Rethinking Legal Pluralism: Local Law and State Law in the Evolution of Water Property Rights in Northwestern Spain

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In recent years, approaches to legal pluralism have shifted dramatically. One shift comes from within a school of fieldwork-oriented anthropologists, historians, and sociologists known as the law-and-society movement.[1] Before the turn, law-and-society scholars viewed local, national, and transnational legal systems as coexisting but essentially separate. Criticisms of the inherent stasis of this formulation and its failure to explore interactions between the systems or power inequalities among them motivated the shift (Griffiths 1986; Starr and Collier 1994; Merry 1988, 1992). The new legal pluralism, as it is called, now includes an expanded range of normative ordering systems, often labeled private governance, found in all societies, not only those with colonial histories but also those produced by transnational processes (Galanter 1981; Merry 1992). It addresses the dialectic, mutually constitutive relations of these systems rather than their separateness (Arthurs 1985; Benda-Beckman and Strijbosch 1986; Fitzpatrick 1983; Henry 1985; Vanderlinden 1989).

The theoretical underpinnings of the new legal pluralism draw heavily on questions of culture and power. In Geertz's influential view (1983), law is an imaginative structure of meaning similar to others, such as classification, art, ideology, or ritual. Symbols provide the material for the creation, communication, and imposition of such structures. The appropriate method to study law is, then, the hermeneutic search for the ideas that underlie the social institutions and cultural formulations of law, rather than the postulational examination of how logical principles inform structures of thought and practice. Law's ability to bestow authority and legitimacy on categories and systems of meaning, rendering them natural and just, gives it tremendous power. This potential has been taken up within legal scholarship by critical legal scholars (Critical

[1] The *Law and Society Review,* and to a lesser extent, *Law and Social Inquiry,* are the main outlets of the movement. Studies of legal pluralism are published in these journals and increasingly so, since its founding in 1981, in the *Journal of Legal Pluralism.*

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Legal Studies Symposium 1984; Kairys 1982; Kennedy 1982). Law-and-society scholars now combine notions of resistance with Gramscian ideas of hegemony to offer an alternative explanation of legal pluralism to cultural heterogeneity (Gramsci 1971; Lazarus-Black and Hirsch 1994; Starr and Collier 1994). Legal pluralism, in this view, reflects alternative sites of counter-hegemonic discourse, inspired by Foucault's dichotomy of power and resistance, and arenas of political struggle by subjugated groups (Foucault 1979; Scott 1985).

Introducing culture and power into discussions of legal pluralism has unquestionably expanded scholarly discourse and provided new insights into the diversity of normative orders, cultural heterogeneity, hegemony, and resistance. Advocates of culture and power resist linking law with economics, however, largely because of their mistrust of the normative and efficiency claims of microeconomic theory.[2] In the 1980s, a new approach to the study of economic systems took shape.[3] The new institutional economics (NIE), as it is called, conceptualizes property as a contractual relationship between agents who assign rights of exclusivity and transferability to specific resources.[4] The NIE argues that transaction costs, the costs of capturing, transferring, and protecting these rights, are positive in contrast to the assumption of zero transaction costs in neoclassical models. High transaction costs lead to institutional solutions, such as the firm, to manage and lower them (Coase 1988[1937]). The acceptance of the role of ideology and interest-group politics sets NIE apart from microeconomic theory, removing one of the major criticisms of critical legal studies. At the least, it suggests a reappraisal of linkages between law and economics in explaining legal pluralism.

Although the NIE has produced a vibrant law-and-economics movement, an excessively centric, Hobbesian, bias toward the state as the chief source of rules and enforcement procedures kept the movement from appreciating the role and scope of local and alternative legal arenas.[5] This is changing. A small but influential and growing number of law-and-economics scholars now use

[2] Geertz's position can be found in his book, *Local Knowledge* (Geertz 1983:172). Attacks by critical legal scholars on law and economics are particularly vitriolic—they are reviewed by Kornhauser (1984).

[3] Nobel Prizes were awarded in 1991 to its founder, Ronald Coase, and in 1993 to its principal proponents in economic history, Douglas North and Robert Fogel. Two of Coase's articles, "The Nature of the Firm" (1937), and "The Problem of Social Cost" (1960), are considered the canonical writings of the school; they and other works by the author are collected in Coase (1988). Comprehensive treatments of the NIE can be found in Eggertsson (1990) and Williamson (1985). See Barzel (1989) and Libecap (1989) for influential models of NIE applied to property rights.

