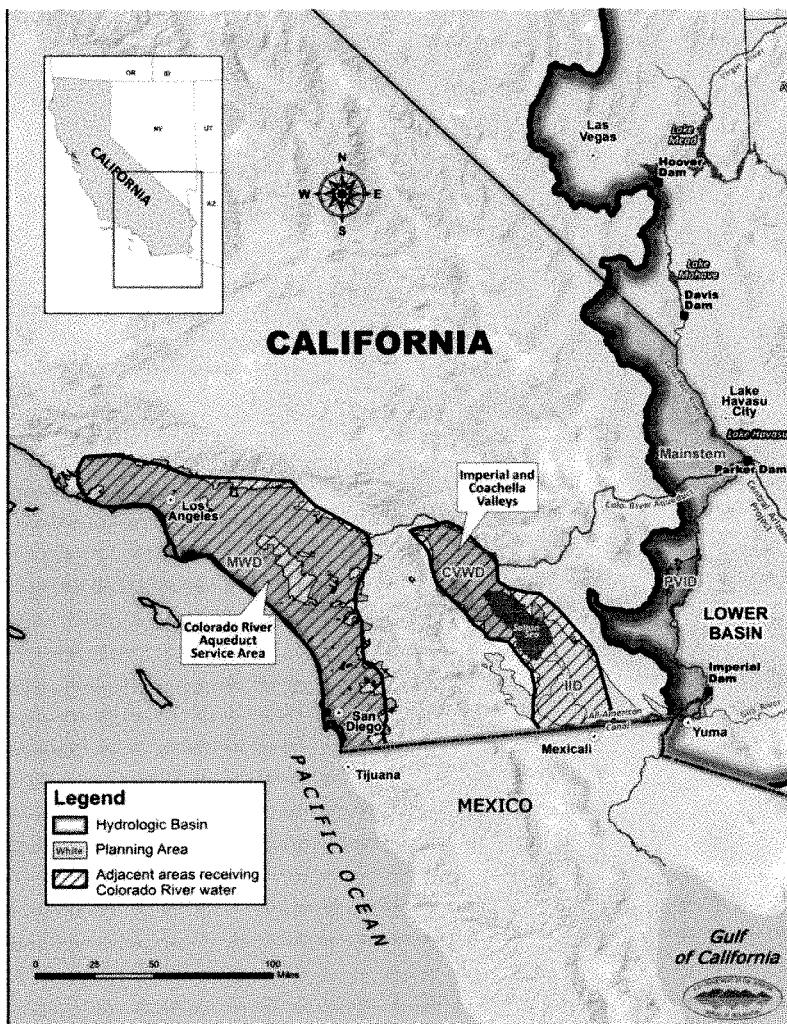


FIGURE 2. Hydrologic Basin and Export Areas in California (Courtesy of U.S. Department of the Interior, Bureau of Reclamation, Colorado River Basin Water Supply and Demand Study, Appendix C-7, California Water Demand Scenario Quantification [2012], C7-2)

River water in Southern California.⁶⁶ Among other salient features, this scheme authorized contractors to collectively consume 3.85 maf of Colorado River water per year under priorities one through three, but failed to specify the amounts of use permitted for each contractor individually. Also notable is the fact that the MWD's and San Diego's entitlements to 662,000 acre-feet of water use in priority five attached to "excess or surplus waters" within the meaning of the Boulder Canyon Project Act and the Limitation Act. As discussed earlier, both acts restricted California from using more than 4.4 maf per year of the water apportioned to the Lower Basin by Article III(a) of the compact, while affording California the use of up to "one-half of any excess or surplus waters unapportioned by [the] Compact"—i.e., assuming such excess or surplus waters indeed were available. The MWD's exercise of its 550,000 acre-feet entitlement in priority four alone, however, would bring California's collective water use to the 4.4 maf level—i.e., before accounting for the priority five entitlements—when combined with the 3.85 maf of water use authorized in priorities one through three. As we shall see, these and related aspects of the Seven-Party Agreement would prove divisive in later decades.

Incorporated into amended general regulations adopted by the secretary of the interior on September 28, 1931,⁶⁷ the Seven-Party Agreement would control the terms of water contracts subsequently formed by the secretary with the California contractors between 1931 and 1934.⁶⁸ The secretary executed a revised version of the MWD's 1930 contract—conforming it to the Seven-Party Agreement—contemporaneously with the adoption of the amended regulations. Following suit in 1932 was a contract with the Imperial Irrigation District for water deliveries through, and construction of, the All-American Canal. The Palo Verde Irrigation District and the city of San Diego similarly formed delivery contracts in 1933, the latter calling for deliveries from, and associated capacity in, the canal. Last but not least among these parties was the Coachella Valley County Water District, which executed a water contract in 1934 that

⁶⁶Table 1 appears in Wilbur and Ely, *The Hoover Dam Documents*, 107. It was produced in 1948 by secretary of the interior Ray Lyman Wilbur, who served in this position at the time of the Seven-Party Agreement's formation, and his assistant Northcutt Ely, who later litigated the principal case of *Arizona v. California* on California's behalf in 1963.

⁶⁷Wilbur and Ely, *The Hoover Dam Documents*, appendix 1005.

⁶⁸*Ibid.*, Metropolitan Water District (appendix 1008), Imperial Irrigation District (appendix 1106), Palo Verde Irrigation District (appendix 1006), San Diego (appendix 1009), Coachella Valley County Water District (appendix 1108). No contract was formed for the Yuma Project.

Priority No.	Agency and description	Annual quantity in acre-feet
1	Palo Verde irrigation district—104,500 acres in and adjoining existing district.....	3,850,000
2	Yuma project (California division)—not exceeding 25,000 acres.....	
3	(a) Imperial irrigation district and lands in Imperial and Coachella Valleys to be served by All-American Canal.....	
4	(b) Palo Verde irrigation district—16,000 acres of adjoining mesa.....	550,000
4	Metropolitan Water District, city of Los Angeles, and/or others on Coastal Plain.....	
5	(a) Metropolitan Water District, city of Los Angeles, and/or others on Coastal Plain.....	550,000
6	(b) City and/or county San Diego.....	112,000
6	(a) Imperial irrigation district and lands in Imperial and Coachella Valleys to be served by All-American Canal.....	300,000
6	(b) Palo Verde irrigation district—16,000 acres of adjoining mesa.....	
	Total.....	5,362,000

TABLE I. California's Colorado River Water Priorities. (Courtesy of Ray Lyman Wilbur and Northcutt Ely, *The Hoover Dam Documents*, Washington, DC, 1948)

resembled San Diego's by obligating the secretary to deliver Colorado River water through, and provide associated capacity in, the All-American Canal.

It was by means of the Seven-Party Agreement and the contracts just outlined that Southern California apportioned its interstate share of Colorado River water—as circumscribed by the Boulder Canyon Project Act and the Limitation Act—on an intrastate basis during the five-year period after the Project Act had taken effect. Minor clarifications and tweaks would be made to this intrastate framework in the 1930s and 1940s, including folding of San Diego's water contract into the MWD's in 1946.⁶⁹ Alongside the compact and the Project Act, the intrastate framework also would survive three unsuccessful lawsuits brought by Arizona against California in the Supreme Court during the 1930s.⁷⁰ Upon Arizona's eventual ratification of the compact in 1944, however, sustained efforts were put into motion within that state to increase its use of Colorado River water through an extensive canal system comparable in scale to the All-American Canal. Just as adoption of the compact's basin-wide framework had been a prerequisite to the Project Act's enactment, so too would clarification of Arizona's and California's respective rights to Colorado River water be necessary before Arizona's plans could be realized. The principle case of *Arizona v. California* emerged at this

⁶⁹*Ibid.*, appendix 1012.

⁷⁰These lawsuits included *Arizona v. California*, 283 U.S. 423 (1931), *Arizona v. California*, 292 U.S. 341 (1934), and *Arizona v. California*, 298 U.S. 558 (1936).

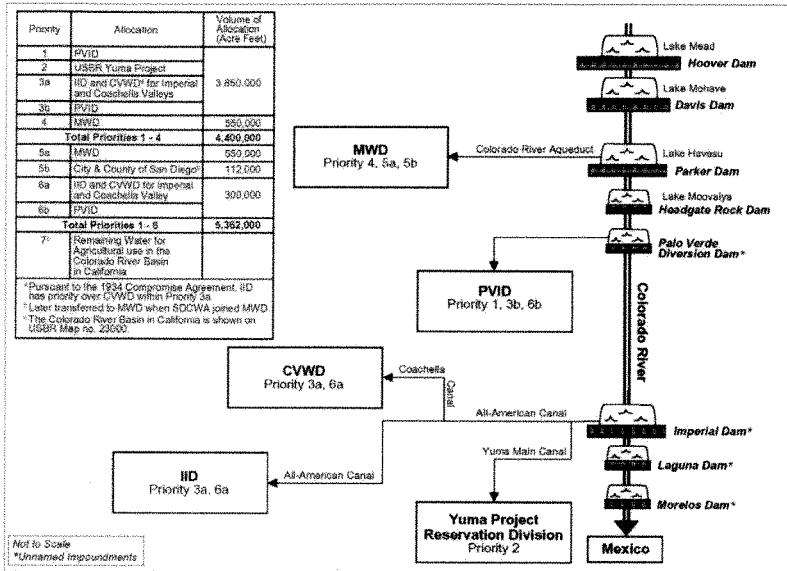


FIGURE 3. California's Intrastate Priority System. (Courtesy of U.S. Department of the Interior, Final Environmental Impact Statement, Implementation Agreement Inadvertent Overrun and Payback Policy, and Related Federal Actions [2012], 1-7)

historic juncture to define the contours of California's allocation scheme in arguably novel ways.

CALIFORNIA AND THE LOWER COLORADO RIVER REVISITED: *ARIZONA V. CALIFORNIA*

Various schemes for constructing a canal system to route water from the Colorado River to central Arizona had been proposed for several decades prior to the Bureau of Reclamation's unveiling of the Central Arizona Project (CAP) in December 1947.⁷¹ Consuming the next twenty years, Arizona's quest for congressional authorization of the CAP, and for secure title to the Colorado River water that would flow through the project, entailed monumental repercussions for the Lower Basin interstate allocation scheme and California's intrastate framework.

⁷¹Hundley, *Water and the West*, 299-300.

The Supreme Court's decision in *Arizona v. California* in 1963 would distinguish the Colorado River Basin as the supposed site of the first congressional apportionment in U.S. history based on a majority of the Court's interpretation of the Boulder Canyon Project Act. That interpretation would definitively delineate California's interstate share of Colorado River water under the Project Act and the Limitation Act, despite the fact that the Seven-Party Agreement and associated water contracts already had been formed three decades earlier.

Eight years elapsed between Arizona's ratification of the compact on February 24, 1944, and the onset of *Arizona v. California* in the Supreme Court. Arizona's ratification followed on the heels of a treaty formed by the United States and Mexico three weeks prior that had established the latter sovereign's legal right to use 1.5 maf of Colorado River water annually.⁷² One week after this treaty was formed, Arizona entered into a water contract with the secretary of the interior for annual deliveries of 2.8 maf of Colorado River water.⁷³ Federal authorization and construction of the CAP infrastructure would be necessary to utilize a portion of this water through the project, however, and stern opposition from California in Congress ultimately would keep Arizona from this goal. On April 18, 1951, the House Committee on Interior and Insular Affairs adopted a resolution postponing consideration of any bills related to the CAP "until such time as use of water in the Lower Colorado River Basin is either adjudicated or binding or mutual agreement as to the use of the water is reached by the States of the lower Colorado River Basin."⁷⁴

Arizona pursued the adjudication route contemplated in the committee's resolution, filing its original complaint with the Supreme Court on August 8, 1952, and thereby commencing one of the most epic lawsuits in the history of western water

⁷²An electronic copy of the U.S.-Mexico Treaty can be accessed on the website of the Bureau of Reclamation's Lower Colorado River Regional Office at <http://www.usbr.gov/lc/region/pao/pdfiles/mextrety.pdf>. For a thorough account of the treaty's formation, see Hundley, *Dividing the Waters: A Century of Controversy Between the United States and Mexico* (Berkeley, CA, 1966).

⁷³Wilbur and Ely, *The Hoover Dam Documents*, appendix 1016.

⁷⁴See *Hearings Before the Committee on Interior and Insular Affairs*, House of Representatives, 82^d Cong., 1st Sess. (April 18, 1951), on H.R. 1500 and H.R. 1501, part 2, pp. 739–61.

law.⁷⁵ Arizona's complaint prayed that the state's "title to the annual beneficial consumptive use of 3,800,000 acre-feet of the water apportioned to the Lower Basin by the Colorado River Compact be forever confirmed and quieted."⁷⁶ Arizona also requested that California's title "be fixed and forever limited to 4,400,000 acre-feet."⁷⁷ Arizona argued that both the Seven-Party Agreement and the contracts formed by the secretary of the interior based on it were illegal and invalid to the extent that they exceeded this limit by apportioning 5,362,000 maf of Colorado River water per year.⁷⁸ California, of course, sharply disputed these and related arguments in its answer, characterizing Arizona's position as an attempt "to obtain water for [the CAP] by taking it from existing and operating California projects."⁷⁹ California allegedly had developed these projects in reliance on interpretations of the Colorado River Compact and the Boulder Canyon Project Act that allowed for 5.362 maf of annual Colorado River water use within the state.⁸⁰ In particular, the MWD would not have accepted its 550,000-acre-foot entitlement in priority five of the Seven-Party Agreement ("a low priority") under interpretations of the compact and the Project Act being proffered by Arizona.⁸¹

These initial arguments touched only the tip of the iceberg concerning the wide range of issues, and the parties' evolving positions with regard to these issues, that emerged throughout the litigation. Eventually drawing the case to a close, the Supreme Court issued its opinion on June 3, 1963, nearly eleven years after Arizona had filed its complaint.⁸² As canvassed by the Court, the proceedings ultimately encompassed the appointment of two special masters; a roughly two-year trial with 340 witnesses, thousands of exhibits, and 25,000 pages of transcripts; a 433-page report and recommended decree from the second special master; and extensive briefing as well as

⁷⁵Seminal articles discussing and critiquing this landmark case include Hundley, "Clio Nods: *Arizona v. California* and the Boulder Canyon Project Act—A Reassessment," *Western Historical Quarterly* 3 (1972): 17–51; Charles J. Meyers, "The Colorado River," *Stanford Law Review* 19 (1967): 1–75; Frank J. Trelease, "*Arizona v. California*: Allocation of Water Resources to People, States, and Nation," *Supreme Court Review* 1963 (1963): 158–205.

⁷⁶Arizona Bill of Complaint 30 (August 8, 1952).

⁷⁷*Ibid.*

⁷⁸*Ibid.*, 16–18.

⁷⁹California Answer of Defendants to Bill of Complaint 2, 69–70 (May 19, 1953).

⁸⁰*Ibid.*, 39–40, 44–45, 60–61.

⁸¹*Ibid.*, Exhibit A, 2.

⁸²*Arizona v. California*, 373 U.S. 546 (1963).

two oral arguments (sixteen hours and more than six hours in length, respectively) before the Court.⁸³ The Court's final opinion was a split one to boot, including two lengthy dissents.⁸⁴

A variety of holdings fell within the majority opinion issued in *Arizona v. California*, but most pivotal among them for Southern California's use of Colorado River water was that Congress had established a statutory apportionment in the Lower Basin when enacting the Boulder Canyon Project Act. According to the majority, "Congress in passing the Project Act intended to and did create its own comprehensive scheme for the apportionment among Arizona, California, and Nevada of the Lower Basin's share of the mainstream waters of the Colorado River, leaving each State its tributaries."⁸⁵ As further construed by the majority, "Congress decided that a fair division of the first 7,500,000 acre-feet of such mainstream waters would give 4,400,000 acre-feet to California, 2,800,000 to Arizona, and 300,000 to Nevada; Arizona and California would each get one-half of any surplus."⁸⁶ The majority's holding responded to voluminous briefing submitted by the parties regarding Congress' intended meaning in section 4 of the Project Act, particularly the limitation imposed on California's use of Colorado River water. In the final analysis, the Court rejected California's constructions of this provision, despite the state's repeated assertions that it had relied on these interpretations when previously adopting the Limitation Act and the Seven-Party Agreement.

The Court issued its original decree in *Arizona v. California* in 1964 to implement its decision.⁸⁷ This decree vested the secretary of the interior with discretion to determine the amount of Colorado River water that would be released from Lake Mead

⁸³*Ibid.*, 551.

⁸⁴One of these dissents was from Justice William O. Douglas. It offered as pointed a critique of the majority opinion as any subsequent academic commentary. In Justice Douglas' words, "Much is written these days about judicial lawmaking; and every scholar knows that judges who construe statutes must of necessity legislate interstitially, to paraphrase Mr. Justice Cardozo. . . . The present case is different. It will, I think, be marked as the baldest attempt by judges in modern times to spin their own philosophy into the fabric of the law, in derogation of the will of the legislature." *Ibid.*, 628.

⁸⁵*Ibid.*, 565.

⁸⁶*Ibid.*

⁸⁷An electronic copy of the Court's original decree can be accessed on the website of the Bureau of Reclamation's Lower Colorado River Regional Office at <http://www.usbr.gov/lc/region/pao/pdfiles/supctdec.pdf>. The Court issued a consolidated version of its decree in 2006, which also can be found on this website at <http://www.usbr.gov/lc/region/g4000/4200Rpts/DecreeRpt/2006/decree/06Decree.pdf>.

for consumptive use in the Lower Division states each year. During normal conditions, releases sufficient to enable 7.5 maf of consumptive use would be allocated according to the interstate scheme noted above: 4.4 maf to California, 2.8 maf to Arizona, and 300,000 acre-feet to Nevada. Years during which surplus was available to facilitate more than 7.5 maf of consumptive use would involve a 50/50 split of the surplus between Arizona and California (with a potential 4-percent cut for Nevada out of Arizona's share). When less than 7.5 maf of consumptive use was possible—i.e., in shortage conditions—the secretary was given guidelines to abide by when allocating the available water, including ensuring no more than 4.4 maf would be apportioned for use in California. An equally notable provision of the decree authorized the secretary to allocate apportioned but unused water from one Lower Division state to another on an annual basis, with no recurrent rights to this water accruing.

Four years elapsed between the Court's issuance of its decree in *Arizona v. California* and Congress' enactment of legislation finally authorizing the CAP—namely, the Colorado River Basin Project Act—in 1968.⁸⁸ In addition to authorizing the project, this legislation contained a key provision bearing on California's legal rights to use water from the Lower Colorado River after *Arizona v. California*. Section 301 of the act restricted Arizona from diverting any water into the CAP during shortages (as defined by the decree) if doing so would preclude 4.4 maf of consumptive use in California in the particular year. That is, after two decades of heated struggle, including eleven years before the Supreme Court and its special masters, Congress ultimately subordinated Arizona's CAP entitlement to California's 4.4 maf normal entitlement in the event of shortages in the Lower Basin. With this post-litigation development, the stage was set for contemporary refinements to the intrastate and interstate allocation schemes governing California's use of the Colorado River.

PATCHWORK ON THE INTRASTATE ALLOCATION

Congress' authorization of the CAP in 1968 led, unsurprisingly, to increased use of Colorado River water within the Lower Basin, as the project gradually began operation two decades after the principal decision in *Arizona v. California*.

⁸⁸ An electronic copy of the Colorado River Basin Project Act can be accessed on the website of the Bureau of Reclamation's Lower Colorado River Regional Office at <http://www.usbr.gov/lc/region/pao/pdfiles/crbproj.pdf>.

This increased water use in Arizona (and Nevada also) posed a crucial issue that largely has defined Southern California's relationship with the Colorado River in modern times: what measures would the state need to employ to live within the 4.4 maf entitlement announced by the Court for normal conditions? In 2011, Justice Ronald Robie of the California Court of Appeals succinctly described *Arizona v. California's* implications for the state's intrastate allocation framework in this regard: "While the United States Supreme Court largely settled the interstate conflict over water nearly 50 years ago . . . the court's resolution of the dispute between the states—which limited California's share of the river to far less than the state can use—ensured the fight would continue within the state for years to come."⁸⁹ Justice Robie's remark stemmed from protracted litigation over an agreement called the Quantification Settlement Agreement ("QSA") that had been forged in 2003 by various parties to the predecessor Seven-Party Agreement. As of the time of this writing, the QSA litigation finally appears positioned to conclude after a dozen years, although this milestone emerges amidst significant parallel developments that intertwine the future of the QSA with that of the Salton Sea. Notwithstanding these developments and the lengthy litigation trail, the QSA currently serves as the primary instrument for refining California's intrastate allocation scheme in a manner that complies with the 4.4 maf normal entitlement secured in *Arizona v. California*.

Commencement of CAP deliveries in 1985 markedly influenced the interstate allocation of Colorado River water among the Lower Division states as well as the intrastate allocation of this water within Southern California.⁹⁰ Arizona's use of Colorado River water had ranged from roughly 1.0 to 1.4 maf per year from 1971 to 1985, and this figure jumped to approximately 2.25 maf within a decade after CAP deliveries began. Nevada's use of Colorado River water—although unrelated to the CAP—likewise more than doubled (from roughly 100,000 to 225,000 acre-feet) across this period. Distinguished from Arizona and Nevada, California's use of Colorado River water consistently exceeded the state's 4.4 maf normal entitlement over this timeframe, falling at or above 5.0 maf during several years. The secretary of the interior enabled California's consumption

⁸⁹*Quantification Settlement Agreement Cases*, 201 Cal. App. 4th 758, 772 (2011) (emphasis in original).

⁹⁰U.S. Department of the Interior, Bureau of Reclamation, Colorado River Basin Water Supply and Demand Study, Appendix C10, Historical Consumptive Use and Loss Detail by State (2012), C10-12 to C10-18, <http://www.usbr.gov/lc/region/programs/crbstudy.html>.

at this level with deliveries of surplus water and water apportioned to, but unused in, Arizona and Nevada. This pattern could not persist once the CAP entered the scene. As described by the Colorado River Water Board of California many years later: "With the commencement of CAP deliveries in 1985, California's dependable supply from the Colorado River was reduced to its basic apportionment of 4.4 maf per year."⁹¹

Roughly two decades passed between the onset of CAP deliveries in 1985 and the formation of an intrastate agreement in 2003 aimed at enabling California to live within its 4.4 maf normal entitlement—again, the QSA. A variety of interstate and intrastate efforts preceded the QSA's adoption.⁹² As an initial development, the Imperial Irrigation District and the MWD formed an agreement in December 1988 whereby the MWD agreed to fund \$10 million of conservation measures in the district annually in exchange for the transfer of 100,000 acre-feet of conserved water (IID-MWD transfer).⁹³ Although this agreement would promote efficient use of California's Colorado River water budget, it also raised concerns about whether the transfer would violate higher-priority entitlements of the Palo Verde Irrigation District and the Coachella Valley Water District under the Seven-Party Agreement. A follow-up agreement with these water agencies in 1989 navigated these concerns,⁹⁴ but a 1992 letter from the Bureau of Reclamation addressed a critical issue raised by them: the need to quantify entitlements held by parties under the first three priorities of the Seven-Party Agreement.⁹⁵ Included in this letter was a proposal from the bureau to accomplish this formidable task, which was considered essential for future intrastate transfers and for curbing excess water use.

⁹¹Colorado River Board of California, *California's Colorado River Water Use Plan* (2000) (emphasis added), 16, http://www.crb.ca.gov/programs/Calif_Plan_May_11-Draft.pdf.

⁹²A detailed discussion of interstate efforts underlying the QSA's formation can be found in James S. Lochhead, "An Upper Basin Perspective on California's Claims to Water from the Colorado River Part II: The Development, Implementation and Collapse of California's Plan to Live Within Its Basic Apportionment," *University of Denver Water Law Review* 6 (2003): 318.

