

# The Hallett Decrees and Acequia Water Rights Administration on Rio Culebra in Colorado

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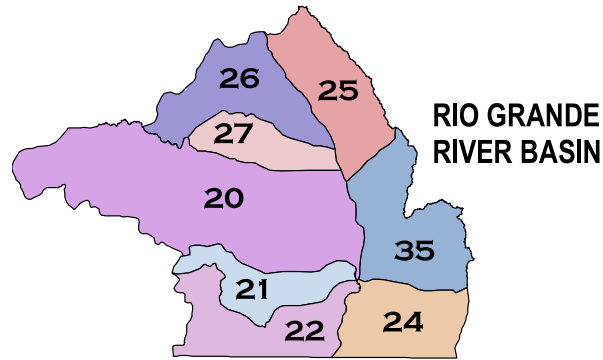
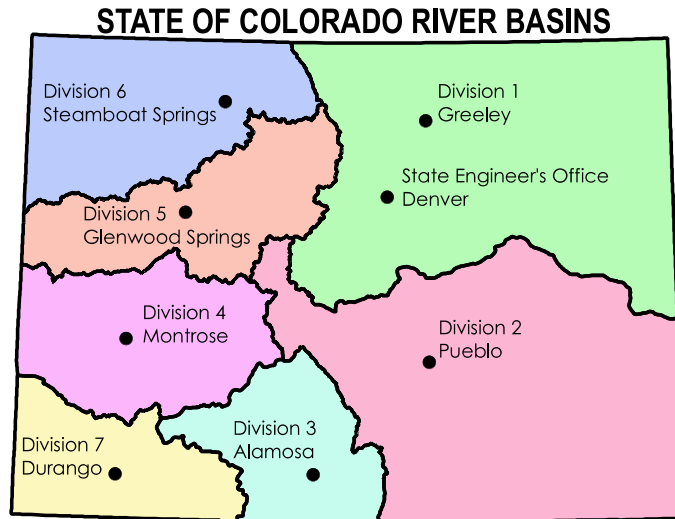
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Figure 1: Colorado River Basins<sup>1</sup>



District	District Name
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20	Rio Grande
21	Alamosa La Jara
22	Conejos River
24	Culebra Creek
25	San Luis Creek
26	Saguache Creek
27	Carnero Creek
35	Trinchera Creek

1. *Colorado Basins*, State of Colorado Department of Natural Resources Division of Water Resources, Mar. 16, 2005, available at <http://water.state.co.us/DWRIPub/DWR%20Maps/ColoradoRiverBasins.pdf>.

## I. INTRODUCTION

The San Luis Valley (“the Valley”) is a broad, high-altitude valley in south-central Colorado, extending southward to the New Mexico state line. Two mountain ranges—the Sangre de Cristo Mountains to the east and the San Juan Mountains to the west—border the Valley. The Rio Culebra flows westward from its source in the Sangre de Cristos through the southeastern portion of the Valley toward the Rio Grande, to which it used to be tributary. A number of smaller tributary creeks feed the Rio Culebra, arising in the Sangre de Cristos and flowing into the Culebra on the valley floor west of the mountains. The San Luis Valley is home to the oldest and longest continually occupied non-native indigenous communities in the state of Colorado.<sup>2</sup> These communities, centered in and around the Culebra watershed, were founded by Hispanic settlers who moved from what is now New Mexico to occupy the Sangre de Cristo Land Grant—a million-acre tract of land the Mexican government granted to a Taos businessman.<sup>3</sup> Shortly before Mexico ceded sovereignty over the Valley to the United States in the aftermath of the Mexican-American War, the settlers established the first community irrigation ditches, known as acequias, along the Rio Culebra.<sup>4</sup> In the following decades, the Sangre de Cristo Grant was sold to Anglo-American investors. Subsequently, the Grant became the subject of international financial speculation and fueled grand dreams of development of the sort that touched many corners of the American West in the late nineteenth and early twentieth centuries.<sup>5</sup> In the San Luis Valley, making these dreams a reality would require land, water, and other resources—resources that the original settlers already claimed and used. Not surprisingly, conflict arose between the investors and the *parciantes*—the traditional users of the original Culebra acequias.

This Article addresses one aspect of that conflict, a struggle over the right to use water from the Rio Culebra and its tributaries. This struggle

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2. Tom I. Romero, II, *Uncertain Waters and Contested Lands: Excavating the Layers of Colorado’s Legal Past*, 73 U. COLO. L. REV. 521, 534–35 (2002).

3. *Id.* at 569–71.

4. See Gregory A. Hicks & Devon G. Peña, *Customary Practice and Community Governance in Implementing the Human Right to Water: The Case of the Acequia Communities of Colorado’s Rio Culebra Watershed*, 18 WILLAMETTE J. INT’L L. & DIS. RES. 185, 190 (2010).

5. Gregory A. Hicks & Devon G. Peña, *Community Acequias in Colorado’s Rio Culebra Watershed: A Customary Commons in the Domain of Prior Appropriation*, 74 U. COLO. L. REV. 387, 426–27 (2003).

for water produced the Hallett Decrees,<sup>6</sup> which were issued by the United States Circuit Court for the District of Colorado in 1900.<sup>7</sup> The Hallett Decrees transferred water rights belonging to the *parciantes* under Colorado law to the owner of the Sangre de Cristo Grant, the United States Freehold Land and Emigration Company (“Freehold”).<sup>8</sup> Because the Decrees were entered by a federal court but purport to affect state water rights, their validity and effect became a source of controversy soon after they were entered.<sup>9</sup> Presently, the validity of the Decrees and ownership and use of the water rights they transferred to Freehold (“Freehold Interests”) remains in controversy. Indeed, the issuance of the Hallett Decrees created more than a century of confusion and conflict over the administration of water rights in Colorado’s Water District 24, the state water rights administration district that encompasses the Rio Culebra watershed.<sup>10</sup>

This Article chronicles the history of the Hallett Decrees from their inception to the present in an attempt to understand how the Decrees came to be, their legal validity and effect, and the practical effects the Decrees had on water rights administration in District 24 over the last 115 years. The main objective of this Article is to understand the Hallett Decrees and the conflicts they engendered in an attempt to facilitate an equitable resolution of this century-old dispute. A resolution could potentially benefit all parties by reducing the resentment and uncertainty that were stirred up by the Decrees and that have lingered in the Rio Culebra watershed for more than a century.

Ownership of the water rights transferred to Freehold under the Hallett Decrees passed through several entities during the first half of the twentieth century before the final entity with deeded ownership of the rights dissolved in 1956. Accordingly, this Article concludes that it is likely that no one has owned or legally used the majority of the Freehold Interests since 1956. However, *parciantes* on the Rio Culebra acequias assert that they have continued to use at least some portion of the Freehold Interests since 1900; use apparently facilitated during some periods by unofficial policies of the Division Engineer. Based on this

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6. The decrees are known as the “Hallett Decrees” because Moses Hallett was the judge who entered them, but are also sometimes referred to as the “Freehold Decrees” after one of the parties, the United States Freehold Land and Emigration Company.

7. Decrees for Water from the Culebra River and Other Streams in Costilla County, Colorado 95 (C.C.D. Colo. July 17, 1900) [hereinafter Hallett Decrees].

8. *Id.* at 97.

9. *See infra* Part III.A.

10. District 24 is part of Colorado Water Division 3, the Rio Grande River Basin. The District lies in Costilla County, and is headquartered in Alamosa, Colorado. *See supra* note 1.

use, the parciantes could bring adverse possession claims in an attempt to regain ownership of at least a portion of the Freehold Interests. This Article concludes, however, that adverse possession litigation would be complex, expensive, and contentious, and might or might not result in the transfer of some of the Freehold Interests to parciantes. In contrast, a negotiated settlement to preserve the status quo approved by a Colorado water court could prevent injury to other water rights users, reduce resentment and uncertainty, and likely return ownership of some of the Freehold Interests to parciantes on the original Culebra acequias.

This Article proceeds in six Parts. Following this introduction, Part II provides historical background for the Hallett Decrees, recounts the events that led to the entry of the Decrees, and describes water rights use and development in the Rio Culebra watershed in the decades following the Decrees. Part III then undertakes an analysis of the legal validity and effects of the Hallett Decrees. Part IV explores potential legal resolutions to the controversies engendered by the Hallett Decrees. Part V proposes a settlement resolution amongst the affected parties. Part VI provides a brief summary and conclusion.

## II. THE HISTORY AND EFFECTS OF THE HALLETT DECREES

This Part provides background information necessary for an understanding of the origins and effects of the Hallett Decrees and the current status of the Freehold Interests. Section II.A presents a brief account of the non-indigenous settlement of the Culebra watershed and introduces the two main players in the creation of the Hallett Decrees—the original Hispanic settlers of the Culebra watershed and the United States Freehold Land and Emigration Company. Section II.B provides background information on Colorado water law and the first adjudication of water rights for the Rio Culebra watershed. Section II.C relates the story of the lawsuit that resulted in the Hallett Decrees. Section II.D covers the role the Freehold Interests played in the 1905 supplemental adjudication of water rights in Water District 24. Finally, Section II.E discusses the Sanchez Reservoir System—an extensive system of reservoirs and canals constructed by one of Freehold’s successors in an attempt to make use of the Freehold Interests.

### A. *Non-Indigenous Settlement in the Rio Culebra Watershed*

The following Section provides a brief overview of the history of European settlement on the Rio Culebra and the still largely Hispanic population that lives and farms in the area today.<sup>11</sup> The Culebra was originally settled by Hispanic emigrants from what is now New Mexico who employed traditional, communal methods of resource development and use. Soon after these settlers established themselves, however, investors from the Eastern United States purchased the majority of the land in the Culebra watershed, making the Culebra the subject of international financial speculation and plans for large-scale development. Friction between these different approaches to resource use and development led to a number of legal battles, one of which eventually produced the Hallett Decrees.

Spain controlled what is now the Southwestern United States until 1821, when Mexico gained independence and took control of the territory.<sup>12</sup> Spanish military expeditions began exploring the San Luis Valley in the eighteenth century, but it was not until the opening of the Santa Fe Trail, also in 1821, that Spanish civilians began to follow.<sup>13</sup> Both the Spanish and Mexican governments encouraged agricultural settlement by making land grants to individuals and communities.<sup>14</sup> Settlers on such grants often established acequia irrigation communities,<sup>15</sup> in which long, narrow, privately owned parcels of land were laid out perpendicularly to a communally constructed and maintained irrigation ditch, or acequia.<sup>16</sup> This system guaranteed each family frontage on the acequia, grazing land, and upland access for gathering firewood and hunting game.<sup>17</sup> Acequia communities treated water as a communal resource, distributing it partially on the basis of

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11. According to 2010 census data, the population of Costilla County, Colorado is 66% Hispanic or Latino, and 84.3% of the town of San Luis, Colorado is Hispanic or Latino. AMERICAN FACTFINDER, [http://factfinder2.census.gov/faces/nav/jsf/pages/community\\_facts.xhtml](http://factfinder2.census.gov/faces/nav/jsf/pages/community_facts.xhtml) (last visited May 12, 2014) [hereinafter 2010 Census Data].

12. ALAN KNIGHT, MEXICO: VOLUME II, THE COLONIAL ERA 330 – 331 (2002). Juan O'Donojú, a Spanish military official, signed the Treaty of Córdoba on August 24, 1821, but the Spanish monarchy did not officially recognize Mexican independence for another fifteen years. *Id.*

13. Kenneth W. Knox, *The Costilla Creek Compact*, 6 U. DENV. WATER L. REV. 453, 453 (2003).

14. DEVON PEÑA, MEXICAN AMERICANS AND THE ENVIRONMENT: TIERRA Y VIDA 79–81 (2005).

15. Hicks & Peña, *supra* note 4, at 391–92.

16. PEÑA, *supra* note 14, at 81.

17. *Id.*

equity and need.<sup>18</sup> Tracts of pasture and forestland were also held and utilized communally.<sup>19</sup> Many acequia communities are still in operation, and continue to employ principles of water sharing that have their origins in Arabic and Mesoamerican traditions.<sup>20</sup>

The ancestors of those who continue to irrigate in the Rio Culebra watershed today came to the area beginning in late 1840s to settle on the one-million acre Sangre de Cristo Land Grant.<sup>21</sup> In 1844, the Mexican government presented the grant to Steven Luis Lee, then governor of Taos, and Narciso Beaubien, the twelve-year-old son of Taos businessman Carlos Beaubien.<sup>22</sup> Following the Mexican-American War of 1846–48, the United States annexed the area through the Treaty of Guadalupe Hidalgo.<sup>23</sup> The Treaty allowed Mexican citizens in the acquired territory to become U.S. citizens if they chose to remain in the United States, and stated that property rights granted or held under Mexican law would be respected.<sup>24</sup> In 1856, the Surveyor General recommended that Congress confirm the Sangre de Cristo Grant as the property of Carlos Beaubien, who had acquired the Grant after the original grantees were killed in the Taos Uprising of 1847.<sup>25</sup> Congress acted on the Surveyor's recommendation on June 21, 1860, confirming the Grant to Beaubien in an Act entitled "An Act to confirm certain private land-claims in the Territory of New Mexico."<sup>26</sup>

As soon as he acquired the Sangre de Cristo Grant from the original grantees, Carlos Beaubien began recruiting settlers and establishing communities.<sup>27</sup> The first successful settlement of the Rio Culebra watershed occurred in the late 1840s, and by 1852 parciantes had constructed the first Rio Culebra acequia, the San Luis People's Ditch.<sup>28</sup> By the time the Rio Culebra became part of the newly formed Colorado

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18. Hicks & Peña, *supra* note 4, at 392.

19. *Id.*

20. See generally Juan Estevan Arellano, *La Cuenca y la Querencia: The Watershed and the Sense of Place in the Merced and Acequia Landscape*, in THINKING LIKE A WATERSHED: VOICES FROM THE WEST (Jack Loeffler & Celestia Loeffler eds., 2012) (discussing the origins of "traditional agriculture" in the Rio Grande Basin).

21. *Tameling v. U.S. Freehold & Emigration Co.*, 93 U.S. 644, 647 (1876); Hicks & Peña, *supra* note 5, at 407–08.

22. Knox, *supra* note 13, at 454.

23. Romero, *supra* note 2, at 535 n.70.

24. See Treaty of Peace, Friendship, Limits, and Settlement (Treaty of Guadalupe Hidalgo), U.S.-Mex., arts. VIII, IX, Feb. 2, 1848, 9 Stat. 922.

25. *Tameling*, 93 U.S. at 660; Hicks & Peña, *supra* note 5, at 408–09.

26. *Tameling*, 93 U.S. at 659–60.

27. Hicks & Peña, *supra* note 5, at 408–09.

28. *Id.*



Territory in 1861, more than 1,700 people lived in the watershed, and *parciantes* had constructed fourteen additional acequias.<sup>29</sup> In 1863, Beaubien provided deeds to the *parciantes* whom he had recruited to settle in the Culebra watershed.<sup>30</sup> At the same time, Beaubien executed the “Beaubien Document,” which promised that “all the [*parciantes*] will have enjoyment of benefits of pastures, water, firewood and timber, always taking care that one does not injure another.”<sup>31</sup>

Not long after Spanish and Mexican *parciantes* established the original acequias on the Rio Culebra, Americans with different development ambitions began to buy up land in the area. After Carlos Beaubien’s death in 1864, William Gilpin, then governor of the Colorado Territory, purchased the majority of the Sangre de Cristo Land Grant from Beaubien’s estate.<sup>32</sup> In the sales agreement, Gilpin promised to give deeds to the original *parciantes* who had not yet received them, and to respect the “settlement rights” Beaubien had granted to the *parciantes*.<sup>33</sup> In total, Gilpin paid \$41,000 for the million-acre Grant—approximately four cents per acre.<sup>34</sup>

Gilpin and his business associates planned to sell the Grant to investors, who would then profit by selling plots of land to new settlers and controlling vital resources such as timber and water.<sup>35</sup> An 1868 pamphlet published by a company Gilpin and his associates created to market the Grant stated that, while land would be sold to settlers for grazing or farming, “all minerals thereon, and the right of water and

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29. *Id.* at 416–17.

30. *Lobato v. Taylor*, 71 P.3d 938, 943 (Colo. 2002).

31. *Id.* at 946–47.

32. Articles of Obligation and Agreement between William Gilpin and the executors of Charles Beaubien’s will (Apr. 7, 1864), in *COSTILLA COUNTY, COLORADO, RECORD BOOK 1*, at 241 (County Recorder’s Office, San Luis, Colorado) (on file with authors) [hereinafter *Articles of Obligation and Agreement*].

33. *Id.*; *see also* *Lobato*, 71 P.3d at 943.

34. HERBERT O. BRAYER, *WILLIAM BLACKMORE: THE SPANISH-MEXICAN LAND GRANTS OF NEW MEXICO AND COLORADO 1863–1878*, 66–67 (1949).