[4] An "older" institutional economics based on the work of John R. Commons and Thorstein Veblen flourished before World War II but waned as the neoclassical paradigm came to the fore.

[5] Coase's article, "The Problem of Social Cost," is the most cited article on law. The *Journal of Law and Economics* is the main vehicle of the law-and-economics movement, although the *Journal of Legal Studies* also publishes their work. See Oliver Williamson (1983: 520, 537) on legal centralism.

empirical studies and NIE theory to expand its reach to legal pluralism.[6] Of these, Ellickson's analysis of the response of Shasta County California neighbors to cattle trespass stands out (1991). Shasta County neighbors develop informal norms to solve their property disputes rather than rely on formal legal rules. This occurs not because they bargain successfully in the context of zero transaction costs, as the Coase Theorem suggests, but by developing and enforcing sociable norms of neighborliness.[7] Ellickson is reluctant to characterize this response as an alternative legal system to state law, preferring to think of it as a system of informal norms.[8] In this he shares the law-and-society movement's affinity with normative orders while discounting questions of culture and power. In essence, private governance coexists with, but remains separate from, state law.

This study attempts to bridge the divide between the law-and-economics and law-and-society movements in rethinking legal pluralism. The key to understanding legal pluralism is the role local and alternative legal systems play in enabling property rights that, while specified in state law, are imperfectly defined and defended. They do this by adjusting property rights to local conditions and alternative forms of resource management. Informal norms, in this regard, regulate, at low cost, non-market "transactional modes" not only in stateless or so-called "primitive societies" but also in state societies (Polanyi 1944; Ellickson 1991). Normative ordering, however, is but one dimension of legal pluralism and, paradoxically, too narrow and too inclusive to ground a theory of legal pluralism.

Local legal systems, moreover, exist in a dialectical, mutually constitutive, relation with state law. The dialectic turns not on cultural heterogeneity and resistance to hegemonic power but on the definition and defense of property rights. This suggests the rethinking of a frequently heard argument concerning law in transaction cost economics (Eggertsson 1990:113–6). In Posner's view (1977), the assignment of property rights in common law is left to the market when the costs of transacting are low; when costs are high, the state intervenes. One solution to high transaction costs is to allocate exclusive rights directly to owners by partitioning a resource and placing sanctions on its later transfer. This solution requires a flexible legal system, one capable of acting quickly to reassign rights when circumstances change. Another solution is to alter the structure of property rights to facilitate market exchange, for example, by dismantling common property regimes and enforcing exclusive rights.

[6] See also Cheung (1973)

[7] In "The Problem of Social Cost," Coase predicted that with zero transaction costs, a change in liability rules will have no effect on the allocation of resources because parties will bargain to achieve cooperative outcomes. Transaction costs are positive in maintaining Shasta County property rights.

[8] Ellickson titles his book (1991) "Order without Law."

This essay suggests a different tack. The state can selectively disengage from law, empowering other agents, often at the local level and informal, to define and defend property rights, even when their provisions are clearly at odds with state law. Voluntary agreements and extralegal institutions grounded in local knowledge dramatically reduce the costs of state legal and judicial institutions. Informal arrangements can become more structured and establish rulings, tested subsequently in state courts and confirmed as legal precedent (Libecap 1989:87–90). Over time, the state reaps the benefits of more efficient property rights and obtains precedents for the revision of state law and judicial procedure.[9]

Such an argument will be developed through an analysis of the evolution of water property rights in northwestern Spain.[10] Spain is unusually apt for studying legal pluralism in the evolution of property rights. Throughout the Middle Ages, local and regional custom combined with *fueros*—written charters, statutes, and privileges—to order rural life and militate against a tradition of legal and juridical institutions (Kleffens 1968:122–35). Water was one of the resources managed at the local level. Local law often took precedence over Castilian law and, when it eventually lost the contest, continued to be drawn on as a body of precedent in national legal codes. In the late nineteenth century, local custom resurfaced in the agenda of a national regeneration movement reacting against centralizing institutional reforms.[11] The tension between local law and state law in Spain continues to be a reality of rural life.