⁹³U.S. Department of the Interior, *Final Environmental Impact Statement, Implementation Agreement, Inadvertent Overrun and Payback Policy, and Related Federal Actions* (2012), 2-13 to 2-14, <http://www.usbr.gov/lc/region/g4000/FEIS/Volume%20I.pdf>.

⁹⁴*Ibid.*

⁹⁵Robert J. Towles, regional director, Bureau of Reclamation Lower Colorado Regional Office to Gerald M. Davisson, manager, Palo Verde Irrigation District, December 10, 1992.

The bureau's 1992 quantification proposal ultimately fell flat, but it set a precedent for related measures that appeared across the decade. Spurring these developments was a 1996 address by secretary of the interior Bruce Babbitt indicating that California must develop a strategy to limit its Colorado River water use to 4.4 maf annually (the normal entitlement) and means to meet its water needs without jeopardizing Colorado River water use in other states.⁹⁶ Two years elapsed between this address and a subsequent water conservation and transfer agreement formed by the Imperial Irrigation District and San Diego County Water Association (SDCWA) involving "the largest agricultural-to-urban water transfer in United States history"—a transfer of 300,000 acre-feet of conserved water annually (IID-SDCWA transfer).⁹⁷ This transfer later would be modified—divvying out 200,000 acre-feet of the conserved water to the SDCWA and 100,000 acre-feet to either the Coachella Valley Water District or the MWD—but both it and the predecessor IID-MWD transfer were incorporated into a path-breaking "Key Terms Agreement" formed in 1999 by the state of California, the Imperial Irrigation District, the Coachella Valley Water District, and the MWD.⁹⁸ This agreement laid the groundwork for the QSA and outlined many of its eventual features, including quantifying the parties' entitlements under the Seven-Party Agreement and authorizing the two water transfers.

It would take four years, from October 1999 to October 2003, for the Key Terms Agreement to evolve into the QSA, and this critical period would be marked by the formation of two important documents. Released by the Colorado River Water Board of California in 2000, the first document was the "California 4.4 Plan," which was tailored to the water budget goal articulated by Secretary Babbitt in 1996 and sought in earnest by the other Basin States since at least the early 1990s.⁹⁹ "There is a fundamental change in the availability and use of Colorado River

⁹⁶Address by Bruce Babbitt, secretary of the interior, to Colorado River Water Users Association 1996 Annual Conference (December 19, 1996), http://www.sci.sdsu.edu/salton/secr_babbitt_CoR_issues.htm.

⁹⁷*Quantification Settlement Agreement Cases*, 201 Cal. App. 4th 758, 788 (2011); Agreement for Transfer of Conserved Water By and Between Imperial Irrigation District and San Diego County Water Authority (April 29, 1998), accessed May 13, 2015, <http://www.iid.com/Modules/ShowDocument.aspx?documentid=887> [agreement no longer available].

⁹⁸Key Terms for Quantification Settlement Among the State of California, IID, CVWD and MWD (1999), <http://www.riversimulator.org/Resources/LawOfTheRiver/HooverDamDocs/Supplements/1999KeyTermsQuantificationSettlement.pdf>.

⁹⁹Colorado River Board of California, California's Colorado River Water Use Plan (2000), http://www.crb.ca.gov/programs/Calif_Plan_May_11-Draft.pdf.

water in California," the plan heralded.¹⁰⁰ "As we enter the new millennium, California for the first time will be required to reduce the amount of Colorado River water it uses."¹⁰¹ In line with the Key Terms Agreement, the plan identified as its core "linchpins" quantification of certain entitlements within the Seven-Party Agreement and implementation of cooperative water conservation/transfers between agricultural and urban water users. An additional measure called for by the plan was the adoption of interim surplus guidelines by the secretary of the interior.¹⁰² These guidelines would clarify the circumstances in which the secretary of the interior would deliver surplus water to California contractors under the *Arizona v. California* decree. They constituted the second key document to emerge at this time, and Secretary Babbitt adopted them under a "Peace on the River" banner at a signing ceremony in San Diego in January 2001,¹⁰³ conditioning their effectiveness on the QSA's formation by December 31, 2002. When this deadline passed unmet, a new secretary of the interior, Gale Norton, suspended the guidelines and limited California's water deliveries to 4.4 maf in 2003.¹⁰⁴ California had consumed 5.37 maf of Colorado River water in 2002,¹⁰⁵ so this reduction did not entail a "soft landing."

After ten months of subsequent negotiations among California contractors, the QSA finally came into being on October 10, 2003.¹⁰⁶ Two noteworthy developments occurred during this final lap, one involving the federal judiciary, the other the California State Legislature.

On the judicial front was a lawsuit filed by the Imperial Irrigation District in the Southern District of California.¹⁰⁷ The district pursued this suit to challenge the secretary of the

¹⁰⁰*Ibid.*, 2.

¹⁰¹*Ibid.*

¹⁰²U.S. Department of the Interior, Record of Decision, Colorado River Interim Surplus Guidelines Final Environmental Impact Statement (January 16, 2001), http://www.usbr.gov/lc/region/g4000/surplus/surplus_rod_final.pdf.

¹⁰³Lochhead, "An Upper Basin Perspective," 375.

¹⁰⁴*Ibid.*, 399–400.

¹⁰⁵This figure appears on page 1 of U.S. Department of the Interior, Bureau of Reclamation, Compilation of Records in Accordance with Article V of the Decree of the Supreme Court of the United States in *Arizona v. California et al.* dated March 9, 1964, calendar year 2002, <http://www.usbr.gov/lc/region/g4000/4200Rpts/DecreeRpt/2002DecreeRpt.pdf>.

¹⁰⁶Quantification Settlement Agreement and Related Agreements and Documents to which Southern California Agencies Are Signatories (2003), http://www.sdcwa.org/sites/default/files/files/QSA_final.pdf.

¹⁰⁷Lochhead, "An Upper Basin Perspective," 402–404.

interior's reduction of Colorado River water deliveries to it in 2003. In short, the district successfully obtained a preliminary injunction in the suit, resulting in an increase in its water use of approximately 330,000 acre-feet that year and a decrease in the MWD's water use of roughly 121,000 acre-feet. This counterpoise ensured that California's collective Colorado River water use did not exceed its 4.4 maf normal entitlement.

In turn, several months after the injunction in the federal lawsuit had been issued, the California State Legislature enacted a trio of laws commonly addressing the fate of the Salton Sea as implicated by the QSA. Comprising this trio were Senate Bills 277, 317, and 654—collectively referred to as the “QSA legislation” and devised “to facilitate” the QSA's implementation.¹⁰⁸ Senate Bill 277 was entitled the Salton Sea Restoration Act and expressed the legislature's intent to “undertake the restoration of the Salton Sea ecosystem and the permanent protection of the wildlife dependent on that ecosystem.”¹⁰⁹ This restoration would be based on an alternative developed in a restoration study that would be funded by moneys deposited into a Salton Sea Restoration Fund.¹¹⁰

The second bill in this line, Senate Bill 317, dovetailed with the first piece of legislation in calling for the secretary of the California Natural Resources Agency to undertake the Salton Sea restoration study, including generating a preferred alternative for restoration and a proposed funding plan.¹¹¹ Also imposed by this bill was an obligation on the Imperial Irrigation District to provide “mitigation water” during the QSA's first fifteen years—i.e., water to mitigate adverse environmental impacts to the Salton Sea resulting from the agriculture-to-urban water transfers contemplated by the QSA.¹¹²

In a similar fashion, Senate Bill 654 also broached the subjects of restoration and environmental mitigation. “[I]t is important that actions taken to reduce California's Colorado River water use are consistent with its commitment to restore the

¹⁰⁸Quantification Settlement Agreement and Related Agreements and Documents to which Southern California Agencies Are Signatories (2003).

¹⁰⁹California Senate Bill 277 (September 29, 2003), 2, section 1 [revising subsection 2931(a) of Fish and Game Code], http://www.leginfo.ca.gov/pub/03-04/bill/sen/sb_0251-0300/sb_277_bill_20030929_chaptered.pdf.

¹¹⁰*Ibid.*, 2–3, section 1 [revising sections 2931 and 2932].

¹¹¹California Senate Bill 317 (September 29, 2003), 5, section 1 [revising subsection 2081.7(c)(1) of Fish and Game Code], http://www.leginfo.ca.gov/pub/03-04/bill/sen/sb_0301-0350/sb_317_bill_20030929_chaptered.pdf.

¹¹²*Ibid.*, 3, section 1 [revising subsection 2081.7(c)(2)].

Salton Sea," provided the bill.¹¹³ It then proceeded to explain how a restoration plan was necessary to prevent the Salton Sea from becoming too saline to support its fishery and fish-eating birds, and how the QSA's water transfers could accelerate the rate of salinization.¹¹⁴ The bill ultimately called for the Imperial Irrigation District, the Coachella Valley Water District, and the SDCWA to contribute \$30 million collectively to the Salton Sea Restoration Fund, and generally provided that any additional restoration actions would be "the sole responsibility of the State of California."¹¹⁵ As for mitigation, the bill explained that it was "necessary to provide a mechanism to implement and allocate the environmental mitigation responsibility" between the water agencies and the state in order to implement the QSA.¹¹⁶ The specific instrument envisioned for this purpose was a "joint powers agreement" to be formed by the California Department of Fish and Game and to include the Coachella Valley Water District, the Imperial Irrigation District, and the SDCWA.¹¹⁷ The bill capped these water agencies' collective environmental mitigation payments at \$133 million.¹¹⁸ As detailed below, it is these restoration and mitigation provisions within the QSA legislation that, as of the time of this writing, factor most significantly into the QSA's future.

Although the QSA is referred to in the singular here, the agreement actually consisted of an individual QSA as well as a suite of related agreements governing the legal rights of California contractors to use Colorado River water. Included among these related agreements was an implementing Colorado River Water Delivery Agreement (CRWDA) forged on October 10, 2003—again, the QSA's signing date—by secretary of the interior Gale Norton and the Coachella Valley Water District, the Imperial Irrigation District, the MWD, and the SDCWA.¹¹⁹ Also sub-

¹¹³California Senate Bill 654 (September 29, 2003), 3, section 2 [revising subsection 1(c) of Chapter 617 of Statutes of 2002], http://www.leginfo.ca.gov/pub/03-04/bill/sen/sb_0651-0700/sb_654_bill_20030929_chaptered.pdf.

¹¹⁴*Ibid.*, 4, section 2 [revising subsection 1(f) of Chapter 617 of Statutes of 2002].

¹¹⁵*Ibid.*, 5, section 3 [revising subsections (1)(b)(2) and (c) of Chapter 617 of Statutes of 2002].

¹¹⁶*Ibid.*, 4, section 3.

¹¹⁷*Ibid.*, 4, section 3 [revising subsection (1)(a) of Chapter 617 of Statutes of 2002].

¹¹⁸*Ibid.*, 5, section 3 [revising subsection (1)(b)(1) of Chapter 617 of Statutes of 2002].

¹¹⁹U.S. Department of the Interior, Record of Decision, Colorado River Water Delivery Agreement, Implementation Agreement, Inadvertent Overrun and Payback Policy, and Related Federal Actions Final Environmental Impact Statement (October 10, 2003), http://www.usbr.gov/lc/region/g4000/crwda/crwda_rod.pdf.

sumed in the mix was a Joint Powers Authority Creation and Funding Agreement (JPA) prepared to implement the restoration and environmental mitigation provisions of Senate Bill 654.¹²⁰ Except for the MWD, the water agencies that were parties to the CRWDA also entered into the JPA, alongside the California Department of Fish and Game. Regarding Salton Sea restoration, the JPA (1) established the water agencies' respective financial contributions to the Salton Sea Restoration Fund (i.e., from the collective \$30-million contribution), and (2) reiterated the state's commitment to both legal and financial coverage of any costs above this amount.¹²¹ As for mitigation, the JPA likewise (1) outlined the water agencies' respective financial contributions for environmental mitigation (i.e., from the collective \$133-million contribution), and (2) specified that the state of California would bear as an "unconditional contractual obligation" any costs in excess of this limit.¹²²

Situated within its proverbial nest of implementing instruments, the QSA was generally described as a consensual agreement among three parties—the Imperial Irrigation District, the Coachella Valley Water District, and the MWD—that served to resolve "longstanding disputes regarding the priority, use (including quantification), and transferability of Colorado River water."¹²³ As already discussed at length, the agreement responded to the other Basin States' and the secretary of the interior's "insistence that California must implement a strategy that [would enable] the State to limit its use of Colorado River water to 4.4 MAF during a normal year."¹²⁴ Although it encompassed a range of measures toward this end, the QSA's linchpins were those of the 1999 Key Terms Agreement: (1) quantification of certain entitlements in the Seven-Party Agreement, and (2) facilitation of agriculture-to-urban water transfers via conservation/transfer agreements.

With regard to quantification, the QSA addressed two priorities within the Seven-Party Agreement that had lacked specificity since 1931. Extending from priority 3(a) of that agreement, the QSA established basic caps of 3.1 maf and 330,000 acre-feet, respectively, for the Imperial Irrigation District's and the

¹²⁰Quantification Settlement Agreement, Joint Powers Authority Creation and Funding Agreement (October 10, 2003), http://www.sdcwa.org/sites/default/files/files/QSA_jpa-funding.pdf.

¹²¹*Ibid.*, 15–16.

¹²²*Ibid.*, 11.

¹²³U.S. Department of the Interior, Record of Decision, Colorado River Water Delivery Agreement (October 10, 2003).

¹²⁴*Ibid.*

Coachella Valley Water District's annual use of Colorado River water.¹²⁵ Similarly, based on forbearance agreements, the QSA prescribed a pecking order for annual water allocations associated with priority 6(a) of the Seven-Party Agreement: (1) 38,000 acre-feet to the MWD, (2) 63,000 acre-feet to the Imperial Irrigation District, and (3) 119,000 acre-feet to the Coachella Valley Water District.¹²⁶ Although not comparably opaque, the QSA also capped the MWD's use of Colorado River water under priorities four and five of the Seven-Party Agreement at 550,000 and 662,000 acre-feet per year, respectively.¹²⁷

Intertwined with the basic caps on consumptive use of priority 3(a) water by the Imperial Irrigation District and the Coachella Valley Water District were a host of conservation and transfer agreements that served to reduce or augment these parties' entitlements.¹²⁸ These agreements included the 1988 IID-MWD and the 1998 IID-SDCWA transfers discussed earlier. Also appearing in the mix were measures that called for lining of portions of the All-American Canal and the Coachella Canal, and transfers of water conserved by this lining to parties to the San Luis Rey Indian Water Rights Settlement. All told, the QSA contemplated that these and related measures would alter the intrastate allocation of California's normal entitlement [specifically, priority 3(a) water] in the manner shown below in Table 2. The Imperial Irrigation District is projected to consume roughly 2.6 maf of this water annually by the time the QSA expires in 2077 at the latest. Similarly, although the Seven-Party Agreement provides for 3.85 maf of annual consumptive use under its first three priorities, the QSA is projected to reduce this amount to approximately 3.47 maf. This nearly 400,000-acre-foot reduction provides critical security for the MWD—again, an entity whose 662,000-acre-foot entitlement under priority five of the Seven-Party Agreement falls squarely outside California's 4.4 maf normal entitlement.

Although the intricacies of the QSA's formation and composition surveyed up to this point alone provide ample food for thought, they do not fully bring the intrastate chronicle up to date. Will the QSA remain in effect to govern allocation of

¹²⁵Quantification Settlement Agreement and Related Agreements and Documents to which Southern California Agencies Are Signatories (2003).

¹²⁶*Ibid.*

¹²⁷*Ibid.*, 12.

¹²⁸*Ibid.*, 10–13. For a useful overview of these agreements, see U.S. Department of the Interior, Final Environmental Impact Statement, Implementation Agreement, Inadvertent Overrun and Payback Policy, and Related Federal Actions (2012), <http://www.usbr.gov/lc/region/g4000/FEIS/Volume%20I.pdf>.

Calendar Year	Priority 1, 2 and 3b (1000 acre-feet)	IID Priority 3a Net Consumptive Use Amount (1000 acre-feet)	CVRD Priority 3a Net Consumptive Use Amount (1000 acre-feet)	Total Priority 1-3 Use Plus PER Consumptive Use (1000 acre-feet)	Water Available for MWD Seven Party Agreement, Priority 5 (1000 acre-feet)
2003	420	2,963.5	347	3,745.0	105.0
2004	420	2,948.5	347	3,730.0	120.0
2005	420	2,933.5	347	3,715.0	135.0
2006	420	2,909.5	321	3,665.0	185.0
2007	420	2,903.5	321	3,659.0	191.0
2008	420	2,811.8	325	3,571.3	278.7
2009	420	2,772.8	329	3,536.3	313.7
2010	420	2,733.8	333	3,501.3	348.7
2011	420	2,694.8	337	3,466.3	383.7
2012	420	2,654.8	342	3,431.3	418.7
2013	420	2,614.8	347	3,396.3	453.7
2014	420	2,589.8	352	3,376.3	473.7
2015	420	2,564.8	357	3,356.3	493.7
2016	420	2,539.8	362	3,336.3	513.7
2017	420	2,524.8	366	3,325.3	524.7
2018	420	2,717.8	384	3,536.3	313.7
2019	420	2,682.8	389	3,506.3	343.7
2020	420	2,645.3	394	3,473.8	376.2
2021	420	2,627.8	399	3,461.3	388.7
2022	420	2,625.3	404	3,463.8	386.2
2023	420	2,622.8	409	3,466.3	383.7
2024	420	2,617.8	414	3,466.3	383.7
2025	420	2,612.8	419	3,466.3	383.7
2026	420	2,607.8	424	3,466.3	383.7
2027	420	2,607.8	424	3,466.3	383.7
2028	420	2,607.8	424	3,466.3	383.7
2029-2037	420	2,607.8	424	3,466.3	383.7
2038-2047	420	2,607.8	424	3,466.3	383.7
2048-2077	420	2,610.8	421	3,466.3	383.7

TABLE 2. QSA Quantifications and Transfers. (Courtesy of U.S. Department of the Interior, Record of Decision, Colorado River Water Delivery Agreement, Implementation Agreement, Inadvertent Overrun and Payback Policy, and Related Federal Actions Final Environmental Impact Statement [2003], 33)

California's share of Colorado River water? Underlying this existential question is a thick post-2003 trajectory of QSA-related developments on which this narrative must shed at least modest light.¹²⁹

As an initial matter, it would probably be naive to assume that an agreement as crucial as the QSA would escape litigation by dissident California interests, and events over the past decade bear out this view. Described by the California Court of Appeals as a "battle royal"¹³⁰ and a "tsunami,"¹³¹ litigation now exceeding in length the eleven-year trail in *Arizona v. California* has been winding its way through the state and federal

¹²⁹The author wishes to express his gratitude to attorneys Antonio Rossmann (previously counsel for Imperial County) and Patrick Redmond (currently counsel for Imperial Irrigation District) for taking time to discuss contemporary developments involving the QSA litigation and Salton Sea. Any errors in the discussion are solely my own.

¹³⁰*County of Imperial v. Superior Court*, 152 Cal. App. 4th 13, 18 (2007).

¹³¹*Imperial County Air Pollution Control District v. State Water Resources Control Board*, 2013 WL 2605470 at 1 (June 12, 2013).

courts ever since the QSA's formation in 2003. Of greatest import, nine related cases were consolidated into a coordinated QSA proceeding in 2004 that has been administered by the Sacramento County Superior Court.¹³² Three of these cases make up the core of the QSA litigation: (1) an action by the Imperial Irrigation District to validate the QSA and related agreements; (2) an action by Imperial County asserting violations of the California Environmental Quality Act (CEQA) and the Water Code in connection with the QSA; and (3) an action by an environmental organization, Protect Our Water and Environmental Rights (POWER), and other parties also asserting CEQA violations. Three major decisions have been handed down in these cases thus far—two from the Sacramento County Superior Court in 2010 and 2013,¹³³ and one from the California Court of Appeals in 2011.¹³⁴ The upshot of the litigation appears to be twofold. First, the QSA has been validated, surviving perhaps most notably a state constitutional challenge to the JPA—specifically, the “unconditional contractual obligation” borne by the state under it for environmental mitigation costs exceeding the water agencies’ collective \$133-million contribution.¹³⁵ Second, the QSA also has persisted through the CEQA and Water Code actions, which have included several challenges to environmental review processes addressing the QSA’s impacts on the Salton Sea (e.g., its restoration).¹³⁶

The last particular lingering thread in the QSA litigation at present seems to be a cross-appeal to the Sacramento County Superior Court’s decision on July 31, 2013. Filed the month following this decision, the superior court’s validation and CEQA holdings initially prompted appeals by Imperial County

¹³²Superior Court of California, County of Sacramento, Quantification Settlement Agreement (QSA) Cases, Judicial Council Coordination Proceeding No. 4353, <http://www.saccourt.ca.gov/coordinated-cases/qs/qs.aspx>.

¹³³Superior Court of California, County of Sacramento, Statement of Decision Following Phase 1A Trial, Coordinated Proceeding, case no.: JC4353 (January 13, 2010), <http://chanceofrain.com/wp-content/uploads/2010/01/jc4353-qs-state-ment-of-decision.htm>; Superior Court of California, County of Sacramento, Statement of Decision, QSA Coordinated Civil Cases, case no. JCCP 4353 (July 31, 2013).

¹³⁴*Quantification Settlement Agreement Cases*, 201 Cal. App. 4th 758 (2011).

¹³⁵*Ibid.*, 796–812.

¹³⁶Superior Court of California, County of Sacramento, Statement of Decision, QSA Coordinated Civil Cases, case no. JCCP 4353 (July 31, 2013), 37–96. The Ninth Circuit also rejected challenges to the QSA under the Clean Air Act and National Environmental Policy Act in *People of the State of California v. U.S. Dep’t of Interior*, case no. 12-55856 (9th Cir. 2014), <http://sdcwa.org/sites/default/files/files/federal-QSA-9th-CircuitOpinion.pdf>.

and POWER, among other parties.¹³⁷ The Imperial Irrigation District eventually entered into settlement agreements with each of these parties in August 2014 and March 2015, however, such that the appeals have now either been dismissed or appear en route to that destination.¹³⁸ Almost (but not quite) the same thing can be said for a cross-appeal filed by the SDCWA, the MWD, the Coachella Valley Water District, and others. It is still live for the time being and generally raises jurisdictional challenges to the superior court's decision that are founded on principles of sovereign immunity and preemption.¹³⁹ Nonetheless, by its own terms, the cross-appeal appears short-lived, since it requests the court of appeals to affirm the superior court and to consider the jurisdictional issues only if the higher court were to reverse the validation and CEQA holdings.¹⁴⁰ In sum, the QSA litigation seems to be slowly grinding to a halt.

Given the seemingly short shelf life of the QSA litigation going forward, only one other key variable appears poised to potentially jeopardize the QSA and its patchwork on the intrastate allocation framework: the Salton Sea. Notwithstanding the recurring emphasis on restoration and environmental mitigation in the QSA legislation and elsewhere, the state of California has not yet implemented and funded a restoration plan for the sea, nearly a dozen years after the QSA's formation. The Imperial Irrigation District has been delivering mitigation flows throughout this period—an obligation prescribed by Senate Bill 317 as well as a 2002 order issued by the State Water Resources Control Board conditionally authorizing the 1998 IID-SDCWA transfer.¹⁴¹ These mitigation flows are scheduled to cease in 2017, however, and grave concerns have been raised based on this sunset about environmental impacts and

¹³⁷The notices of appeal and related information about the case (case no. C074592) can be accessed through the court of appeals case information system at http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=3&doc_id=2055075&doc_no=C074592.