35. Gilpin was a member of a generation that believed deeply in the Jeffersonian ideal of settlement, development, and the “yeoman farmer.” *See* ALAN TRACHTENBERG, *THE INCORPORATION OF AMERICA: CULTURE AND SOCIETY IN THE GILDED AGE* 11–12 (2007). In his public speeches and writings, Gilpin resoundingly praised the progress of development throughout the United State’s territory. *See generally* WILLIAM GILPIN, *MISSION OF THE NORTH AMERICAN PEOPLE, GEOGRAPHICAL, SOCIAL, AND POLITICAL* (1874). At that time, the federal government was also consistently encouraging settlement through programs such as the Homestead Act of 1862, ch. 75, §1, 12 Stat. 392 (1862) (repealed 1976).

timber for working the same [will] be reserved by the company.”<sup>36</sup> Their attempts to sell off parts of the Grant in the Eastern U.S. were unsuccessful, however, so Gilpin and his associates attempted to market it to European investors.<sup>37</sup> Reasoning that such investors would be more likely to buy shares in development companies than to purchase the Grant itself, in 1869 the group split the Grant into two “estates” and set about incorporating land companies to promote settlement on each estate.<sup>38</sup> They called the southern portion of the Grant, which encompassed the Rio Culebra watershed, the Costilla Estate.<sup>39</sup>

In their attempts to sell the Sangre de Cristo Grant, Gilpin and his associates entertained and promoted dreams of lush farms, rich mines, extensive development, and large profits. In an 1869 letter, one of Gilpin’s associates speculated that once the Grant was accessible by railroad—which would surely be soon—its lands, mineral value aside, would be worth five dollars per acre, “and in five years they will be worth \$10 per acre.”<sup>40</sup> Ferdinand Hayden, a government surveyor famous for his explorations of the West, surveyed the Grant and enthused: “I know of no region of the West more desirable for settlement than [the Sangre de Cristo Grant], combining as it does all of the elements of wealth and productiveness.”<sup>41</sup> The Grant was “the finest agricultural district . . . west of the Missouri River,” its mountains were “charged with ores of gold, silver, copper, lead and iron,” and it would no doubt become “immensely valuable at no distant period.”<sup>42</sup> Gilpin, a hyperbolic booster of the West’s potential for development in general,<sup>43</sup> promoted Colorado and the Grant through his public speaking engagements in the U.S. and Europe.<sup>44</sup> Indeed, Gilpin’s claims regarding

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36. BRAYER, *supra* note 36, at 71 (quoting MORTON C. FISHER, DESCRIPTION OF THE PARKS OF COLORADO AND THE ESTATE OF THE COLORADO FREEHOLD LAND ASSOCIATION LIMITED 23 (1868)).

37. *Id.* at 70.

38. *Id.* at 76.

39. Hicks & Peña, *supra* note 5, at 426. The northern portion of the Grant, which is not addressed in this Article, was called the Trinchera Estate, and Gilpin and his associates incorporated the Colorado Freehold Land and Emigration Company to develop it. BRAYER, *supra* note 34, at 76.

40. BRAYER, *supra* note 34, at 76 (quoting Letter from Charles Lambard to William Blackmore (Jan. 9, 1869)).

41. *Id.* at 74 (quoting Letter from Professor F.V. Hayden (Dec. 5, 1868), reprinted in WILLIAM BLACKMORE, COLORADO: ITS RESOURCES, PARKS AND PROSPECTS AS A NEW FIELD FOR EMIGRATION; WITH AN ACCOUNT OF THE TRENCHARA AND COSTILLA ESTATES IN THE SAN LUIS PARK 196–200 (1869)).

42. *Id.*

43. See WALLACE STEGNER, BEYOND THE HUNDREDTH MERIDIAN 2–5 (1982).

44. GILPIN, *supra* note 35, at 215–23 app.

the wonders and bright future of the San Luis Valley led Wallace Stegner to note that, according to Gilpin, “San Luis Park would in time become as renowned as the Vale of Kashmir.”<sup>45</sup>

In early 1870, Gilpin and his associates incorporated the United States Freehold Land and Emigration Company in Colorado Territory.<sup>46</sup> Freehold’s purpose was “to colonize, settle, improve and induce emigration to [the Costilla Estate].”<sup>47</sup> Gilpin and his associates quickly sold the Costilla Estate to Freehold,<sup>48</sup> and induced a group of Dutch investors to purchase the company’s bonds.<sup>49</sup> The Dutch investors, however, insisted that Freehold be incorporated through an act of the United States Congress, rather than merely under the laws of Colorado Territory.<sup>50</sup> Gilpin lobbied for congressional incorporation in Washington D.C., and after considerable political maneuvering and debate, a bill incorporating Freehold passed both the House and Senate.<sup>51</sup>

With congressional incorporation secured, plans to develop the Costilla Estate proceeded. Freehold seemed to view the Costilla Estate as a place where it could exercise sovereign-like control over political and economic life—a blank slate on which to realize its ambitions for development.<sup>52</sup> In 1871, Freehold representatives toured the Estate and

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45. STEGNER, *supra* note 43, at 4.

46. BRAYER, *supra* note 34, at 81. Many notable historical figures were involved in Freehold. *Id.* at 81–82. David H. Moffat, Jr., a prominent Denver banker and railroad promoter, after whom the Moffat Tunnel was named, was one of Freehold’s incorporators. BRAYER, *supra* note 34, at 81; *see also* Ed Quillen, *Name that Pass*, DENVER POST, Apr. 18, 2010, [http://www.denverpost.com/ci\\_14893605](http://www.denverpost.com/ci_14893605). Among Freehold’s original directors were civil war general Ambrose Burnside and General Robert C. Schenck, who at the time was the chairman of the Ways and Means Committee of the U.S. House of Representatives. BRAYER, *supra* note 34, at 82.

47. BRAYER, *supra* note 34, at 82 (quoting Certificate of Incorporation, *Book C.*, Office of the Secretary of State, Denver, Colorado).

48. Indenture between Freehold and Ambrose Burnside, Rudolph Burlage, and Ambrose Meyer (July 15, 1870), in COSTILLA COUNTY, COLORADO, RECORD BOOK 1, at 416 (County Recorder’s Office, San Luis, Colorado) (stating that Freehold purchased the Costilla Estate from Morton Fischer on July 14, 1870, that the Costilla Estate comprises the southern 500,000 acres of the Sangre de Cristo Grant) (on file with authors). The legal description of the Costilla Estate contained in the indenture describes the Costilla Estate as being bounded on the west by the Rio Grande and on the east by the crest of the Sangre de Cristos. *See id.* The Estate extends south into modern day New Mexico, and north to just north of the Rio Culebra. *See id.*

49. BRAYER, *supra* note 34, at 81.

50. *Id.* at 82–83.

51. *See id.* at 83–86. General Robert C. Schenck, both one of Freehold’s directors and chairman of the House Ways and Means Committee, was instrumental in moving the Freehold incorporation bill through the House of Representatives. *Id.* at 85 n.56.

52. *See id.* at 95–98, 104–06.

made plans.<sup>53</sup> Roads would be constructed and homes built for prospective immigrants.<sup>54</sup> The company would purchase agricultural and industrial implements for immigrants to use and erect mills and shops.<sup>55</sup> A surveyor would be employed to map out a reservoir site and system of irrigation canals, which would be constructed as soon as possible.<sup>56</sup> On the sagebrush flats near the Rio Grande a townsite would be laid out, including a “scenic boulevard with grass and trees, two hundred feet in width and running along the river front for a distance one mile above and one mile below the townsite.”<sup>57</sup> One representative predicted that the proposed town would become “the most important business centre of the district.”<sup>58</sup>

Freehold intended to settle the Costilla Estate through a “colony” system like the one utilized in Greeley, Colorado.<sup>59</sup> The company arranged to hire “emigration agents” in Germany and Holland who would be paid “five dollars per head of family or adult” to recruit immigrants.<sup>60</sup> The company’s directors appointed Gilpin to be “resident managing director” on the Costilla Estate, and directed him to build a “printing plant,” publish a weekly newspaper, and “maintain . . . a library and museum.”<sup>61</sup> Freehold intended to build an entire community from scratch, according to its own design.<sup>62</sup> The degree of control the company sought to exercise is illustrated by its directors’ decision to secure the election of one of its employees as county recorder of Costilla County.<sup>63</sup> This public servant/Freehold employee would be paid by the company and charged with “assisting Governor Gilpin in the selection of farms of such area and character as will be most suitable to the wants and requirements of the [immigrants].”<sup>64</sup>

Though Freehold treated the Costilla Estate as a blank slate for the purpose of making its development plans, by the early 1870s the original settlers and their patterns of land ownership and resource use were

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53. *Id.* at 104–06.

54. BRAYER, *supra* note 34, at 104–06.

55. *Id.* at 98.

56. *Id.* at 104–06.

57. *Id.*

58. *Id.* at 106 (quoting Memorandum of matters discussed and arranged at a meeting of Gov. Gilpin, Mr. Squarey, Mr. Blackmore (Sept. 9, 1871)).

59. BRAYER, *supra* note 34, at 95.

60. *Id.* at 98.

61. *Id.* at 99.

62. *See id.* at 95–98, 104–06.

63. BRAYER, *supra* note 34, at 97.

64. *Id.*

already well established.<sup>65</sup> The fact that communities already existed on the Costilla Estate was a frustrating reality; to establish its desired order, Freehold would need to find a way to either accommodate or erase the existing one.<sup>66</sup> Accordingly, at the same 1871 meeting at which Freehold's representatives outlined their plans for the Costilla Estate, they resolved to deal with the claims of the original parciantes, most of whom opposed Freehold's plans and disputed its title to the Estate.<sup>67</sup> The parciantes had settled on the best farmlands,<sup>68</sup> and to irrigate these lands had constructed acequias and appropriated vital water supplies.<sup>69</sup> In addition, the parciantes claimed the right to graze their livestock and cut timber on unoccupied lands.<sup>70</sup> Freehold recognized that the original parciantes recruited by Beaubien had rights to their individual plots of land, but also knew that it would need to limit the extent of the parciantes' claims to land and resources if its ambitions for the Costilla Estate were to be realized.<sup>71</sup>

Freehold first attempted to deal with the parciantes' claims through negotiation. One of the main areas of dispute between Freehold and the parciantes was how the parciantes' claims to the land they had settled on would be recognized.<sup>72</sup> Carlos Beaubien had promised deeds to the parciantes he recruited, and issued deeds to some, but many parciantes had not received deeds from Beaubien before his death, and thus had no proof of their ownership.<sup>73</sup> This difficult situation was further complicated by Gilpin having promised, in purchasing the Sangre de Cristo Grant, to give deeds to the original parciantes who did not yet have them.<sup>74</sup> Yet another layer of complexity was added by the fact that, in the years after Gilpin acquired the Sangre de Cristo Grant, Hispanic settlers continued to push north onto the Grant from New Mexico.<sup>75</sup> These "squatters" could claim no title from Beaubien but were difficult to distinguish from original parciantes.<sup>76</sup> Though Freehold made efforts

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65. *Id.* at 107–08.

66. *Id.*

67. *Id.* at 105–07.

68. BRAYER, *supra* note 34, at 108.

69. *Id.*; Decree, In the Matter of a Certain Petition for the Adjudication of Water Rights for Irrigation in Water Dist. No. 24, June 14, 1889 [hereinafter 1889 Decree].

70. BRAYER, *supra* note 34, at 108.

71. *See id.* at 107–10.

72. *Id.* at 108–09.

73. *Id.* at 107.

74. *See* Articles of Obligation and Agreement, *supra* note 32 and accompanying text.

75. Hicks & Peña, *supra* note 5, at 426.

76. *See id.* at 427.

to differentiate between original parciantes and later-arriving “squatters,” Freehold officials generally viewed all of the Hispanic settlers as barriers to their plans for development.<sup>77</sup> The company eventually negotiated an agreement with the parciantes that provided for recognition of their claims to the lands on which they had settled, but the agreement fell apart because the parties could not agree on whether the parciantes would be allowed to graze livestock and cut timber on unoccupied lands.<sup>78</sup>

When negotiation failed, Freehold turned to litigation. It initiated ejectment proceedings against some “squatters,”<sup>79</sup> and in 1890 challenged the parciantes’ right to use the water of the Rio Culebra watershed in federal court.<sup>80</sup> This challenge pitted the parciantes’ water rights—which they had acquired by using the waters of the Culebra and its tributaries, and which had been recognized in 1889 by a Colorado court applying the prior appropriation doctrine—against Freehold’s assertion that its ownership of the Costilla Estate gave it the right to control the Estate’s waters.<sup>81</sup> After ten years and a trip to the Eighth Circuit Court of Appeals (which included Colorado before the Tenth Circuit was created), Freehold’s lawsuit was resolved by a series of consent decrees between Freehold and the parciantes on each acequia. In the decrees, the parciantes agreed to give Freehold a portion of the water rights they had obtained under state law in 1889.<sup>82</sup> These decrees are commonly known as the “Freehold Decrees” or the “Hallett Decrees,” after Freehold or Judge Moses Hallett, the federal judge who approved them.<sup>83</sup> After the Hallett Decrees were entered in 1900, Freehold and its

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77. *Id.* at 427.

78. BRAYER, *supra* note 34, at 109–10. The issue of the rights of the original parciantes and their successors to graze livestock and cut timber on open areas of the Costilla Estate was finally resolved in *Lobato v. Taylor*, 71 P.3d 938 (Colo. 2002), in which the Colorado Supreme Court ruled that the descendants of the original settlers had the right to graze livestock and cut timber on a privately held ranch encompassing a large portion of the mountainous uplands of the Costilla Estate.

79. *Tameling*, 93 U.S. at 660–61.

80. Complaint at 4, *Vigil v. Swanson*, (Costilla Cnty. Dist. Ct. 1914).

81. See 1889 Decree, *supra* note 69. The 1889 Decree is discussed in detail *infra* in Section II(b).

82. Hallett Decrees, *supra* note 7; 1889 Decree, *supra* note 69.

83. Judge Hallett was “the ‘John Marshall’ of the Colorado legal system.” Romero, II, *supra* note 2, at 521 (quoting Golding Fairfield, *The Original “Rush to the Rockies,”* 36 *DICTA* 131, 138 (1959)). Hallett came to Colorado in 1860 as part of the gold rush, and was appointed Chief Justice of the Colorado Territorial Supreme Court in 1866. John L. Kane, Jr., *Moses Hallett*, *COLO. LAW.*, July 1998, at 17. President Andrew Johnson appointed Hallett Chief Justice at the request of the territorial legislature, which wanted a judge familiar with local mining and irrigation issues and specifically requested that Hallett be appointed. *Id.* As Chief Justice, Hallett lived in Pueblo and rode a circuit that

successors and the parcientes on the original Rio Culebra acequias fought over whether the decrees were valid, how they should be interpreted, and whether or how Colorado water officials could enforce them.<sup>84</sup>

Today, Freehold no longer exists, and the status of the water rights it acquired through the Hallett Decrees is unclear. In spite of Freehold and its successors' efforts to attract European and Anglo farmers to the Costilla Estate, the communities on the Rio Culebra have remained primarily Hispanic.<sup>85</sup> Today, approximately 240 families irrigate more than 24,000 acres of land in the Rio Culebra watershed, many using traditional acequia irrigation practices.<sup>86</sup> These families continue to grow traditional crops such as heirloom potato, corn, and bean varieties that are adapted to the high altitude, dry climate, and short growing season on the Rio Culebra.<sup>87</sup> Although Colorado courts have considered two major legal disputes concerning the effects of the Hallett Decrees, many issues surrounding the Decrees remain unresolved, and the Hallett Decrees continue to cast a shadow of doubt over the status of water rights on the Rio Culebra.

Before this Part turns to an examination of the Hallett Decrees and their effects, the following Section provides necessary background on Colorado water law and describes the event that sparked the litigation that led to the Hallett Decrees: the original 1889 adjudication of water rights on the Rio Culebra.

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included the San Luis Valley, where Hispanic residents knew him as “*el juez severo*,” or, “the strict judge.” *Id.* at 18. When Colorado became a state in 1876, President Grant appointed Hallett as the first federal district judge for the District of Colorado, a position in which he served until 1906. *Id.* Hallett also served as the first dean of the University of Colorado Law School. *Id.* at 19.

84. See discussion *infra* of *Vigil v. Swanson* in Part III.A.

85. See 2010 Census Data, *supra* note 11.

86. See Rio Culebra Cooperative, *Our Traditions: Acequias*, <http://www.rioculebra.com/acequias.html> (last visited Oct. 4, 2014).

87. Hicks & Peña, *supra* note 4, at 189.

*B. Colorado Water Law and the 1889 General Stream  
Adjudication*

In Colorado, a water right is created by diverting and beneficially using unappropriated water.<sup>88</sup> A water right cannot be enforced until it has been adjudicated in state water court.<sup>89</sup> In an adjudication, the court considers evidence regarding when water use began and how much water has been used, and enters a decree that establishes both the amount of water available under a water right and the right's priority in the relevant stream system.<sup>90</sup> Once the water court enters the decree, state officials use the information in the decree to administer water to users.<sup>91</sup>

Colorado's General Assembly first created a comprehensive system for adjudicating water rights in the Adjudication Acts of 1879 and 1881.<sup>92</sup> The Adjudication Acts divided Colorado into water districts and

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88. *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443, 449-50 (1882) (seminal case upholding "prior appropriation" as the governing doctrine for water allocation in Colorado).

89. *Concerning Application for Water Rights of Turkey Canon Ranch Ltd. Liab. Co.*, 937 P.2d 739, 749 (Colo. 1997) ("The actual award of a decree, or formal adjudication of the water right, is therefore generally a condition precedent to any effort to enforce that right by calling out a junior user."); *see also* *Empire Lodge Homeowners' Ass'n v. Moyer*, 39 P.3d 1139, 1149 (Colo. 2001) ("Colorado early recognized the interlocking nature of appropriation, adjudication, and administration. The 1879 and 1881 Acts provided for courts to adjudicate irrigation water rights and the water officials to administer them in priority. The 1903 Act provided for the adjudication and administration of rights and their priorities for all beneficial uses, not just irrigation. The 1919 Act required adjudication of water rights; if not adjudicated, they were deemed abandoned. The 1943 Act provided for original and supplemental adjudications for water rights to be brought in the district court where the water diversions were located. The purpose of each of these acts was to make clear that adjudication was required in order to obtain the benefits of priority administration" (*citations omitted*)).