Spanish irrigation systems also are quite old, dating in many instances to the Roman and Islamic periods and illustrate well the issues surrounding the evolution of property rights in water (Butzer, Mateu, and Butzer 1985; Glick 1970, 1979; Sol Clot and Torres Grael 1974). The large-scale, long-canal systems of Valencia, Murcia, Orihuela, and Alicante in eastern Spain are commonly cited today in the NIE literature as examples of long-term, successful, and robust common pool regimes (Maas and Anderson 1978; Ostrom 1990:69–82). The Tribunal of Waters, a joint session of the syndics of the

[9] For example, in the California gold rush, "The state was approving and agreeing to enforce (at least in the courts) the miners' rights to agree among themselves how to work the mineral lands" (Umbeck 1977:204). Unions and trade associations in the United States, more structured alternatives to informal arrangements, often establish rulings which are tested subsequently in state courts and established as legal precedent (Libecap 1989:87–90).

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[11] The founder of the movement was Joaquin Costa y Martinez (1981 [1902]). Studies of Spanish customary law written under his influence include Ruiz-Funes García (1983) on Murcia; Martinez y Martinez (1983) on Aitana; López Morán (1902) on León. For recent analyses by legal scholars of the contribution of customary law to state law, see Oliver Sola (1991), Gonzalez Trevijano (1989). Assier-Andrieu (1987) has written a recent historical anthropology of customary law in Catalunya.

seven canals of the Valencian Huerta, has met every Thursday on the steps of the Cathedral of Valencia since the Middle Ages to resolve the previous week's conflicts over irrigation (Glick 1970:64–68). It is the archetype of a local legal ordering system used to define and defend water property rights. This essay examines the evolution of water property rights in less well understood, widely dispersed forms of irrigation association in Northwestern Spain, the small-scale systems in the upper Duero basin. There, fast-flowing rivers descend the geologically young Cantabrian-Asturian mountains, providing easily diverted water to irrigate fertile alluvial terraces called *riberas* and *vegas.* In the narrow, cold, upper valleys of the Cantabrian-Asturian mountains, individual villages traditionally tapped rivers to irrigate pastures. On the lower slopes and valleys, several villages joined together to construct and manage systems designed to irrigate fields for agriculture (López Morán 1902; Díez González 1992:44).

I begin by considering the structure of property rights built by the Castilian state during the late Middle Ages. I then construct a scenario for the origins of the Parcionería, a multi-village irrigation confederation in the Orbigo valley of León, before turning to the interaction of Castilian law and local law in the evolution of its rights in water. The accompanying process of more finely discriminating two categories of water property defined in Castilian law is then analyzed. I conclude by considering how this case contributes to a new approach to legal pluralism.

THE CONCEPTUAL FRAMEWORK OF WATER PROPERTY RIGHTS IN NORTHWESTERN SPAIN

Contemporary populations of the Duero basin originated in the resettlement of the mid-ninth through the eleventh centuries after the expulsion of the Muslims (García de Cortázar 1985). During early repopulation, low population density and relatively abundant resources allowed groups of settlers to claim squatter's rights, *presura,* to land, water and other assets, in a tradition traceable to Germanic customary law (Vassberg 1984:54–55; Glick 1979:89). In the Orbigo valley, water was a prime consideration of colonizers. Annual precipitation was insufficient for optimal crop production and varied wildly from spring floods to summer drought. Riparian rights to water, in particular, became included as squatter's rights. Squatter's rights were subsequently transformed into exclusive rights that had to be respected by later appropriators under the doctrine of "prior est in tempore, potior est in iure" (first in time, first in right) (Lalinde Abadia 1966–67:80–84).