¹³⁸*Ibid.*; Imperial Irrigation District, "IID Reaches Settlement Agreement with QSA Litigants," news release, September 16, 2014, <http://iid.com/Home/Components/News/News/416/30?arch=1>; Imperial Irrigation District, "IID and Imperial County Announce QSA Coordinated Cases Settlement," news release, February 3, 2015, <http://www.iid.com/Home/Components/News/News/431/30?arch=1>.

¹³⁹Respondents and Cross-Appellants San Diego County Water Authority, Vista Irrigation District and City of Escondido's Joint Combined Cross-Appellants' Reply Brief (August 25, 2014).

¹⁴⁰*Ibid.*, 40.

¹⁴¹State of California, State Water Resources Control Board, Revised Order WRO 2002-0013 (December 20, 2002), http://www.waterboards.ca.gov/water-rights/board_decisions/adopted_orders/orders/2002/wro2002-16.pdf.

corresponding costs associated with not having a restoration plan in place. A 2014 report by the Pacific Institute estimated "inaction costs" through 2047 of \$3 billion to \$37 billion related to public health, \$400 million to \$7 billion related to property devaluation, \$110 million to \$150 million related to recreation, and \$10 billion to \$26 billion related to ecological values.¹⁴² Also highlighted (but unquantified) as an inaction cost in the report was diminished agricultural productivity.

It was against this backdrop of unfulfilled Salton Sea restoration and waning mitigation water that the Imperial Irrigation District in November 2014 submitted a petition to the control board requesting two forms of relief pertaining to the sea.¹⁴³ "[A]lthough the obligation to restore the Sea belongs to the State alone," explained the petition, the district requested the control board "to order the QSA parties and Salton Sea Authority member agencies to meet and confer in good faith in an effort to achieve consensus around a realistic, feasible restoration plan and mechanism for funding it."¹⁴⁴ In turn, extending from this collaborative effort, the district sought a second form of relief that, if granted, would hold significant implications for the QSA's future. As requested by the district, "the Board should issue an order modifying its 2002 Order"—again, the order issued in 2002 conditionally authorizing the 1998 IID-SDCWA transfer—"to add State implementation and funding of [the] restoration plan as a condition of transfers under the QSA."¹⁴⁵ Simply put, "the State *must* restore the Sea as a condition of the QSA transfers," contended the petition, expressing elsewhere in its text the district's hope "that cooperative dialogue and proceedings before the Board can obviate any possible litigation regarding restoration of the Sea."¹⁴⁶

On March 18, 2015, the control board held a public workshop in response to the Imperial Irrigation District's petition, and as of the time of this writing this event marks the van-

¹⁴²Pacific Institute, *Hazard's Toll: The Costs of Inaction at the Salton Sea* (2014), v–vii, <http://pacinst.org/publication/hazards-toll/>.

¹⁴³Imperial Irrigation District, "IID Petitions State Water Board to Take Action at the Salton Sea," news release, November 18, 2014, <http://38.106.5.247/Home/Components/News/News/425/30?arch=1>.

¹⁴⁴State of California, State Water Resources Control Board, Petition of Imperial Irrigation District for Modification of Revised Water Rights Order 2002-0013 (November 18, 2014), 48, http://www.waterboards.ca.gov/waterrights/water_issues/programs/salton_sea/docs/iid_petition.pdf.

¹⁴⁵*Ibid.*, 50.

¹⁴⁶*Ibid.*, 30, 44 (*italics in original*).

guard of QSA-related developments in this domain.¹⁴⁷ A notice issued by the control board made clear that its convening of the workshop did "not reflect a conclusion that changes to the [2002 order] would be an appropriate way to address issues concerning restoration of the Salton Sea."¹⁴⁸ The notice likewise flagged as an issue for discussion at the workshop how making the transfer permitted by the 2002 order contingent on Salton Sea restoration might "unravel the complex series of agreements that make up the QSA, which would have significant water supply implications for the State."¹⁴⁹ Complementing testimony offered at the workshop, parties submitted a wide range of comment letters to the control board in support of, and in opposition to, the petition both before and after the event.¹⁵⁰ A full discussion of these letters would go beyond this article's scope, but, broadly speaking, solid support came from the environmental community, while staunch opposition came from the water agencies on the receiving end of the 1998 IID-SDCWA transfer: the SDCWA, the Coachella Valley Water District, and the MWD.

The punch line to this continuous drama over California's intrastate allocation framework for Colorado River water is that the QSA currently is intact. It is performing the clutch interstate function of enabling California to live within the bounds of its 4.4 maf normal entitlement announced in *Arizona v. California*. Despite the apparently impending close of litigation comparable in length to the Supreme Court's historic suit, what lies ahead for the QSA nonetheless appears less than fully clear given the status of Salton Sea restoration and the Imperial Irrigation District's associated petition. A point that does appear beyond dispute at this juncture, however, is that if the QSA parties "thought they were buying peace . . . they were sorely mistaken." Justice Ronald Robie explained this elegantly in 2011: "[A] drop of water cannot do two things at once, and every drop residents of coastal Southern California

¹⁴⁷Portions of testimony offered at the public workshop can be viewed at <https://www.youtube.com/watch?v=mYGUZTolIdA>.

¹⁴⁸State of California, State Water Resources Control Board, Notice of Public Workshop, Solicitation of Comments Regarding the Status of the Salton Sea and Revised Order WRO 2002-0013 (February 6, 2015), 1, http://www.waterboards.ca.gov/waterrights/water_issues/programs/salton_sea/docs/notice_saltonsea031815.pdf.

¹⁴⁹*Ibid.*, 3.

¹⁵⁰These comments can be accessed via the letters links of the State Water Resources Control Board's Salton Sea webpage, http://www.waterboards.ca.gov/waterrights/water_issues/programs/salton_sea/.

want to drink is one that cannot be used to sustain the endangered Salton Sea."¹⁵¹

SHORTAGE SHARING IN THE ERA OF LIMITS

One monumental fact not yet highlighted in the evolution of California's intrastate allocation framework, and the Lower Basin and basin-wide frameworks within which it is nested, concerns the onset of a historic drought in the Colorado River Basin beginning in 2000. This drought has forced innovations at the intrastate, interstate, and basin-wide levels that have paralleled the QSA's formation and the ensuing wave of conflicts. Just as the QSA evolved in 2003 to clarify the Seven-Party Agreement's scheme for allocating Colorado River water in California, so too did a similarly functioning instrument appear in 2007 to navigate this potentially game-changing dry spell: the "Colorado River Interim Guidelines for Lower Basin Shortages and the Coordinated Operations for Lake Powell and Lake Mead" (Interim Guidelines).¹⁵² These guidelines have influenced California's use of the Colorado River in diverse ways.

It was shortly before the California 4.4 Plan's formation in 2000 that severe drought conditions gripped the Colorado River Basin and precipitated crisp relations among the Basin States. As described by the Bureau of Reclamation upon the Interim Guidelines' adoption in 2007, "the eight-year period from 2000 through 2007 was the driest eight-year period in the 100-year historical record of the Colorado River."¹⁵³ Vividly illustrating this pattern were declining reservoir storage levels throughout the basin. "From October 1, 1999 through September 30, 2007, storage in Colorado River reservoirs decreased from 55.8 maf (approximately 94 percent of capacity) to 32.1 maf (approximately 54 percent of capacity)."¹⁵⁴ Given the Basin States' extensive reliance on Colorado River water—particularly within the Lower Basin—the initially adversarial dynamic fostered by the drought may seem commonsensical. In 2005, after several years of coping with the drought, "tensions among the Basin States

¹⁵¹*Quantification Settlement Agreement Cases*, 201 Cal. App. 4th 758, 773 (2011).

¹⁵²U.S. Department of the Interior, Record of Decision, Colorado River Interim Guidelines for Lower Basin Shortages and the Coordinated Operations for Lake Powell and Lake Mead (2007), <http://www.usbr.gov/lc/region/programs/strategies/RecordofDecision.pdf>.

¹⁵³*Ibid.*, 6.

¹⁵⁴*Ibid.*

brought the basin closer to multi-state and inter-basin litigation than perhaps any time since the adoption of the Compact."¹⁵⁵

Issuance of a directive by the secretary of the interior in 2005 served as a major turning point in the transition from adversarial to collaborative relations during the Interim Guidelines' formation. Preceding this directive was an October 2004 letter from the governors' representatives of the Upper Division states to their counterparts in the Lower Division states describing how "[d]eclining reservoir levels have raised fundamental issues associated with the allocations established under the Colorado River Compact, the Boulder Canyon Project Act as interpreted by the decree in *Arizona v. California*, and the Mexican Treaty."¹⁵⁶ Stating that "these issues will not go away," the letter identified the "fundamental issue" as the Upper Division states' obligation to contribute flows toward Mexico's treaty entitlement under Article III(c) of the compact.¹⁵⁷ Formal dialogue was needed on this matter and others. Roughly six months after this letter was sent, a disagreement arose among the Basin States regarding annual reservoir operations. On May 2, 2005, the secretary issued a directive responding to this disagreement, calling for consultation followed by a National Environmental Policy Act (NEPA) process that eventually would produce the Interim Guidelines in December 2007.¹⁵⁸

Embarked on by the Bureau of Reclamation one month after the secretary of the interior's directive, the NEPA process that yielded the Interim Guidelines involved broad-based participation by the Basin States and other stakeholders. The focus of the NEPA process was twofold: (1) development of guidelines that would clarify the circumstances in which the secretary would declare a shortage in the Lower Basin and reduce deliveries to the Lower Division states under the *Arizona v. California* decree, and (2) development of coordinated management

¹⁵⁵Ibid.

¹⁵⁶Letter from the States of Colorado, New Mexico, Utah and Wyoming Governor's Representatives on Colorado River Operations, October 7, 2004, http://www.usbr.gov/uc/rm/amp/amwg/mtgs/04oct25/Attach_12.pdf. W. Patrick Schiffer et al., "From a Colorado River Compact Challenge to the Next Era of Cooperation among the Seven Basin States," *Arizona Law Review* 49 (2007): 217-33.

¹⁵⁷Ibid.

¹⁵⁸Secretary of the interior Gale A. Norton to Honorable Jon Huntsman, Jr., governor of Utah, May 2, 2005, <http://www.usbr.gov/lc/region/g4000/AOP2005/DOIDecision.pdf>.

strategies for the operation of Lake Powell and Lake Mead.¹⁵⁹ With input from the Basin States and other parties throughout 2005 and 2006, the secretary issued a draft environmental impact statement in February 2007, incorporating into this document a "Basin States Alternative." In subsequent correspondence following the draft statement's release, the Basin States described how they had made "tremendous progress over the last two years in setting aside contentious issues and reaching agreements regarding operation of the Colorado River system reservoirs."¹⁶⁰ The Bureau of Reclamation released a final environmental impact statement six months later,¹⁶¹ which was followed by a Record of Decision on December 13, 2007.¹⁶²

As cast in their final form, the Interim Guidelines included a host of provisions at the basin-wide, interstate, and intrastate levels relevance to California's use of Colorado River water. At the basin-wide level, the guidelines adopted a coordinated operating scheme for Lake Powell and Lake Mead that would control the amount of water released from Lake Powell into the Lower Colorado River each year.¹⁶³ These annual releases from the Upper Division states again are the primary source on which Southern California water users rely. The guidelines' scheme was composed to hinge the amount of these annual releases on the relative water levels of Lake Powell and Lake Mead during a particular year. Historically, the minimum annual release had been 8.23 maf, but the guidelines authorized releases as low as 7.0 maf in certain circumstances. Traced to its root within the Law of the River, the guidelines' scheme was devised to implement for an interim period (up to 2026)

¹⁵⁹U.S. Department of the Interior, Bureau of Reclamation, Colorado River Reservoir Operations: Development of Lower Basin Shortage Guidelines and Coordinated Management Strategies for Lake Powell and Lake Mead Under Low Reservoir Conditions, Federal Register, vol. 70, no. 189 (September 30, 2005), <http://www.usbr.gov/lc/region/programs/strategies/news/FRnoticeSept05.pdf>.

¹⁶⁰Letter from the states of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming Governors' Representatives on Colorado River Operations to Secretary of the Interior Dirk Kempthorne, April 30, 2007, <http://www.ose.state.nm.us/Basins/Colorado/PDF/1-TransmittalLetter.pdf>.

¹⁶¹U.S. Department of the Interior, Bureau of Reclamation, Final Environmental Impact Statement, Colorado River Interim Guidelines for Lower Basin Shortages and Coordinated Operations for Lake Powell and Lake Mead (2007), <http://www.usbr.gov/lc/region/programs/strategies/FEIS/>.

¹⁶²U.S. Department of the Interior, Record of Decision, Colorado River Interim Guidelines for Lower Basin Shortages and the Coordinated Operations for Lake Powell and Lake Mead (2007), <http://www.usbr.gov/lc/region/programs/strategies/RecordofDecision.pdf>.

¹⁶³*Ibid.*, 49–53.

the Upper Division states' flow obligations under Article III(c) and (d) of the Colorado River Compact.

Complementing the coordinated operating scheme, the Interim Guidelines also outlined a regime for Lake Mead's operation in normal, surplus, and shortage conditions as defined by the *Arizona v. California* decree.¹⁶⁴ Broadly speaking, Lake Mead's water level would dictate what type of conditions the secretary of the interior would declare each year. In the event of a shortage, the guidelines would allow for annual releases as low as 7.0 maf from Lake Mead, with 2.32 maf and 280,000 acre-feet available for consumptive use in Arizona and Nevada, respectively. California's 4.4 maf normal entitlement would remain untouched in this situation; a shortage declaration would not cut into it at all. On the other end of the spectrum, the guidelines' rules for allocating surplus water among the Lower Division states supplanted those that had been adopted in the interim surplus guidelines in 2001. Among other things, these revised rules earmarked surplus water for the MWD during a "domestic surplus" and adhered to the Seven-Party Agreement's intrastate priority system for surplus water deliveries during a "quantified surplus."

An additional aspect of the Interim Guidelines worth noting in relation to California's contractors (and those elsewhere in the Lower Basin) is a water banking program for "intentionally created surplus" (ICS).¹⁶⁵ This program was founded on the basic premise that these contractors could engage in activities like land fallowing, canal lining, desalination, etc., that would enable them to rely on the water generated by these activities in lieu of some of the mainstream water that they otherwise would use under their contracts. In turn, the contractors could store this unused water in Lake Mead for later use, subject to certain limits. Among these limits were caps on the annual and cumulative amounts of ICS created by contractors in each Lower Division state, as well as a cap on the amount of ICS that could be delivered annually. On the same day the Interim Guidelines were adopted, California contractors—including the MWD, the Imperial Irrigation District, and the Coachella Valley Water District—signed an intrastate agreement that defined their individual caps in each of these respects.¹⁶⁶ This agreement notably disclaimed any effect on the QSA.

¹⁶⁴*Ibid.*, 34–37.

¹⁶⁵*Ibid.*, 38–43.

¹⁶⁶California Agreement for the Creation and Delivery of Extraordinary Conservation Intentionally Created Surplus (December 13, 2007), <http://www.usbr.gov/lc/region/programs/strategies/agreements/CAICS.pdf>.

In sum, the secretary of the interior has relied on the Interim Guidelines since 2007 to operate Lake Powell and Lake Mead, and the drought in the Colorado River Basin has yet to abate. Although the ICS program is noteworthy for the flexibility it affords California's contractors under the intrastate scheme, arguably even more salient parts of the guidelines are the reservoir operating regimes. The final environmental impact statement prepared for the guidelines identified a 41-percent chance of an "involuntary shortage" along the Lower Colorado River while these regimes were in effect (until December 31, 2025).¹⁶⁷ Such a shortage has yet to be declared, but it should be noted that for the first time since its filling in the 1960s the Bureau of Reclamation released from Lake Powell only 7.48 maf this past year.¹⁶⁸ Moreover, in April 2015, the bureau reportedly projected the chances of shortage declarations along the Lower Colorado River as 33 percent and 75 percent during 2016 and 2017, respectively.¹⁶⁹ If this shortage scenario plays out—in 2016, 2017, or otherwise—Arizona and Nevada contractors again will bear the brunt. As mentioned, although California did not prevail in *Arizona v. California*, the Interim Guidelines fully insulate its 4.4 maf normal entitlement from shortage declarations.

CONCLUSION

If we treat as bookends the Colorado River Compact's formation in 1922 and the ongoing QSA-related developments and implementation of the Interim Guidelines, the evolution of the allocation framework governing Southern California's use of Colorado River water encompasses nearly one hundred years of western legal history. Apparent across this period is an iterative and provisional pattern and a resulting diversity of nested allocational institutions that make this evolutionary process

¹⁶⁷U.S. Department of the Interior, Bureau of Reclamation, Final Environmental Impact Statement, Colorado River Interim Guidelines for Lower Basin Shortages and Coordinated Operations for Lake Powell and Lake Mead (2007), ES-25, <http://www.usbr.gov/lc/region/programs/strategies/FEIS/>.

¹⁶⁸Bureau of Reclamation, Upper Colorado Region, "Bureau of Reclamation Forecasts Lower Water Release from Lake Powell to Lake Mead for 2014," press release, August 16, 2013, <http://www.usbr.gov/newsroom/newsrelease/detail.cfm?RecordID=44245>; U.S. Department of the Interior, Bureau of Reclamation, Annual Operating Plan for Colorado River Reservoirs 2015 (2014), 17, <http://www.usbr.gov/uc/water/rsvrs/ops/aop/AOP15.pdf>.

¹⁶⁹Tony Davis, "Risk of CAP Shortages Next Year Reach 33%," *Arizona Daily Star*, April 29, 2015, http://tucson.com/news/science/environment/risks-of-cap-shortages-next-year-hit/article_7feb966b-6a17-5bc7-b2c1-057b9b70c00a.html.

resemblant in principle (though perhaps not in scale) to that of almost any legal regime ever devised for governance of water resources. Such regimes might be conceived of as sandcastles, and the myriad forces within society that perpetually shape their rule-laden structures might be analogized to the tide.

Tangible examples of the iterative and provisional nature of this evolution abound. Consider initially the relationship between the compact and the Interim Guidelines in this regard. Prescribing the Upper Division states' flow obligations to the Lower Division states and to Mexico, Article III(c) and (d) of the compact have eluded Supreme Court interpretation since their genesis. Notwithstanding their less-than-clear meaning in certain key respects for almost a century (and derivative tensions among the Basin States), however, these flow obligations have been implemented on the ground since 2007 through the Interim Guidelines' coordinated operating scheme for Lake Powell and Lake Mead. A similar pattern can be discerned in the Boulder Canyon Project Act's history. It is respectfully questionable whether Congress indeed intended to establish an apportionment scheme for the Lower Colorado River when enacting the Project Act in 1928. Thirty-five years after this milestone, however—i.e., after thirty-five years of living with uncertainty regarding the Project Act's precise meaning and relationship with the compact—the Supreme Court pragmatically laid these issues to rest in *Arizona v. California*.

Another salient example in this vein concerns the Seven-Party Agreement. Its intrastate priority system for California's use of Colorado River water would have benefited from clarity upon its inception in 1931, particularly with regard to the scope of the Imperial Irrigation District's and the Coachella Valley Water District's entitlements under priority 3(a). Yet it took a sustained interstate and intrastate effort to formulate the QSA for this purpose in 2003, and even now, a dozen years later, the QSA's fate is unfolding with that of the Salton Sea.

By way of synthesis, a common trend is evident from the "lives" of each of these allocation institutions bearing on Southern California's use of the Colorado River. They have originated without an entirely clear (or at least fully shared) understanding of their meaning and intended operation. They nonetheless have governed water allocation and management and related infrastructural and capital investment decisions in and around the Colorado River Basin until various tipping points have been reached requiring their clarification or modification. They then have been subject to triage-like work generally involving large-scale concerted efforts by diverse federal and state entities (executive, judicial, and/or legislative) at both the interstate and intrastate levels. In a nutshell, when

considered across the long arc of time, the persistence of these institutions within the history of western water law has had everything to do with the iterative and provisional manner in which they have been finessed.

A corollary to the preceding point is also notable concerning the diversity and interconnectedness of the allocation institutions that govern Southern California's Colorado River water use. A detailed recitation of the features of these institutions would not be prudent this late in the game, but it is enough to say generally that they demonstrate incredible variation in their makeup. This variation is apparent in their allocation schemes—e.g., the compact's scheme for the Colorado River system as a whole versus the *Arizona v. California* decree's scheme for the Lower Colorado River. This variation also is evident from the administrative arrangements for the allocation schemes—e.g., the absence of a formal basin-wide commission for the compact's scheme contrasted with the secretary of the interior's watermaster role for the scheme set forth in the *Arizona v. California* decree. Despite their diversity in these respects and others, however, these institutions obviously are inescapably joined. It is the entire integrated framework constituted by the compact, the *Arizona v. California* decree, the Seven-Party Agreement, the QSA, and related measures that collectively governs Southern California's use of the Colorado River. Simply put, the evolution chronicled above has generated in contemporary times a nested collection of diverse allocation institutions with rich insights for water laws elsewhere in the United States and across the globe.

Ultimately, given the particular contours of the allocation institutions that have originated through this iterative and provisional evolution, California's legal entitlement to Colorado River water has emerged comparatively secure from an interstate perspective as of 2015. Ever since the compact's formation in 1922, California has enjoyed its status as a beneficiary of the Upper Division states' decadal obligation under Article III(d) to avoid depleting Lee's Ferry flows below 75.0 maf. Moving forward four decades, despite the outcome in *Arizona v. California*, California nonetheless was able to ensure primacy for its 4.4 maf normal entitlement to Colorado River water (i.e., over Arizona's CAP entitlement) through the Colorado River Basin Project Act in 1968. Finally, coming about in 2007 in response to ongoing drought in the basin, there is again the Interim Guidelines' operating regime for Lake Mead. In the event of future shortages along the Lower Colorado River, this regime calls for cutting into Arizona's and Nevada's entitlements—the former's by as much as almost 500,000 acre-feet—while leaving California's 4.4 maf normal entitlement

wholly untouched. One may inquire about the equity of these allocational arrangements—particularly, in light of the textual importance ascribed to “equity” within the Law of the River’s constitution (compact).¹⁷⁰ At this stage of the institutional evolution, however, the relative security of Southern California’s entitlement seems clear.

A return to the statement quoted at the outset of this article from Secretary of the Interior Wilbur on July 7, 1930, upon commencement of Hoover Dam’s construction, is appropriate to close. It is apparent that the historical process canvassed in the preceding pages largely has realized the vision then articulated by the secretary for California and the U.S. Southwest.¹⁷¹ People hold diverse normative views on this subject in modern times, but Hoover Dam and the vast infrastructure governed by the Law of the River indeed have made “new geography” and ushered in a “new era in the southwestern part of the United States.”¹⁷² Even more germane to the focus of this piece, the Imperial Irrigation District has benefitted from the “new hope” and “new financial credit” alluded to by the secretary, and the large-scale importation of Colorado River water to Southern California’s urban coast has made possible “homes and industries . . . for many millions of people.”¹⁷³ Future Lee’s Ferry flows, as supplied by the Upper Division states under Article III(c) and (d) of the compact, will be a key variable to watch in successive visions implicating California’s use of the Colorado River. The Interim Guidelines now implement these flow obligations—as well as govern shortage sharing in the Lower Basin—but their 2026 sunset is little more than a decade away. Also warranting close attention, of course, will be the QSA’s intrastate juggling act. Will it be possible to reconcile the competing visions associated with undertaking the largest water transfer in U.S. history while simultaneously restoring California’s largest lake and one of the world’s largest inland seas? Time will tell, and that is the takeaway. What appears most clear from the historical record is that Southern California’s ongoing use of Colorado River water will remain deeply intertwined with ever-shifting economic, environmental, political, and social conditions in the state and across the basin, and that these dynamic changes will ensure that today’s allocation framework inevitably will evolve into tomorrow’s.

¹⁷⁰Jason A. Robison and Douglas S. Kenney, “Equity and the Colorado River Compact,” *Environmental Law* 42 (2012): 1157–1209.