90. COLO. REV. STAT. § 37-92-304(7) (2014) ("The judgment and decree shall give the names of the applicants with respect to each water right or conditional water right involved, the location of the point of diversion or place of storage, the means of diversion, the type of use, the amount and priority, and other pertinent information.").

91. COLO. REV. STAT. § 37-92-501(1) (2014) ("The state engineer and the division engineers shall administer, distribute, and regulate the waters of the state in accordance with the constitution of the state of Colorado, the provisions of this article and other applicable laws, and written instructions and orders of the state engineer, in conformity with such constitution and laws.").

92. Act of Feb. 19, 1879, § 19, 1879 Colo. Sess. Laws 94; Act of Feb. 23, 1881, § 1, 1881 Colo. Sess. Laws 142. The system of adjudication created by the Adjudication Acts is no longer in place, having been replaced by the enactment of the Water Rights Determination and Administration Act in 1969. Water Right Determination and Administration Act of 1969, COLO. REV. STAT. §§ 37-92-101 to -602 (2014). However, because all adjudications relevant to the Hallett Decrees took place prior to 1969, the



granted state district courts jurisdiction over water-rights adjudications.<sup>93</sup> To adjudicate a water right under the 1881 Adjudication Act, a water user filed a claim in the district court associated with the water district where he used water.<sup>94</sup> Filing such a claim triggered a “general adjudication” in which all previously un-adjudicated claims for water rights in the water district were determined simultaneously.<sup>95</sup> All water users in the district received notice of the adjudication and were joined in the case.<sup>96</sup> The district court evaluated the claim of each water user who appeared and entered a single decree laying out the amount and priority of each user’s water right.<sup>97</sup> If a water user did not participate in a general adjudication, the user’s right was not adjudicated or included in the decree and remained unenforceable.<sup>98</sup> In 1905, the General Assembly passed a law providing for supplementary water rights adjudications in which water rights that were not adjudicated in water districts’ original general adjudications could be claimed and decreed.<sup>99</sup>

In addition to setting a water right’s amount and priority, decrees from original and supplemental adjudications also describe the location where water is diverted from the natural stream, usually the type of use to which the water is put, and sometimes the location where or the

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adjudication system created by the Adjudication Acts is the system most relevant to this article.

93. Act of Feb. 19, 1879, § 19, 1879 Colo. Sess. Laws 94, 99; Act of Feb. 23, 1881, § 1, 1881 Colo. Sess. Laws 142.

94. Act of Feb. 23, 1881, § 1, 1881 Colo. Sess. Laws 142.

95. *O’Neill v. N. Colorado Irr. Co.*, 139 P. 536, 537 (1914), *aff’d*, 242 U.S. 20 (1916) (“The 1879 and 1881 irrigation statutes divide the natural streams of the state into units, called water districts, and provide for obtaining a general adjudication decree in each district settling the priorities of all the ditches in the district, and create the office of water commissioner in each district, and make it his duty to distribute the water to the ditches of the district according to the decreed priorities.”). Though the filing of a claim triggered a general adjudication, there could be significant delay between when a claim was filed and when a general adjudication took place. *See, e.g.*, Deed from Costilla Estate Co. to San Luis Power and Water (Apr. 15, 1909), in COSTILLA COUNTY, COLORADO, RECORD BOOK 74, at 365 (County Recorder’s Office, San Luis, Colorado) (showing that filings were made for water rightrights for the Sanchez Reservoir System in 1908 and 1909) [hereinafter Deed from Costilla Estate Co. to San Luis Power]; *see also* In the Matter of the Adjudication of Priorities of Water Rights for Irrigation, Power, Seepage Rights, Domestic Rights, and Reservoir Storage Purposes in Water Dist. No. 24, of the State of Colorado, No. 885 (Costilla Cnty. Dist. Ct., Feb. 11, 1935) (showing that the claimed rights were not adjudicated until 1935) [hereinafter 1935 Decree].

96. Act of Feb. 23, 1881, § 26, 35, 1881 Colo. Sess. Laws 142, 156, 160.

97. *Id.*

98. *Nichols v. McIntosh*, 34 P. 278, 280–81 (Colo. 1893).

99. Act of Apr. 10, 1905, ch. 111, § 2, 1905 Colo. Sess. Laws 243.

number of acres on which the water is used.<sup>100</sup> A water right's place of diversion, place of use, or type of use may all be changed, but such changes have required court approval since 1899.<sup>101</sup> In addition to being changed, water rights may be sold, either in combination with, or separately from, the land with which they are associated.<sup>102</sup>

The original general adjudication of water rights in Colorado's Water District 24 took place in the late 1880s,<sup>103</sup> with the Costilla County District Court issuing its final decree on June 14, 1889.<sup>104</sup> The decree awarded water rights to parciantes on the original Rio Culebra acequias, listed in Table 1 below, with most acequias receiving a right to use one cubic foot per second ("cfs") of water for each forty acres "cultivated under and irrigated from" the acequia.<sup>105</sup> Although Freehold owned the Costilla Estate (and thus much of the land on the Rio Culebra) at the time of the 1889 adjudication, it did not claim and was not decreed rights to a significant amount of water.<sup>106</sup> Freehold only appears in the 1889 decree as one of thirteen claimants on the Montez Ditch, which irrigated a total of twelve acres and was decreed a water right to one cfs.<sup>107</sup>

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100. JAMES N. CORBRIDGE JR. & TERESA A. RICE, VRANESH'S COLORADO WATER LAW 234–35 (rev. ed. 2006).

101. See COLO. REV. STAT. § 37-92-305(3) (2014); Act of Apr. 6, 1899, § 1, 1899 Colo. Sess. Laws 235, 235-36.

102. *Arnold v. Roup*, 157 P. 206, 210 (Colo. 1916). A document conveying land can convey water rights without expressly mentioning them, but only if the water rights are considered appurtenant to the land. CORBRIDGE & RICE, *supra* note 100, at 239. Appurtenance depends on the intent of the grantor as determined by the circumstances surrounding the conveyance, including whether the water rights have historically been used on the conveyed land and whether water rights are necessary for beneficial use and enjoyment of the land. *Id.* at 240–42.

103. 1889 Decree, *supra* note 69. Water District 24 encompasses the Rio Culebra in addition to the Rio Grande and its tributaries. *Id.* at 7.

104. *Id.*

105. See *id.* at 1–30. The 1889 decree lists the names of the parciantes who used water on each of the acequias that were granted water rights under the decree. *Id.* It is not clear if all of these parciantes were original settlers who held deeds from Beaubien. It is possible that some of them may have arrived in the Rio Culebra watershed after Beaubien sold the Sangre de Cristo Grant in 1864 and before the 1889 original adjudication. Others may have arrived before Beaubien sold the Sangre de Cristo Grant but may not have received deeds from Beaubien. If the parciantes did not hold deeds from Beaubien, Freehold arguably owned the land that the parciantes obtained water rights by irrigating.

106. See *id.*

107. *Id.* at 11.

**Table 1: Water rights decreed to various acequias in 1889 general adjudication (in cubic feet per second (“cfs”))<sup>108</sup>**

Name of Acequia	1889 Decreed Water Right	Acreage irrigated by acequia	Acres per 1 cfs
San Luis People’s	23.00	900	39.13
San Pedro	19.50	780	40
Montez	1.00	12	12
Vallejos	17.00	670	39.41
San Acacio	46.00	1,850	40.21
Cerro	40.00	1,586	39.65
Francisco Sanchez	12.50	490	38.4
Mestas	4.50	170	37.78
San Francisco	16.00	637	39.81
Little Rock	1.00	21	21
Torcido	1.00	33	33
Abundo Martin	3.50	138	39.43
Guadalupe Vigil	4.00	167	41.75
J. M. J. Maez	1.50	60	40
Pando	1.25	50	40
Guadalupe Sanchez	5.25	207	39.43

### C. The Hallett Decrees

Although Freehold did not seek significant water rights of its own in the 1889 adjudication, it apparently perceived the rights the 1889 Decree awarded to the original Culebra acequias as a threat. Soon after the 1889 Decree was issued, the company sought to prevent the parciantes on the original acequias from exercising their decreed water rights. On June 19, 1890, Freehold filed eleven complaints against the parciantes in the United States Circuit Court for the District of Colorado.<sup>109</sup> This Section

108. *Id.* at 6–7.

109. Complaint, *Vigil v. Swanson*, *supra* note 80, at 4. In these suits, Freehold was represented by Charles J. Hughes, Jr. Hallett Decrees, *supra* note 7. Hughes was a prominent Denver lawyer, representing high profile clients including “David Moffat’s The First National Bank of Denver, the International Trust Company, The Denver Union Water Company, Denver Tramway, the Adolph Coors Company, the Great Western Sugar Company . . . [and] several railroads.” Eli Wald, *The Other Legal Profession and*

relates how these complaints led to the entrance of the Hallett Decrees. Part III, below, addresses the meaning and validity of the Decrees.

In its complaints, Freehold asserted that it held water rights in the Rio Culebra because: (1) such rights were conveyed by the Mexican government along with the Sangre de Cristo Grant, or by the U.S. government as a result of its confirmation of the Grant; and (2) it owned riparian land along the Culebra.<sup>110</sup> Freehold also alleged that the parciantes had no right to use water from the Culebra, and that the amounts of water the parciantes claimed under the 1889 Decree were more than the parciantes needed or had ever actually used.<sup>111</sup> As a remedy, Freehold sought to enjoin the parciantes from using water from the Culebra and its tributaries unless the parciantes could prove that they had a legal right to use the water.<sup>112</sup>

The parciantes objected to Freehold's complaints, arguing that Freehold had failed to state a cause of action because it failed to demonstrate that it had water rights superior to those held by the parciantes, or any water rights at all.<sup>113</sup> The parciantes also argued that the federal circuit court did not have jurisdiction to decide the case because Colorado state courts have exclusive jurisdiction over state-based water rights cases.<sup>114</sup> On January 14, 1898, the Circuit Court for the District of Colorado upheld the parciantes' demurrer and dismissed

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*the Orthodox View of the Bar: The Rise of Colorado's Elite Law Firms*, 80 U. COLO. L. REV. 605, 645 (2009). In 1909, Hughes was elected to the United States Senate. *Id.*

110. Complaint, U.S. Freehold Land & Emigration Co. v. Gallegos (C.C.D. Colo. June 19, 1890) (reproduced in its entirety in: Complaint, *Vigil v. Swanson*, *supra* note 80).

111. *Id.* At the time, advances in the science of irrigation engineering were driving policy changes, and likely Freehold was basing at least some of its claims on developing standardized practices for irrigation in the West that attempted to reduce waste and encourage development and settlement. In his landmark 1903 book *Irrigation Institutions*, Elwood Mead points to the previously standard practice in Colorado courts of approving one cfs per 80 acres of land irrigated, and asserts that such decrees provided three to fifty times as much water as necessary for proper irrigation. ELWOOD MEAD, *IRRIGATION INSTITUTIONS: A DISCUSSION OF THE ECONOMIC AND LEGAL QUESTIONS CREATED BY THE GROWTH OF IRRIGATED AGRICULTURE IN THE WEST* 154 (1903). In light of this developing standardization, Gilpin and his associates likely felt that they were both behaving with generosity and were backed by a scientifically sound understanding of the needs of irrigators in Colorado when they sought a reduction of the parciantes' 1889 Decree rights.

112. Complaint, U.S. Freehold Land & Emigration Co. v. Gallegos, *supra* note 110.

113. Demurer, U.S. Freehold Land and Emigration Co. v. Gallegos (C.C.D. Colo. Aug. 2, 1890) (reproduced in: Complaint, *Vigil v. Swanson*, *supra* note 80).

114. *Id.*

Freehold's complaints.<sup>115</sup> The Circuit Court's rejection of Freehold's arguments was significant enough that a number of Colorado newspapers reported on it.<sup>116</sup> The Colorado Transcript stated that the decision was of "great importance" because it followed Colorado statutory law—which embraced prior appropriation—rather than the common law—which employed the riparian doctrine.<sup>117</sup>

Freehold appealed to the U.S. Court of Appeals for the Eighth Circuit, which reversed the Circuit Court's dismissal and remanded the suits to the Circuit Court for trial.<sup>118</sup> Before the trial took place, however, the parciantes reached settlement agreements with Freehold. Accordingly, the merits of Freehold's claims for water rights were not evaluated.<sup>119</sup> Under an early draft of the settlement agreement, the parciantes would have agreed to modify the 1889 Decree "by some appropriate proceedings" such that each acequia would be entitled to one cfs for each eighty acres irrigated, rather than one cfs for each forty acres

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115. Complaint, *Vigil v. Swanson*, *supra* note 80; U.S. *Freehold Land & Emigration Co. v. Gallegos*, 89 F. 769, 770 (8th Cir. 1898).

116. *E.g.*, *Judge Riner Says Farmers Using Water Have Rights Superior to the Riparian Proprietors*, SUMMIT CNTY. J. (Breckenridge), Jan. 22, 1898, at 7; *Irrigation Decision*, COLO. TRANSCRIPT (Golden), Jan. 19, 1898, at 2.

117. *Irrigation Decision*, COLO. TRANSCRIPT (Golden), Jan. 19, 1898, at 2 ("The decision also establishes the principle that priority of appropriation is of greater effect in determining ownership than claims by virtue of riparian rights, the statutes of the state, rather than the common law, governing the question."). Colorado courts had already established that prior appropriation, rather than the riparian doctrine, was the law in Colorado by the time of the Circuit Court's decision. *See Coffin v. Left Hand Ditch Co.*, 6 Colo. 443 (1882). Accordingly, the perception that the Circuit Court's decision was significant likely resulted from the fact that it, as a federal court, followed Colorado law in favoring prior appropriation.

118. *Freehold*, 89 F. at 774.

119. Although Freehold's claims were never evaluated, at least one legal scholar argues that they were likely without merit. Gregory Hicks and Devon Peña note that the U.S. Supreme Court held in *Boquillas Land & Cattle Co. v. Curtis*, 213 U.S. 339 (1909) "that parties with confirmed land grants acquired water rights either under state or territorial law or retained water rights granted under the law of the predecessor sovereign," but that congressional confirmation created no new water rights. Hicks & Peña, *supra* note 5, at 431–32 n.140. Because grants of riparian public domain lands did not convey water rights under Colorado law, and because Hicks and Peña interpret Mexican law as holding that grants of land did not include grants of water rights, Hicks and Peña argue that Freehold's claims were based on "misapprehensions of law." *Id.* Interestingly, Judge Moses Hallett, who approved the Hallett Decrees, served on the Colorado Territorial Supreme Court from 1866 to 1876 and was originally appointed to that court by President Andrew Johnson because he lived in Colorado and understood "the unique legal problems of mining and irrigation." Kane, *supra* note 83, at 17. Accordingly, it is likely that Hallett was familiar with Colorado water law and prior appropriation.

irrigated.<sup>120</sup> The extra water would be “released and abandoned . . . turned back into the stream or streams from which it is taken, and . . . made subject to future appropriations by parties other than [the parciantes].”<sup>121</sup> This language suggests that Freehold’s initial goal in the Hallett proceedings was not to obtain the parciantes’ water rights, but simply to free up water supplies by limiting the parciantes’ use of water. In the final agreement memorialized in the Hallett Decrees, however, the parciantes agreed to give the extra water to Freehold instead of abandoning it. As a result, under the settlement agreement, the parciantes granted Freehold a total of 91.1 cfs of the 197 cfs decreed to the original Rio Culebra acequias in 1889.<sup>122</sup> On July 17, 1900, Judge Moses Hallett of the United States Circuit Court for the District of Colorado entered a series of decrees approving the settlement agreements between Freehold and each acequia.<sup>123</sup>

As illustrated in Table 2, the Hallett Decrees allowed most of the acequias to retain one cfs of water for every eighty acres of land irrigated.<sup>124</sup> The Hallett Decrees also revised the number of acres irrigated by most of the acequias from the acreage listed in the 1889 Decree.

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120. Draft Settlement Agreement (May 1900) (available at the Van Diest Collection, Tutt Library, Colorado College, Box 81, Bound Copybook 1) [hereinafter the Van Diest Collection].

121. *Id.*

122. Complaint, *Vigil v. Swanson*, *supra* note 80, at 10–11.

123. Hallett Decrees, *supra* note 7. The several decrees were essentially the same, with each decree laying out how much of its 1889 decreed water right a particular acequia granted to Freehold. *Id.* The decrees state that Freehold “is the owner by virtue of the premise and agreements of the parties hereto, and the stipulations filed by them herein, and by this decree, and entitled to take from the [particular river/stream] [ ] cubic feet per second of time of the waters flowing therein . . . being a portion of the waters heretofore decreed” to the Rio Culebra acequias by the 1889 Decree. *Id.* at 2. The decrees also say that the rights and claims of the parciantes “to all water acquired by them [under the 1889 Decree] by virtue of Priority No. [ ] over and above [the amount of water retained by each acequia] are, by the agreements of the parties and the stipulation herein, and by this decree, transferred, assigned, and set over to” Freehold. *Id.* The decrees stated that the portion of the 1889 rights retained by the parciantes would have a higher priority than those granted to Freehold. *Id.* at 3.

124. *Id.* at 1–35; Complaint, *Vigil v. Swanson*, *supra* note 80, at 13–14. As shown in Table 1 above, the 1889 Decree granted most acequias approximately one cfs for every 40 acres of irrigated land. The complaint in *Vigil v. Swanson* alleges that Freehold convinced the parciantes that one cfs was sufficient to irrigate 80 acres of land as part of Freehold’s efforts to induce the parciantes to agree to the settlement memorialized in the Hallett Decrees. *Id.* at 14.