Some resources such as water, forests, and pastures were considered public goods subject to collective management in a tradition associated with the Romans and inherited by the Moslems (Richardson 1983). Collective management was eventually institutionalized as a prerogative of the municipal council, *concejo,* or assembly of the citizens of villages, towns, and cities (Carlé

1968; Hinojosa and Naveros 1974[1896]). Cultivable land and houseplots, on the other hand, were available for individual claims. Private assets and public goods were regulated by a complex mix of local law, privileges and municipal charters or fueros, and *cartas de poblacíon* issued by the king, lord, church official, or another municipal council, to new settlers to encourage further colonization (Kleffens 1968:122–3). Rights to water were included in cartas de poblacíon and municipal charters as a necessary concomitant to rights to land and forests (Lalinde Abadia 1968–69:47*ff*) and, occasionally, in a special privilege, such as the royal concession to the monastery of Nuestra Señora de Carracedo in the tenth century of rights to the Orbigo river.[12]

The strength of local law originating in municipal charters began to dissipate in the mid-thirteenth century, as a result of the influence of Roman law and the threat to the Crown represented by the excessive fragmentation and diversity of public and private law. Three Castilian kings, Ferdinand III the Saint (1199–1252), his son Alfonso X the Learned (1221–84), and Alfonso XI (1311–50) embarked on a project of unifying the law and clarifying its content. The most important product of this effort was, by far, the seven-volume legal code, *Las Siete Partidas,* attributed to Alfonso X and produced in the second half of the thirteenth century.

The *Partidas* confirmed the riparian rights of those who owned land next to running water and extended them by permitting the owner to authorize others to use it (*Partidas,* III, 28, 31). Councils owning land across which flowed, or on which originated, a water source could appropriate the water for communal use. Such uses could not cause damage to adjacent or downstream users by, for example, restricting water flow to existing mills (*Partidas,* III, 37, 8; *Partidas,* III, 37, 14–15).[13] Although seigniorial grants could include rights to water, the appropriation of a village or town by a feudal lord did not necessarily mean that local resource management disappeared. In the Orbigo valley, when villages and towns were appropriated by the seigniorial Quiñones family, villages retained this prerogative.[14]

The *Partidas,* and commentaries on them by legal scholars, represented an important attempt by a state to give shape and coherence to the system of property rights emerging after the Reconquest. They remained a very real influence in Castile through successive codifications, including the *Nueva Recopilación* of 1567 and the *Novisima* of 1809, until the Civil Code in 1889 was promulgated and accepted. Neither local law nor the *Partidas* was eclipsed entirely by the Civil Code, however. Absent any applicable statutory

[12] AHDL 1730+/-Fondo Miguel Bravo, No. 139.

[13] The specific law in the Partidas is referenced by a Roman numeral indicating the *Partida,* followed by Arabic numerals indicating the Title and the Law. See Gallego Anabitarte (1986: 129–38) for an analysis of water law in the *Partidas.*

[14] Gallego Anabitarte 1986:140ff discusses water rights under seigneurial dominion. The Quiñones señorio in the Orbigo valley is analyzed by Merino Rubio (1976) and Alvarez Alvarez (1982).

provision, local custom was followed, and in its absence, the general principles of law, including those of the *Partidas,* were decisive (Kleffens 1968:260).

Of equal importance to the definition of property rights were the judicial institutions, including a system of courts and procedure, specified in the *Partidas.* Lawsuits could be heard in a wide array of municipal, royal, ecclesiastical, and manorial law courts and legal tribunals. Villages and towns preferred the royal court system for its impartiality over other courts, particularly manorial courts administered by feudal lords (Kagan 1981: 36). The royal system had three levels. *Corregidores* named by the king administered trial courts at the lowest of the levels. Their decisions, and those of the other courts and tribunals, could be appealed to one of five regional high courts, or *audiencias,* of which the *Chancillería* of Valladolid was the preeminent. It was, in effect, the final court of appeals for most suits involving water. Certain important cases could be appealed to the third and highest tier, the Royal Council of Castile, the kingdom's superior court.

By the end of the thirteenth century, then, two alternative legal systems were in place to define and defend emerging property rights in water in the Orbigo Valley. At the local level, municipalities had developed a rich body of customary law based on local knowledge and practice to regulate the private assets and public goods within their boundaries. While usually tacit and unwritten, customary law occasionally found voice in municipal charters, and, later, ordinances. Against this local tradition, the state struggled to erect a structure of uniform law and courts. By producing the *Partidas* and refining a system of courts and procedure, a structure of property rights to assign rights to the use and transfer of rights to use land, water, and other natural resources came into place. While foral law eventually declined in importance, local law continued to oppose a centralizing body of state law in legal and administrative practice (Kleffens 1968:146). How successful was the property rights structure erected by the state to help irrigation expand during the late repopulation of the upper Duero valley? To address this question, I turn now to the irrigation associations of the Orbigo valley.