¹⁷¹Wilbur and Ely, *The Hoover Dam Power and Water Contracts*, 439.

¹⁷²*Ibid.*

¹⁷³*Ibid.*

THE ALL-AMERICAN CANAL AND THE CIVIL-COMMON LAW DIVIDE¹

PETER L. REICH

SUMMARY

Using as a starting point the Ninth Circuit's 2007 All-American Canal lining decision, *Consejo de Desarrollo Económico de Mexicali, AC v. United States*, this essay explores how doctrinal disconnects complicate adjudication of international water rights controversies. However, legal history and comparative law sources can fill gaps and build analogies to bridge differences in substantive law. Between Mexico and the United States in particular, the civil-common law divide at times appears vast, but occasionally it has been narrowed by reference to shared Roman principles of usufruct or by incorporation of Mexican law into the U.S. system. Such meeting places for doctrine suggest that, even in domestic courts, nations need not attempt to resolve international problems through domestic law alone.

One of the most intractable issues in international natural resources law has been the equitable distribution of water be-

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yond national boundaries. Many watersheds (both surface and groundwater) cross artificial political lines and have created international tensions. These controversies have sometimes been resolved by adjudication or diplomacy, but have often persisted due to legal or policy divides.² Mexico and the United States have long been at odds over their common watercourses (the Colorado and Rio Bravo/Rio Grande Rivers on the surface, and various underground aquifers), but analysts of this contestation usually treat it as only political and disregard the problem of their differing legal systems.³ A recent U.S. decision, *Consejo de Desarrollo Económico de Mexicali, AC v. United States*, illustrates the inadequacy of domestic law to address international water claims in this region. The ruling holds that the Bureau of Reclamation's lining of California's All-American Canal with concrete could not be enjoined to protect cross-border agriculture or ecosystem use.⁴

This essay explores the Mexico-U.S. legal disconnect epitomized by *Consejo*; historical and comparative perspectives showing that legal dichotomies have been at least partially reconciled in other contexts; and issues that have separated, but might in fact bring together, the Mexican and U.S. water law regimes. I conclude by suggesting how the *Consejo* decision might have been otherwise resolved, and assessing the possibilities for more comprehensive legal harmonization.

THE ALL-AMERICAN CANAL CONTROVERSY AND THE LIMITS OF DOMESTIC LAW

Irrigation of the Imperial and Mexicali Valleys straddling the border states of California and Baja California Norte began in the early 1900s when U.S. investors built canals from the Colorado River traversing the less hilly Mexican side.⁵ Promoters of

²Examples of such disputes are detailed in Joseph Dellapenna and Joyceta Gupta, eds., *The Evolution of the Law and Politics of Water* (Dordrecht, Netherlands, 2008), 227–352. See, generally, Stephen C. McCaffrey, *The Law of International Watercourses*, 2^d ed. (Oxford, UK, 2007) [surveying international water law theories, cases, and principles].

³See Peter H. Gleick, “United States International Water Policy,” in *A Twenty-First Century U.S. Water Policy*, ed. Juliet Christian-Smith and Peter H. Gleick (Oxford, UK, 2012), 263, 265–67; see Myron B. Holburt, “International Problems,” in *Values and Choices in the Development of the Colorado River Basin*, ed. Dean F. Peterson and A. Berry Crawford (Tucson, AZ, 1978) 220–37.

⁴482 F.3d 1157 (9th Cir. 2007).

⁵Oscar Sánchez Ramírez, “El Agua del Río Colorado en Baja California,” *Voces de la Península* 1 (April–June 2003): 6–8.

agriculture in this period knew that water would be lost when transported through dirt canals; for example, one contract guaranteed that 2 percent additional water would be provided to an American farmer "to make up for seepage and evaporation between the boundary line and the place where the water is to be used."⁶ U.S. irrigators' concern that the water supply was unreliable due to Mexico's political instability and the addition of canals to serve the city of Mexicali led to pressure for an "All-American" canal entirely within U.S. territory.⁷ The All-American Canal was authorized by Congress in 1928 and completed in 1942.⁸ In addition to its value to U.S. farmers in the Imperial Valley, the canal allowed seepage to recharge groundwater supplying Mexicali Valley residents, businesses, and the Colorado River delta's ecosystem.⁹ But in response to Southern California's population growth and accompanying water demand, in 1994 the U.S. Bureau of Reclamation approved a project to line the canal with concrete to prevent further water loss.¹⁰

The *Consejo* litigation was initiated in 2005, when a Mexican business and community group and two U.S. environmental organizations sued the Department of the Interior and the Bureau of Reclamation in federal court to enjoin the lining.¹¹ Plaintiffs alleged deprivation of property without due process, a constitutional tort, and violations of NEPA, the APA, the ESA, and the Migratory Bird Treaty.¹² The district court granted the defendants' motions to dismiss on some counts, and for summary

⁶Agreement, Sociedad de Yrrigación y terrenos de Baja California and D.O. Anderson, 1903, in "Land and Water Titles and Agreements, 1896–1907" (ms. in Huntington Library, San Marino, California).

⁷Jeffrey Kishel, "Lining the All-American Canal: Legal Problems and Physical Solutions," *Natural Resources Journal* 33 (Summer 1993): 699–704; Sánchez Ramírez, "El Agua del Río Colorado," 7, 8.

⁸Boulder Canyon Project Act of 1928, 45 Stat. 1057 (codified at 43 U.S.C. §617) (1928).

⁹482 F. 3d at 1163; Nicole Ries, "The (Almost) All-American Canal: *Consejo de Desarrollo Económico de Mexicali v. United States* and the Pursuit of Environmental Justice in Transboundary Resource Management," *Ecology Law Quarterly* 35 (2008): 491, 502–504 (summarizing briefs and other evidence of the seepage's ecological benefits).

¹⁰482 F. 3d at 1164; Ries, "The (Almost) All-American Canal," 496–98. For analysis of the lining project's potentially damaging effects on urban supply, agriculture, and the environment, see, generally, Vicente Sánchez Munguía, ed., *El Revestimiento del Canal Todo Americano* (Tijuana, Mexico, 2004).

¹¹482 F. 3d at 1165. The city of Calexico, California, later intervened as a plaintiff, and various irrigation districts and the state of Nevada joined the defense. *Ibid.*

¹²*Ibid.*, at 1166.



The All-American Canal was authorized by Congress in 1928 and completed in 1942. (Photograph by Chris Austin)

judgment on others.¹³ After oral argument was heard during the plaintiffs' appeal to the Ninth Circuit, Congress passed an omnibus tax bill containing a section ordering the immediate lining of the canal.¹⁴ Bipartisan congressional support for the rider, as well as that of the San Diego County Water Authority, aimed at halting the *Consejo* litigation, forestalling further environmental review, and deferring to existing Mexico-U.S. treaties to settle border water disputes.¹⁵

Based on this legislative support for the lining project, the Ninth Circuit held that the 2006 act now exempted the Bureau of Reclamation from challenges and ordered the trial court to dismiss all of the plaintiffs' claims, either for mootness or for lack of subject matter jurisdiction.¹⁶ One of the environmental plaintiffs' attorneys consulted the author regarding the potential for an appeal to the U.S. Supreme Court—an option that

¹³*Consejo de Desarrollo Económico de Mexicali, AC v. United States*, 417 F. Supp. 1176, and 438 F. Supp. 1207 (D. Nevada, 2006).

¹⁴*Tax Relief and Health Care Act of 2006*, Pub. L. 109-432, 120 Stat. 2922.

¹⁵See Ries, "The (Almost) All-American Canal," 515–16 (quoting San Diego County Water Authority officials' statements regarding the bill's purpose).

¹⁶482 F. 3d at 1158, 1174.

ultimately was not pursued.¹⁷ Significantly for our purposes here, the parties in *Consejo* did not raise, nor did the court address, the disconnect between legal ideas about water on opposite sides of the border.¹⁸ It is likely that the court simply assumed that no claims arising under Mexican law were cognizable in the United States, so the damages to agriculture, urban supply, and the environment in Mexico were simply not remediable.¹⁹ Yet in other contexts a common legal language for dealing with conflicts between different legal regimes had been developed.

HISTORICAL AND COMPARATIVE PERSPECTIVES

As historian Alan Watson has noted, legal history is valuable “for explaining present and future law.”²⁰ The fact that medieval Europe was largely governed by two supranational legal systems, canon law and the neo-Roman *jus comune*, shows us that disputes could be resolved via these structures as well as through local customary law.²¹ Even at the end of the nineteenth century, when Europe had separated into nation-states with more-or-less distinct bodies of law, aspects of the *jus comune* remained influential in both civil and common-law jurisdictions.²²

For example, water law came under the universalizing influence of Roman law in periods of doctrinal transition. Historian Frederic Maitland has explained how, as an independent English law was being created in the thirteenth century, jurist William Bracton incorporated classical references to “islands that arise in mid-stream,” among his other uses of Roman law to fill

¹⁷Author to Gideon Kracov, Esq. (email, April 30, 2007, 13:25 PST) (on file with author).

¹⁸For a discussion of the contrast between Mexican civil law and U.S. common law regarding water rights, see text accompanying notes 32–39.

¹⁹See Ries, “The (Almost) All-American Canal,” 494–95.

²⁰Alan Watson, *Legal History and a Common Law for Europe* (Stockholm, Sweden, 2001), 176.

²¹See R.C. Van Caenegem, *European Law in the Past and the Future* (Cambridge, UK, 2002), 1.

²²See, generally, Manlio Bellomo, *The Common Legal Past of Europe* (Washington, DC, 1995), 1–33. (observing the pervasiveness of Roman legal methodology and substantive law in national codification).

gaps in national or provincial custom.²³ And Alan Watson has analyzed how Roman law on neighboring landowners' rights to use water or divert it onto or from another's land influenced developing jurisprudence in France, Scotland, South Africa, and the United States.²⁴ The fact that nation-states have historically looked beyond their boundaries for legal authority has implications for dispute resolution between countries as well.

Comparative analysis of how different countries have successfully mingled doctrinal traditions and continue to apply the mixture provides another model for cross-border legal accommodation. "Mixed jurisdictions" such as South Africa, Scotland, Louisiana, Quebec, Puerto Rico, the Philippines, and Israel currently fuse substantive civil law with procedural and evidentiary common law.²⁵ In turn, these jurisdictions can become sources of doctrine for other polities still struggling to assimilate distinct traditions, as Louisiana was for Texas and California when they were incorporating Spanish law into common law after the U.S. acquired the Southwest from Mexico.²⁶ The comparative method was successfully applied to a water controversy in 1996 by the Supreme Court of India, when that tribunal cited American cases on the public trust doctrine (originally Roman but expanded by U.S. jurisprudence)

²³Frederic Maitland, ed., *Select Passages from the Works of Bracton and Azo* (London, UK, 1895), xxvii, xxix. This phrase refers to a discussion by the second-century Roman legal scholar Gaius, who distinguishes between an addition to riparian property created gradually by alluvial accretion, which remains with that parcel's owner, and an island formed in the middle of a river, which is to be shared by all the surrounding riparian proprietors. See W.M. Gordon and O.F. Robinson, trans., *Gaius's Institutes*, section 2.70 (Ithaca, NY, 1988).

²⁴Alan Watson, *The Evolution of Western Private Law* (Baltimore, MD, 2001), 138–92.

²⁵See Vernon Valentine Palmer, "A Descriptive and Comparative Overview," in *Mixed Jurisdictions Worldwide: The Third Legal Family*, ed. Vernon Valentine Palmer (Cambridge, UK, 2001), 17, 76–80. See also Warren M. Billings, "Mixed Jurisdictions and Convergence: The Louisiana Example," in *Magistrates and Pioneers: Essays in the History of American Law*, ed. Warren M. Billings (Clark, NJ, 2011), 361–62 (Louisiana's blend of Roman, French, Spanish, British, and American law exemplifies the successful harmonization of different systems).

²⁶See Peter L. Reich, "Siete Partidas in My Saddlebags: The Transmission of Hispanic Law from Antebellum Louisiana to Texas and California," *Tulane European and Civil Law Forum* 22 (2007): 79–88.

to block a state from leasing ecologically fragile riparian land to a private developer.²⁷

That the doctrinal accommodation model has been used historically and comparatively as a legal source for national dispute resolution augurs well for its applicability to international conflicts. In fact, the contemporary value of legal history and comparative analogies has been demonstrated by the rise of a unified European Union jurisprudence, considered by some as "a new *jus comune*."²⁸ This reconstitution of supranational legal hegemony includes legislation requiring the management and protection of watercourses at the river basin level, whether within or crossing national boundaries.²⁹ Beyond the EU, other regional organizations now provide for natural resource dispute resolution among diverse countries.³⁰ While transnational environmental instruments and litigation to enforce them have been criticized as ineffective at best and as possibly undermining state

²⁷*M.C. Mehta v. Kamal Nath and Others* (1997) 1 S.C.C. 388. For a discussion of the public trust doctrine protecting rivers, the seashore, and other resources for general use, see Joseph L. Sax et al., *Legal Control of Water Resources: Cases and Materials*, 4th ed. (St. Paul, MN, 2006), 590–628. The public trust doctrine has developed judicially, statutorily, and even constitutionally in a variety of nations, including India, Pakistan, the Philippines, Uganda, Kenya, Nigeria, South Africa, Brazil, Ecuador, and Canada. Michael C. Blumm and Rachel D. Guthrie, "Internationalizing the Public Trust Doctrine: Natural Law and Constitutional and Statutory Approaches to Fulfilling the Saxion Vision," *U.C. Davis Law Review* 45 (February 2012): 741–808.

²⁸Van Caenegem, *European Law*, 136–37.

²⁹See *European Union Directive 2000/60/EC of European Parliament and Council of 23 Oct. 2000 Establishing a Framework for Community Action in the Field of Water Policy*, O.J.L. 327/1.22.12.2000, pp. 1–72, available at ec.europa.eu/environment/water/water-framework/index_en.html. See also Paulo Canelas de Castro, "European Community Water Policy," in Dellapenna and Gupta, *The Evolution of the Law*, 227–44. (summarizing the legislative origins and enforcement mechanisms of the Water Framework Directive).

³⁰See, generally, Harry N. Scheiber and Jin-Hyun Paik, eds., *Regions, Institutions, and Law of the Sea: Studies in Ocean Governance* (Leiden, Netherlands, 2013). For a discussion of the South Pacific Regional Fisheries Management Organization and the Inter-American Convention for the Protection and Conservation of Sea Turtles, both of which include civil and common law jurisdictions, see Eduardo Ferrero Costa, "Latin America and the Law of the Sea," in *ibid.*, 383–410.

sovereignty, the European experience suggests that Mexico-U.S. water problems could be addressed in a similar manner.³¹

MEXICAN AND U.S. WATER REGIMES: CONTRAST AND CONVERGENCE

The wide divergence in legal doctrine between civil law in Mexico and common law in the United States illustrates why resolution of water disputes like the *Consejo* case has been so difficult. Mexican water rights, descended from Roman and medieval Spanish concepts and applied in the northern territories that became the U.S. Southwest after 1848, have traditionally been shared among various users, especially during times of drought.³² Groundwater was considered appurtenant to land ownership, but the landowner's use of it could be restricted if he maliciously denied access to a neighbor, ignored an existing legal right, or prejudiced a town with no other adequate water source.³³ Modern legislation in Mexico regulates surface and groundwater together at the national level, and covers extraction, use, and conservation to achieve sustainable development.³⁴

U.S. water law is less centralized, being disaggregated into state law.³⁵ It also differs significantly from Mexican law, particularly in the western states, which developed the doctrine of prior appropriation granting an absolute, exclusive right in surface waters and underground streams to the first beneficial

³¹For criticisms of international legal structures, see Eric A. Posner, *The Perils of Global Legalism* (Chicago, IL, 2011), 207–25 (climate change treaties and lawsuits merely drive polluting industries to non-enforcing venues); see Jeremy A. Rabkin, *Law Without Nations! Why Constitutional Government Requires Sovereign States* (Princeton, NJ, 2005), 144–48 (hazardous waste, bio-safety, and climate change measures restrict national policies favoring economic growth).

³²See Michael C. Meyer, *Water in the Hispanic Southwest* (Tucson, 1984), 145–64. Many criteria have been used to resolve disputes, including just title, need, priority, reason for use, legal right, and the common good. *Ibid.*

³³Meyer, “The Living Legacy of Hispanic Groundwater in the Contemporary Southwest,” *Journal of the Southwest* 31 (Autumn 1989): 287–99.

³⁴*Ley de Aguas Nacionales*, D.O. 1 Dec. 1992. See also Stephen Zamora et al., *Mexican Law* (Oxford, UK, 2004), 297 (summarizing constitutional provisions, regulatory authorities, right to benefit from public waters, and penalties).

³⁵See, generally, Robert E. Beck, *Waters and Water Rights* 4, subpart B (State Surveys), 3^d ed. (Charlottesville, VA, 2009).

user.³⁶ In the eastern United States, riparian doctrine provides that every landowner along a watercourse has an appurtenant right to reasonable use of the water.³⁷ California incorporates elements of both systems.³⁸ Groundwater, typically defined as percolating waters rather than a stream's subflow, is subject to five different rules, depending on jurisdiction: the rule of capture, American reasonable use, correlative rights, Restatement (Second) of Torts reasonable use, and prior appropriation.³⁹ Thus the Mexican emphasis on communal sharing, in which priority is only one factor, contrasts sharply with the U.S. focus on individual ownership.

These doctrines have borne distinct results in the two countries and have shaped water negotiations between them. In the late 1870s, when municipal councils in Mexico City and in the state of Tlaxcala attempted to divert water used by local farmers, federal courts enjoined the cities from doing so.⁴⁰ By way of contrast, under identical circumstances, the California Supreme Court held in 1895 that the city of Los Angeles could monopolize local water sources to the detriment of other users based on a "pueblo water right" supposedly originating in colonial Spanish California.⁴¹

³⁶See Sax et al., *Legal Control of Water Resources*, 124–26. Underground streams were considered part of surface waters, contrasted with percolating groundwater, which is subject to different rules. *Ibid.*, 411–14; see text accompanying note 39.

³⁷*Ibid.*, 27–28.

³⁸*Ibid.*, 340–42.

³⁹For a full discussion of these distinct rules beyond the scope of this essay, see *ibid.*, 414–17. Some jurisdictions, notably in Southern California, have implemented government control and allocation of groundwater basins. See William Blomquist, *Dividing the Waters: Governing Groundwater in Southern California* (San Francisco, CA, 1992).

⁴⁰Jurisprudencia Federal, *El Foro: Periódico de Jurisprudencia, Legislación y Ciencias Sociales*, 1 Nov. 1878, p. 342; *ibid.*, 16 July 1879, p. 46. See also Salvador Avila González, ed., *Guía de fuentes documentales para la historia del agua en el Valle de México (1824–1928)* (México, D.F. 1997) (summarizing case files on water disputes between Mexico City and other users).

⁴¹*Vernon Irrigation Co. v. City of Los Angeles*, 39 P. 762, 766 (Cal. 1895). For a discussion of the judicial invention of the pueblo water right and its application in Los Angeles, San Diego, and New Mexico despite case file documentation that no such absolute and exclusive property in water had existed in Spanish or Mexican California, see Peter L. Reich, "Mission Revival Jurisprudence: State Courts and Hispanic Water Law Since 1850," *Washington Law Review* 69 (October 1994): 884–906. See also Sax et al., *Legal Control of Water Resources*, 354–56. The pueblo right has been upheld in California as recently as 1975. *City of Los Angeles v. City of San Fernando*, 537 P. 2d 1250 (Cal. 1975). It has, however, been overruled in New Mexico. *State of New Mexico v. City of Las Vegas*, 89 P. 3d 47 (N.M. 2004).

These conflicting water doctrines have affected not only internal jurisprudence in Mexico and the United States, but their relations with each other as well. In 1928, the two countries' representatives to the International Water Commission were negotiating the status of existing diversions from the Colorado and Rio Grande, and the American section proposed that, as a matter of comity, such uses be recognized and confirmed as prior appropriations.⁴² The Mexican section rejected the proposal, stating that it could not agree to any restriction on its sovereignty over river tributaries within its own territory, and so could not recognize even established uses of this water on the other side of the border.⁴³ Ironically, taking a less hard-line position against cross-border prior appropriation would have strengthened Mexico's position years later in the *Consejo* case.⁴⁴

Due to these doctrinal disparities, Mexico-U.S. water disputes have been addressed largely through diplomacy rather than the courts. In 1944, the two countries signed a treaty apportioning the Colorado River, allotting 1.5 million acre-feet per year to Mexico.⁴⁵ The apportionment, however, was based on unusually high flow measurements during the preceding years and led to excessive allocation, given the multiple agricultural, business, and urban demands on the river.⁴⁶ Water quality, an issue not resolved in 1944, was partially addressed by the International Boundary and Water Commission (IBWC, the successor to the International Water Commission) in Minute 242, which stipulated that overly saline water would not be charged against Mexico's entitlement.⁴⁷ The IBWC representatives recently agreed to Minute 319, by which Mexico will ac-

⁴²Report of the American Section of the International Water Commission, United States and Mexico, *H.R. Doc. No. 359*, at 14 (1930).

⁴³*Ibid.* For the history of this principle of absolute territorial sovereignty over water resources, enunciated in 1895 by a U.S. attorney general as the "Harmon Doctrine" but never put into practice, see McCaffrey, *The Law of International Watercourses*, 76–110.

⁴⁴See discussion in "Conclusion" of this article.

⁴⁵*Treaty Between the United States of America and Mexico Respecting Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande*, Nov. 8, 1945, 59 Stat. 1219.

⁴⁶Michael Cohen, "The Delta's Perennial Drought: Instream Flows for an Over-Allocated River," *Global Business and Development Law Journal* 19 (2006): 121–24.

⁴⁷IBWC, Minute 242, *Permanent and Definitive Solution to the International Problem of the Salinity of the Colorado River* (August 30, 1973), available at www.ibwc.state.gov/Files/Minutes/Min242.pdf. For discussion of the salinity impacts on the Colorado River delta and attempts to mitigate them, see Kara Gillon, "Environmental and Other Implications of Operating the Yuma Desalt-
ing Plant," *Global Business and Development Law Journal* 14 (2006): 129–56.

cept reduced water deliveries when reservoirs are low, and the United States will increase deliveries when supply is higher, as well as authorize additional investment in Mexican earthquake repairs and conservation infrastructure.⁴⁸ This incremental improvement in water dispute resolution benefits both sides, but the IBWC has been criticized for secretiveness, bias in favor of regional agricultural interests, and apathy toward ecology.⁴⁹ A further weakness of diplomatic approaches is that many agreements can take place only at the national level due to the U.S. disaggregation of political authority compared with the far more centralized Mexican governance structure.⁵⁰

Notwithstanding divergent legal regimes and diplomatic limits, a few examples of Mexico-U.S. legal integration suggest opportunities for water law harmonization. The traditional Roman distinction between gradual accretion and rapid avulsion of watercourses became the basis for the International Boundary Commission's settling ownership of the Rio Bravo/Rio Grande *bancos* (sandbar islands).⁵¹ Bancos were allocated in the Colorado River on the same basis.⁵² Just as William Bracton did in

⁴⁸IBWC, *Minute 319, Interim International Cooperative Measures in the Colorado River Basin through 2017 and Extension of Minute 318 Cooperative Measures to Address the Continued Effects of the April 2010 Earthquake in the Mexicali Valley, Baja California* (Nov. 20, 2012), available at www.ibwc.gov/Files/Minutes/Minute-319.pdf.