**Table 2: Amounts of water retained by parciantes and granted to Freehold under the Hallett Decrees (in cfs)**

Name of Acequia	Water awarded by 1889 decree	Water retained by parciantes	Water granted to Freehold	Acreage irrigated by acequia per 1889 decree	Acreage irrigated by acequia per Hallett Decrees	Acres per one cfs of water retained by acequia (based on Hallett Decrees)
San Luis People's	23.00	13.50	9.5	900	1,080	80
San Pedro	19.50	10.50	9.00	780	840	80
Montez	1.00	.25	.75	12	12	48
Vallejos	17.00	8.50	8.50	670	680	80
San Acacio	46.00	23.25	22.75	1,850	1,860	80
Cerro	40.00	22.50	17.50	1,586	1,800	80
Francisco Sanchez	12.50	6.25	6.25	490	500	80
Mestas	4.50	2.25	2.25	170	180	80
San Francisco	16.00	10.00	6.00	637	800	80
Little Rock	1.00	.25	.75	21	21	84
Torcido	1.00	.50	.50	33	40	80
Abundo Martin	3.50	1.75	1.75	138	140	80
Guadalupe Vigil	4.00	2.50	1.50	167	200	80
J. M. J. Maez	1.50	.75	.75	60	60	80
Pando	1.25	.65	.60	50	50	76.92
Guadalupe Sanchez	5.25	2.5	2.75	207	200	80

Why did the *parciantes* agree to give Freehold a large portion of their water rights? It is possible that the *parciantes* involved in the settlement negotiations felt, at the time, that the Hallett Decrees were strategic in that they provided certainty around issues of land and water rights over which they were having ongoing conflicts with Freehold.<sup>125</sup> Alternatively, Gregory Hicks and Devon Peña argue that the settlement memorialized in the Hallett Decrees may have resulted from Freehold's influence over the committee that negotiated the settlement on behalf of the *parciantes*.<sup>126</sup> This "citizens' committee" consisted of William H. Meyer, A. A. Salazar, and Louis Cohn, all of whom were prominent merchants in Costilla County.<sup>127</sup> Both Meyer and Salazar were friends of Edmund Van Diest, who was Freehold's resident manager on the Costilla Estate at the time of the Hallett Decrees.<sup>128</sup>

In the months leading up to the settlement, Van Diest took an active interest in the business of the merchants on the citizens' committee and even proposed that they go into business with him. In February 1899 Van Diest sent a letter to Cohn, Salazar, and Meyer's father Ferdinand, who was also a local merchant.<sup>129</sup> The letter emphasized the risks that Van Diest perceived in extending too much credit to the merchants' Hispanic customers.<sup>130</sup> The following month, Van Diest sent William Meyer a copy of a "proposition" apparently meant for all local merchants, suggesting the consolidation of local general stores into a single

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125. First, is possible that the *parciantes* sought to avoid the expense and uncertainty of adjudicating the validity of their water rights in federal court. Though Freehold's claim to hold water rights derived from the company's ownership of the Costilla Estate was questionable at the time, and though later court decisions revealed it to be without merit, at the time of the Hallett Decrees such issues were not clearly settled. *See supra* note 119. Second, because Freehold disputed some *parciantes*' title to the land the *parciantes* occupied, it could also be argued that the Hallett settlement was attractive to at least some *parciantes* because the settlement constituted an implicit recognition of their right to occupy their land. This argument is weakened, however, by the fact that Freehold and its successors sold land served by acequias affected by the Hallett Decrees to *parciantes* in the years after the Hallett Decrees. *See infra* Part II(d).

126. Hicks & Peña, *supra* note 5, at 435–36.

127. *Id.*

128. *Id.* (citing Letter from Edmund Van Diest to W.H. Meyer (Dec. 7, 1903) (available at the Van Diest Collection, Box 82, Folder A)); Letter from Edmund Van Diest to Delfino Salazar (A. A. Salazar's son) (Apr. 29, 1919) (available at the Van Diest Collection, Box 81, Bound Copybook 1).

129. Hicks & Peña, *supra* note 5, at 435–36. (citing Letter from Edmund Van Diest to Fred Meyer (Feb. 23, 1899) (available at the Van Diest Collection, Box 83, Copybook of letters dated Dec. 13, 1898 through Sept. 3, 1899).

130. *See id.*



business.<sup>131</sup> The formerly independent merchants would own stock in, and be paid employees of, the new company.<sup>132</sup> Van Diest argued that the consolidated business would benefit the merchants by allowing for “[r]eduction in credit business, and control of debtors,” as well as “cheaper buying, by the ability to buy in larger quantities.”<sup>133</sup> He further noted that “[t]he tendency of all enterprise is to a concentration of effort,” because “in union there is strength,” and “every businessman does readily realize the benefits obtainable from the withdrawal of his neighbor’s competition.”<sup>134</sup> The proposition closed by suggesting a meeting to discuss details, including “what stores will be allowed to come into the combination.”<sup>135</sup> It is not clear whether the members of the citizens’ committee accepted Van Diest’s proposition, or, if they did, whether it influenced the committee’s actions in negotiating the Hallett settlement. It does appear, however, that Van Diest was attempting to align the committee’s interests with his own, and by extension, with those of Freehold.

It is unclear whether the Hallett Decrees resulted in Freehold obtaining a legal right to use any water. The Decrees state that Freehold can take water from the Rio Culebra and its tributaries, but do not specify particular sites for diversion or use.<sup>136</sup> At the time the Hallett Decrees were entered, as now, Colorado water rights were decreed for use through a specific diversion structure and in a specific location, and their place and manner of use could not be legally changed without approval by a state court.<sup>137</sup> Accordingly, without court approval, Freehold could

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131. Letter from Edmund Van Diest to William H. Meyer (Mar. 23, 1899) (available at the Van Diest Collection, Box 81, Bound Copybook 1) (the letter itself does not show William H. Meyer’s name and is worded as if addressed to a group of people; the copybook index, however, indicates that the letter was sent to William H. Meyer).

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. Hallett Decrees, *supra* note 7.

137. Act of Apr. 6, 1899, § 1, 1899 Colo. Sess. Laws 235, 235-36; City of Englewood v. Burlington Ditch, Reservoir & Land Co., 235 P.3d 1061, 1068 (Colo. 2010). (“The right to change the use of a water right is an important stick in the bundle of rights that constitute a Colorado water right. It is not, however, absolute, as it must be balanced against the competing interests of other holders of vested water rights, including their right to ‘the continuation of stream conditions as they existed at the time they first made their appropriation.’ *Farmers Reservoir & Irrigation Co. v. City of Golden*, 44 P.3d 241, 245 (Colo. 2002). As such, changes in water rights cannot be made ‘in any manner other than through judicial approval, following statutorily authorized procedures.’ *Fort Lyon Canal Co. v. Catlin Canal Co.*, 642 P.2d 501, 506 (Colo. 1982) (citations omitted).”).

not legally use the Freehold Interests at locations other than the acequias to which the Interests were originally decreed. Some of the possible solutions to this issue are addressed in Parts IV and V, below. The following two Sections, however, examine how the Freehold Interests were used in the years following the Hallett Decrees.

#### *D. The 1905 District 24 Supplemental Adjudication*

In 1905, the Colorado District Court for Costilla County conducted a supplemental adjudication to determine previously unadjudicated water rights on the Rio Culebra.<sup>138</sup> This Section examines some of the claims and assertions made by various parties to the 1905 adjudication in order to shed light on how the Freehold Interests were used in the years following the Hallett Decrees. Although none of the Freehold Interests were directly at issue in the 1905 adjudication, evidence introduced in the adjudication suggests that in the years following the Hallett Decrees Freehold and its successor leased and sold small portions of the Freehold Interests. In general, however, the 1905 adjudication demonstrates that Freehold and its successors thought they possessed power to grant the right to use water regardless of whether they owned adjudicated water rights, and likely did not believe that they were transferring portions of the Freehold Interests every time they purported to grant someone the right to use water.

As of 1902, Freehold had been unable to realize the majority of its development ambitions. Although the company had made plans to construct a water storage and distribution system soon after acquiring the Freehold Interests, its plans were thwarted, at least in part by a series of dry years.<sup>139</sup> Freehold had also failed to attract significant numbers of immigrants to the Costilla Estate.<sup>140</sup> In debt and unable to make money by selling parcels to immigrants, Freehold sold the entire Estate to the Costilla Land Investment Company (“Costilla Investment”) in 1902.<sup>141</sup> The conveyances through which Costilla Investment obtained the

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138. Decree, In the Matter of the Adjudication of the Priorities of Right to the Use of Water for Irrigating and Other Purposes in Water Dist. No. 24, No. 536 (Costilla Cnty. Dist. Ct., Dec. 14, 1905) [hereinafter 1905 Decree].

139. Hicks & Peña, *supra* note 5, at 437.

140. BRAYER, *supra* note 34, at 123.

141. Warranty deed from Freehold to Harry C. Watt (Aug. 7, 1902), in COSTILLA COUNTY, COLORADO, RECORD BOOK 43, at 453 (County Recorder’s Office, San Luis, Colorado) (conveying Colorado portion of the Costilla Estate); Quit-Claim Deed from Harry C. Watt to Costilla Investment (Aug. 26, 1903), in COSTILLA COUNTY, COLORADO, RECORD BOOK 46, at 106 (County Recorder’s Office, San Luis, Colorado) (conveying Colorado portion of the Costilla Estate).

Costilla Estate did not specifically mention water rights, but included all hereditaments and appurtenances.<sup>142</sup>

Costilla Investment did not file any claims for water rights in the 1905 adjudication, but did participate, offering evidence and testimony.<sup>143</sup> Some of the claims filed in the adjudication indicate that Costilla Investment was selling small portions of the Freehold Interests. The San Luis People's Ditch introduced a deed, executed in May of 1905, from Costilla Investment to J. M. Salazar for 189 acres of land lying under the San Luis People's Ditch.<sup>144</sup> In addition to land, the deed conveyed 1.6 cfs of water from the Rio Culebra "such water being in recognition of and not a conveyance in addition to the water rights belonging to the above described land, under [the Hallett Decrees]."<sup>145</sup> The San Luis People's Ditch claimants stated that the land conveyed to Salazar by the deed was the only land that Costilla Investment had owned along the San Luis People's Ditch.<sup>146</sup> The Vallejos ditch also claimed additional water based on deeds from Costilla Investment and Freehold conveying land and the right to use water on that land.<sup>147</sup> Accordingly, Freehold and Costilla Investment may have sold small portions of the Freehold Interests. In addition to selling portions of the

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142. Warranty deed from Freehold to Harry C. Watt (Aug. 7, 1902), in COSTILLA COUNTY, COLORADO, RECORD BOOK 43, at 453 (County Recorder's Office, San Luis, Colorado) (conveying Colorado portion of the Costilla Estate); Quit-Claim Deed from Harry C. Watt to Costilla Investment (Aug. 26, 1903), in COSTILLA COUNTY, COLORADO, RECORD BOOK 46, at 106 (County Recorder's Office, San Luis, Colorado) (conveying Colorado portion of the Costilla Estate).

143. Transcript of Evidence Offered Generally, In the Matter of the Adjudication of the Priorities of Right to the Use of Water for Irrigating and Other Purposes in Water Dist. No. 24, No. 536, at 5–9 (Costilla Cnty. Dist. Ct., Dec. 14, 1905) [hereinafter Transcript of Evidence 1905].

144. Abstract of Evidence at 106, 109–10, In the Matter of the Adjudication of the Priorities of Right to the Use of Water for Irrigating and Other Purposes in Water Dist. No. 24, No. 536 (Costilla Cnty. Dist. Ct., Dec. 14, 1905) [hereinafter Abstract of Evidence].

145. *Id.* at 109–10. It is not clear whether the water right referred to in the deed is part of the water right left to the parciantes under the Hallett decree or part of the water right granted to Freehold. The fact that Costilla Investment was Freehold's successor and was conveying the water right suggests that the water right in the deed was a part of the right Freehold obtained through the Hallett Decrees and subsequently sold to Costilla Investment. However, the fact that the deed characterizes the water right as "belonging to the above described land" could suggest that the right was a portion of the rights the Hallett Decrees left to the parciantes. The Hallett Decrees do not describe any particular land that Freehold's rights are to be used on, but do describe land that the parciantes are "entitled" to apply their water to. Hallett Decrees, *supra* note 7, at 2.

146. Abstract of Evidence, *supra* note 151, at 106.

147. *Id.* at 106, 109–10, 164.

Freehold Interests, Freehold and Costilla Investment also may have been leasing them. One issue disputed in the adjudication proceedings was whether or not Freehold or Costilla Investment had ever put the Freehold Interests to use.<sup>148</sup> A. A. Salazar, who claimed to have lived on the Rio Culebra for over forty years (and who had served as a member of the citizens' committee that negotiated the Hallett Decrees for the parciantes), testified that Freehold and Costilla Investment had never constructed any irrigation ditches or applied any water to District 24 land.<sup>149</sup> Costilla Investment did not contest that it had not constructed any ditches or diverted any water itself, but claimed to be using the Freehold Interests "through its tenants."<sup>150</sup> As evidence, Costilla Investment introduced sixty-seven leases of agricultural land on the Culebra between itself or Freehold and third parties.<sup>151</sup> Some of these leases granted the lessee the right to use specified amounts of water from the Culebra and its tributaries, but none of them mentioned the 1889 Decree or the Hallett Decrees, or specified particular diversion structures that water was to be taken through.<sup>152</sup> In fact, all of the leases examined for this Article that explicitly granted the right to take water from the Culebra and its tributaries were issued prior to the entry of the Hallett Decrees, at a time when Freehold held no adjudicated water rights apart from a portion of the one cfs decreed to the Montez Ditch.<sup>153</sup> Accordingly, while Costilla Investment claimed that it was using the Freehold Interests through its tenants, the company apparently did not take pains to document its use of the Freehold Interests in its leases. Indeed, the company's leasing practices suggest that the company thought it had the authority to grant its lessees the right to use water regardless of whether it possessed any adjudicated water rights.

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148. Transcript of Evidence 1905 at 2, 14.

149. *Id.* at 2.

150. *Id.* at 14.

151. Transcript of Evidence 1905, *supra* note 143, at 5; Abstract of Evidence at 181.

152. Abstract of Evidence, *supra* note 151, at 181–84. Sixteen of the sixty-seven leases were reviewed for this Article. All sixteen leases were made between 1900 and 1904 and had terms of three to five years. *Id.* Four of the sixteen leases specifically included water for the irrigation of the leased land on the basis of one cfs per 80 acres. *Id.* These leases do not specify particular acequias from which the water was to be taken. *Id.* Twelve of the sixteen leases do not mention water, but state that the land is leased for "agricultural purposes." *Id.* All of the leases that mention water were executed prior to the entrance of the Hallett Decrees on July 17, 1900. *Id.* All of the leases that do not mention water were executed after the entrance of the Hallett Decrees. *Id.* It is not clear whether this is merely a coincidence, or if Freehold's lease writing practices changed as a result of the Hallett Decrees.

153. *Id.*; see 1889 Decree, *supra* note 69.

In general, it appears that no one was paying close attention to legal niceties such as who had the power to create water rights or where the water rights that Freehold or Costilla Investment purported to be granting were coming from. In giving testimony in support of the application of the Eastdale Reservoir Number 1 to take water from the Culebra, a trustee of the reservoir company stated that Freehold had agreed to allow the reservoir company to take twenty cfs from the Culebra outside of irrigation season.<sup>154</sup> The examining lawyer asked the trustee whether this water was “to be taken from the water that [Freehold] claim[s] to be decreed to them by the United States Court,” and the trustee replied, “they don’t say what water.”<sup>155</sup> Though the trustee went on to say that he believed Freehold had already appropriated the water it agreed to let the reservoir company use,<sup>156</sup> the 1905 decree granted the reservoir company the right to take water from the Culebra under new, junior priorities, demonstrating that the court treated the diversions as new appropriations rather than as transfers of the Freehold Interests.<sup>157</sup>

The claims and testimony offered in the 1905 adjudication indicate that up until at least 1905, Freehold and Costilla Investment did not build diversion structures or directly put any of the Freehold Interests to use.<sup>158</sup> Instead, the companies used the Freehold Interests as the basis for granting their lessees and grantees rights to use water from the Rio Culebra watershed.<sup>159</sup> However, Freehold granted rights to use water from the Culebra prior to the Hallett Decrees,<sup>160</sup> and Costilla Investment appears to have believed that it was improper for the state to decree water rights to Costilla Estate water users unless Costilla Investment had first deeded such users the right to use water.<sup>161</sup> These facts indicate that the companies thought they possessed power to grant rights to water

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154. Transcript of Testimony Offered for Eastdale No. 1 Ditch and Reservoir at 2, 18, In the Matter of the Adjudication of the Priorities of Right to the Use of Water for Irrigating and Other Purposes in Water Dist. No. 24, No. 536 (Costilla Cnty. Dist. Ct., Dec. 14, 1905).

155. *Id.* at 18.

156. *Id.*

157. 1905 Decree, *supra* note 138, at 35–36.

158. Transcript of Evidence 1905, *supra* note 143, at 4–5.

159. *Id.* at 14.

160. *See* Abstract of Evidence, *supra* note 151, at 164–73.