PRESAS OF THE ORBIGO VALLEY

The Orbigo river valley, one of the most fertile and rich in Spain, originates in the confluence of the Omaña and Luna rivers in the Department of León.[15] To successfully divert water from the river for irrigation, several technical problems related to its fluvial geomorphology had to be solved.[16] First, annually

[15] Macías y García (1928:25–27), writing at the beginning of the nineteenth century, considers it the most fertile region of Astorga. For modern assessments, see Molinero Hernando (1986:88) and Teijon Laso (1949:239).

[16] Instituto Geológico y Minero, various dates; Corrales, I., J. Carballeira, G. Flor, C. Pol and A. Corrochano (1986), Masach Alavedra (1948), Rubio Recio (1955).

flooding and insalubrious, low-lying, land forced settlements on to alluvial terraces above the riverbed and kept water from being diverted from the river nearby, since it lay below the grade of fields. The very slight fall from the top to the bottom of the valley forced dams far upstream to divert sufficient river water to flow downstream with enough force to irrigate fields quickly. Although designers used natural features to their utmost, diverting water into natural corridors and onto the backs of alluvial terraces to maximize irrigable area and minimize the demand for labor and materials, construction costs (posts, sod, pebbles and large stones) were exceedingly high.

Seasonal flooding jeopardized the entire waterworks. Late winter snowmelt in the mountains increased flow from 30 to 35 cubic meters per second at the upstream town of Carrizo to over 1,500 cubic meters per second (Calonge Cano, Luengo Ugidos, Moreno Pena, and Martin García 1991:15). The geologically young river bed of the Orbigo is flat and shallow, rather than deep and well incised. An increase of this magnitude quickly swelled the river into a wide, impassable expanse. To keep the swollen river from inundating towns and villages, settlers dismantled diversion dams and closed the main canal with large stones every year in late September. In April, the stones were removed and the dam reconstructed, shunting water into the main canal for the irrigation season. The annual reconstruction consumed enormous amounts of labor and materials. The most serious threat to the irrigation infrastructure were catastrophic floods with flow volumes of several magnitudes above average annual peaks. While rare, they raised the possibility of a complete change of the river's post-flood course, from one side of the flood plain to the other, cutting off the opening, *bocatoma*, of an existing main canal from access to water.

Even though answers could be found to these technological problems, they came at a cost in labor, time, and materials beyond what one village or town could assume. The solution was for villages and towns to confederate into an irrigation association, called a *presa*, and share the expenses of infrastructure construction and maintenance. This provided only a partial answer, however, for a way had to be found to exclude access to the water, lest farmers who did not contribute to the costs diverted it for their own use, a classic problem of free riding. Moreover, upstream users had the potential to take water first, leaving none for downstream users, a frequent problem in canal irrigation. The solution was for presas to assign rights to individuals or groups to use presa water. Creating property rights in water was not cost-free, however; negotiating contracts to assign rights, monitoring their compliance, enforcing their provisions and collecting damages, and protecting against third-party encroachment involved considerable costs. By creating a set of rules and regulations and by confederating, presas devised an institutional solution to the management of these costs. What kinds of property rights developed during the institutionalization of presas? How were they defended? What role

did Castilian law play in the definition and defense of these property rights? Where, why and how did local law enter the process?

PRESA WATER RIGHTS

First, before it could contract with end users, a presa had to obtain rights to the use and transfer of the water. Many presas lacked the formal concession of water associated with ecclesiastical, seigniorial, or royal sponsorship.[17] As a result, they had to negotiate rights of way with those holding upstream riparian rights and with towns or villages in the path of the main canal which were in positions to extract monopolistic terms. The nature of the flooding of the Orbigo river raised considerably the expense of these already costly contracts. When catastrophic floods cut off the opening of a main canal, the upstream holder of riparian rights often refused permission or demanded excessive compensation. This led to serious conflicts and costly litigation and settlement.[18]

One solution to lower these costs was to obtain an unencumbered right of way to river water. The *Partidas* established an avenue for this in providing for the acquisition of right of way through prior use (III, 21, 15). There were two provisions. Daily use of a right of way for a period of ten years without opposition from the landowner entitled one to an unencumbered right. Regular use, even if sporadic or periodic "for so long a time that men cannot remember when they began to do so," was also sufficient. It could be established through oral testimony by elderly witnesses. The second provision was the more important for Orbigo presas. Acceptance of this claim by the highest appellate courts provided an opportunity for obtaining a permanent right of way.