⁴⁹See Robert J. McCarthy, "Executive Authority, Adaptive Treaty Interpretation, and the International Boundary and Water Commission, U.S.-Mexico," *University of Denver Water Law Review* (Spring 2011): 199–200. McCarthy formerly served as general counsel to the IBWC's U.S. section. For a summary of IBWC efforts to balance infrastructure projects with environmental needs, as well as expand opportunities for public participation, see Sally E. Spener, "Current Policy Direction at the International Boundary and Water Commission, United States and Mexico, United States Section," *Journal of Law and Border Studies* 2 (2002): 65–80.

⁵⁰See Leonard Cardenas, *The Municipality in Northern Mexico* (El Paso, TX, 1963), 18 (Mexican municipalities are subordinate to state government, contrasted with U.S. chartered cities). See also Carlos F. Lascurain Fernández, *El desempeño del régimen ambiental México-Estados Unidos: manejo de las aguas de los ríos Bravo y Colorado* (México, 2010) (applying international relations theory to cross-border water problems faced by different levels of government).

⁵¹See *Comisión Internacional de Límites entre México y los Estados Unidos, Sección Mexicana, Eliminación de Bancos de Río Bravo, Primera Serie* (Washington, DC, 1910), 5–6. According to classical Roman law, alluvial additions, or accretions, altered a riverine boundary while rapid changes, or avulsions, did not. See W.M. Gordon and O.F. Robinson, trans., *Gaius's Institutes* (Ithaca, NY, 1988), section 2.70; Fritz Schulz, *Classical Roman Law* (1951; repr. ed. Darmstadt, Germany, 1992), 363.

⁵²See IBWC, *Minute 83, Re Survey of Portion of Colorado River that forms boundary between U.S. and Mexico* (August 4, 1926), available at www.ibwc.state.gov/Files/Minutes/Min83.pdf.

the thirteenth century, the commission used a legal historical source, in this instance an ancestor of Mexican civil law, to fill a gap and reconcile two doctrinal regimes.

At the state level, American courts have begun the process of integrating Mexican natural resources law into the U.S. doctrinal system, as a recent Colorado Supreme Court decision demonstrates. In *Lobato v. Taylor*, petitioners—successors in interest to an 1843 Mexican land grant—argued that they were entitled to grazing, woodcutting, and fishing rights on the community's former common lands, now occupied by a ski resort.⁵³ In an amicus brief for petitioners, the author explained how these usufructuary traditions were recognized by Mexican law of the 1840s and were therefore incorporated into the 1848 Treaty of Guadalupe Hidalgo protecting the property of individuals residing in territories being annexed to the United States.⁵⁴ The state supreme court decided the case for petitioners on a number of grounds, including prescription, prior use, and estoppel, and cited Mexican law throughout the opinion, stating that "Mexican land use and property law are highly relevant in this case in ascertaining the intentions of the parties involved."⁵⁵ *Lobato's* successful incorporation of Mexican civil law into a U.S. state's common law offers a prototype for applying this legal mixture at the bi-national level.

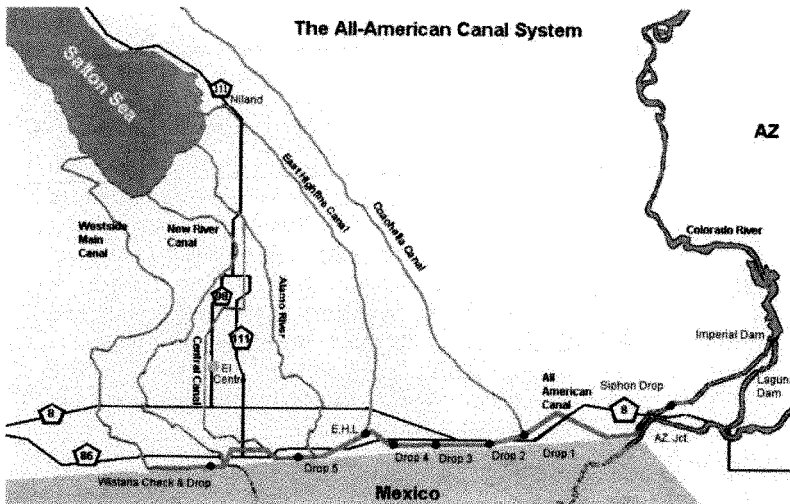
CONCLUSION

Mexico and the United States allocate water, and natural resources generally, in markedly dissimilar ways, but the examples above demonstrate that these doctrines are not necessarily incompatible. How might a more "mixed jurisdiction" model be applied to the *Consejo* case? Drawing on the mutual Roman heritage of both civil and common law, combined with Mexico's flexible water system, the court could have awarded uses to the country most in need in times of shortage. In effect, this is what IBWC Minute 319 already does, but characterizing such access as a legal right, or as emanating from the public

5371 P. 3d 938, 943 (Colo. 2002).

⁵⁴Brief of Amici Curiae Bi-National Human Rights Commission et al., *Lobato v. Taylor*, 71 P. 3d 938 (2002).

⁵⁵71 P. 3d at 946. See also Peter L. Reich, "Litigating the Sangre de Cristo Land Grant Case," *The Scholar* 5 (Spring 2003): 217–26 (discussing *Lobato* and comparative perspectives from Native American and New Zealand Maori indigenous rights cases).



U.S. farmers in the Imperial and Mexicali Valleys, who worried that their water supply was unreliable due to Mexico's political instability, pressured the government for an "All-American" canal entirely within U.S. territory. (Courtesy of Imperial Irrigation District)

trust, would carry more force.⁵⁶ Minute 319's delivery plan presumes voluntary cooperation and is limited to the five-year duration of the agreement.⁵⁷

Common law prior appropriation could also be integrated into the system, which would protect Mexican farmers' pre-lining diversions, and arguably the Colorado River delta, as well as allow surpluses to be transferred where they were most needed.⁵⁸ The lining project itself would not have to be blocked; in fact, lining the canal would facilitate water control and distribution for implementing usufructuary and prior appropriative rights.

⁵⁶See Shelley Ross Saxer, "The Fluid Nature of Property Rights in Water," *Duke Environmental Law and Policy Forum* 21 (Fall 2010): 49–112 (arguing for converting U.S. water law to a usufructuary rather than private property scheme and giving federal and state governments stewardship over a public trust in water in order to distribute uses).

⁵⁷See Minute 319, *Interim International Cooperative Measures*.

⁵⁸See Micha Glaser, "The Appropriation Doctrine: A Tool for Continental Water Marketing along the U.S.-Mexico Border," in *Continental Water Marketing*, ed. Terry L. Anderson (San Francisco, CA, 1993), 93–111 (arguing for a cross-border water market where rights are defined according to consumptive use and protected against third-party impairment).

Even if hypothetical, this blending of civil and common law concepts as a way to resolve the All-American Canal controversy strengthens the argument for a larger North American community. Legal harmonization could ultimately help synchronize Canadian, U.S., and Mexican transportation, infrastructure, currency, a customs union, and regulation.⁵⁹ Canada, of course, already includes the mixed jurisdiction of Quebec, which would facilitate the dialogue of civil and common law.⁶⁰ However, it may be too soon to speak of a North American *jus comune*, given policy clashes and the economic decline associated with the North American Free Trade Agreement (NAFTA), a more narrowly trade-focused structure than the European Union.⁶¹

It is clear that at least on a regional basis, employing legal history, comparative law, and the idea of legal convergence will help solve cross-border allocation problems of river systems such as the Colorado. The future of international natural resources law lies not in piecemeal adjudication relying entirely on one country's domestic legal sources, but in traversing doctrinal boundaries to find more comprehensive solutions.

⁵⁹See, generally, Robert A. Pastor, *The North American Idea* (Oxford, UK, 2011), 168–69 (discussing necessary components of a North American Union).

⁶⁰See Claire L'Heureux-Dubé, "Bijuralism: A Supreme Court of Canada Justice's Perspective," *Louisiana Law Review* 62 (Winter 2002): 449–66 (Canada's development of two legal traditions increases opportunities for commercial exchange with other countries).

⁶¹See Pastor, *The North American Idea*, 7–10, 16–18.

INDIAN WATER RIGHTS IN SOUTHERN CALIFORNIA IN THE PROGRESSIVE ERA: A CASE STUDY¹

TANIS THORNE

Mr. Chairman, ladies and gentlemen, it seems like our chairman has said we have a pipe-line into the treasury. So far, we have failed to even find that pipe. Where is that pipe? On our Reservation we have a water problem. We write letters and don't get no answers to them. I don't know where to start. . . . Now we want something done. How about it?

—Testimony of Del Mar Nejo, Mesa Grande Reservation²

Historian Norris Hundley, Jr., described Indian water rights as a “dark and bloody ground.”³ Congress asserted its authority to allot Indian reservations under the Dawes

¹This article is a tribute to the late Norris Hundley, water scholar and mentor. My thanks to Donald Pisani, Timothy Tackett, and Spence Olin for comments on earlier drafts of this article.

²“Mission Indians Problem in San Diego County,” unpublished hearing before a U.S. House subcommittee of the Public Lands Committee, October 18, 1950, San Diego, CA. HRG-1950-PLH-0021, accessed from Congressional ProQuest site, <http://congressional.proquest.com/congressional/result/congressional/pqpdocumentview?accountid=14509&groupid=96104&pgId=a86110a9-f458-47b8-a23d-ec5aa94ca19>. These and other government documents cited in this paper are available from the Congressional ProQuest website.

³Norris Hundley, Jr., “The Dark and Bloody Ground of Indian Water Rights: Confusion Elevated to Principle,” *Western Historical Quarterly* 9:4 (Oct. 1978): 454–82. Approved February 2, 1887 (49-2), the Dawes Act, section 7, asserts the secretary of the interior’s right to distribute water within the reservations, implying that Indian water rights existed beyond state authority.

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Act of 1887. The Supreme Court asserted that water rights of reservation Indians were guaranteed via federal treaties in the *Winters v. United States* decision of 1908, establishing the "reserved rights" doctrine. Yet the landmark *Winters* decision—undergirding a national policy of converting Indians into self-supporting, landholding farmers—was stillborn. The reserved rights doctrine threatened the vested rights of non-Indians under the prior appropriations doctrine of state law. As secretary of the interior Ethan Allen Hitchcock informed President Theodore Roosevelt, if the *Winters* decision were enforced, the "development of the entire arid West [would] be materially retarded, if not entirely destroyed."⁴

Concurring with Hundley's assessment in his well-regarded book, *Command of the Waters*, Daniel McCool argues that Indian stakeholders were largely invisible until the *Arizona v. California* decision (1963) reaffirmed the reserved rights principle and the federal government's authority to enforce it.⁵ The consensual opinion of water rights historians is that piecemeal legal transfer of Indian water rights to the non-Indian majority progressed unabated, decade after decade, throughout the arid American West. The water rights of Southern California Native people remained ill defined well into the twentieth century, as the epigraph suggests. A term coined by McCool provides a succinct tool for explaining the political dynamics by which

⁴Quoted in Donald Pisani, *Water and American Government: The Reclamation Bureau, National Water Policy, and the West, 1902–1935* (Berkeley, CA, 2002), 166; Pisani argues that the Republican Party's investment in the Reclamation Bureau's success in the Teddy Roosevelt administration was at the expense of Indians. See Charles Rhoads' summary of the Capitan Grande Reservation's legal history, in the Hearing Before a Subcommittee of the Committee on Public Lands on S. 1715 (72-1), March 9, 1932 [hereafter Rhoads Report], <http://congressional.proquest.com/congressional/result/congressional/ppqdocumentview?accountid=14509&groupid=96104&pgId=be412-0eff-4d30-8072-e78dbe981878#756>. For a more full story of Capitan Grande, see Tanis Thorne, *El Capitan: Adaptation and Agency on a Southern California Indian Reservation* (Banning, CA, 2012). Based on new archival research, this paper views the story through the narrower lens of water rights.

⁵*Winters* [207 U.S. 564 1908] was reaffirmed in *Arizona v. California* [373 U.S. 546 1963] with the practicable, irrigatable acreage doctrine. Norris Hundley maintains that the *Winters* decision sent a clear message about the priority of Indian water rights and the wide range of Indian uses, as well as the quantity, to which Indians were entitled. Hundley, "The *Winters* Decision and Indian Water Rights: A Mystery Reexamined," *Western Historical Quarterly* 13:1 (1982): 42. But even after 1963, as Hundley has demonstrated, there was little public consensus on the reserved rights doctrine and too little enforcement because of the West's water scarcity. The Indian Office relied on state appropriation law and beneficial use as a stronger approach. Daniel McCool, *Command of the Waters: Iron Triangles, Federal Water Development, and Indian Water Rights* (Berkeley, CA, 1987), 117–18.

Indians' rights, needs, and preferences were rendered invisible: the "iron triangle" is a politically powerful and efficient but "informal political alliance" of politicians (on congressional committees/subcommittees), administrative agencies (like the Bureau of Reclamation), and local interest groups, lobbying for water infrastructural development for their constituencies.⁶

This study departs from the consensual position, which has argued that Indian water rights were ignored until the 1960s. In the case of the Capitan Grande Indian people of San Diego County in the early twentieth century, Indian rights were hardly ignored; they were, in fact, a subject of considerable importance to the federal government. In 1919, the El Capitan Act gave the city of San Diego the right to purchase the Capitan Grande Reservation's most valuable agricultural acreage along the San Diego River to build the El Capitan Dam and create the El Capitan Reservoir as a city storage site. The transfer of Indian land, held under federal trust, required complicated local, state, and federal negotiations both in the 1910s and in 1932, when the El Capitan Act was amended. The Department of the Interior made a concerted effort to define and protect the Capitan Grande people's riparian rights using the state prior appropriation doctrine. The terms of transfer negotiated in 1919 anticipated the quantification measures based on "practicably irrigatable" acreage set in *Arizona v. California*.

BACKGROUND: THE CAPITAN GRANDE STORY

Southern California was an unlikely place for even a pyrrhic federal victory in behalf of Indians. In the first place, all of the Indian trust lands in the Southern California region were created by executive order, not treaty.⁷ The resources of executive order reservations were particularly insecure. The Capitan

⁶*Ibid.*, 5–6. See also Marc Reisner and Sarah F. Bates, *Overtapped Oasis: Reform or Revolution for Western Water* (Washington, DC, 1990), 9, quoting the report of the National Water Commission (1973). The commissioners claim that Winters was ignored and the secretary of the interior encouraged and/or cooperated in further irrigation projects via the Bureau of Reclamation "without attempt to define, let alone protect, prior rights that Indian tribes might have."

⁷There are about thirty reservations, principally in Riverside and San Diego Counties, located on isolated, marginal parcels of land in the interior: the foothills, mountains, and passes that separate the desirable coastal property from the desert. Much of the well-watered land for pasturage was granted to Mexicans after the missions were secularized. See Florence Shippek, *Pushed into the Rocks* (Lincoln, NE, 1987), chs. 3–4.

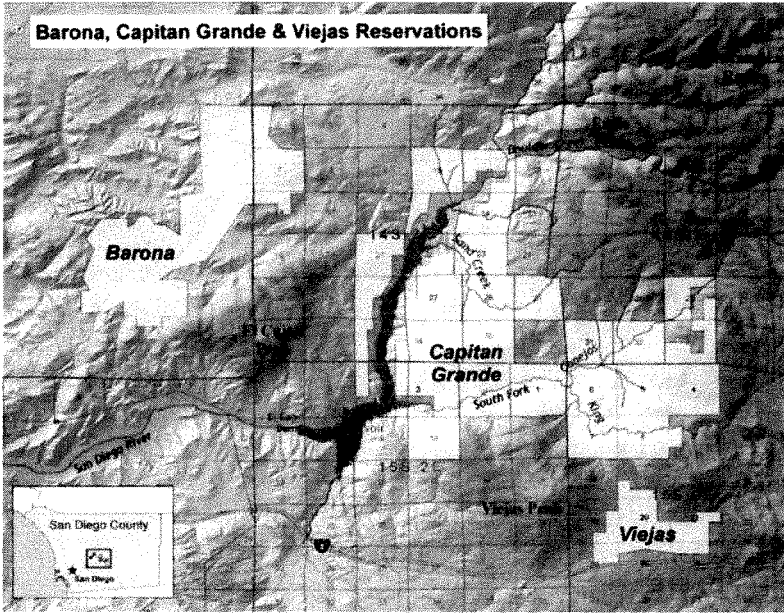
Grande bands, along with other Indian communities of the region, received some benefits of federal trust protection for their resources after 1875; but by the time the Mission Indian Agency reservations were created and the federal trust relationship was solidified with the Mission Relief Act in 1891, it was already too late for the federal government to provide Indians there with high-quality agricultural land. The disadvantaged position of the surviving Indian groups was institutionalized. Only 5 percent of Indian lands in the region were arable. Secondly, Southern California's aridity and its rapidly growing population of non-Indians made this an extremely competitive region for water. The few resources that Native people held were under continual assault by intruders. The oft-quoted statement that Indians' survival depended on securing their long-ignored water rights comes, not surprisingly, from historian Rupert Costo, a Cahuilla Indian of Southern California.⁸ Thirdly, Southern California is a borderlands area where Hispanic law and culture profoundly influenced the region during the Franciscan mission period (1769–1834) and the subsequent Mexican land grant era prior to the American takeover following the Mexican War (1846–48). The cities of Los Angeles and San Diego would win court judgments based on the "pueblo rights doctrine," giving these growing, coastal, urban areas paramount rights to ground and river waters of the interior hinterland.

Although the executive-order reservations lacked arable land, many were strategically located for access to water. For example, the Morongo community, situated at the base of the lofty San Bernardino Mountains, was the best reservation in California in terms of its agricultural potential, according to the Smiley Commission's assessment. Several Indian reservations were along the San Luis Rey River, and the Capitan Grande Reservation straddled the San Diego River.⁹

The strong legal case for the Capitan Grande entitlement to water dates to the 1850s, when a group of San Diego Mission Indians successfully petitioned a federal official to allow them to colonize riverbed lands thirty miles into the interior. The Capitan Grande community had a record of beneficial use for

⁸"Indian Water Rights: A Survival Issue," *Indian Historian* 5 (Fall 1972): 4–6; Thorne, *El Capitan*, chs. 1–2ff.

⁹Albert K Smiley, Joseph B. Moore, and Charles C. Painter, *Report of the Mission Indian Commissioners* (Washington, DC, 1891), 62; Damon Akins, "Lines on the Land: The San Luis Rey River Reservations and the Origins of the Mission Indian Federation, 1850–1934" (Ph.D. diss., University of Oklahoma, 2009), ch. 5. Santa Ysabel and Palm Springs are other examples of communities in mountainous areas or at the base of mountains where river and groundwater were abundant.



Many California reservations were strategically located for access to water, including the Capitan Grande Reservation, which straddled the San Diego River. (Courtesy of the author)

agriculture predating any non-Indian claim. When American homesteaders threatened to appropriate the homes and improvements of the Capitan Grande and other Southern California Indian communities in the 1870s, reformer Helen Hunt Jackson and her East Coast allies persuaded the federal government to place the so-called "Mission Indians" under trust protection. The construction of the transcontinental railroads brought many more people to the region; ditching, flume, and dam construction by private water companies immediately followed in the boom of the eighties. Six major dams were built on local rivers in the region between 1887 and 1897.¹⁰

One of the most important landmarks in San Diego's water infrastructural development was the organization of the San Diego Flume Company (SDFC) in the mid-1880s. The flume company laid preemptive claim to the waters of the San Diego River under state prior appropriation laws. The company built a flume system bringing water from the river's headwaters

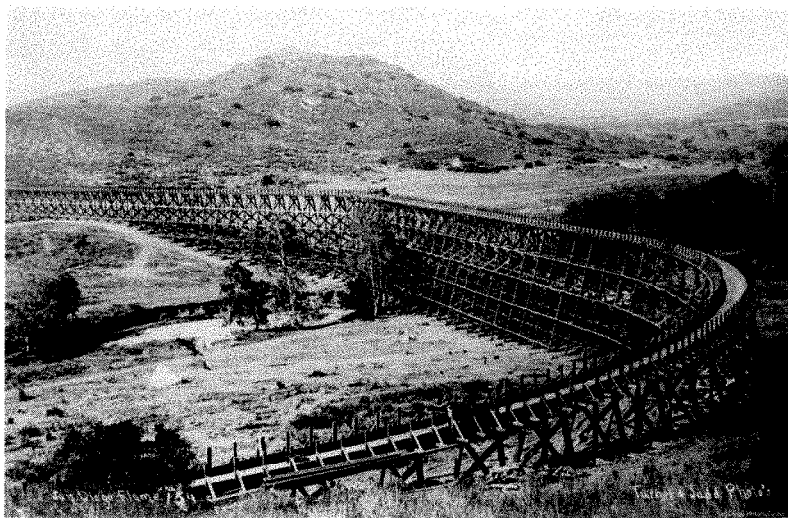
¹⁰Michael Connolly Miskwish, "Kumeyaay Water and Policy Issues" (unpublished ms. 2009); Thorne, *El Capitan*, chs. 2–3.

in the Cuyamaca Mountains to the coastal region to irrigate farms and ranches. Although the flume crossed through the federal trust lands of the Capitan Grande Reservation, the SDFC ignored the rights of the Indians and the authority of the federal guardian. Charles Painter, an East Coast Indian rights activist carrying the mantle for Helen Hunt Jackson's unfinished work, alerted the government to the trespass. Caught red-handed, an SDFC representative said that the company "assumed" that permission would be freely given for such an important improvement to the rapidly growing city of San Diego. The Mission Indian agent subsequently drafted a document with the company in 1888, reserving for the U.S. government for Indian use "ample and sufficient" water for "agricultural and for domestic purposes, and for stock" from the flume—as well as an annual fee for the right-of-way across the reservation—in return for "undisputed right to all the natural flow of the San Diego River."¹¹ Water companies were also developing the waters of the San Luis Rey River and the San Bernardino Mountains.¹²

An example of iron triangle politics, the 1891 Act for Relief of the Mission Indians permanently secured Southern California Indians' land rights, but, at the same time, seriously undermined their water rights. Article 6 authorized the secretary of the interior to grant permission for private water projects crossing Mission Indian reservations. The legislation emblemized the U.S. Department of the Interior's conflict of interest to serve both Indian and non-Indian interests simultaneously. Contrary promises were being made both to protect and to free Indian water resources. (These contradictory promises would become the basis for Indian water rights litigation advanced by the Luiseño along the San Luis Rey River in the late twentieth

¹¹"Special Report regarding actions in matter of the San Diego Flume Company on Capitan Grande . . .," agent J.W. Preston to commissioner of Indian affairs John D.C. Atkins, 20 January 1888, National Archives, Washington, DC, Special Cases-31, 2753-1888, RG-75; Thorne, *El Capitan*, 92-93, 183, Appendices 3-4. On the flume company's responsibility to deliver water to the Indians, see "Report on Illegal Occupation of Capitan Grande and La Jolla Reserves, May 12, 1890," Senate Exec. Doc. #118 (51-1).

¹²The Banning Land and Water Company built two reservoirs in the San Bernardino Mountains between 1883 and 1884. Kenneth M. Holtzclaw, *San Geronio Pass* (San Francisco, CA, 2006), 7. The Smiley Commission spent much of its time in the late 1880s and early 1890s negotiating a land swap to secure the Potrero River waters for the Morongo Reservation Indians. Almost identical legal language was used in the SDFC agreement and in grants to other private water companies for the San Luis Rey Indians and other western tribes in this same decade. Megan Benson, "Damming the Bighorn: Indian Reserved Water Rights on the Crow Reservation, 1900-2000" (Ph.D. diss., University of Oklahoma, 2003), 4; Atkins, "Lines on the Land," 142; Pisani, *Water and American Government*, 162.



The San Diego Flume Co. built a flume system that brought water from the river's headwaters to the coastal region to irrigate farms and ranches. (Courtesy of the San Diego History Center)

century.¹³) Speeding the process of Indians' private property ownership of farms was a primary goal of the legislation. The lands of Capitan Grande were allotted in 1895.