161. Memorandum itemizing Costilla Investment’s objections to the 1905 Decree (Nov. 11, 1907) (available at the Van Diest Collection, Box 50, Folder 325) (Asserting that the Antonio Valdez Ditch should have been awarded one cfs rather than three and 19/80 cfs because the company had granted two claimants a total of one cfs, and the other claimants were only lessees. Also, objecting to the Aban Sanchez Ditch being decreed one and 21/30 cfs because all of the water used by the ditch was “used on company ground; some by renters, some by squatters”).

from the Rio Culebra system even if they did not possess any adjudicated water rights, perhaps as a consequence of their ownership of the Costilla Estate. Accordingly, Freehold and Costilla Investment likely did not believe they were transferring a portion of the Freehold Interests every time they granted someone the right to use water. In addition, because Colorado water rights may only be used at their decreed place of use and through their decreed point of diversion,<sup>162</sup> where Freehold and Costilla Investment granted or leased the right to use water on lands that could not be irrigated by the Hallett acequias, the companies could not have been granting or leasing the Freehold Interests.

Thus, the 1905 adjudication indicates that Costilla Investment likely was using at least some of the Freehold Interests through its tenants, and had transferred other portions of the Interests through land sales. Part V, below, discusses the implications of leases and deeds granted by Freehold and Costilla Investment for the current legal status of the Freehold Interests. The next Section discusses the construction of an extensive water storage and distribution system on the Costilla Estate and an attempt to utilize the Freehold Interests to supply water for the system.

### *E. The Sanchez Reservoir System*

After the 1905 adjudication, momentum toward development began to build again, and plans to construct an extensive water storage and distribution system in the Culebra watershed finally came to fruition with the construction of the Sanchez Reservoir System.<sup>163</sup> In 1908, Costilla Investment transferred the Costilla Estate and all of its water rights to yet another company—the Costilla Estate Development Company (“Costilla Estate Co.”).<sup>164</sup> Costilla Estate Co. recorded deeds with the State

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162. See COLO. REV. STAT. § 37-92-304(7) (2014); COLO. REV. STAT. § 37-92-501(1) (2014).

163. The Sanchez system consists of the following structures: The Culebra-Sanchez Canal, the Sanchez Reservoir, the Culebra-Eastdale Canal, the Eastdale No. 1 Reservoir, the Eastdale No. 2 Reservoir, the Culebra-Cerritos Canal, the Cerritos Reservoir, the Romero Ditch, and the Mesita Reservoir.

164. Quit-claim deed from Costilla Investment to Franklin Brooks (Nov. 11 1908), in COSTILLA COUNTY, COLORADO, RECORD BOOK 55, at 164 (County Recorder’s Office, San Luis, Colorado) (conveying entire Costilla Estate and “all water rights, water privileges, appropriations, priorities, adjudications, ditches, canals, laterals and water privileges of every kind or nature whatsoever, thereon situate, thereto belonging, appendant or appurtenant, or therewith used and enjoyed”); Quit-claim Deed from Franklin Brooks to Costilla Estate Co. (Dec. 19, 1908), in COSTILLA COUNTY, COLORADO, RECORD BOOK 55, at 164 (County Recorder’s Office, San Luis, Colorado) (conveying the same).

Engineer for most of the major elements of the Sanchez system in 1908 and 1909,<sup>165</sup> and the construction of the majority of the system was completed between 1907 and 1912.<sup>166</sup>

The Sanchez System was designed to take water from the Rio Culebra and its tributaries and transport it to the Sanchez Reservoir through a feeder ditch known as the Culebra-Sanchez Canal.<sup>167</sup> Water would be stored in Sanchez Reservoir until needed and then released back into the Rio Culebra.<sup>168</sup> The released water would be transported downstream by the Culebra and then re-diverted into various distribution ditches.<sup>169</sup> Water diverted into the distribution ditches would be used by customers or diverted into one of the system's downstream reservoirs for further storage.<sup>170</sup>

The construction of the Sanchez System was part of a new wave of investment, optimism, and boosterism regarding the Costilla Estate.<sup>171</sup> Costilla Estate Co. was one of a group of companies “capitalized . . . for a total of \$10,000,000” that would use the “abundant water supply” of the Estate to provide water and power to the surrounding area, allowing development of “800,000 acres of agricultural land” both within and outside of the Estate.<sup>172</sup> In addition, a railroad through the Costilla Estate that would “open[] vast territory” was planned.<sup>173</sup> Unsurprisingly, renewed conflict over water followed close on the heels of this renewed interest in development.

By the time the Sanchez System was complete, Costilla Estate Co. had sold the water rights it obtained through its purchase of the Costilla Estate to the San Luis Power and Water Company (“San Luis

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165. Deed from Costilla Estate Co. to San Luis Power and Water, *supra* note 95, at 365 (conveying water rights and infrastructure, including most major elements of the Sanchez system).

166. Statement of Claim for the Sanchez System of Reservoirs and Ditches, In the Matter of the Adjudication of the Priorities of Water Rights in Water Dist. No. 24, No. 885 (Costilla Cnty. Dist. Ct., May 21, 1926) [hereinafter Sanchez Statement of Claim]; Transcript of Evidence at 49, In the Matter of the Adjudication of the Priorities of Water Rights in Water Dist. No. 24, No. 885 ( Costilla Cnty. Dist. Ct., Feb. 11, 1935) [hereinafter Transcript of Evidence 1935].

167. Sanchez Statement of Claim, *supra* note 166, at 2–3.

168. *Id.*

169. *Id.*

170. *Id.*

171. See, e.g., *Railway for Costilla Grant*, KIOWA CNTY. PRESS (Eads), July. 9, 1909, at 1.

172. *Id.*

173. *Id.*

Power”).<sup>174</sup> San Luis Power apparently convinced the Division Engineer and Water Commissioner responsible for distributing water on the Rio Culebra to allow it to divert the entire 91.1 cfs granted to Freehold under the Hallett Decrees into the Sanchez System through the Culebra-Sanchez Canal.<sup>175</sup> It was most likely this action that sparked the next round in the legal fight to control the waters of the Rio Culebra—a 1914 suit filed in the Costilla County District Court by parciantes on the original acequias captioned *Vigil v. Swanson*.<sup>176</sup> In ruling on the parciantes claims in the case, the *Vigil* court was required to interpret the meaning of the Hallett Decrees.

### III. THE MEANING OF THE HALLETT DECREES

Since their inception, the Hallett Decrees have created confusion in the Rio Culebra community. This Part chronicles the community’s attempts to interpret the meaning and effects of the Decrees, from *Vigil v. Swanson*, in which a Colorado court explained the Decrees’ legal effect, to the 1984 Abandonment Proceedings that ended in further confusion. This Part also describes the type of ownership interests created by the Hallett Decrees and explains the results of a title search conducted by the authors in an attempt to determine the current ownership status of the Freehold Interests.

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174. Quit-claim Deed from Costilla Investment to Franklin Brooks (Nov. 11, 1908), in COSTILLA COUNTY, COLORADO, RECORD BOOK 55, at 164 (County Recorder’s Office, San Luis, Colorado) (conveying entire Costilla Estate and “all water rights, water privileges, appropriations, priorities, adjudications, ditches, canals, laterals and water privileges of every kind or nature whatsoever, thereon situate, thereto belonging, appendant or appurtenant, or therewith used and enjoyed”); Quit-claim Deed from Franklin Brooks to Costilla Estate Development Corporation (“Costilla Estate Co.”) (Dec. 19, 1908), in COSTILLA COUNTY, COLORADO, RECORD BOOK 55, at 164 (County Recorder’s Office, San Luis, Colorado) (conveying the same); Deed from Costilla Estate Co. to San Luis Power, *supra* note 95 (conveying all rights to the surface and ground water of the Costilla Estate that Costilla Estate Co. possessed as the successor of Charles Beaubien, including Costilla Estate Co.’s rights as “riparian proprietor” or “owners of the watershed or drainage area,” and also conveying the Sanchez reservoir system and “the waters therein stored and to be stored and therein flowing and to flow and all rights of any kind or nature in and to the same according to all and every the adjudicated priorities thereof or appropriations thereon under any decrees or title”).

175. See Order Findings and Decree, *Vigil v. Swanson*, at 3 (Costilla Cnty. Dist. Ct., Mar. 26, 1917) [hereinafter Order Findings and Decree].

176. Complaint, *Vigil v. Swanson*, *supra* note 80.



A. *Vigil v. Swanson and the Legal Effect of the Hallett Decrees*

In *Vigil v. Swanson*, a group of Costilla County parciantes (the majority of whom were parciantes of the original Culebra acequias) sued the Colorado Division Engineer and Water Commissioner for Water District 24, seeking to enjoin them from enforcing the Hallett Decrees.<sup>177</sup> The plaintiff parciantes claimed that San Luis Power had convinced the Engineer and Commissioner to rely on the Hallett Decrees in administering the waters of District 24 rather than distributing water in accordance with the existing Costilla County District Court decrees.<sup>178</sup> The plaintiff parciantes asked the court to enjoin the Engineer and Commissioner from enforcing the Hallett Decrees, and to force the Engineer and Commissioner to administer District 24 only in accordance with the 1889 and 1905 state decrees.<sup>179</sup> The plaintiff parciantes argued that the Hallett Decrees were invalid because the U.S. Circuit Court for the District of Colorado lacked subject-matter jurisdiction to enter decrees concerning Colorado water rights.<sup>180</sup> They also asserted that even if the Hallett Decrees were valid, the decrees only gave Freehold the right to appropriate water and seek an adjudicated water right under Colorado law, which neither Freehold nor its successors had done.<sup>181</sup> It appears that the parciantes' goal was to regain control of the Freehold Interests, or at least to force San Luis Power to obtain a Colorado state decree before the company could use the Interests in the Sanchez Reservoir System.

The *Vigil* court entered its opinion on March 26, 1917.<sup>182</sup> The court held that the Hallett Decrees “were valid and binding adjudications between the parties thereto, and their successors in interest,”<sup>183</sup> but that the Engineer and Commissioner had “no right to regard any decree, save the decrees of this court entered for that especial purpose, in the

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177. *Id.*; 1889 Decree, *supra* note 69.

178. Complaint, *Vigil v. Swanson*, *supra* note 80, at 15–16 (stating that San Luis Power had filed copies of the Hallett Decrees with the Costilla County Recorder and District Court and had convinced the Water Commissioner “to recognize [the Hallett Decrees] as binding and lawful adjudications of priorities to the use of water in said Water District 24”).

179. *Id.* at 24–25.

180. *Id.* at 14–15.

181. *Id.* at 14–16, 22. Though the plaintiff parciantes alleged that San Luis Power and its predecessors had never put water to use or constructed diversion works, evidence submitted to obtain water rights for the Sanchez Reservoir system indicates that the system had been constructed and was in use by 1912, two years before the parciantes filed their complaint in *Vigil*. Transcript of Evidence 1935, *supra* note 166, at 49.

182. Order Findings and Decree, *supra* note 175.

183. *Id.* at 3.

distribution of the waters of . . . district 24.”<sup>184</sup> The court also found that San Luis Power had “wrongfully persuaded” the Engineer and Commissioner to deliver the Freehold Interests at the head gate of the Culebra-Sanchez Canal, and ordered the officials “to distribute the waters of the Culebra river, and its tributaries, in accordance with the [1889 and 1905] decrees of this court.”<sup>185</sup>

The *Vigil* court’s ruling that the Hallett Decrees were binding on the parties and their successors but could not be used by state officials in determining how to distribute water is in accordance with federal and Colorado case law. As explained in the *Vigil* opinion, the Circuit Court for the District of Colorado had sufficient jurisdiction to approve the Hallett Decrees. In Colorado, the state water court system has jurisdiction over all state-based water rights, including the adjudication of priorities and changes in water rights.<sup>186</sup> At the time that Freehold filed suit against the Rio Culebra parciantes, however, federal courts had special statutory jurisdiction over suits filed by federally chartered corporations.<sup>187</sup> This special statutory jurisdiction gave the federal circuit court power to hear Freehold’s case because Freehold was federally chartered.<sup>188</sup> Even with this special statutory jurisdiction, however, the federal court did not have the power to alter a state water rights decree by reducing or invalidating the parciantes’ water rights.<sup>189</sup> In the case that produced the Hallett Decrees, however, the Eighth Circuit held that the question of law was not the validity of the parciantes water rights, but

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184. *Id.*

185. *Id.*

186. *See In re Tonko v. Mallow*, 154 P.3d 397, 404 (Colo. 2007).

187. “It is contended that the circuit court had no jurisdiction, because the bill contains no allegation of the diverse citizenship of the parties, or of any other jurisdictional ground. But it has an averment that the appellant is a corporation organized under an act of congress (16 Stat. 192), and that fact makes this a case ‘arising under the laws of the United States,’ and confers jurisdiction upon the federal court.” *U.S. Freehold Land & Emmigration Co. v. Gallegos*, 89 F. 769, 771 (8th Cir. 1898) (citations omitted). This federal statute has since been repealed. *See Am. Nat’l Red Cross v. S.G.*, 505 U.S. 247, 251 (1992).

188. Order Findings and Decree, *supra* note 175, at 3.

189. *Weiland v. Reorganized Catlin Consol. Canal Co.*, 156 P. 596, 597 (Colo. 1916) (“The statutes designate the District Court vested with exclusive jurisdiction to adjudicate priorities to the use of water for irrigation in a water district. When jurisdiction for that purpose has attached and a decree is entered, the statutes on that subject necessarily inhibit any other court of coordinate jurisdiction from modifying, reviewing, or construing such decree; otherwise there could be, in effect, more than one decree, by different courts, affecting the same priority to the use of water in the same water district, which it is the object of the statutes to avoid.”); *see also City of Grand Junction v. City & Cnty. of Denver*, 960 P.2d 675, 681 (Colo. 1998); *Hazard v. Joseph W. Bowles Reservoir Co.*, 287 P. 854, 855 (Colo. 1930).

rather whether the parciantes' diversion of water constituted trespass in light of Freehold's ownership of the land bordering the Culebra.<sup>190</sup> Because the federal courts interpreted the dispute to not involve the validity of state water rights, and because the Hallett Decrees were consent decrees that essentially acted as contracts transferring portions of the parciantes' 1889 water rights to Freehold,<sup>191</sup> the Federal Circuit Court for the District of Colorado had jurisdiction to enter the Hallett Decrees.

Although the Hallett Decrees were binding between the parties to them, because they were not Colorado decrees, they could not authorize use of Colorado water rights at locations other than those for which the rights were originally decreed. When the parciantes challenged the Hallett Decrees in state court in *Vigil v. Swanson*, therefore, the state court was presented with a conflict: the Hallett Decrees were validly entered and binding on the parties to the decrees, but Freehold had not returned to state court to change the Freehold Interests' location of use.<sup>192</sup> Colorado law has always recognized the right of individual users to sell or otherwise transfer their water rights, absent injury to other water users.<sup>193</sup> However, the State Engineer and other water officials are required to administer water according to users' decreed priorities.<sup>194</sup> Therefore, if a water right is not decreed according to state law, it

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190. *Freehold*, 89 F. at 772.

191. *United States v. N. Colorado Water Conservancy Dist.*, 608 F.2d 422, 430 (10th Cir. 1979) (citing *United States v. ITT Continental Baking Co.*, 420 U.S. 223 (1975)) ("A consent decree or order is to be construed for enforcement purposes basically as a contract."). The Colorado Supreme Court has held that private agreements that "modify rights incident to water right ownership" are valid where the modifications do not run counter to the purpose of the law or strip water courts of their jurisdiction. *See Ft. Lyon Canal Co. v. Catlin Canal Co.*, 642 P.2d 501, 506, 509 (Colo. 1982) (upholding a mutual ditch company bylaw requiring board approval before a shareholder could seek to change a water right where the bylaw did not "oust the water court of jurisdiction, . . . conflict with the purposes of the Water Right Act or unduly interfere with the water court's exercise of its authority pursuant to that statute"). The Tenth Circuit has adopted this holding in the context of consent decrees entered in federal court. *See Application of City & Cnty. of Denver By & Through Bd. of Water Comm'rs*, 935 F.2d 1143, 1151–52 (10th Cir. 1991) (applying the Colorado Supreme Court's holding in *Ft. Lyon Canal Co.* to rule on Denver's contention that requiring compliance with a provision of a federal consent decree between Denver and the U.S. would violate Colorado water law).

192. Order Findings and Decree, *supra* note 175.

193. *Strickler v. City of Colo. Springs*, 26 P. 313, 316 (1891) ("[T]he [water] right may be transferred by sale so long as the rights of others, as in this case, are not injuriously affected thereby.").

194. COLO. REV. STAT. §§ 37-92-301(3), -501, -503 (2014).

generally cannot be enforced.<sup>195</sup> This is true even when a water right is validly transferred from one user to another.<sup>196</sup> Any change in water use from that contemplated in an original decree must be brought before a state court through a change of use action.<sup>197</sup> Accordingly, as federal decrees the Hallett Decrees could not authorize changing the Freehold Interests' location of use from the original acequias to the Culebra-Sanchez Canal.

Thus, the *Vigil* court's ruling was correct. Insofar as the Hallett Decrees transferred ownership of water rights from the parciantes to Freehold they were valid under Colorado law. A private agreement or consent decree that transfers ownership does not violate Colorado law or deprive Colorado courts of jurisdiction because Colorado law allows water rights to change hands without the involvement of a court.<sup>198</sup> Because only a Colorado court can approve a change in place of use or

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195. Concerning Application for Water Rights of Turkey Canon Ranch Ltd. Liab. Co., 937 P.2d 739, 749 (Colo. 1997) (citing *People ex rel. Simpson v. Highland Irrigation Co.*, 917 P.2d 1242, 1252-53 (Colo. 1996) (“Absent an adjudication under the Act, water rights are generally incapable of being enforced.”); *Cresson Consol. Gold Min. & Mill. Co. v. Whitten*, 338 P.2d 278, 283 (1959)).