THE PARCIONERÍA

The middle Orbigo valley begins at Carrizo and ends near La Bañeza, where the Orbigo empties into the Tuerto river. Here, seven villages and small towns, Benavides, Gualtares, San Feliz, Villares, Moral, Hospital de Orbigo, and Villarejo, share water diverted from the river to irrigate their fields. This irrigation system, the Presa de la Tierra, was constituted during repopulation and throughout the Middle Ages was known as the Parcionería (see Figure 1).

[17] For example, the Monastery of Santa Maria de Carrizo constructed the Presa Forera in the twelfth century and the Monastery of Santa Maria de Villoria the Presa del Moro in the thirteenth century as part of the privileges attending their founding (Rubio Recio 1955). The royal concession of rights to the water of the Orbigo river in 1315 to the Cabildo of Astorga to irrigate land in the town of Santa Marina del Rey led to the construction of the Presa Cerrajera (Rodríguez López 1981).

[18] AGS 1490–91 Consejo Real Legajo 63–6. A lawsuit of the council and neighbors of the town of Santa Marina del Rey, under the jurisdiction of the parish of Astorga, against Diego Fernandez de Quiñones, Count Luna, and the neighbors of the towns of Turcia, Armellada, Lamilla, and Benavides, concerning the use of the water and the movement of the course of the Orbigo river.