The Indian Office's aim to make self-supporting farmers of the Mission Indians was on a collision course with reality from the outset. The introduction of Christianity, agricultural skills, and foods during the mission period enhanced Mission Indians' image as prime candidates for both federal protection and ultimate assimilation. Ironically, the Hispanicized, Catholic Indians—lacking adequate farmland—more pragmatically embraced pastoralism and wage labor for self-support in this arid region. From the late 1880s to the 1920s, the Indian Office faced chronic resistance in its ethnocentric attempts to make

¹³Thorne, *El Capitan*, 60–62; "San Luis Rey Water Rights Challenge—A 100-Year-Old Struggle," *Indian Country Today*, March 22, 2013, <http://indiancountrytodaymedianetwork.com/2013/03/22/san-luis-rey-water-rights-challenge-100-year-old-struggle-148305>.

Southern California Indians self-supporting farmers under the Procrustean policies of the allotment era.¹⁴

INDIAN WATER RIGHTS IN THE PROGRESSIVE REFORM ERA: FULFILLING THE AIMS OF THE DAWES ACT

The turn of the century was a formative but volatile period of change in western water infrastructural development. The Dawes Act provided a clear directive for the Indian Office to follow for Indian economic adjustment and assimilation. Western Indians obviously needed water to be successful farmers. "Congressional recognition of an implied Indian water right antedated the *Winters* case by a decade," as Pisani has demonstrated.¹⁵ Exemplifying the Department of the Interior's attempt to fulfill its mandate, in 1892 it contracted a second agreement with the SDFC in behalf of the Capitan Grande Indians. This was an explicit acknowledgment of the executive-order reservation's water right, based on riparian rights and beneficial use.¹⁶

During the Progressive reform era at the turn of the century, honest and capable federal personnel renewed their commitment to Indian interests. Although the Indian Office's efforts were underfunded, it labored to bring irrigation to western Indian reservations and to perfect Indians' individual water rights through beneficial use. According to McCool, the decade from 1910 to 1920 was a time "acutely important for Indian water rights."¹⁷ Within the Mission Indian Agency, the Indian Office added land to several Mission Indian reservations, among them Capitan Grande, with an aim to protect watershed and promote farming. Improvements made in the irrigation at

¹⁴Tanis Thorne, "Remembering William Pablo: Man of Malki" (unpublished ms.). Agency farmers working to secure the water rights and encourage full-time agriculture were viewed skeptically by the Capitan Grande Indians, who dared not risk changing from their reliable forms of survival based on off-reservation wage labor. Thorne, *El Capitan*, 67, 88.

¹⁵Pisani, *Water and American Government*, 162.

¹⁶Thorne, *El Capitan*, 50–61.

¹⁷McCool, *Command of the Waters*, 122–24 and chs. 2, 3, and 5. The expansion of reclamation activities, general population growth, and the dwindling amount of unappropriated water were prominent causes for an approaching crisis. The *Winters* decision of 1908 prompted the BIA to introduce a bill to have Congress recognize the reserved rights of Indians. The *Winters* case principle was applied at Pipe Spring, Kaibab Indian Reservation, by Scattergood. See National Park service site: http://www.nps.gov/history/history/online_books/pisp/adhi/adhi4c.htm.

select Mission Indian reservations buoyed Indian Office confidence and purpose. At the Morongo Reservation, specialty crops like apricots flourished from 1890 to the 1940s. There were enthusiastic reports that the Pala Reservation along the San Luis Rey River would be "a model" and an "ideal village." From 1909 to 1911, the federal government funded expenditures at Capitan Grande to enable the Indians to use the full allowance of water to which they were entitled by the 1892 agreement: Indians had used only a fraction of this water because of the faulty delivery system.¹⁸

Optimism that these successful Indian farmers would soon be liberated from federal guardianship was short-lived. Skeptics doubted that the Cuyamaca Flume Company (successor to the SDFC) could be pressured to provide the Indians their full water allowance, as its paying customers were already underserved. Entanglement of Capitan Grande water rights with those of a private company yielded an unanticipated legal glitch. An astute federal employee at Capitan Grande discovered in 1911 that once the federal trust relation ended, so too would the guaranteed rights under the flume company agreement. The agent informed the commissioner of Indian Affairs, "It will be obvious that the lands at Capitan Grande proper should NEVER be conveyed to these Indians in fee simple . . . [because] the water right will be extinguished. The land would always have to be held in trust."¹⁹ Coincidentally, the commissioner sent a circular to all Indian agencies nationally, dated October 16, 1913, explaining to Indian Service personnel that the reserved right would dissolve when an allotted Indian accepted the title in fee, a narrow view that virtually foreclosed any chance for Indians to prosper in the new, post-reclamation West.²⁰ The water supply to even the most promising Mission Indian communities with federal contracts guaranteeing "ample and sufficient water" had become so seriously degraded by the second decade of the twentieth cen-

¹⁸Regarding the land additions, see Thorne, *El Capitan*, 62–63; Akins, "Lines on the Land," 155, 161; Lowell Bean, "Morongo Indian Reservation: A Century of Adaptive Strategies," in *American Indian Economic Development*, ed. Sam Stanley (The Hague, 1978): 159–236.

¹⁹Thorne, *El Capitan*, 89.

²⁰McCool, *Command of the Waters*, 114–15; W.H. Code, head of the Indian Irrigation Service, to subordinate, cited in Pisani, *Water and American Government*, 166. According to this theory, if a reservation was intact, the federal government could protect Indian water, but once the land was allotted, state water laws would apply. Pisani, *Water and American Government*, 166; Thorne, *El Capitan*, 87–88.

tury that even small populations could not be self-supporting with agriculture.²¹

In the brief span from 1900 to 1920, the Indian Office's difficulties implementing the allotment policy were complicated by legislation greatly accelerating non-Indians' political leverage to control the lion's share of water in the West. The Reclamation Act (1902) provided federal funds for dam construction so western farmers could have access to affordable water for irrigation. The Reimbursable Debt Act (1914) supplied credit to prospective beneficiaries in arid western lands to pay for needed improvements in water delivery infrastructure. The Act of June 25, 1910, gave the Interior Department authority to reserve lands within Indian reservations for power and reservoir sites. These acts served non-Native users at the expense of Indians. Without Indians' consent, tribal money and lands were used to construct dams and irrigation works in the West, of which non-Indians were the main beneficiaries.²²

In 1912, the city of San Diego, the Cuyamaca Flume Company, and others began a fierce and prolonged competition for the waters of the San Diego River and a reservoir site at Capitan Grande. The city sued to establish its paramount right to the river under the pueblo doctrine and tried unsuccessfully to buy out the Cuyamaca Company (and later its water district successors), which had a prior appropriations and beneficial use claim.²³ A major water battle ensued. Five years of state and federal hearings, surveys, investigations, negotiations, and court rulings followed the city's 1912 application for the reservoir site. During this period, the federal guardian gave much attention to doing right by the Capitan Grande Indians. Congressman William Kettner, who introduced the El Capitan bill for the city of San Diego in 1914, said that he had "never known a department go into a matter more thoroughly than the Department of the Interior had in

²¹Ibid., 96; Akins, "Lines," 184–90; Bean, "Morongo Indian Reservation."

²²"In this case the benefits are concentrated, but so are the costs," McCool concluded. *Command of the Waters*, 133. Pisani presents a trenchant argument that the Bureau of Reclamation undermined and coopted the Bureau of Indian Affairs in order to "limit Indian agriculture and water rights." *Water and American Government*, 155 and ch. 6ff.

²³For an abbreviated version of the water war, see Thorne, *El Capitan*, 62–63, 89–93; for a more detailed version, see Frank Adams, "Irrigation Districts in California, 1929," *State of CA Public Works Report*, Bulletin 21 (Sacramento, 1929), ch. 5, part 11, 316–18, PDF available online at http://www.water.ca.gov/waterdatalibrary/docs/historic/Bulletins/Bulletin_21/Bulletin_21-B_1930.pdf.

the Capitan Grande removal case."²⁴ The Department of the Interior soon capitulated to the "greatest good for the greatest number" argument and endorsed San Diego's application for the reservoir site. Commissioner of Indian affairs Cato Sells made personal visits to Capitan Grande from 1916 to 1917 to gain the residents' consent to the condemnation of their land and removal elsewhere. The band whose prime lands and improvements along the San Diego River would be flooded demanded that the price of their removal was that their community relations would be reconstructed elsewhere. Language was included in the 1919 El Capitan Act that promised new homes, churches, schools, a water system, and provisions for water rights at the place of relocation.²⁵

The Indian Office realized that this was a golden opportunity, for the costs of removal and rehabilitation of the Capitan Grande Indians would be borne by the city of San Diego. At the hearing before the House Public Lands Committee in 1918, the attorney for San Diego stated that the city was willing to pay whatever it took, because the purchase of the Indian bottomlands was "the best deal in town." Approximately one hundred persons (the Capitan Grande Band in the

²⁴Kettner's comment is in hearing on "Conservation and Storage of Water, San Diego," U.S. House Hearings on Public Lands, H.R. 4037, Jan. 28–29, Feb. 1, 1918 (65-2), available at <http://congressional.proquest.com/congressional/docview/t29.d30.hrg-1918-plh-0003?accountid=14509>; a copy of the hearings is in UCLA Special Collections, Phil Swing Collection, box 30, folder 6. San Diego attempted to buy the flume system at the price set by California Railroad Commission in 1914. There was an eleven-day hearing in Los Angeles in 1915–16 and another in Washington, D.C., in June 1916. Assistant commissioner of Indian affairs E.B. Meritt came to San Diego to investigate after the June 1916 hearing; then agent Tyrell, sent by the Indian Office, came three times. In 1921 San Diego brought suit against the Cuyamaca Flume Company to enforce its unexercised but paramount right to all of the water of the San Diego River. The suit was dropped and the effort of water districts to defend prior beneficial use resulted in transfer of the private Cuyamaca company to the water districts. C.R. Olberg, supervisor of irrigation, was prompted to produce a regional map, "Mission Indian Reservations of Southern California" (1914), UC Berkeley, Bancroft Library, Map Collection G4363 S24E1 1933 m5 case C.

²⁵Thorne, *El Capitan*, 97–101; 1919 Act, Sec. 3: "Provided further, That the Secretary of the Interior shall require from the city of San Diego in addition to the award of condemnation such further sum which, in his opinion, when added to said award, will be sufficient in the aggregate to provide for the purchase of additional lands for the Capitan Grande Band of Indians, the erection of suitable homes for the Indians on the lands so purchased, the erection of such schools, churches, and administrative buildings, the sinking of such wells and the construction of such roads and ditches, and providing water and water rights and for such other expenses as may be deemed necessary by the Secretary of the Interior to properly establish these Indians permanently on the lands purchased for them."

San Diego River bottomlands) were entitled to an estimated 40 miner's inches out of the 256 inches carried annually (or 15 percent) by the flume company to its 10,000 customers. In the successive revisions of the El Capitan bill from 1914 to 1919, the Department of the Interior and its advisors steadily drove up the price tag from the original compensation of \$100,000. In June 1921, the damages were set in San Diego Superior Court. Capitan Grande's loss of 194 irrigated acres to which water rights were attached was set at \$38.66 per acre, or \$75,000. Extensive field studies by the Department of the Interior determined that the value of the remaining lands that were rendered useless (virtually the rest of the reservation)—including personal damages and replacements costs—was \$286,428 on December 22, 1922. The two sums were added together by the court for the grand total of \$361,428. The city received title to roughly 10 percent of the reservation: a total of 1,940 acres. The Indians retained ownership of the rest of the reservation.²⁶ The *Winters* decision was not invoked, but rather the more generally accepted doctrines of riparian rights, beneficial use and prior appropriation.

The 1919 El Capitan Act was a triumph of statesmanship, since, seemingly, all parties would benefit. The Capitan Grande Indians were promised a better quality of life. The Interior Department assumed that the compensation fund would be more than adequate to buy a new San Diego County property with adequate water. Had the federal guardian failed to protect the Capitan Grande people's existing and future water rights by *not* insisting on explicit language in the legislation quantifying their riparian rights? At least in retrospect, Indian irrigation engineer Charles Olberg's sanguine 1914 comment—"Of course they [private developers] could not obtain the rights belonging to the [Mission] Indian reservations"—suggests naïveté. At least one watchdog agency raised the alarm that stronger guarantees were necessary to ensure the Capitan Grande Indians an "ample supply of water . . . without any doubt forever" in their new homes.²⁷

²⁶The quote regarding the "best deal in town" is from the hearing on "Conservation and Storage of Water, San Diego." The 1922 appraisal and report of supervising engineer Herbert V. Clotts was the final version of the Department of the Interior's research assessing the value of Capitan Grande's water and other resources. Other reports identified a larger number of the irrigatable and irrigated lands at Capitan Grande. A miner's inch was worth about \$1,000 in 1914; Capitan Grande's quantified share was estimated in 1910 at 40 inches. Thorne, *El Capitan*, 84, 87–88, 92, 99, 100, 102–103.

²⁷Olberg quoted in Akins, "Lines," 175; George Vaux, of the Board of Indian Commissioners, quoted in 1924 in Thorne, *El Capitan*, 203.

SWING AND COLLIER: INFRASTRUCTURAL
DEVELOPMENT AND THE "THIRD FORCE"
IN CALIFORNIA IN THE 1920S²⁸

During the 1920s, Phil Swing, congressman for California's eleventh district,²⁹ became a tireless advocate for Southern California's regional water infrastructural development. A visionary and an effective dealmaker, Swing is best known for his invaluable contributions toward the construction of the All-American Canal and the Boulder Dam (aka the Swing-Johnson Bill). Less well known is his effort to secure the waters of the San Diego River for the city of San Diego. As litigation dragged on through the 1920s, postponing the construction of the El Capitan Dam, the Southern California population increased, and water rights became more scarce and valuable. In late 1926, Representative Swing (then a member of the House Committee on Indian Affairs) mindfully acted in the city's interest by introducing legislation to extend the Capitan Grande trust patent for ten years beyond the five-year extension made in 1919. There were fears within San Diego that if the Capitan Grande people collectively owned their land patent, they would invite competitive bidding for their reservoir site based on rising land and water values. Swing's extension act benefited the city, not the Indians.³⁰

Also in 1926, Swing introduced another, less known "Swing-Johnson Bill" to transfer federal funds for the care and relief of the Indians of California to public agencies in the state. Establishing a contract whereby the state was reimbursed for services, the legislation was the brainchild of the American Indian Defense Association (AIDA) of Central and Northern California

²⁸Francis Jocelyn Fischer, "The Third Force: The Involvement of Voluntary Organizations in the Education of the American Indian with Special Reference to California, 1880-1933" (Ph.D. diss., University of California, Berkeley, 1980). McCool discusses the disruptions of the operations of the iron triangle by outside sources like reformers but says little about the impact of 1920s reform.

²⁹Phil Swing's district is called "7 come 11" because it was made up of seven counties and was the eleventh district (aka Mono to Mexico). Beverly Bowen Moeller, *Phil Swing and the Boulder Dam* (Berkeley, CA, 1971), 3, fig. 1. Swing was elected November 20, 1921, and ended his public career after finishing his term in March 1933; he withdrew from a bid for the U.S. Senate on June 22, 1933.

³⁰House Bill 14250 was introduced by Swing on December 7, 1926 (69-2) "[t]o authorize reimposition and extension of the trust period on lands held for the use and benefit of the Capitan Grande Band of Indians in California." It became law as PL 69-585; 44 Stat. 1061 on February 8, 1927.

and its brilliant analyst John Collier. (The bill's coauthor, California senator Hiram Johnson—formerly the nationally prominent progressive state governor—was largely a silent party in the Indian relief bill.)³¹

Using the AIDA as his base, Collier built his political career in the spirit and coin of Progressivism. The well-heeled intellectual elite of San Francisco's Commonwealth Club, whose membership overlapped with the AIDA's Northern California branch, provided the movement with respectability and authority. Members of the California Federation of Women Clubs and other Indian rights organizations served as the ground troops. A skilled organizer, Collier launched a national reform movement in California in the mid-1920s, which blamed Indian woes on the spoliation by the federal government's Indian Office and economic ruination by predatory whites. Collier exposed many shocking defects of Indian policy, which were diametrically counter to Indian interests, and he outlined a legislative agenda for sweeping reforms. He decried the policy thrust toward assimilation (calling it "racial extermination") through "individualization." Collier became the commissioner of Indian affairs in the administration of President Franklin D. Roosevelt and is renowned

³¹The bill authorizing the secretary of the interior to arrange with states for the education, medical attention, and relief of distress of Indians, and for other purposes, was introduced first on February 3, 1926, H.R. 8821 (69-1); Swing reintroduced it to the House on December 17, 1926, and Hiram Johnson to the Senate on December 19; the bill was revised successively, simplified, and shortened. S. 2571, introduced by Senator Johnson, became P.L. 73-167 in the 72^d Congress in 1934. It was drafted originally by Robert M. Searls, a lawyer, in cooperation with the Commonwealth Club. Senators LaFollette and Cooper introduced an identical measure affecting Wisconsin, which obtained the Department of the Interior's and the comptroller general's endorsement. Secretary of the interior H. Work stated in his annual report (p. 20) that state and local agencies "are in a position to assume these responsibilities for the Indians and perform them more promptly and sympathetically than the Federal Government," Bancroft Library, UC Berkeley, Merriam Papers, reel 88, AIDA folder, Indians, 1926.

for ushering the landmark Indian Reorganization Act (1934) through Congress.³²

As Progressive reformers fighting for efficient and honest government guided by educated professionals but serving democratic ends, Phil Swing and John Collier were on parallel courses: Swing to expand the water infrastructure dramatically through canal and dam construction to bring water to Southern California's Imperial Valley farmers and the Southland's coastal urban dwellers; Collier to bring bureaucratic reform to Indian social services by integrating Indians into state welfare bureaucracy. The policies of both men entailed a major restructuring of state and federal relationships, and required federal money and authority.

Collier and Swing shared common ground on California Indian welfare reform. In the 1920s, California was propelled toward broad-based political activism regarding Indian policy by two intertwining developments. The first was the *California Claims* case. In the wake of the rediscovery in 1905 of the eighteen unratified California treaties of 1851–52, public awareness was expanding about the injustices done and about the viability of a suit by California Indians against the federal government for redress and compensation. The second was the growing financial burden on county governments for health and welfare services for impoverished, landless California Indians who were not receiving federal services for health,

³²Primary sources for the AIDA's political activities and Collier's leadership, in conjunction with the San Francisco Commonwealth Club, are in the Bancroft Library's manuscript collections: the Chauncey Goodrich Papers, BANC MSS 79/59, and the C. Hart Merriam Papers, Bancroft film 1022 [aka BANC MSS 80/18c], reel 88, with some supplementary information in reels 80 and 8; all materials cited for the Merriam Papers are on reel 88 unless otherwise specified. See Merriam Papers, Indian Affairs: NS 1, no. 2 (January 1938). Kenneth R. Philp, "John Collier," in *The Commissioners of Indian Affairs, 1824–1977*, ed. Robert M. Kvasnicka and Herman J. Viola (Lincoln, NE, 1979), 273–83.

The AIDA, a mere handful of people in the mid-1920s, Collier wrote, would become a powerful national propaganda organization seeking "an ultimate revolution of Indian policy, and of method of administering Indian affairs." Merriam Papers, [Collier] Statement [n.d., c. 1924–25], AIDA folder, Indians, 1924–25; see also in same folder *AIDA Bulletin*, no. 2, June 1924. "The Indian Bureau admits that it is attempting to DESTROY the Indian race by breaking up the tribes," *AIDA Bulletin* 9, "Indian Reform Is A NATIONAL RESPONSIBILITY" (caps in original). See also "Program for [A]IDA director's meeting" [undated (1925?)], Goodrich Papers, carton 1.

education, or welfare.³³ Impoverished Indians included those with federal trust status due to the paucity of resources on the California Indian reservations. California Indians were "falling through the cracks" as an underserved population, as lawyer and Collier ally Chauncey Goodrich affirmed. Research by the AIDA revealed that the vast, centralized federal Indian Office administration consumed the lion's share (53 percent) of congressional appropriations. Collier's answer was to propose a major restructuring of state-federal relations. The "Indian population is part of the social fabric of the state,"

³³Oscar H. Lipps, Sacramento Indian agent, stated that there had been "numerous and persistent" publications from 1885 to 1920 about the "depths of distress and degradation" of the state's Native people. Lipps' sixty-nine-page report, "The Case of the California Indians on economic, education, health, and home conditions of landless CA Indians," was submitted to the commissioner of Indian affairs on June 15, 1920. A Christian organization, the Northern California Indian Association (NCIA), had begun the first systematic survey of the condition of landless California Indians. The NCIA spearheaded the drive to acquire land after 1908, when Congress made small appropriations to this end; 80 percent of the land purchased for the homeless Indians was worthless for farming or grazing. Approximately 8,000 California Indians were landless out of the estimated 17,350 total Indian population in the state. C.E. Kelsey, "California Indian Land Situation, 1914" (NCIA flier); see also L.A. Barrett, "Land and Economic Conditions of the California Indians," in UC Berkeley, Bancroft Library, Commonwealth Club folder, Goodrich Papers, carton 1.

The *California Claims* suit went forward with the passage of the California Jurisdictional Act in 1928, permitting the state of California to sue the federal government in behalf of the California Indians.

Addressing health issues, in 1921–22 a survey done by the California State Board of Health Report of Northeast California by Allen F. Gillihan, M.D., and Alma B. Shaffer, R.N., confirmed the alarming state of affairs regarding disease contagion among California Indians. "California's Hopeless Indians," *American Indian Life*, Bulletin No. 4 (Jan.–March 1926), quotes this report. Merriam Papers, AIDA folder of California.

Collier argued. The state's welfare bureaucracy could more effectively and cheaply serve the California Indians.³⁴

In his persistent lobbying efforts for the Swing-Johnson Bill from 1926 to 1930, Collier declared the interests of state citizens to be parallel to those of the Indians in the welfare reform bill as well as the *California Claims* bill.³⁵ This assertion can best be understood as Collier's artful political strategizing. California voters needed to be maneuvered into a more sympathetic frame of mind regarding Indian people, he realized. To awaken the public conscience, an image of Indians as deserving, industrious people, pillaged and repeatedly betrayed, needed to displace the image of Indians as shiftless incompetents. California citizens could be politically mobilized by shame—the specter of indigent, aging, and sick Indians in a time of general prosperity—and by apprehension about disease contagion and higher taxation. Collier sought to convince California voters to support the radical change of incorporating Native people into state welfare services by persuading the voters that they would gain local political control over Indian affairs but avoid major costs. Costs would be avoided by tapping congressional appropriations, but also by transferring the estimated \$10 to \$50 million the California Indians were expected to receive in the *Claims* case to the California state government for Indians'

³⁴"Wheeler Indian Bill" mimeograph, Merriam Papers, AIDA folder, Indians, 1926; Congressman John E. Raker estimated the administrative overhead at 75 percent in 1918. Hearing on "Conservation and Storage of Water, San Diego." Collier quoted in Commonwealth Club of California folder, Goodrich Papers, carton 1.

"[I]n California the Indian, even though he lives on a reservation, must work outside for a living." Chauncey Goodrich, "The Legal Status of the California Indian," *California Law Review* 14:3 (1926): 168. Further burdening the county relief system and creating taxpayer anxiety was the 1917 California Supreme Court decision, *Anderson v. Mathews* (174 Cal. 537, 163 Pac 902) (discussed in Goodrich, "The Legal Status of the California Indian," 164–68). The Indian who did not live a tribal life, the court ruled, was a citizen of the state and was entitled to vote even though he was a member of a group that received social services. Even reservation Indians were eligible for state services. A May 1926 report from the comptroller general of the United States confirmed state responsibility: "The scattering bands of Indians in California have, for some time, been considered as citizens and the responsibility for their care, when indigent, devolves upon local or state officials. . . ." Goodrich Papers, clippings folder, "Our Step-child, the Indian" (Dec. 18, 1926), carton 1.