196. See *City of Englewood v. Burlington Ditch, Reservoir & Land Co.*, 235 P.3d 1061 (Colo. 2010).

197. COLO. REV. STAT. §§ 37-92-302(1)(a), 203(1), 103(5); *In re Tonko*, 154 P.3d 397, 405 (Colo. 2007) (citing *Santa Fe Trail Ranches Prop. Owners Ass'n v. Simpson*, 990 P.2d 46, 55-56 (Colo. 1999) (“Water use at a place other than that anticipated by the original decree can be used to establish historic use in a change proceeding, but only if the change is inconsequential and there is no question of enlargement or abandonment.”); *Se. Colo. Water Conservancy Dist. v. Rich*, 625 P.2d 977, 980 (Colo. 1981)).

198. Even if the parciantes had never used the amounts of water they granted to Freehold in the Hallett Decrees, the transfer of ownership of the rights was valid. Though the owner of a water right may sell the right without court approval, the sale of the right may not result in increased water use. *Enlarged Southside Irr. Ditch Co. v. John's Flood Ditch Co.*, 183 P.2d 552, 554 (Colo. 1947) (“The owner of a priority for irrigation has no right . . . to lend, rent or sell to others the excess water after irrigation of the land for which it was appropriated.”). However, it is not the sale of the water right that is unlawful, but the expanded use that subsequently takes place. See *Baker v. City of Pueblo*, 289 P. 603, 603-06 (1930) (rejecting city's application to change recently purchased irrigation water rights because the change would result in expanded use, but not commenting on the validity of the city's acquisition of the rights). Colorado law makes no provision for halting or invalidating a transfer of ownership of a water right simply because the transfer may result in expanded use. Rather, water rights holders can enforce the prohibition against expanded use by seeking an injunction to halt expanded use, see, e.g., *id.* at 583-84, or by objecting to a proposed change in manner or place of use that will lead to expanded use, see, e.g., *In re Water Rights of Cent. Colorado Water Conservancy Dist.*, 147 P.3d 9 (Colo. 2006). Because the sale of a water right cannot be invalid simply because it could lead to expanded use, even if the parciantes had never used the amounts of water they granted to Freehold, the transfer of ownership was valid.

diversion of a Colorado water right, however, the Hallett Decrees could not have changed the Freehold Interests place of diversion or use. Accordingly, it was inappropriate for Colorado water officials to rely of the Hallett Decrees rather than the 1889 Decree in determining where to deliver the Freehold Interests, as *Vigil* found.

### *B. The Type of Ownership Interests Created By the Hallett Decrees*

As discussed in Section (a) above, the Hallett Decrees were valid insofar as they constituted an agreement by the parciantes to transfer a portion of their water rights to Freehold. Were the Decrees alone enough to effect such a transfer, or was a deed required? Under current Colorado law, “[t]he conveyance of a water right requires that the same formalities be observed as in the conveyance of real estate.”<sup>199</sup> However, early water law cases upheld oral agreements transferring ownership of water rights in more than one instance without requiring the execution a deed.<sup>200</sup> In the 1909 case *Park v. Park*, the Colorado Supreme Court even upheld an oral agreement that conflicted with the applicable water rights decree, in the name of equity.<sup>201</sup> Although ownership of the Freehold Interests was only confirmed by deed in the case of the rights on the San Acacio Ditch,<sup>202</sup> the permissive case law regarding water rights agreements in the late nineteenth and early twentieth centuries combined with the District Court’s conclusion in *Vigil v. Swanson* indicate that the Hallett Decrees created real and enforceable property rights in the form of the Freehold Interests.

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199. *Navajo Dev. Co. v. Sanderson*, 655 P.2d 1374, 1378 (Colo. 1982). *See also* COLO. REV. STAT. § 38-30-102(2) (2009) (“In the conveyance of water rights in all cases, except where the ownership of stock in ditch companies or other companies constitutes the ownership of a water right, the same formalities shall be observed and complied with as in the conveyance of real estate.”).

200. *See, e.g., Park v. Park*, 101 P. 403, 405-06 (Colo. 1909); *Caldwell v. States*, 6 P.2d 1, 1 (Colo. 1931).

201. *Park*, 101 P. at 405-06 (citing *Schilling et al. v. Rominger*, 4 Colo. 104 (1878); *McLure v. Koen*, 25 Colo. 284 (1898)) (“Oral agreements concerning priorities and title to water rights, followed with its change of possession and application by the claimant, have heretofore been held valid by this court, also that part performance will take it out of the statute of frauds, and equity will enforce the right thus acquired.”).

202. *See* Quit-Claim Deed from San Luis Water and Power to Sanchez Ditch and Reservoir Company (Apr. 18, 1956), in *COSTILLA COUNTY, COLORADO, RECORD BOOK 162*, at 160 (County Recorder’s Office, San Luis, Colorado) [hereinafter *Quit-Claim Deed from San Luis Water*].

### C. *Post-Vigil Developments*

In the decades following *Vigil*, San Luis Power apparently made no further attempts to utilize the Freehold Interests. After the 1905 supplemental adjudication, the next District 24 supplemental adjudication did not take place until 1935.<sup>203</sup> Accordingly, although the Sanchez System had been in use since 1912, the 1935 adjudication was the first time that San Luis Power's water rights created by use of the System were adjudicated.

In its statement of claim filed in the 1935 adjudication, San Luis Power sought recognition of water rights for each canal, ditch, and reservoir of the Sanchez System "from the unappropriated waters" of the Culebra and its tributaries.<sup>204</sup> Because the Freehold Interests were recognized as appropriated in the 1889 Decree,<sup>205</sup> San Luis Power appears not to have cited the Freehold Interests as a basis for its claimed appropriation of water rights for the Sanchez System. Indeed, the decree from the 1935 adjudication states: "no part of the water rights of said Sanchez System for direct irrigation [or storage] has heretofore been decreed."<sup>206</sup> Accordingly, the 1935 adjudication indicates that, post-*Vigil*, San Luis Power did not claim the Freehold Interests for use in the Sanchez system or seek to have the Freehold Interests transferred for use in the Sanchez System. Rather, in the 1935 adjudication the company sought recognition of new water rights to previously unappropriated water.

The conclusion that San Luis Power did not use the Freehold Interests in the Sanchez system post-*Vigil* is further supported by the fact that San Luis Power apparently did not include the Freehold Interests when it conveyed the Sanchez System and associated water rights to the Sanchez Ditch and Reservoir Company ("Sanchez Reservoir Co.") in

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203. 1935 Decree, *supra* note 95.

204. Sanchez Statement of Claim, *supra* note 166 at 5–18.

205. See Hallett Decrees, *supra* note 7, at 2; 1889 Decree, *supra* note 69.

206. 1935 Decree, *supra* note 95, at 83–84. The 1935 decree makes an exception to this statement for Eastdale 1 and 2 Reservoirs, the Eastdale 1 and 2 Canals, the Eastdale Culebra No. 1 Ditch, and the Culebra-Eastdale Ditch ("Eastdale structures"), as rights for these structures were decreed in the 1905 decree. *Id.* The claimant for rights for the Eastdale structures in the 1905 decree was the Eastdale Land, Canal, and Reservoir Company. 1905 Decree, *supra* note 138, at 26–29, 35. Because Costilla Investment owned the Freehold Interests in 1905, see *supra* note 141 and 142 and accompanying text, the water rights obtained for the Eastdale structures in the 1905 decree could not have been based on the Freehold Interests. Costilla Estate Co. acquired the Eastdale structures from Eastdale Land, Canal, and Reservoir Company in 1909, and transferred them to San Luis Power in the same year. Deed from Costilla Estate Co. to San Luis Power, *supra* note 95.

1956.<sup>207</sup> The deed for the Sanchez System specifically mentions one of the Hallett Decrees in the context of noting that the decree modified the San Acacio Ditch water right included in the deed.<sup>208</sup> However, the deed makes no other mention of the Hallett Decrees and does not include a catchall phrase transferring any and all unenumerated water rights belonging to San Luis Power.<sup>209</sup> In Colorado, when a deed expressly conveys specific water rights, unmentioned water rights are not implicitly conveyed.<sup>210</sup> Accordingly, because San Luis Power's deed to Sanchez Reservoir Co. expressly conveys specifically described water rights but does not mention the Freehold Interests, the deed could not have implicitly conveyed the Freehold Interests.

San Luis Power was voluntarily dissolved on December 28, 1956.<sup>211</sup> Because the company did not transfer the majority of the Freehold Interests to Sanchez Reservoir Co., at least some of the Freehold Interests remained in the ownership of San Luis Power upon its dissolution. Accordingly, the next Section examines what happened to the Freehold Interests after San Luis Power dissolved.

#### *D. Who Currently Owns the Freehold Interests?*

If San Luis Power, the last entity that held title to the Freehold Interests, ceased to exist in 1956, who holds title to the Freehold Interests today? The answer appears to be twofold. First, a title search conducted

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207. Quit-claim Deed from San Luis Water, *supra* note 202 (conveying Sanchez Reservoir and the water rights thereof, Mesita Reservoir and the water rights thereof, Eastdale #1 Reservoir storage priority 1934-1, Eastdale #2 Reservoir storage priority 1934-2, the Culebra-Sanchez Canal with water rights as described in 1935 decree, the Romero Ditch and water rights thereof, the Culebra-Cerritos Canal and water rights thereof, the Culebra Eastdale Ditch and water rights thereof, the Cordillera Ditch and water rights thereof, the Island Ditch and water rights thereof, priorities 61 and 7 for the Eastdale #2 Reservoir as laid out in 1905 general adjudication, priorities 60 and 6 for the Eastdale-Culebra #1 Ditch as laid out in 1905 general adjudication, and the San Acacio Ditch and the water rights thereof as modified by the Hallett Decrees and *Vigil v. Swanson*).

208. *Id.*

209. *Id.* The deed does say that the structures and water rights it conveys are transferred "together with all appropriations, filings, adjudications, application, users, decrees or filings made, entered, or availed of as incident thereto or therewith and all sites rights of way, and easements of and for said reservoirs . . . canals, ditches, and segments thereof conveyed hereby, with all structures thereon and appurtenances thereto." *Id.* However, because the Hallett Decrees do not involve any of the rights or structures transferred, they do not appear to be covered by this language.

210. *Nielson v. Newmyer*, 228 P.2d 456, 459 (Colo. 1951).

211. Colorado State Archives Records, San Luis Power & Water Co., No. 49249, Dec. 28, 1956 [hereinafter San Luis Power & Water Records].

by the authors revealed that Freehold and its successors transferred small portions of the Freehold Interests to landowners along the Hallett acequias between 1900, when the Hallett Decrees were entered, and 1956, when San Luis Power dissolved without transferring most of its remaining Freehold Interests to Sanchez Reservoir Co.<sup>212</sup> Accordingly, it is possible that a portion of the Freehold Interests are currently held by landowners along the original acequias, although further legal and title research would be required to determine if that is the case.<sup>213</sup>

Second, the portion of the Freehold Interests that were not alienated by Freehold or its successors, but instead remained in the possession of San Luis Power when it dissolved, are now held by the Costilla County Public Trustee. Under Colorado Law, title to the remaining interests of any corporation that dissolved prior to January 1, 1959 passed to its trustees, directors, or managers unless otherwise ordered by decree.<sup>214</sup> After dissolution, a deed was only valid if executed by all surviving directors.<sup>215</sup> A sole surviving director had authority to convey property formerly held by a corporation alone.<sup>216</sup> Upon the death of the last surviving director, the title to property formerly owned by the corporation passes to the Public Trustee of the county in which the property was situated.<sup>217</sup> In such a case, the Public Trustee has full power and authority to dispose of the corporate property on the corporation's behalf.<sup>218</sup>

The Costilla County Grantor Index contains no record of any conveyance of the Freehold Interests by San Luis Power to another entity before or after its dissolution on December 18, 1956.<sup>219</sup> In addition, as of 1987, no member of San Luis Power's final board of directors was still living.<sup>220</sup> Once all of the final board members of a Colorado corporation

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212. *See id.* San Luis Power explicitly transferred the Freehold Interests on the San Acacio Ditch to Sanchez Reservoir Co in 1956, but did not transfer any other Freehold Interest in that deed.

213. The results of the title search are on file with the authors. Because the title search was not conducted by a professional title company, the specific results are not included here.

214. COLO. REV. STAT. § 31-6-5 (1953).

215. *Whatley v. Wood*, 366 P.2d 570 (1961).

216. *Hochmuth v. Norton*, 9 P.2d 1060 (1932).

217. COLO. REV. STAT. § 38-30-171 (2014).

218. *Id.*

219. *See San Luis Power & Water Records*, *supra* note 211.

220. According to the Colorado State Archives records, the final board members of San Luis Power and Water upon its dissolution were Alice S. John, Gerald Hughes, Charles J. Hughes, W. Clayton Carpenter, and L. H. Larwill. The authors have not been able to demonstrate sufficient legal interest to obtain death certificates for those members who died in Colorado, but have been able to identify dates and locations of death for each



are deceased, Colorado Law gives the public trustee of the county in which any real property remaining in the name of corporation is located the power to dispose of that property.<sup>221</sup> As a result, the Public Trustee for Costilla County has the statutory authority to dispose of the Freehold Interests. Parts IV and V, below, deal with potential avenues for resolving the conflict over the Freehold Interests in light of this fact. Before moving on to potential resolutions, however, Section (e) examines a past attempt to resolve the lingering uncertainty created by the Hallett Decrees—the Colorado Division Engineer’s placement of the Freehold Interests on the 1984 abandonment list.

#### *E. The Division Engineer’s 1984 Abandonment List*

On July 1, 1984, the Colorado Division Engineer released an abandonment list for District 24 that listed the amounts of water granted to Freehold out of each acequia involved in the Hallett Decrees as abandoned.<sup>222</sup> Under Colorado law, a presumption of abandonment arises, and a water right may be listed on an abandonment list, when “the person entitled to use [the water available under the water right]” has not put the water to beneficial use for ten years or longer.<sup>223</sup>

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board member. If the parciantes or another party wishes to move forward with resolution, they would need to obtain proof of death for each of these board members.

221. COLO. REV. STAT. § 38-30-171(3)(b) (2014).

222. *Id.*

223. COLO. REV. STAT. § 37-92-402(11) (2014) (stating that 10 years of non-use creates a rebuttable presumption of abandonment).

**Table 3: Comparison of water rights granted to Freehold by the Hallett Decrees and water rights listed as abandoned on 1984 abandonment list (in cfs)<sup>224</sup>**

Name of Acequia	Water rights retained by parciantes under Hallett Decrees	Water rights granted to Freehold by Hallett Decrees	Water rights listed as abandoned on 1984 abandonment list
San Luis People's	13.5	9.5	9.5
San Pedro	10.5	9	9
Montez	0.25	0.75	0.75
Vallejos	8.5	8.5	8.5
San Acacio	23.25	22.75	22.75
Cerro	22.5	17.5	17.5
Francisco Sanchez	6.25	6.25	6.25
Mestas	2.25	2.25	2.25
San Francisco	10	6	6
Little Rock	0.25	0.75	0.75
Torcido	0.50	0.5	0.50
Abundo Martin	1.75	1.75	1.75
Guadalupe Vigil	2.5	1.5	1.5
J. M. J. Maez	0.75	0.75	0.75
Pando	0.65	0.6	0.6
Guadalupe Sanchez	2.5	2.75	2.75

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224. Colo. Div. of Water Res. Div. 3, Dist. 24 Division Engineer Abandonment List (1984); Hallett Decrees, *supra* note 7, at 1–35; Complaint, *Vigil v. Swanson*, *supra* note 80, at 13–14.

Some parciantes on each of the acequias with Freehold Interests protested the abandonment listings.<sup>225</sup> In their protests, the parciantes claimed that they owned the allegedly abandoned rights and used them on a “regular basis.”<sup>226</sup> Because the parciantes protested the listing of the water rights on the abandonment list, preparations were made for trials to determine whether the water rights had in fact been abandoned.<sup>227</sup> Sanchez Reservoir Co. intervened in the cases, claiming that findings of non-abandonment and subsequent use of the Freehold Interests would damage the company’s ability to receive water under its junior priorities for the Sanchez System.<sup>228</sup>

During pre-litigation procedures, the parciantes claimed that they owned the water rights in question and had been using them to irrigate their fields.<sup>229</sup> The Division Engineer asked the parciantes to admit that they did not own the water rights because the water rights had been transferred to Freehold by the Hallett Decrees, and that the parciantes had not “ever demanded or requested delivery of” the allegedly abandoned rights.<sup>230</sup> The Engineer also argued that even if the parciantes had been using the rights, use of a water right by a party that did not own the right could not serve as a defense to abandonment.<sup>231</sup> The last known

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225. See Amended Order Deleting Water Rights from the July 1, 1984 Abandonment Tabulation, Concerning the Abandonment List of the Div. Engineer for Water Div. No. 3, Nos. 84CW77, 84CW78, 84CW79, 84CW82, 84CW83, 84CW84, 84CW85, 84CW86, 84CW87, 84CW92, 84CW93, 84CW99, 84CW101, 84CW112, 84CW119, 84CW173, 84CW174 (Dist. Ct. Water Div. 3, Feb. 17, 1987) [hereinafter Amended Order].

226. See, e.g., Protest to Abandonment List at 2, Concerning the Abandonment List of the Div. Engineer for Water Div. No. 3, No. 84CW77 (Dist. Ct. Water Div. 3, Oct. 11, 1984).