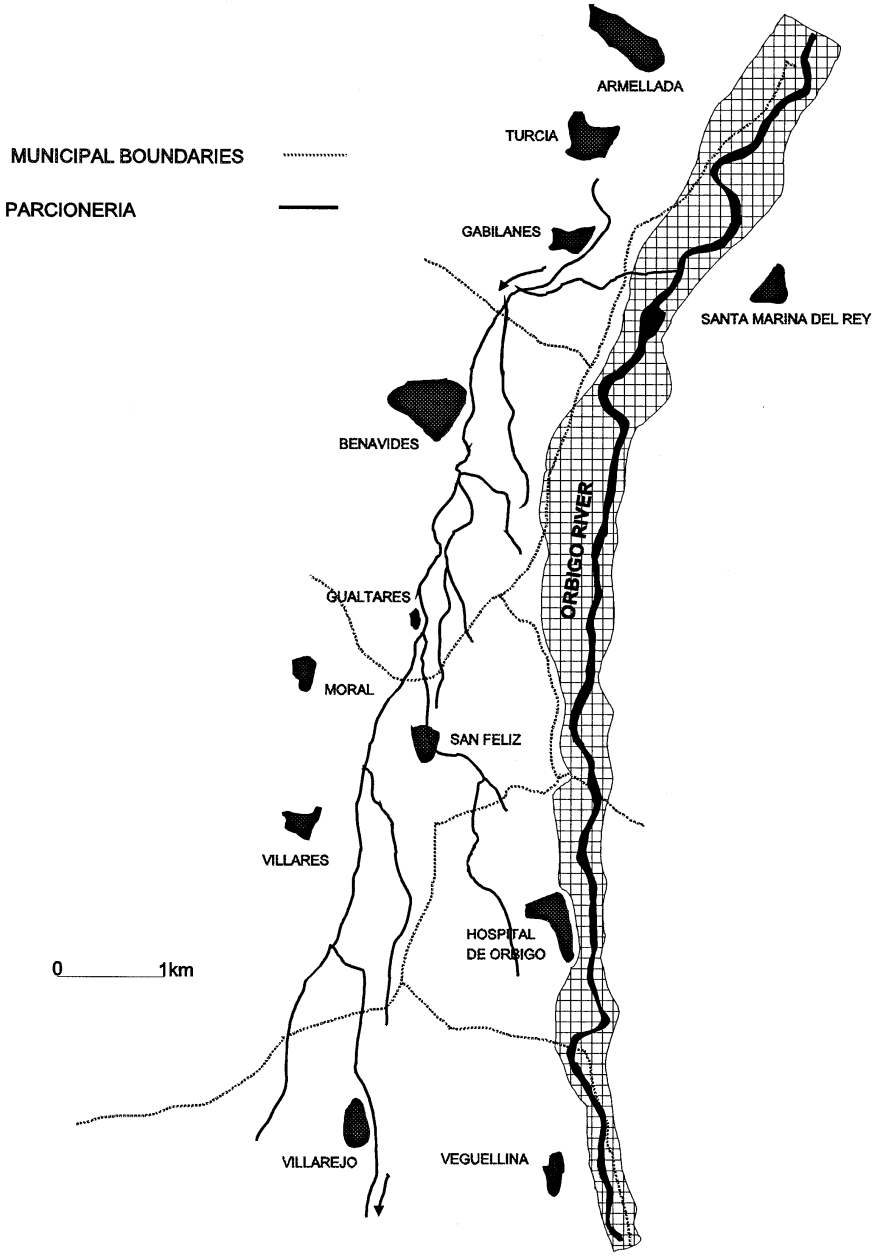

FIGURE 1. The Parcioneria.

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Documentary evidence suggests a plausible scenario for the origins of the Parcionería. The village of Moral (from *muro,* the rampart of a fortified city or village) was the initial settlement, founded in the early thirteenth century on an easily defended hilltop overlooking the ribera.[19] As the political situation stabilized, settlers began to aggregate in the villages of Villares, Villarejo, Gualtares, and San Feliz on the fertile alluvial terrace below. Villares, immediately below Moral, took the lead in the founding of the presa. Villares is the "village with the greater legal rights" in early court cases. It supplied the legal representative of the Parcionería,[20] and it also received special privileges in the allocation of the Parcionería's water.[21] Benavides and Hospital de Orbigo were not part of the founding core of villages and towns; Benavides became a member when it granted a right-of-way to construct the main canal through its borders and Hospital de Orbigo under the authority of a religious order and appears to have entered into the presa at a date subsequent to its founding.[22]

The opportunity to secure a permanent right of way through prior appropriation came to the Parcionería in the late sixteenth century in a lawsuit with the town of Santa Marina del Rey. In the precipitating events in the case, Luis Alvarez, the Villares water judge, and over a hundred followers from other Parcionería villages and towns, destroyed a canal constructed by Santa Marina del Rey to irrigate communal pastures. The Parcionería then relocated the dam and main canal within the municipal boundaries of Santa Marina del Rey without asking permission of the town. Santa Marina del Rey denounced the action in its municipal court, and the two presiding judges placed Alvarez and several of his consorts in jail. As the representative of Villares, the village with the "greater legal rights" of the Parcionería, Alvarez appealed the lower-court decision. The Corregidor's court in the town of Villamañan took up the case. The appellate judge ordered the men released from jail. The case eventually wound its way on appeal to the Chancillería of Valladolid. In their defense, Parcionería municipalities presented testimony of elder witnesses to substantiate a long-standing pattern of accustomed use. The Chancillería ruled in favor of the Parcionería, granting them rights to as much water as they needed "above and below Juan de Villavante's mill and every other location on the river within the boundaries of the town of Santa Marina del Rey." The sentence was upheld on final appeal, and a final writ to this effect was issued in 1587.[23] Winning the case was a major victory for the Parcionería. The

[19] Alfonso IX (1188–1230) granted a carta de población to the village of Moral during the early thirteenth century. See 1291–Abr–17. The privilege of King Sancho by which he confirms [was] granted by his great grandfather, King Alfonso, in favor of the neighbors of the village of Moral de Orbigo IV–83. ADA Pergaminos de la Camara Episcopal. A collection of transcriptions of twenty-one documents concerning the Parcionería from 1454–1612 made in 1734 (CAJVV 1734) and kept in the Archivo de la Junta Vecinal de Villares contains material on its early organization.

[20] AJVV 1587 Carte ejecutoria. [21] CAJVV 1734 [1454] folios 46v–58.