³⁵Debate on Senate bills 336–37, c. 1926 in Commonwealth Club of California folder, Goodrich Papers, carton 1; cf. Merriam Papers, AIDA Indians folder, 1924–25.

social services. Successively debated and revised, the Swing-Johnson Bill became law in 1934.³⁶

The situation in California, with its increasingly overburdened county service agencies and its underserved, uneducated, indigent Indian population, graphically demonstrated what lay in store for the rest of the nation. The national policy outlined by the Dawes Act was bankrupt. Once freed from guardianship, Indians throughout the arid West would lose their fragile hold on water, default on their properties, and become dependent on local social services. California was on the cutting edge of change in the generative political movement to address the problems of serving an indigent non-reservation Indian population. Advocating for major experimentation and innovation in social service delivery, Collier and others called California "a demonstration state."³⁷

Collier drew a line between reform in social welfare and matters of Indian property, because in matters of property non-Indian and Indian interests were adversarial and this would not be politically popular. Swing and Collier had opposing agendas when it came to Indian water rights, and their differences would be manifested over the Capitan Grande removal. Swing and his Southern California constituency would take the self-interested position that "freeing" the Indians—and their resources—from federal trust management was long overdue. They opposed creating more reservation trust land within San Diego County for the relocated Indians of Capitan Grande, because more land would be withdrawn from the county tax base, putting a greater burden on non-Indian property owners. Alternately, Collier and his followers accurately read the historic record as demonstrating that Indians freed from federal trust became further impoverished and a burden to county welfare agencies.

Much as Collier wished to downplay conflicts over resources, his research led directly to a critique of the Indian Office for its failure to protect Indian water rights. Collier was an astute political analyst, and he sought answers for why Indian resources

³⁶Collier also proposed using the Indians' funds in tribal and personal accounts held by the federal government "as a working capital to put the Indians as groups and individuals on their feet industrially." Debate on Senate bills 336–37, c. 1926 in Commonwealth Club of California folder, Goodrich Papers, carton 1.

³⁷*American Indian Life*, Bulletin No. 8 (May 1927) in Merriam Papers, AIDA folder of California. Following a state supreme court ruling in 1925 that Indians have a compulsory right to state schooling, California began integrating more Indian children into public schools with subsidies paid by the federal government. Meeting of Indian Affairs, June 1, 1925, section outline, Commonwealth Club of California folder, Goodrich Papers, carton 1.

were steadily diminishing under federal guardianship. Why was even the most highly skilled and most motivated reservation Indian unable to succeed as a farmer under the current policy framework? At the heart of the problem was that a checks-and-balances system was absent: Native people were government "wards" until they took their properties in fee simple title. The Indian Office lacked accountability, creating an environment for extortion, fraud, abuse of power, and cloaked complicity with those seeking legal control of Indian resources.

Collier developed a sophisticated analysis of the dark and bloody ground of ongoing Indian property abuses, which later historians would confirm. The Dawes Act authorized sale of "surplus" reservation land; tribal money from these sales was put into government trust accounts, which were then manipulated by the Bureau of Reclamation to fund dam and irrigation projects primarily benefitting non-Indians. Collier found similar asymmetrical benefits and costs resulting from the Reimbursable Debt Act and the Federal Powers Act. A power generation reservoir on the Flathead Reservation was one target of an AIDA exposé of the 1920s: the Indians were not receiving payment for the lease on their lands.³⁸ Collier emphasized the need for immediate correction, such as requiring Indian consent for water projects on reservation land and use of tribal funds; creating stronger protections for resources on executive order reservations; and establishing Indian Office accountability.³⁹

By the late 1920s, the AIDA's activities included being a watchdog and informal legal counsel for Indian water rights in Southern California. In conjunction with county public officials and Indian affairs divisions of the Federation of Women's Clubs, AIDA conducted a flurry of field inspections and fact-finding research into the living conditions of the Mission Indians. During one of these field investigations, the resident Indian Office farmer at Torres-Martinez Reservation opined that the old days were gone when they "used to be able to keep a tight rein on the Indians and discipline them as they thought

³⁸AIDA of Central and Northern California to Charles J. Rhoads, 22 April 1929, Merriam Papers, AIDA folder, 1927–30. There were also problems regarding the Coolidge Reservoir on the San Carlos Apache Reservation.

³⁹*Ibid.*, *Legislative Bulletin* 5-A dated March 1, 1926, Merriam Papers, AIDA folder, Indians, 1924–25. See also Charles Elkus to Charles J. Rhoads, 22 April 1929, in Merriam Papers, AIDA folder, 1927–30, p. 8, regarding the need for Indian assent and compensation for water power sites. The Federal Water Power Act says proceeds from power development on any Indian reservation should be placed to the credit exclusively of the Indians on such reservation.

best when they needed it. . . . But now they dare not touch them because if they do the Women's Clubs land on them."⁴⁰

At Palm Springs, Chauncey Goodrich and other AIDA attorneys scrutinized a proposed water lease agreement between a private water developer and the Agua Caliente Indians.⁴¹ The Indian Irrigation Service was also defending Mission Indian water rights more vigorously in the 1920s.⁴² The AIDA offered advice to one of the Capitan Grande people, who was perplexed by the long delay in removal.⁴³ Characteristically, the Indian Office did not keep these soon-to-be-displaced Indians apprised of the legal developments delaying construction of the El Capitan Dam.

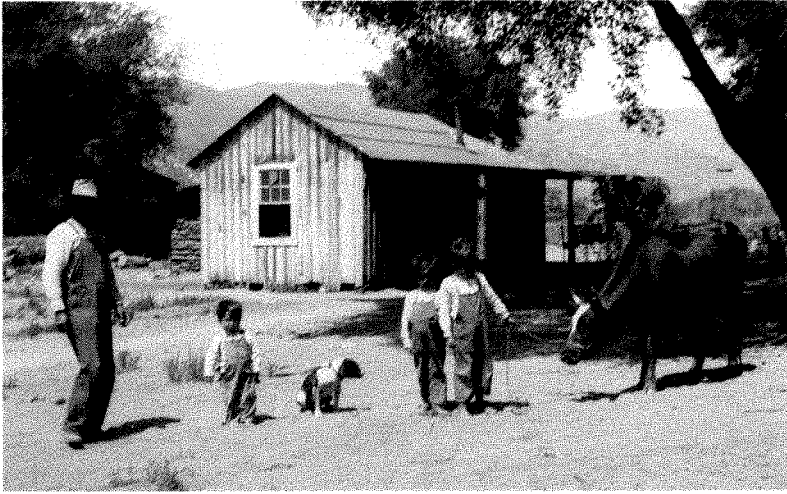
The Southland's Native people were among those Californians organizing, networking, and forging strategic alliances, and articulating their demands for reform. Their inquiries and demands were treated dismissively, as a petition from the Mission Indian captains to President Harding, dated May 24, 1921, reveals. In the petition, a coalition of leaders thoughtfully and clearly explained their opposition to allotment and their desire for tribal land patents and reservation schools for their children, their need for surveys to mark boundaries firmly, their wish for self-government through elected councils, and provision for water rights. The terse critique scribbled in the margin of the document by some federal official—saying these Indians were ignorant and reactionary, and were not following proper channels—speaks volumes about how Indian voices

⁴⁰AIDA report of December 18–22, 1925, trip of Jay Nash and Alida Bowler and an undated six-page preliminary report [1924] of a trip by Goodrich and Collier; these detail the water problems on Southern California Indian reservations. AIDA folder of Central and Northern California, Goodrich Papers, carton 1. No other reservation that they visited besides Pala had adequate water for agriculture; at Palm Springs, a white home was built to block water flow of an Indian ditch; there were liens of Indian holdings for reimbursable debts for wells, pumps, and ditches. Nash and Bowler reported unfair distribution of water at Soboba.

⁴¹Goodrich Papers, correspondence folder, outgoing, 1925, box 1.

⁴²Herbert V. Clotts, supervising engineer, Indian Irrigation Service, protest of July 1922 in behalf of the Indian Irrigation Service against Coachella Valley Water District application for 94,500 acre-feet from the White Water River and other streams as this will adversely impact forty-seven of the Indians' artesian wells. Indians folder, legal notes, Goodrich Papers, carton 1.

⁴³Jim Banegas appealed to Stella Atwood, an AIDA affiliate, for information. Goodrich to Jim Vanga [Banegas], 16 March 1925. Goodrich Papers, correspondence, outgoing, 1925, box 1.



The AIDA offered advice to Jim Banegas, above with his children, after he asked for information about the removal. (Courtesy of the San Diego History Center)

were silenced.⁴⁴ Long-suffering under the yoke of the Indian Office's neglect, paternalism, and mismanagement, the Indians of Southern California became outspoken critics of Indian policy in the 1920s. As in the northern part of the state, the demand for restitution for the lost treaties was a stimulus for pan-Indian cooperation.⁴⁵

Southern California Indians were drawn into a grassroots organization, the Mission Indian Federation, in part because of the increasingly desperate water situation. The wells were going dry at the Torres-Martinez Reservation, forcing Indians out of farming their allotments and into wage labor, while the resident agency farmer and white neighbors enjoyed an adequate water supply. The dissidents at Capitan Grande, who opposed removal, also joined the federation. A banner federation issue in 1920–21 was the effort to prevent San Diego from “stealing

⁴⁴Mission captains to President Harding, 24 May 1921, Mission Indian Agency, RG75, NA-Laguna Niguel [now Perris]. In the Goodrich/Collier report, c. 1924, p. 5, blame is placed on the Indian Office for not educating and informing Indians or acting for them in courts. AIDA folder of Central and Northern California, Goodrich Papers, carton 1.

⁴⁵In the preface to *Water and the West* (Berkeley, CA, 1975), Norris Hundley, Jr., calls for additional historical studies, including those “approaching river development from the point of view of the Indian, whose interests are often at stake and just as often overlooked” (p. xviii).

the Capitan Grande Reservation from the Indians." Luiseno Indians were aggrieved by the enormous debts incurred under the Reimbursable Debt Act.⁴⁶

THE NEW ERA OF INDIAN POLICY

Facing a barrage of criticism from both Indian critics and non-Indian reformers throughout the 1920s, the Indian Office was thoroughly discredited. With the election of Herbert Hoover, the birth of a "new era" of bureaucratic efficiency and integrity was anticipated. Old Guard commissioner Charles Burke was ousted, and Quakers Charles Rhoads and Henry Scattergood were appointed in 1929. The AIDA forged an alliance with the Indian Office. Commissioner Rhoads agreed with John Collier on key issues of revoking the Indians' reimbursable debts and an eventual state government takeover of Indian welfare services.

The new commissioners endorsed a more realistic approach to Indian problems.⁴⁷ The outdated formula of making successful farmers of Indians died hard,⁴⁸ but there was the growing awareness that other creative approaches were needed, since affordable and well-watered agricultural land was simply not available in California. In 1929, the AIDA recommended that Commissioner Rhoads consider an experimental plan to place "migrant Indians, or . . . those Indians not yet migrant, who desire and are equipped[,] . . . into the white industrial world."⁴⁹

Rhoads and his assistant, Scattergood, broke with Collier and the AIDA in 1930–31 because of differences over ends and means. Secretary of the interior Lyman Wilbur appointed Rhoads commissioner of Indian affairs with the clear expectation that

⁴⁶Thorne, *El Capitan*, 107 and 105–12ff. On Torres-Martinez with Joe Pete, founding federation member, as spokesperson, Goodrich/Collier report. Akins, "Lines," implies that water rights are a major cause for federation organization. An argument can be made, along the lines of his nascent analysis, that Mission Indian federation members were those most imperiled by federal water policies, while those gaining some positive benefits of federal intervention—allotments, government jobs, and promises of an improvement in quality of life, as at Capitan Grande—were anti-federation.

⁴⁷"Indian Defense Association Hears Executive Secretary," *Santa Barbara* (California) *News*, January 11, 1930. Clipping in Merriam Papers, AIDA, Indians folder, 1924–25.

⁴⁸In 1926, AIDA itself was advocating this approach as the ultimate solution for self-support. "Our Step-child, the Indian." Lawrence Kelly, "Charles James Rhoads" in *The Commissioners of Indian Affairs, 1824–1977*, 263–73ff.

⁴⁹AIDA letter to Charles J. Rhoads, 22 April 1929.

Rhoads would work himself out of a job. The "Indian problem is the elimination of the guardianship of the Government over the Indian and the transformation of the native Americans from wards to independent and self-sufficient citizens," Wilbur stated.⁵⁰ Pressured to fulfill Wilbur's mandate to move Indians toward termination, Rhoads believed the application of modern irrigation practices could make the individualization of Indian lands feasible, with ultimate taxation by local, state, and federal governments. Collier opposed individualization; he favored collectivism and was against allotment and taxation.⁵¹

Capitan Grande would be a testing ground for the Hoover administration's "new era," a window into how Indian water rights were being reconfigured in this transformative time: farming versus wage labor, individualism versus collectivism, assimilation and termination versus an ongoing federal trust responsibility. After years of litigation postponing the construction of the El Capitan Dam, on October 13, 1930 the Supreme Court sided with the city of San Diego (282 U.S. 863). Assistant Commissioner Scattergood arrived at Capitan Grande in spring 1931 to initiate the removal process.

A "no urgency" approach was publicly announced. No properties would be purchased for the Capitan Grande people's relocation until Indian preferences were ascertained. Each person on the reservation would be eligible for an estimated \$2,000 share of the total distribution from the city. In June, Scattergood wrote to John Randolph Haynes, a prominent AIDA member in Los Angeles, about the desirability of "ending of tribal life and location [of the Capitan Grande Indians] on individual plots of land near population centers."⁵² Embracing an experimental approach, Scattergood offered the Capitan Grande people three possible options: to put their shares toward collective purchase of a new property; to remain on the Capitan Grande Reservation in homes not inundated by the new reservoir; or to "scatter"—that is, to spend their shares for purchases of properties closer to jobs in urban areas. For these detribalized Indians, individual properties would be subject to local, state, and federal taxes. "We want to know what all the

⁵⁰"Wilbur Has Plan to Set Indians Right," *San Francisco Chronicle*, March 29, 1929, in Goodrich Papers, carton 1; *American Indian Life*, Bulletin No. 4 (Jan.–March 1926) in Merriam Papers, AIDA folder of California.

⁵¹Kelly, "Charles James Rhoads," 266; Philp, "John Collier"; June 4, 1931 minutes, Goodrich Papers, AIDA of Central and Northern California folder, carton 1.

⁵²J.H. Scattergood to John R. Haynes, 20 June 1931, John Randolph Haynes Papers (Collection 1241), University of California, Los Angeles, Charles E. Young Research Library, Department of Special Collections, box 81, folder 19; Thorne, *El Capitan*, 117–23ff.



The city of San Diego, the Cuyamaca Flume Company, and others engaged in a fierce and prolonged battle for the waters of the San Diego River and a reservoir site at Capitan Grande, shown above in 1917. (Courtesy of the San Diego History Center)

Indians themselves want," he stated.⁵³ Since one-fourth of the Capitan Grande people were already living off the reservation, it was expected that many would choose to scatter.

Scattergood's chief concern was providing equities so that all Capitan Grande members would experience economic betterment. We have here a large sum of money for a small group of people (approximately 150), he said; all should be guaranteed a better life. Scattergood aimed to help "these Indians to help themselves in the making of a living in the community so that they may not become a charge upon the public."⁵⁴ The Conejos Band lived in an isolated location on a tributary of the San Diego River. They, too, might be tempted by the offer of individual shares of \$2,000.

Meanwhile, Scattergood was slow to respond to the urgent and united demand by the Ames group (the people along the river whose homes and improvements would be flooded) for purchase of the Barona Ranch property. The Indian Office

⁵³Rhoads repeated a statement from Lipps' "The Case of the California Indians" that Southern California Indians were little different from Mexicans, p. 64; Thorne, *El Capitan*, 116–18. News release, July 20, 1931, UCLA, Phil Swing Collection, folder 4, box 30; cf. documents in, Goodrich Papers, Phil Swing folder, box 4.

⁵⁴Thorne, *El Capitan*, 117.

hesitated to give approval, because Barona lacked adequate water, so the Indians likely would not succeed in becoming self-supporting.⁵⁵ In his annual report for 1931, Commissioner Rhoads described San Diego's November delivery of \$361,428 to the federal treasury as the "outstanding development" of the year; he reiterated the need for a cautious and considered approach, which would balance what was acceptable to the Indians with bringing about maximum improvement.⁵⁶

NEGOTIATIONS OVER WATER: THE 1932 AMENDMENT TO THE EL CAPITAN ACT

More or less simultaneously, the city of San Diego and the Indian Office recognized the need for Congress to amend the 1919 act. The Department of the Interior did not have the discretionary authority to distribute the money as it deemed fit among all of the Capitan Grande members, not just to those forced to relocate because their homes would be flooded. In late 1931, the city attorneys were discussing the city engineers' recommendation to raise the height of the dam by 197 feet and to acquire another 920 acres of the reservation to allow for an enlarged reservoir.⁵⁷

Alarmed that the Indian Office was ignoring Indian wishes in refusing to buy the Barona property and suspicious that its cloaked motive was to remove trust status from some, if not all, Capitan Grande Indians, the AIDA went into action. Haynes began negotiations for purchase of the Barona property, and Collier wrote a detailed report excoriating Scattergood for misunderstanding the 1919 act, the intent of which clearly was to move the Indians as a group and to reconstruct their community relations. He contested the Indian's Office's claim that many of the Capitan Grande people were favorably disposed to dispersal. A congressional amendment was needed to create the equities Scattergood sought.⁵⁸

A four-month period of discussions over several controversial issues followed between the city and the Indian Office, with Congressman Swing playing the role of negotiator and

⁵⁵Ibid., 120–21; 127 of 147 reservation members were resident according to the Annual Report of the Commissioner of Indian Affairs, 43.

⁵⁶Annual Report of the Commissioner of Indian Affairs, 35–36.

⁵⁷Amount deposited in treasury following U.S. Supreme Court decision of October 1930 (282 U.S. 863).

⁵⁸Thorne, *El Capitan*, 122–23.

cosponsor of the bill to amend the 1919 El Capitan Act. The city's lawyers insisted that there be no additional charges to San Diego for the additional 920 acres of Capitan Grande Indian land, nor any further concessions by the city. They claimed that the \$361,428 covered the value of the entire reservation, including all Indian water rights.⁵⁹ After San Diegans voted the funds to build the dam in early December 1932, city engineer Hiram Savage and Congressman Swing were in Washington, D.C., lobbying for the bill. They brought with them an easy-to-read, color-coded map prepared by city attorneys as a visual aid for congressmen.⁶⁰ They were adamant that no other water right doctrines challenge their paramount pueblo rights. Referencing the 1922 Clott Report on the value of the assets of the Capitan Grande Reservation, city auditors argued that the 17,597 acres remaining at Capitan Grande were not irrigated or irrigatable and had been valued at \$5 per acre. The Department of the Interior maintained that the \$286,428 was merely a "severance charge" for damages to the Capitan Grande people for having their best agricultural lands taken; the city had not purchased the whole reservation and its water rights, but only 1,940 acres and a right-of-way. The Indian Office and the Department of the Interior insisted that San Diego pay for the additional 940 acres it required for the taller dam and larger reservoir.⁶¹

Most importantly, the Indian Office used the city's request for additional acreage to leverage a clear legal definition of the Capitan Grande people's existing and future water rights. Without such a provision, the drive to make the Capitan Grande people self-supporting would be illusory. "It is perfectly manifest that these Indians in this dry country must have water," Scattergood testified, "and they must be moved to new locations where water is provided for them."

⁵⁹Details of the negotiations and meetings are in Swing's correspondence and some in clippings from San Diego newspapers; many, undated, are in the Phil Swing Collection, folders 4-5, El Capitan Grande Indian Land Transfer Bill (HR10495) and folder 6, El Capitan H.R. 228, box 30; also in hearing reports on the amendment and bills. Swing introduced House Bill 229 in early December, and Hiram Johnson introduced it to the Senate on December 14, 1931. Special Water Counsel T.B. Cosgrove attended a November 4, 1931, conference with the city mayor and attorney C.L. Byers. Swing to Hiram Johnson, 9 Dec. 1932, reporting Byers' letter of 7 Dec. 1931, saying the city paid \$361,428, and Congress should grant additional land for free. Phil Swing Collection, folder 5.

⁶⁰C.L. Byers to Swing 7 Dec. 7, 1931; *San Diego Tribune*, Jan. 29, 1932; Byers reported that the BIA insisted on an additional \$35,000 and "that restrictions regarding supplying water to Indians are such that the city could not afford to make the deal." Phil Swing Collection, folder 5, box 30.

⁶¹Swing to Hiram Johnson, 9 Dec. 1932, Phil Swing Collection, folder 5.

The Indian commissioners recognized that inasmuch as there had been a vast amount of litigation over the water rights to the San Diego River, the federal government had to define its legal position. Rhoads made the federal view of the matter explicit in his 1932 report to the Public Lands Committee: The Department of the Interior was not a party to and was not bound by the Supreme Court decision affirming the city's paramount rights; the Indians and the United States in their behalf held a water right to develop and use water from the San Diego River; the city had to make a concession to the paramount right of the U.S. government.

In combative discussions from January to February, the city considered withdrawing its application entirely in the face of what it viewed as the Indian Office's unreasonable demands. These demands included that the city deed back Indian water rights granted in 1919; that Indians have the right to San Diego River water either above or below the reservoir; that the Indians be guaranteed the right to 917,000 gallons of water per day (based on their previous agreements with the flume company); and that the Indians have storage space for their water in the El Capitan Reservoir. Significantly, there was a serious attempt to quantify the aggregate sum of Capitan Grande water at 10 percent of the total 10 million gallons the city stood to acquire when Indians comprised one-tenth of 1 percent of the San Diego population.⁶²

In his final report in early March 1932, Commissioner Rhoads declared that all of the Capitan Grande Reservation members had water rights that should be protected. Because the city needed a favorable report from the Indian Office to get action in committee and in Congress, the city officials and the Indian Office came to a compromise in spring 1932. Phil Swing introduced a revised bill. San Diego agreed to pay for the additional 920 acres at \$38.33 per acre, the price set in 1922.

⁶²Scattergood quoted in Report 805 (72-1) includes Scattergood's March 3, 1932, report, Phil Swing Collection, folder 6, El Capitan H.R. 229; cf. Rhoads Report. Newspaper clipping (possibly *San Diego Sun*, n.d.), "Federal Bureau Water Demands Block Deal for El Capitan Land." The city was thinking of abandoning its request for more acres/a higher dam unless the BIA abated its requests for water rights concessions, the "latest move" by the Indian Bureau being to develop 917,000 gal./day along the river and collect \$38,000. A memorandum from Savage says the BIA is insisting on a side agreement regarding water for Barona from tributaries flowing into the San Diego River below the dam. Details in another undated clipping (unnamed San Diego newspaper) say the bureau wants the right to develop an unspecified amount of water above the 1,000-ft. elevation on the San Diego River watershed and 185-acre feet, or about 160,000 gallons a day, on the lower reaches of the river. Phil Swing Collection, folder 5.