227. See, e.g., Notice Setting Hearing, Concerning the Abandonment List of the Div. Engineer for Water Div. No. 3, No. 84CW77 (Dist. Ct. Water Div. 3, Mar. 22, 1985).

228. Motion to Intervene, Concerning the Abandonment List of the Div. Engineer for Water Div. No. 3, Nos. 84CW77, 84CW78, 84CW79, 84CW82, 84CW83, 84CW84, 84CW85, 84CW86, 84CW87, 84CW92, 84CW93, 84CW99, 84CW101, 84CW112, 84CW119, 84CW173, 84CW174 (Dist. Ct. Water Div. 3, June 28, 1985).

229. See, e.g., Protest to Abandonment List, *supra* note 226, at 2.

230. Request for Admissions, First Set of Interrogatories and Request for Production of Documents at 4, Concerning the Abandonment List of the Div. Engineer for Water Div. No. 3, Nos. 84CW78, 84CW79, 84CW82, 84CW83, 84CW86, 84CW87, 84CW92, 84CW93, 84CW99, 84CW101, 84CW112, 84CW124 84CW100 (Dist. Ct. Water Div. 3, Oct. 7, 1985).

231. Motion in Limine at 2–3, Concerning the Abandonment List of the Div. Engineer for Water Div. No. 3, Nos. 84CW77, 84CW78, 84CW79, 84CW82, 84CW83, 84CW84, 84CW85, 84CW86, 84CW87, 84CW92, 84CW93, 84CW99, 84CW101, 84CW112, 84CW119, 84CW173, 84CW174 (Dist. Ct. Water Div. 3, Oct. 28, 1985).

owner of the Freehold Interests, the Engineer contended, no longer existed.<sup>232</sup>

Before the protest cases went to trial, the Engineer and the parciantes entered into a stipulated settlement.<sup>233</sup> The stipulation noted that “all parties desire the preservation of the status quo where possible within the bounds of law,” and stated that the Engineer would delete the Freehold Interests from the abandonment list if the parciantes complied with a list of conditions.<sup>234</sup> In order for the rights to be removed from the list, the parciantes were required to: (1) provide the Engineer with a claimed “actual historically irrigated acreage” for each acequia; and (2) provide the Engineer with proof of the claimed “actual historically irrigated acreage” in the form of an aerial photograph study performed by the U.S. Soil Conservation Service or a private engineering firm.<sup>235</sup> The study was to determine “the highest amount and location of acreage which has been irrigated under each specific water right and priority . . . during the last 49 years.”<sup>236</sup>

Under the stipulation, the Engineer would accept the historically irrigated acreage verified by the study as long as the verified acreage did not exceed the acreage listed for each acequia in the Hallett Decrees (see Table 2 above).<sup>237</sup> The parciantes agreed to “accept and be bound by” the verified acreage even if it was a smaller amount than that listed in the Hallett Decrees.<sup>238</sup> The parciantes further agreed “to limit the use of the entire water right as originally decreed in 1889 to the . . . historically irrigated acres.”<sup>239</sup> Once historically irrigated acreage had been verified and accepted by both sides, a list would be attached to the stipulation specifying “the individual water rights and their corresponding legal

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232. *Id.* at 3 (stating that “[t]he State Engineer and Division Engineer contend that the last known owner of the amounts of the water rights which have been included in the abandonment tabulation no longer exist”).

233. Stipulation, Concerning the Abandonment List of the Div. Engineer for Water Div. No. 3, Nos. 84CW77, 84CW78, 84CW79, 84CW82, 84CW83, 84CW84, 84CW85, 84CW86, 84CW87, 84CW92, 84CW93, 84CW99, 84CW101, 84CW112, 84CW119, 84CW173, 84CW174 (Dist. Ct. Water Div. 3, Nov. 15, 1985) [hereinafter Stipulation Concerning Abandonment List in Water Div. No. 3].

234. *Id.* at 2.

235. *Id.*

236. *Id.*

237. *Id.* at 3.

238. Stipulation Concerning Abandonment List in Water Div. No. 3, *supra* note 233, at 4.

239. *Id.*

descriptions and verified historically irrigated acreage amounts.”<sup>240</sup> All parties agreed to be bound by the list.<sup>241</sup>

Both the U.S. Soil Conservation Service and a private engineering firm completed historically irrigated acreage studies as contemplated by the stipulation (the studies’ results are listed in Table 4 below).<sup>242</sup> However, disagreements developed between the Engineer and the parciantes regarding how the aerial photographs should be interpreted to determine “actual historically irrigated acreage.”<sup>243</sup> The Division Engineer refused to accept the results of the studies, asserting that the parciantes had not complied with the terms of the stipulation,<sup>244</sup> but nonetheless requested that the court enter an order deleting the Freehold Interests from the abandonment list.<sup>245</sup> The Engineer’s request indicated that the state would allow “status quo” conditions to return but would monitor the parciantes’ water usage to determine if it was harming other water right holders.<sup>246</sup>

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240. *Id.*

241. *Id.*

242. AM-COR ENGINEERS, INC., VERIFICATION OF ACTUAL HISTORICALLY IRRIGATED ACREAGE (1986); SOIL CONSERVATION SERVICE, U.S. DEPT. OF AGRIC., IRRIGATED ACREAGE MEASUREMET (1986).

243. *See* Letter from Richard Kadinger, lawyer for parciantes, to Steve Witte, Division Engineer (Jan. 27, 1986) (on file with authors) (alleging that the Engineer’s proposed specifications for the study are not in accord with the stipulation because they define historically irrigated acreage totoo narrowly); Letter from Steve Witte, Division Engineer, to Richard Kadinger, lawyer for parciantes (Feb. 6, 1986) (on file with authors) (alleging that parciantes’ proposed specifications for the study are not in accord with the stipulation because they define historically irrigated acreage too loosely).

244. Response to Protestants’ Motion to Dismiss and Vacate Trial Dates and Recitation of Legal Authority, Concerning the Abandonment List of the Div. Engineer for Water Div. No. 3, Nos. 84CW77, 84CW78, 84CW79, 84CW82, 84CW83, 84CW84, 84CW85, 84CW86, 84CW87, 84CW92, 84CW93, 84CW99, 84CW101, 84CW112, 84CW119, 84CW173, 84CW174 (Dist. Ct. Water Div. 3, Jan. 15, 1987) [hereinafter Response to Protestants’ Motion].

245. Motion to Delete from the July 1, 1984 Abandonment Tabulation, Water Div. No. 3, Concerning the Abandonment List of the Div. Engineer for Water Div. No. 3, Nos. 84CW77, 84CW78, 84CW79, 84CW82, 84CW83, 84CW84, 84CW85, 84CW86, 84CW87, 84CW92, 84CW93, 84CW99, 84CW101, 84CW112, 84CW119, 84CW173, 84CW174 (Dist. Ct. Water Div. 3, Jan. 9, 1987).

246. *Id.* at 1.

**Table 4: “Actual historically irrigated acreage” by acequia as determined by the U.S.S.C.S. and Am-Cor Engineers.<sup>247</sup>**

Name of Acequia	U.S.S.C.S. Acreage	Am-Cor Acreage	Acreage listed in Hallett Decrees
Maestas	220	222.5	180
Montez	13	12	12
Vallejos	1366	1290	680
Cerro	1867	1884	1,800
Little Rock	17	17	21
Guadalupe Sanchez	210	201	200
San Acacio	2446	2233	1,860
Guadalupe Vigil	353	320	200
Francisco Sanchez	336	326	500
San Luis People's	1710	1633	1,080
J.M.J. Maez	Not listed	Not listed	60
San Pedro	857	Not listed	840
Pando	48	Not listed	50
San Francisco	1178	Not listed	800

The parciantes did not support the Division Engineer's request, and instead asked the court to resolve the disagreement and enforce the stipulation.<sup>248</sup> The parciantes worried that the Engineer's conception of status quo conditions differed from their own,<sup>249</sup> and that even if the Engineer deleted the Freehold Interests from the abandonment list, he or future Engineers would still administer District 24 as if the rights had

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247. AM-COR ENGINEERS, INC., *supra* note 242; SOIL CONSERVATION SERVICE, U.S. DEPT. OF AGRIC., *supra* note 242.

248. *See* Motion for Relief from Judgment or Order and Recitation of Legal Authority, Concerning the Abandonment List of the Div. Engineer for Water Div. No. 3, Nos. 84CW77, 84CW85, 84CW87, 84CW92, 84CW93, 84CW119 (Dist. Ct. Water Div. 3, Jan. 26, 1987).

249. *Id.* at 2. The parciantes claimed that the Assistant Attorney General representing the State Engineer had sent the parciantes a letter stating that use of the Freehold Interests pursuant to the stipulation “would alter historic water usage and injure . . . vested rights.” *Id.* (quoting letter from Assistant Attorney General).

been abandoned.<sup>250</sup> For his part, the Engineer claimed that the parciantes had “repudiated” the stipulation during a status conference.<sup>251</sup>

On February 17, 1987 the court entered an order that deleted the Freehold Interests from the abandonment list but did not include the provisions of the stipulation.<sup>252</sup> As the Engineer requested, the order stated that the deletion of the rights “shall in no way preclude the . . . Engineer from placing the above-listed water rights on the 1990 Abandonment Tabulation.”<sup>253</sup> However, in an apparent attempt to address the concerns of the parciantes the order also stated that the deletion “shall in no way prejudice the rights of protestants under the Stipulation dated October 31, 1985, if any.”<sup>254</sup> Following this 1987 order, no further legal action has taken place to determine the legal ownership or status of the Freehold Interests and the issue of who, if anyone, owns the Interests or has the right to use them remains unresolved. Accordingly, Part IV evaluates potential legal avenues for resolving this issue.

#### IV. POTENTIAL LEGAL RESOLUTIONS

The following Part explores whether the Freehold Interests have been abandoned, whether the parciantes have the right to use the Interests because they are co-tenants in them, and whether the parciantes could regain control of the Freehold Interests through an adverse possession action. The Freehold Interests likely are subject to a presumption of abandonment, and the parciantes likely are not co-tenants in the Interests. The parciantes, however, may have adversely possessed the Freehold Interests by using them. Although it is possible that the parciantes could prevail in an adverse possession action, it is likely that this path would be prohibitively expensive and suffer from the same factual difficulties that the parciantes confronted in the 1984 Abandonment List settlement negotiations, during which conflict arose around proof of historically irrigated acreage. Therefore, a different strategy for resolution of the ownership of the Freehold Interests is proposed in Part V. This Part,

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250. Memorandum Brief in Support of Motion to Alter or Amend Orders, or for New Trials at ¶ 5, Concerning the Abandonment List of the Div. Engineer for Water Div. No. 3, Nos. 84CW77, 84CW78, 84CW79, 84CW82, 84CW83, 84CW84, 84CW85, 84CW86, 84CW87, 84CW92, 84CW93, 84CW99, 84CW101, 84CW112, 84CW119, 84CW173, 84CW174 (Dist. Ct. Water Div. 3, Jan. 26, 1987).

251. Response to Protestants’ Motion, *supra* note 244, at 2.

252. Amended Order, *supra* note 225.

253. *Id.* at 4.

254. *Id.*

however, contains important information for the parties as they consider their legal position.

A. *The Freehold Interests Likely Are Subject to a Presumption of Abandonment*

“‘Abandonment of a water right’ means the termination of a water right in whole or in part as a result of the intent of the owner thereof to discontinue permanently the use of all or part of the water available thereunder.”<sup>255</sup> A period of ten years of non-use creates a rebuttable presumption of intent to abandon “by the person entitled to use [the water right].”<sup>256</sup> Because the majority of the Freehold Interests were not transferred to an entity that currently exists, the Interests have apparently not been used “by the person entitled to” do so since at least 1956.<sup>257</sup> The Interests are therefore subject to a presumption of abandonment.

Because Freehold evidently owned some land along some of the acequias,<sup>258</sup> it is possible that Freehold could have legally used the Freehold Interests by leasing out land and accompanying water served by the original acequias. However, if Freehold or its successors attempted to use the Freehold Interests on land other than that to which it was decreed in 1889, such use would not rebut a presumption of abandonment.

Colorado courts have held that use of a water right through an unofficially changed point of diversion can lead to a presumption of abandonment but is not necessarily enough to prove intent to abandon.<sup>259</sup> Rather, they have emphasized that even when the actual point of diversion is different from that described in the decree, if the right is being used for the purposes and on the land described, abandonment cannot be proven.<sup>260</sup> Therefore, use by Freehold, its lessees, or

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255. COLO. REV. STAT. § 37-92-103 (2014).

256. *Id.* § 37-92-402(11).

257. See discussion of undivided interests *infra* Part IV.B.

258. See *supra* discussion of Costilla Investment’s participation in the 1905 supplemental adjudication in Section II.D.

259. *Wolfe v. Jim Hutton Educ. Found.*, No. 2015 CO 17, slip op. at 2 (Colo. 2015) (“We hold that when the Engineers prove that the water rights holder has not used the decreed point of diversion for ten years or more, the Engineers trigger the rebuttable presumption of abandonment . . . Once triggered, the burden shifts to the water rights holder to demonstrate a lack of intent to abandon”).

260. See, e.g., *Means v. Pratt*, 331 P.2d 805, 807 (Colo. 1958) (“That the point of diversion as fixed in the original decree renders it impossible to divert water into the ditch, as originally located, strongly suggests that such point was erroneously described and fixed in the decree. If the users of this water intended to, and thought that they were diverting water from Dry Creek under the decreed priority . . . certainly no intention to



successors in interest on land served by the original acequias would likely rebut a presumption of abandonment for that period of use.

Colorado courts have not considered an abandonment case in which the place of use, in addition to the point of diversion, has been changed. The Colorado Supreme Court has, however, held that use of water rights for non-decreed uses cannot be used to establish historical use for the purpose of a change-in-use proceeding.<sup>261</sup> In *Santa Fe Trail Ranches Property Owners Association v. Simpson*, Santa Fe Trail Ranches sought to change the use of two water rights originally decreed to Colorado Fuel and Iron Company.<sup>262</sup> The original rights were for domestic and manufacturing uses, but were leased by Colorado Fuel and Iron to El Moro Ditch for irrigation purposes through a different point of diversion for more than thirty years.<sup>263</sup> Although Colorado Fuel and Iron never sought a change in use for its lease to El Moro Ditch, Santa Fe Trail Ranches presented evidence of historic use by El Moro Ditch to the Water Court as part of its own change in use application.<sup>264</sup> The Water Court held and the Colorado Supreme Court confirmed that: “an undecreed change of use of a water right cannot be the basis for calculating the amount of consumable water that can be decreed for change to another use.”<sup>265</sup> Because use of water for an undecreed use at an undecreed location cannot be the basis for calculating historical use of a water right, it is likely that a court would hold that use of a water right at an undecreed location cannot rebut a presumption of abandonment.

In light of *Santa Fe Trail Ranches*, it is unlikely that Freehold could have avoided abandoning the Freehold Interests by using them on land that they were not decreed to. It is possible, however, that Freehold could have avoided abandonment if it continued to use the Freehold Interests

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abandon can be inferred . . . all of the evidence points to a regular and continued diversion and use of water from Dry Creek for the irrigation of this farm for more than 40 years.”); *see also* *Corey v. Long*, 138 P.2d 930, 932 (Colo. 1943) (“The defendants, by changing the point of diversion, or by procuring a priority decree in which the point of diversion was erroneously described, did not thereby lose the right to the water which they had theretofore appropriated and which they had continued to use.”).

261. *Santa Fe Trail Ranches Prop. Owners Ass’n v. Simpson*, 990 P.2d 46, 49 (Colo. 1999) (“Diversion made pursuant to a decreed water right, when not used for decreed uses, may not be considered as establishing historical use for the purpose of a change of water right proceeding, regardless of whether the water commissioner was aware of such diversions and did not order their discontinuance or curtailment.”).

262. *Id.*

263. *Id.* at 50.

264. *Id.* at 51.

265. *Id.* at 52.

on land served by the acequias the Interests were originally decreed to, even if the use was via a different point of diversion.

*B. The Parciantes Likely Are Not Co-Tenants in the Freehold Interests, and It Is Thus Unlikely That Their Use of the Freehold Interests Prevented Abandonment*

A water right that is used by a co-tenant in the right is not subject to abandonment due to lack of use.<sup>266</sup> Accordingly, because the Freehold Interests are likely subject to a presumption of abandonment, whether or not a court would find that they have been abandoned may turn on whether parciantes on the original acequias are co-tenants in the rights with Freehold and its successors. Colorado case law suggests that it is unlikely that a court would find that the parciantes are co-tenants in the Freehold Interests..

In *Cache La Poudre Irrigation Company v. Larimer & Weld Reservoir Company*, the Supreme Court of Colorado held that where two or more people are co-tenants in a water right, use of the water right by any co-tenant avoids abandonment.<sup>267</sup> However, a subsequent case, *City and County of Denver v. Just*, limited the *Cache La Poudre* holding by stating that normally only stockholders in mutual ditch companies and co-tenants of irrigated land are co-tenants in water rights.<sup>268</sup>

In *Just*, the single holder of a water right for a ditch executed a quitclaim deed that divided the water right into shares and conveyed a specific number of shares to each of nine other landowners along the ditch.<sup>269</sup> Years later, Denver claimed that the rights held by one of the landowners had been abandoned because the rights had not been used by that landowner for an extended period of time.<sup>270</sup> Citing *Cache La Poudre*, the trial court held that the rights had not been abandoned because they had been used by other rights holders on the ditch.<sup>271</sup> The Supreme Court of Colorado reversed the trial court, holding that the landowners were not co-tenants in the water right, and that use by a non-co-tenant was not a defense to abandonment.<sup>272</sup> The Supreme Court

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266. See *Cache La Poudre Irrigation Co. v. Larimer & Weld Reservoir Co.*, 53 P. 318 at 320–21 (Colo. 1898).

267. See *id.* (stating that “one tenant in common may preserve the entire estate held in common”).

268. *City and County of Denver v. Just*, 487 P.2d 367, 369 (Colo. 1971).

269. *Id.* at 367–68.

270. *Id.* at 368.

271. *Id.* at 368–69.

272. See *id.* at 369.

distinguished *Cache La Poudre* by noting that *Cache La Poudre* involved a mutual ditch company while *Just* did not.<sup>273</sup> The court stated that “[e]xcluding consideration of stockholders in mutual ditch companies, ordinarily, for persons to be tenants in common in an irrigation water right, they must be owners as tenants in common of the lands upon which the water is used.”<sup>274</sup> Because the water right deed conveyed “designated fractional amount[s] of a water priority” rather than “undivided interests in co-tenancy,” the court held that the deed did not create a co-tenancy in the water right even if doing so was possible outside of a mutual ditch company or co-tenancy in land.<sup>275</sup> The court distinguished the ownership structure in *Just* from a mutual ditch company by noting that in *Just*, there was no attempt to transfer ownership of the water right “to the ditch or to a community of persons owning the ditch.”<sup>276</sup>

The *Just* court did not exclude the possibility that co-tenancy in a water right might arise outside of a mutual ditch company or co-tenancy in irrigated land, and in *Kountz v. Olson*, the court found that co-tenancy existed without either.<sup>277</sup> In *Kountz*, ten water users on a single ditch agreed orally that each would hold a one-tenth “interest” in the ditch and its water right.<sup>278</sup> The court stated that through their agreement, the users “became tenants in common.”<sup>279</sup>

While the parciantes on the acequias affected by the Hallett Decrees might be held to be co-tenants with one another in their water rights,<sup>280</sup> it

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273. *Just*, 487 P.2d at 369.

274. *Id.* (citing *City of Telluride v. Davis*, 80 P. 1051 (Colo. 1905)). The *Telluride* court held that there is no co-tenancy in a water right where the holders of the right use their portions of the right on separately owned pieces of land because in such a situation “the right to a unity of possession necessary to constitute a tenancy in common d[oes] not extend to the right of user, which is essential to the existence of such a tenancy in a water right.” *Telluride*, 80 P. at 1052.

275. *Just*, 487 P.2d at 369–70.

276. *Id.* at 370.

277. *Kountz v. Olson*, 29 P.2d 627, 629 (Colo. 1934).

278. *Id.*

279. *Id.* Though the water users in *Kountz* had equal interests in their water right, equal interests are not required for co-tenancy to exist. 20 Am. Jur. 2d Co-tenancy and Joint Ownership § 31 (stating that in co-tenancy, property “may be owned in equal or unequal undivided shares, with each person having an equal right to possess the whole property”).

280. Acequia parciantes may be co-tenants in their acequia’s water rights because an acequia is like a mutual ditch company. Currently, “acequia ditch corporations” are governed by COLO. REV. STAT. § 7-42-101.5 (2014), which is located in the same section of statutes that govern mutual and carrier ditch companies. Acequias are more like mutual ditches than carrier ditches because mutual ditches are nonprofit organizations created to

is unlikely that Freehold became a co-tenant with the parciantes as a result of the Hallett Decrees. Like the water deed in *Just*, which conveyed “designated fractional amount[s] of a water priority” rather than “undivided interests in co-tenancy,”<sup>281</sup> the Hallett Decrees appear to divide the priorities, transferring specific amounts of water to Freehold.<sup>282</sup> Co-tenancy requires that each co-tenant have the right to possess the entire property,<sup>283</sup> but the Hallett Decrees state that Freehold is “entitled to take and use” the portion of each priority transferred to it, whereas the parciantes are entitled to “the remainder” of each priority, suggesting that neither party has the right to possess the entire water right.<sup>284</sup> *Just* and *Kountz* suggest that co-tenancy arises only when parties intend or arrange for a water right to be held in common. Accordingly, it is likely that a court would hold that Freehold and the parciantes were not co-tenants in the Hallett decree water rights. Because it is unlikely that the Hallett Decrees made Freehold and the parciantes co-tenants in Freehold Interests, and because use by a non-co-tenant is not a defense to abandonment, it is unlikely that use of the Freehold Interests by the parciantes would rebut a presumption that the rights have been abandoned.

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distribute water to shareholders who own water rights, while carrier ditches are for-profit companies that own water rights and sell water to customers. (See *Nelson v. Lake Canal Co. of Colo.*, 644 P.2d 55, 57–58 (Colo. App. 1981). In addition, COLO. REV. STAT. § 7-30-101(2) (2014) recognizes that acequias are “nonprofit association[s]”). Because acequias are community organizations that treat water as a communal resource, they share the cooperative nature of a mutual ditch company and the arrangement between the water users in *Kountz*. Accordingly, it is possible that parciantes on the acequias affected by the Hallett Decrees could have been or could be co-tenants in the water rights of their respective acequias.

Furthermore, the mutual ditch company system was modeled, in Colorado, on the acequia system. In the 1870s, Benjamin Eaton, who had worked on the Maxwell Grant in New Mexico, came to Greeley, Colorado, where he built the Union Colony No. 2 canal modeled in part on the acequias he had observed in New Mexico. Eaton went on to build the High Line Canal in Denver and the Weld Canal in Fort Collins, and was Governor of Colorado from 1885 to 1887. See generally JANE E. NORRIS & LEE G. NORRIS, WRITTEN IN WATER: THE LIFE OF BENJAMIN HARRISON EATON (1990). This historical connection further supports the proposition that acequia irrigators, like members of a mutual ditch company, should be considered co-tenants in their water rights.

281. *City and County of Denver v. Just*, 487 P.2d 367, 369–70 (Colo. 1971).

282. See Hallett Decrees, *supra* note 7.

283. See 20 Am. Jur. 2d Co-tenancy and Joint Ownership § 31.

284. *U.S. Freehold Land & Emigration Co. v. Albert*, No. 2548, slip op. at 2 (C.C.D. Colo. Filed July 17, 1900).

*C. The Parciantes Could Potentially Rebut a Presumption of Abandonment Through Adverse Possession*

While a non-co-tenant's use of a water right cannot rebut a presumption of abandonment, such use can defeat that presumption through adverse possession.<sup>285</sup> Although adverse possession cannot revive a water right that has been abandoned,<sup>286</sup> "evidence rebutting the presumption of abandonment may . . . be adduced by an adverse possession claimant who demonstrates his or her continuous use of [a] deeded owner's interest in [an] adjudicated water right."<sup>287</sup> Accordingly, the parciantes' use of the Freehold Interests could rebut a presumption of abandonment if such use was demonstrated in connection with an adverse possession claim and the parciantes could prove that their adverse use occurred before the Freehold Interests were abandoned.<sup>288</sup>

Under Colorado law, water rights are considered real property and are subject to adverse possession under the terms of Colorado's adverse possession statutes.<sup>289</sup> Adverse possession of water rights can only occur "between rival claimants to the possession and use of water . . . after the water's diversion from the stream pursuant to an adjudicated water right."<sup>290</sup> As only Freehold and the parciantes owned water rights on the acequias affected by the Hallett Decrees,<sup>291</sup> the parciantes would have used the Freehold Interests by using any amount of water greater than the amount they retained under the Hallett Decrees. Because adverse

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285. *Archuleta v. Gomez*, 200 P.3d 333, 344 (Colo. 2009).

286. *Id.* at 344.

287. *Id.*

288. *Coffey v. Emigh*, 25 P. 83, 86 (Colo. 1890) (quoting *Bush v. Stanley*, 13 N.E. 249 (Ill. 1887) (Because "[t]he doctrine of laches can only be invoked by one in possession against one out of possession," and cannot defeat an adverse possession claim, the long period of time between when the parciantes may have obtained ownership of the Hallett rights and when any potential claim of adverse possession may be brought in the future should not be a barrier to a claim of adverse possession). Additionally, because "a grantor may originate a possession adverse to his grantee," the fact that the parciantes granted the Hallett rights to Freehold through the Hallett Decrees does not bar the parciantes from adversely possessing the rights. *Hitchens v. Milner Land, Coal & Townsite Co.*, 178 P. 575, 577 (Colo. 1919).

289. COLO. REV. STAT. §§ 38-41-101, -106 (2014). COLO. REV. STAT. § 38-41-106 applies when property is adversely possessed under color of title and is thus not applicable to the present case. COLO. REV. STAT. § 38-41-101 applies when property is adversely possessed without color of title, and provides that "[e]ighteen years' adverse possession of any land shall be conclusive evidence of absolute ownership."

290. *Archuleta*, 200 P.3d at 342.

291. *See U.S. Freehold Land & Emigration Co. v. Albert*, No. 2548, slip op. at 2 (C.C.D. Colo. July 17, 1900).

possession cannot revive an abandoned water right, determining the validity of an adverse possession claim requires assessing whether the right's record owner abandoned it before the adverse possession occurred.<sup>292</sup> In order to obtain ownership through adverse possession, a claimant must adversely possess a piece of property continuously for the required statutory period,<sup>293</sup> which was twenty years in 1908.<sup>294</sup> The Colorado Supreme Court has also noted that: "adverse possession [of a water right] is very difficult to establish."<sup>295</sup>

The reason that adverse possession is so difficult to establish is that claimants are required to demonstrate actual possession of a disputed water right through beneficial use.<sup>296</sup> The Colorado Supreme Court has held that proof of beneficial use requires quantification of that use, stating that in order to show actual possession, a claimant must "establish, by a preponderance of the evidence, the amount of water expressed in acre feet belonging to the deeded owner's water right that the adverse claimant has placed to beneficial consumptive use."<sup>297</sup> Where a claimant holds water rights in addition to those he claims through adverse possession, the claimant must show that his total beneficial use of water was greater than that allowed under his own rights.<sup>298</sup>

In order for the parciantes to make a valid claim of adverse possession of the Freehold Interests they would need to produce evidence that they have, in fact, used the Interests. Supporting such a claim would require a detailed investigation by a water engineer employing aerial photos and other evidence of use during the required statutory period, and would also require refuting inevitable cross-claims of abandonment.

## V. RECOMMENDATION FOR A RESOLUTION

The Hallett Decrees were valid binding agreements between the parciantes and Freehold and accordingly transferred portions of the parciantes' water rights to Freehold. Under *Vigil v. Swanson* and in accordance with Colorado and federal case law, however, the Division Engineer and Water Commissioner for Water District 24 are required to

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292. Archuleta, 200 P.3d at 344.

293. See *Hodge v. Terrill*, 228 P.2d 984, 988 (1951).

294. COLO. REV. STAT. § 4084 (1908).

295. Archuleta, 200 P.3d at 344.

296. *Id.* at 343, 346.

297. *Id.* at 346.

298. *Id.* at 346-47.

deliver the Freehold Interests to the acequias as the rights were originally decreed in the absence of a change decree issued by a Colorado water court.<sup>299</sup> Accordingly, because a water court never entered a change decree for the Freehold Interests, current parciantes on the original Rio Culebra acequias would be legally justified in calling for the Freehold Interests to be delivered to their acequias. Calling for the Freehold Interests, however, would likely result in the state or junior right holders initiating legal action to have the Freehold Interests declared abandoned. Junior appropriators would likely feel that reactivation of the Freehold Interests would greatly decrease the juniors' likelihood of receiving water. In addition, the state might feel obligated to protect the rights of juniors and preserve what it views as the status quo.

Because the Freehold Interests' last record owner no longer exists,<sup>300</sup> and use of a water right by a non-owner is not a defense to abandonment,<sup>301</sup> it is likely that a court would rule that the Freehold Interests have been abandoned unless the parciantes can successfully demonstrate that they adversely possessed the Interests before abandonment occurred.<sup>302</sup> Although it is possible that the parciantes adversely possessed the Freehold Interests if they regularly used the rights, the extent to which they did so over the past 115 years is unclear.<sup>303</sup> Even if the parciantes have regularly used the Freehold Interests, providing the level of proof required to demonstrate adverse possession—quantification of the amount of water historically beneficially used under the claimed water right—would be complex and expensive.

Because litigation regarding abandonment or adverse possession would be costly, contentious, and unpredictable, a settlement agreement between all affected parties is likely the most desirable and cost-effective way to resolve ownership of the Freehold Interests. Furthermore, the settlement process would provide a venue that, unlike litigation, would be flexible enough to take into account the tortuous history of the Hallett Decrees and the interests of all involved, in order to reach an equitable solution. As discussed in Section IV (d), above, the Costilla County Public Trustee obtained the power and authority to dispose of the Freehold Interests that remained the property of San Luis Power upon the last board member's death in 1987.<sup>304</sup> However, this power is not

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299. *See supra* Section III.A.

300. *See supra* Section III.D.

301. *See supra* Section IV.A.

302. *See supra* Section IV.C.

303. *See id.*

304. COLO. REV. STAT. § 38-30-171 (2014).

unfettered. For example, the Public Trustee should not convey the Freehold Interests to herself or to a friend or family member, except to the extent to which she or they had a valid claim to use the Freehold Interests in their decreed locations as of 1987. As an additional example, the Public Trustee should not convey the Freehold Interests to a place where they cannot lawfully be used. Such a conveyance would seemingly be beyond the authority of the Public Trustee because only the water court can approve a change in location of use, and the court might nullify or call into question the right purporting to be conveyed, thereby causing unlawful waste by the Public Trustee of the property interest. Thus, the only permissible alternative for the Public Trustee appears to be to convey the Freehold Interests to the landowners who could lawfully make use of the Freehold Interests in their decreed location, subject to the possible claim that all or a portion of the Interests have been abandoned. Such a conveyance could consist of undivided interests in the appropriate amount of water to individual parciantes or to the respective acequias for the use of its parciantes.

Settlement negotiations should include all users on the original acequias and the Public Trustee, and should also be open to other water rights owners. Each party may desire to hire its own lawyer or advocate, and all parties would likely benefit from the appointment of a neutral mediator to oversee the process. Settlement will necessarily avoid injury to other users on the Culebra, which as a practical matter probably means preserving the status quo to the extent possible.<sup>305</sup> The settlement process has the advantage of avoiding the zero-sum approach of litigation, and could account for the needs of junior users through partial abandonment of the Freehold Interests or a later stipulated administration date for any Freehold Interests transferred back to the parciantes or the acequias. If the parties reached a solution, it would need to be adopted by the water court to be legally enforceable because it would involve the use of water rights. The agreement of other water rights owners to settlement is accordingly crucial to avoid litigation on the question of injury.

As climate change and long-term drought continue to affect the water resources of the San Luis Valley, clarifying the legacy of the Hallett Decrees and the state of ownership of the Freehold Interests will likely become of increasing importance for all water users on the Rio

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305. There appear to be some unofficial policies and practices in place on the Culebra that are aimed at equitable and workable water distribution amongst users in the system. Based on conversations with water users and state officials, the authors were not able to discern a clear or universally understood scheme to these policies and practices. Defining the status quo, therefore, would likely be a major component of the settlement negotiations.



Culebra. Although there is certainly reason for parciantes to be wary of initiating a reduction of the water rights decreed to the acequias, it is likely that the state of water resources on the Rio Culebra will eventually force the issue to some kind of legal resolution. As one user pointed out at the 2014 Congreso de Acequias<sup>306</sup> in San Luis, the longer this issue remains unresolved, the more difficult it is for acequias and individual parciantes to plan for the future.

## VI. CONCLUSION

The history of non-Indigenous settlement of the West is a story of optimism, greed and speculation, conflicts between majority and minority groups, and the persistent quest for water in what was once called “The Great American Desert.”<sup>307</sup> The story of the Rio Culebra and the conflicts that arose there between Hispanic settlers and later Euro-American developers is one that played out across the West between different actors in different watersheds. On the Rio Culebra this conflict took the form of an 1889 Decree awarding recognized water rights to the parciantes, complicated within a decade by a law suit brought in federal court by the United States Freehold Land and Emigration Company. That lawsuit ended in the Hallett Decrees, settlement agreements that transferred almost half of the water rights awarded to the parciantes in 1889 to Freehold. The parties went back to state court in 1914, arguing over whether the Hallett Decrees were valid. The state court concluded, in a decision captions *Vigil v. Swanson*, that the Decrees validly transferred the Freehold Interests from the parciantes to Freehold, but did not authorize their use in any place other than those to which they were decreed in 1889. Apparently *Vigil v. Swanson* did little to clarify things on the ground, and Freehold and its successors in interest never legally transferred or used more than a small portion of the Freehold Interests before the final owner, San Luis Power and Water, dissolved in 1956. The last living board member of San Luis Power passed away in 1987, leaving the task of disposing of the remaining Freehold Interests to the Public Trustee of Costilla County. This twist of fate has created an opportunity for the parciantes to seek a return of at least some portion of the Freehold Interests, transferred to Freehold under unequal and perhaps

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306. The Congreso de Acequias is an annual event put on by the Sangre de Cristo Acequia Association, where parciantes from all around the San Luis Valley gather to share information about acequias and water law in their communities.

307. See 2 EDWIN JAMES, AN ACCOUNT OF AN EXPEDITION FROM PITTSBURGH TO THE ROCKY MOUNTAINS, PERFORMED IN THE YEARS 1819, 1820 236–37 (1823).

unjust circumstances, through a settlement negotiation that has the potential to reach an equitable solution unavailable through litigation.