The Interior Department gained the authority to use discretion to equalize the benefits of the city's money. The Indian Office succeeded in including language protecting and preserving the Capitan Grande people's not inconsiderable existing water rights. Scattergood testified that the agreement "means that we can proceed to develop water wherever we may elect to put these Indians, without interference from the city, because of that paramount water right." Explicit language subjected San Diego to these terms even if the Capitan Grande Indians did not use these water rights; the Indians had the right to transfer water rights to lands purchased or to acquire water rights in a new location, as long as the quantity did not exceed the aggregate total quantity of water they had the right to develop. The 1932 amendment did not terminate or limit the rights of the Capitan Grande Indians or of the United States in or to the lands or waters flowing in or along the lands remaining and forming part of the Capitan Grande Reservation.⁶³

The city celebrated its victory with passage of the amendment on April 21, 1932.⁶⁴ A San Diego newspaper exulted, "The bureau stood strongly on points relative to the protection of interests of the El Capitan Indians. But it finally was convinced that its points were not well taken, because our acquisition of the land in no way takes from the Indians any rights they now have." Key points on which the Indian Office backed down were the inclusion of specific language quantifying the Indians' water entitlement and the right to storage space at El Capitan Dam. Representative Swing proudly telegraphed San Diego mayor Walter W. Austin, saying, "I was successful in getting the city's El Capitan [R]eservoir bill passed by the house today in the form recommended by the committee." The 1932 amendment was one of Swing's last accomplishments as a Congressman.⁶⁵

As events unfolded, the Indian Office's intent to make Barona Ranch a flagship for Southern California Indian termination became manifest. The Department of the Interior was heavily invested in engineering the Capitan Grande people's rehabilitation. The application of modern scientific expertise by the Indian Office would enable Barona to become a self-supporting agricultural/ranching community whose individual members could be assimilated gradually into the larger population. As a demonstration state, California would be the forerunner of the termination movement of the 1950s. South-

⁶³Rhoads Report, 16, H.R. 10495 revised bill.

⁶⁴P.L. 72-119, Statutes-at-Large, 47 Stat. 146, ch. 165.

⁶⁵Clipping "San Diego Wins Hard Fight for El Capitan Land," unnamed San Diego newspaper, April 1932?, Phil Swing Collection, folder 4.

ern California Indians quickly organized to block this with a "water rights first platform" as one of its principal demands before it would agree to termination. The U.S. Justice Department initiated litigation for the Luiseño Indians' water rights to the San Luis Rey River in these years.⁶⁶

CONCLUSION

The Capitan Grande experience reveals a doggedly consistent path by the Indian Office to realize its mandate under the ill-conceived Dawes Act. The Indian Office fought diligently to maximize water rights for the Capitan Grande Indians to make them self-sufficient, so they could be terminated. The events at Capitan Grande unfolded in an era of rapid transformation in California, where Indian policy reform, water infrastructural developments, and Indian water rights converged. In the politically volatile 1920s, critics were assaulting the Indian Office for its failures, and Southern California Indians' acute crisis over water came into the spotlight.

Tellingly, the Indian Office's enhanced political leverage in the 1930s brought success, if qualified, in countering the "iron triangle." The Indian rights struggle at Capitan Grande anticipated and paralleled later developments of the 1960s and 1970s, ushered in by an Indian reform movement and Indian political activism. Indians were viewed as legitimate stakeholders in a negotiated settlement among competing groups: deals were cut, relationships among polities were restructured, and water was reallocated.⁶⁷

⁶⁶"Mission Indians Problem in San Diego County," unpublished hearing; Max Mazetti, another person giving testimony before the committee, demanded adjudication of water rights before the courts as one of the preconditions to passage of a termination bill; Mazetti adopted a "water rights first" platform with the slogan "Remember the Bishop Indians." Heather Daly, "American Indian Freedom Controversy" (Ph.D. diss., UCLA, 2013), 109, 134. Litigation was introduced in 1951 for Southern California Indians of the San Luis Rey River drainage, resulting in the San Luis Rey Indian Water Rights Settlement Act (P.L. 100-675). After twenty-three years of negotiations, on April 25, 2012, the tribes, the city of Escondido, and the Vista Irrigation District reached an agreement, still not approved by the Department of the Interior, which sets as a condition the price of settlement for the United States is termination of its trust responsibility for all of the bands' rights to the San Luis Rey water. cf. Mike Lee, "No End in Sight for 43-year Water Saga," *Union Tribune*, <http://www.utsandiego.com/news/2012/jun/15/no-end-sight-43-year-water-saga/>.

⁶⁷Thomas McGuire, "Getting to Yes in the New West," in *State and Reservation: New Perspectives on Federal Indian Policy*, ed. George Pierre Castile (Tucson, AZ, 1992), 224–25.

Placing this case study within the larger political context of Indian policy reform and Southern California water projects provides insight into the overall historical development of regional Indian water rights.

BOOK REVIEWS

The Court That Tamed the West: From the Gold Rush to the Tech Boom, by Richard Cahan, Pia Hinckle, and Jessica Royer Ocken. Berkeley: Heyday Books, 2013. 515 pp.; illustrations, appendices, note on sources, index; \$35.00 cloth.

The Court That Tamed the West chronicles the history of the United States District Court for the Northern District of California from 1850 to the present day in lively fashion. It recounts celebrated trials and covers virtually all of the court's cases that were controversial or highly publicized, or that involved well-known individuals. In addition, it profiles each of the court's judges, in varying degrees of detail. About half the book covers the ninety-five years from the court's beginning until the end of World War II; the other half presents the court's history until the present. The book was commissioned by the Northern District's historical society.

The authors of the book describe themselves as "journalists, not legal historians." Like good journalism, the volume moves along quickly, with vivid prose. It utilizes colorful detail, and it provides striking portraits of judges, attorneys, plaintiffs, and defendants. It also contains many illustrations and textural sidebars that complement the text well.

The first three chapters, covering the nineteenth century, focus on types of cases and are perhaps more analytical than the later parts of the book. During this period, Ogden Hoffman sat for forty years as the only Northern District judge. The authors draw heavily on the exhaustive study of Judge Hoffman by Christian Fritz, *Federal Justice in California* (1991), which they mention in the text. As the volume moves closer to the present day, particularly after about 1970, the authors organize their presentation more around portraits of judges and discussions of the judges' most noteworthy cases. In this part of the book, the authors depend extensively on oral histories and interviews with the judges.

The Northern District Historical Society's goal in underwriting this volume appears to have been the creation of a comprehensive history of the Northern District, accessible and appealing to a broad public. In this goal, they largely have succeeded. The history of this court, which was not previously related by any one book, is now readily available. Readers of this volume will gain an appreciation of the significance of the Northern District Court in the history of Northern California and also of the importance of federal courts in the history of the nation.

Unfortunately, there are costs associated with the approach taken by *The Court That Tamed the West*. Because the book focuses on celebrated cases and judicial biographies, subjects that do not fit well into this framework receive less attention. After the book's discussion of admiralty cases during the gold rush era, they largely disappear from the volume, with the exception of the *Rio de Janeiro* sinking in 1901. Similarly, with the exception of the case of well-known chocolate manufacturer Domenico Ghirardelli, bankruptcy cases—and the court's role in overseeing them—are almost wholly absent. Also barely discussed are the more arcane, but not insignificant, subjects of court administration and of changes in federal jurisdiction since 1850.

The book contains a brief "Note on Sources." The addition of a guide to further reading would have benefited readers who wish to learn more about Northern District history.

The Court That Tamed the West succeeds as a lively introduction to the history of an important federal court. It is a valuable addition to the histories of federal courts in the United States and the West.

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Arresting Dress: Cross-Dressing, Law, and Fascination in Nineteenth-Century San Francisco, by Clare Sears. Durham, NC, and London: Duke University Press, 2015. 216 pp.; photographs, illustrations, notes, index; \$79.95 cloth, \$22.95 paper.

Clare Sears' *Arresting Dress* offers a fresh, smart, and compelling study of San Francisco's 1863 law against cross-dressing in public and the law's effects. Her story begins with the gender freedoms of the gold rush era as a point of contrast, then traces anti-cross-dressing law, its enforcement, and its effects throughout the rest of the nineteenth century. This study is the first to examine anti-cross-dressing legislation in relation to larger social trends within a single urban location. San Francisco serves as a case study to help us understand not only this local context, but also the spread of similar laws and concerns in cities across the United States.

Sears uses the topic of cross-dressing as a focal point in order to examine both the obvious and subtle, lasting effects of city and state efforts to suppress, punish, and hide that practice. She argues that cross-dressing laws must be considered in relation to other nineteenth-century legislation, including anti-miscegenation laws, Jim Crow laws, and federal laws that limited

citizenship to Americans of European and African descent. These laws were part of a cluster of legal ideas that ultimately helped preserve the supremacy of whites and the social norms and values of the middle class. Sears considers popular culture to be a political domain, and she argues that legal history must be understood as a force that works together with popular culture to establish and reinforce, in this particular case, binary concepts of male and female, normal and abnormal, criminal and respectable. In the process of policing gender, Sears argues, laws actively produced ideas about gender difference.

Drawing on an eclectic array of historical sources, Sears convincingly demonstrates how laws against cross-dressing in public were part of larger social and cultural processes in which urban elites defined boundaries of inclusion and exclusion, reinscribing those ideas through legal processes of policing and punishing. Both law and popular ideas about cross-dressers as objects of fascination worked together to define and redefine the cross-dresser as abnormal, criminal, and a public nuisance. Sears' study provides an opportunity to consider some of the unintended but still powerful effects of law, popular culture, and their combined role in ongoing processes of defining who was welcome in the urban public sphere, and who was not. San Francisco's 1863 anti-cross-dressing law was one component of a larger "good morals" law that was also designed to suppress prostitution, another serious nuisance according to the city's leading women. Sears' examination of these laws, however, separates cross-dressing from its modern-day association with gay, lesbian, and queer sexualities in order to highlight the fact that there were multiple cross-dressing practices in the nineteenth century, making cross-dressing a discrete problem, unrelated to an offender's sexuality.

Arresting Dress begins in the post-Mexican, Anglo-California period. The discovery of gold at Sutter's Mill set off a huge wave of migration, and men from across the eastern and central regions of the U.S. (and places farther away) flooded the mining regions of California from the end of the 1840s through the first few years of the 1850s. The resulting gender imbalance in Northern California (these new arrivals included a tiny number of women) created an environment in which many men enjoyed much greater freedom to fashion their own, personal gender identities. This included taking on roles reserved for women "back East," and Sears finds that cross-dressing was not a problem until those women came out West.

The end of the California gold rush ushered in a period of rapid urban growth in San Francisco, and urban elites implemented laws that were consistent with other legislation in American cities that was designed to police and enforce social

and cultural conformity. It was only after the gold rush, with the influx of middle-class women from more settled, class-conscious parts of the U.S., that San Francisco and California lawmakers criminalized cross-dressing and deemed the practice a serious social problem. Civic leaders, including newspaper editors, celebrated these women's "civilizing" influence, and expressed their own happiness in complying with women's efforts. Acts of cross-dressing and participation in urban sexual commerce that were tolerated in the gold rush period now became a way to clearly marginalize individuals whom middle-class-minded city leaders considered to be anti-social and inappropriate for inclusion in public life. Those who would not conform to such ideas found themselves forced into the "private or hidden realms" of home, prison, and mental institutions.

Although the entire book weaves together the connections among criminal law, urban development, and the formation of ideas about race and gender, chapters 2 and 3 will be of particular interest to those concerned with the establishment and enforcement of laws related to cross-dressing, and their effects. Sears demonstrates that public awareness of cross-dressing affected popular ideas about Chinese immigrants' supposed unsuitability for citizenship. In particular, she finds that news items about local Chinese cross-dressers reinforced popular ideas about the effeminacy of Chinese men. She argues that this kind of focus on cross-dressing was used to stoke the fires of anti-Chinese sentiment, thus bolstering popular support for Chinese exclusion laws. She draws connections between these ideas and a much larger nineteenth-century local and national agenda to secure white supremacy through laws, in the form of citizenship restrictions, anti-miscegenation laws, and Jim Crow laws that were designed to enforce racial segregation and inequality.

Katherine Hajar

California State University, San Marcos

Religious Liberty and the American Supreme Court: The Essential Cases and Documents, updated edition, by Vincent Phillip Muñoz. Lanham, MD: Rowman and Littlefield, 2015. 678 pp.; index; \$59.95, paper.

One of the most contentious issues in the United States today is religious freedom. Vincent Phillip Muñoz, professor of religion and public life at the University of Notre Dame, has compiled a volume of excerpts from Supreme Court cases and other historical documents that chronicle the development of church-state doctrine in the United States. *Religious Liberty*

and the American Supreme Court: *The Essential Cases and Documents* contains excerpts from sixty-six cases spanning from *Reynolds v. United States* (1879) to *Burwell v. Hobby Lobby Stores* (2014). He also includes seven historical documents that have been influential in the development of American church-state doctrine, including Thomas Jefferson's "Bill for Establishing Religious Freedom in Virginia (1777, 1786)," James Madison's "Memorial and Remonstrance against Religious Assessments (1785)," and George Washington's "Letter to the Annual Meeting of Quakers (1789)." Muñoz's purpose in this volume is to help the reader understand how the Supreme Court has come to its present-day position on religious liberty.

To aid in an understanding of the evolution of church-state doctrine in the United States, Muñoz has organized his volume chronologically rather than thematically, as most casebooks are usually organized. This arrangement helps readers understand "how various First Amendment church-state doctrines were developed and have changed over time" (p. xix). It also allows the reader to see how decisions in cases dealing with the two parts of the First Amendment, the Establishment Clause and the Free Exercise Clause, have influenced each other (p. xix).

The introduction to the volume mainly deals with the Establishment Clause and the Free Exercise Clause and the various Supreme Court cases that have shaped their interpretation. These cases include *Everson v. Board of Education* (1947), in which the well-known concept of the "wall of separation" was first established, and *Reynolds v. United States* (1879), which cited Thomas Jefferson's Bill for Establishing Religious Freedom and its definition of religious freedom, and set the precedent in the *Everson* decision. The remainder of the introduction explores how subsequent Supreme Court justices have interpreted both clauses, and how interpretation of the Establishment Clause remains contentious, while the Free Exercise Clause, while more defined, is "by no means clear" (p. 12).

The rest of the book is divided into two sections: the cases and the historical documents. In each of the sixty-six cases included in the volume, Muñoz begins with a brief introduction that describes the justices involved in the case, how they voted, and who authored the case opinions. Muñoz also includes brief background sections that provide context for each case. The historical documents contained in the second section of the volume include writings by Thomas Jefferson, James Madison, and George Washington. Also included is a chapter containing passages from the 1780 Massachusetts Constitution and the *Barnes v. Falmouth* (1810) case, and a chapter with the records from the 1789 First Congress regarding the drafting of the religious clauses of the First Amendment. For each histori-

cal document, Muñoz also provides a brief introduction that includes background and context.

Overall, *Religious Liberty and the American Supreme Court* is an excellent resource. Muñoz deftly leads readers through the winding path that American church-state doctrine has taken. His introduction to the volume offers a concise history of a complex topic. His brief commentaries frame the excerpted cases insightfully, making this an excellent reference source for anyone attempting to understand how the U.S. Supreme Court has come to interpret religious freedom.

Chelsea Snover

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The Big Trial: Law as Public Spectacle, by Lawrence M. Friedman. Lawrence: University Press of Kansas, 2015. 238 pp.; notes, index; \$29.95 cloth.

The legal process has had the attention of the public for ages. In *The Big Trial: Law as Public Spectacle*, Lawrence M. Friedman highlights many of the more interesting, or perhaps more publicized, trials that have taken place over the last couple of centuries in the United States. As the subtitle of the book indicates, the author examines "law as public spectacle" fully here. *The Big Trial* is composed of 171 pages of text and 39 pages of notes, followed by 15 pages of index—making for a short and easy read. The text covers the nineteenth and twentieth centuries up to the latest public legal proceedings, and in doing so provides an informative picture of headline trials. It describes, in various fashions, how these trials affected the societies in which they took place and demonstrates, in one way or another, whether those societies were considered to be fair, whom they protected, and whose interests were served at the time.

In brief, the public cannot expect all governmental functions to be open to them, but by pointing out the differences between "public" and "private" affairs, the author does a superb job of describing these differences and the reasons for the establishment of rules relating to these matters. Friedman focuses on the more public hearings as the subtitle of the book would suggest. The O.J. Simpson trial of the mid-1990s gets "star" treatment, as does the *Lizzie Borden* case. The *Sam Sheppard* case, the *McMartin* case, the *Jeffrey Dahmer* trial, the *Sacco and Vanzetti* trial, and others are also featured in the text.

It is important to note that Friedman is a professor of law at Stanford Law School and has written articles for a variety

of historical and legal publications. His background and training allow him to consider the historical trials in question as a means for developing theories about the trials. Friedman is especially interested in the O.J. Simpson trial, and he maintains that the case turned into a question of racial identity: "Many African-Americans . . . were sure he (Simpson) was innocent. . . . Most white people, on the other hand, simply thought Simpson was guilty." Thus the author believes the Simpson trial was transformed into a public spectacle due to the attempts by the football star's attorneys to turn it into a "trial about race" because a police witness may have lied when he said he never used the "n-word." Friedman asserts that, in that instance, Simpson's racial identity moved to center stage: "In other words, one question of identity (was he really a murderer?) was absorbed by another question of identity (how black was he, and how white was Lt. Furman?)." The author does little to buttress these assertions; he does so mostly by showing in the notes section that some African-Americans claimed a conspiracy had taken place (p. 202, notes 44–45). Friedman does not provide sufficient evidence for his belief in the trial's transformation. The testimony of other witnesses and the oft-repeated phrase "If the glove doesn't fit, you must acquit" serve as memorable moments in the trial that probably had more to do with the outcome than questionable testimony from a police detective, although Lt. Furman's testimony certainly helped the defense.

Another case of interest involves the events that took place in 1893 in Fall River, Massachusetts, where "Lizzie Borden took an ax and gave her parents forty whacks." That Lizzie Borden was found not guilty seems to have titillated the public. The jury's decision in that trial raises an important idea: the nature of public pronouncement on the matter at hand.

From the massive publicity of the Simpson trial to the scandalous hearings involving Dr. Sam Sheppard in Cleveland in 1954 and 1966, to the *McMartin* trials in Los Angeles in 1987—covered by television, print, and various other media platforms—the author describes the differing qualities of the media coverage in each of the cases. In this regard, he does a fine job of informing the reader of the link between the nature of the coverage and the results of the trials. From the broadsheet coverage of the *Borden* case to the newspaper reporting of the *Sheppard* hearings to the television coverage of the *McMartin* and *Simpson* trials, the author describes the public's participation in these events.

The Big Trial opens the door to many noteworthy court proceedings. Broadly speaking, the book will generate interest among a wide subset of readers. The author's interest in fashioning theories about the outcomes of particular trials may, at times,

be questioned, but he does highlight many worthwhile episodes in legal history. For historical purposes, I recommend this book to the general public, but the recommendation comes with the caveat that not everything that you read is necessarily true.

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ARTICLES OF RELATED INTEREST

Below we list articles recently published in journals of history, law, political science, and other fields that we believe may be of interest to readers. Although comprehensive, the list is not definitive, and the editor would appreciate being informed of articles not included here.

Ambler, Rachel. "Senator John G. Tower: A Republican's Dissent to the Civil Rights Act of 1964," *Journal of Southern Legal History* 21:1 (2013): 109–56.

Baker, H. Robert. "The Fugitive Slave Clause and the Antebellum Constitution," *Law and History Review* 30 (Nov. 2012): 1133–74.

Bennett, Lyn Ellen. "Child Custody, Custodial Arrangements, and Financial Support in Late Nineteenth-Century Kansas," *Kansas History* 37 (Spring 2014): 20–33.

Bergera, Gary James. "'This Time of Crisis': The Race-Based Anti-BYU Athletic Protests of 1968 to 1971," *Utah Historical Quarterly* 81 (Summer 2013): 204–29.

Cain, Ellen. "'The Golden Days': Taylor and Mary Ealy, Citizenship, and the Freedmen of Chickasaw Indian Territory, 1874–77," *Chronicles of Oklahoma* 92 (Spring 2014): 54–77.

Cater, Ben. "Segregating Sanitation in Salt Lake City, 1870–1915," *Utah Historical Quarterly* 82 (Spring 2014): 92–113.

González, Fredy. "Chinese Dragon and Eagle of Anáhuac: The Local, National, and International Implications of the Ensenada Anti-Chinese Campaign of 1934," *Western Historical Quarterly* 44 (Spring 2013): 49–68.

Hays, J. Stanford. "Twisting the Law: Legal Inconsistencies in Andrew Jackson's Treatment of Native American Sovereignty and State Sovereignty," *Journal of Southern Legal History* 21:1 (2013): 157–92.

Heatherton, Christina. "University of Radicalism: Ricardo Flores Magón and Leavenworth Penitentiary," *American Quarterly* 66 (Sept. 2014): 557–81.

Hill, Christina Gish. "'General Miles Put Us Here': Northern Cheyenne Military Alliance and Sovereign Territorial Rights," *American Indian Quarterly* 37 (Fall 2013): 340–69.

Hurtado, Albert L. "Bolton and Turner: The Borderlands and American Exceptionalism," *Western Historical Quarterly* 44 (Spring 2013): 5–20.

Kennington, Kelly Marie. "Law, Geography, and Mobility: Su-ing for Freedom in Antebellum St. Louis," *Journal of Southern History* 80 (Aug. 2014): 575–604.

Keyes, Elizabeth. "Race and Immigration, Then and Now: How the Shift to Worthiness Undermines the 1965 Immigration Law's Civil Rights Goals," *Howard Law Journal* 57 (Spring 2014): 899–929.

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Kornbluh, Felicia. "Disability, Antiprofessionalism, and Civil Rights: The National Federation of the Blind and the 'Right to Organize' in the 1950s," *Journal of American History* 97:4 (March 2011): 1023–47.

Lowenthal, Kristi. "The Equal Rights Amendment and the Persistence of Kansas Conservatism," *Kansas History* 37 (Spring 2014): 34–49.

Madley, Benjamin. "'Unholy Traffic in Human Blood and Souls': Systems of California Indian Servitude under U.S. Rule," *Pacific Historical Review* 83:4 (November 2014): 626–67.

McCrary, Peyton. "The Interaction of Policy and Law: How the Courts Came to Treat Annexations under the Voting Rights Act," *Journal of Policy History* 26:4 (2014): 429–58.

Molina, Natalia. "'In a Race All Their Own': The Quest to Make Mexicans Ineligible for U.S. Citizenship," *Pacific Historical Review* 79:2 (May 2010): 167–201.

Mumme, Stephen, and Peter Leigh Taylor. "The Ocotillo Water War and the U.S.-Mexico 'Salinity Crisis': An Examination of Transitivity and Scale in Environmental Justice," *Journal of the Southwest* 56 (Spring 2014): 1–28.

Nicholls, Michael L. "Creating Identity: Free Blacks and the Law," *Slavery and Abolition* 35 (June 2014): 214–33.

Noel, Linda C. "'I Am an American': Anglos, Mexicans, *Nativos*, and the National Debate over Arizona and New Mexico Statehood," *Pacific Historical Review* 80:3 (August 2011): 430–67.

Peterson, Mark A. "The Kansas Roots of Arthur Allen Fletcher: Football All-Star to the 'Father of Affirmative Action,'" *Kansas History* 34:3 (Autumn 2011): 225–41.

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Tamayose, Beth C., and Lois M. Takahashi. "Land Privatization in Hawai'i: An Analysis of Governmental Leases and Court Cases in Hawai'i, 1830s–1910s," *Journal of Planning History* 13 (Nov. 2014): 322–40.

Walker, Ronald W. "The Affairs of the 'Runaways': Utah's First Encounter with the Federal Officers, Part 1," *Journal of Mormon History* 39 (Fall 2013): 1-43.

Whittemore, Andrew H. "How the Federal Government Zoned America: The Federal Housing Administration and Zoning," *Journal of Urban History* 39 (July 2013): 620-42.

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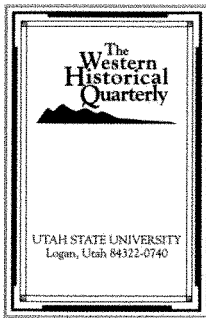
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