[22] CAJVV 1734 [1524] folios 21–24v. [23] AJVV 1587 Carte ejecutoria.

thick, parchment-bound final writ, with its signatures of the judges and Royal Seal, was cherished by the Parcionería and kept under lock and key in the archives of Villares. It was used to establish a claim for water rights when the Presa de la Tierra successfully sought recognition in 1946 as an irrigation community, *comunidad de regantes,* under the provisions of the 1879 Water Law.[24]

Although the pursuit of a permanent right of way on the basis of accustomed use was a viable option, the costs of litigation were considerable: Bribes, gifts, and other clandestine payments had to be added to the official costs of scribes, advocates, attorneys, and solicitors to ensure a successful resolution (Kagan 1981:39). Until the 1879 Water Law granted corporate status to irrigation confederations, each municipality had to secure its own legal representation to initiate and continue all civil and criminal actions, to negotiate formal and informal agreements, and to defend its rights to water in general within the presa. This increased substantially the costs of defining and defending the joint property rights of presas like the Parcionería.

Nor did such expenses guarantee a speedy resolution. In the corregidor courts, cases were normally resolved in less than a year. Appealing lower decisions before the Chancillería of Valladolid or the Royal Council of Castile took much longer. The lawsuit between Santa Marina del Rey and the Parcionería began with a complaint before the apellate judge in September of 1581; in May 1587, close to six years later, the final writ was issued by the Chancillería. This was longer than the average of two to three years in a sample of lawsuits drawn from the archives of the Chancillería for the year 1580 (Kagan 1981). While reasonably quick in some respects, appeals still took far too long for farmers needing water for irrigation.[25]

The high costs motivated litigants to bypass the royal court system and submit voluntarily to private arbitration. Arbitrated agreements arrived at voluntarily or mandated by a higher official (see below) were known variously as *conciertos, convenios, concordias,* and *compromisos.* While simple in form, arbitrated agreements could treat contentious disputes, including basic property rights issues, quickly and inexpensively. Unlike judicial resolution of disputes, arbitration was predominantly oral, although the final agreement was recorded by a scribe. Recourse to written law was infrequent, since judgments were based almost entirely upon traditional usages and customs (Kagan 1981:22–23). Conciertos, concordias, convenios, and compromisos became legal documents that often surfaced years, or even centuries, later in formal court proceedings.

A voluntarily arbitrated agreement reached in 1607 between Turcia and the

[24] Ministro de Obras Publicas, Registro de Aprovechamientos No. 12.367.

[25] The U.S. Supreme Court, for example, takes three to five years to act on a case it decides to review.

Parcionería is illustrative.[26] Turcia held riparian rights at an upstream location used by the Parcionería as an alternative diversion site, depending on the river's course, to one within Santa Marina del Rey. Following a catastrophic flood in 1606 that required the relocation of its main canal and dam within Turcia, the Parcionería found itself confronted with excessive demands for compensation. Turcia named ten men to represent it; the Parcionería, five. The ensuing agreement gave the Parcionería permanent rights to divert water within Turcia's boundaries. Both parties benefited by participating in negotiations rather than submitting to the dictates of a formal court. The agreement transformed the periodic need to renew a right of way at heavy expense into a permanent right of way, the same outcome reached after close to six years and enormous costs in the 1587 ruling of the Chancillería of Valladolid but much more quickly and cheaply. The agreement was recorded by the Corregidor's scribe and copies were deposited in the archives of Turcia and Villares.

The initial institutional problem confronted by the Parcionería was to secure rights to the water diverted from the river. Castilian law authorizing riparian rights, right of way, and contract guarantees provided an initial solution. Over time, however, upstream holders of riparian rights used their monopolistic position to extract prohibitively expensive costs for rights of way. Castilian law again came to the rescue with provisions for acquiring an unencumbered right of way through prior use. The high costs and excessive time involved in pursuing rights through the formal system led to voluntary informal arrangements based on customary law and local practice. Local law, thus, supplied an alternative to the formal legal system. It reduced costs considerably, produced a legally recognized resolution and provided precedents for subsequent reforms in Castilian law. As the 1607 agreement illustrates, the state law and local law were mutually constitutive, in that unfavorable earlier formal lawsuits motivated litigants to resolve their differences through the informal legal system.

PROPERTY RIGHTS IN THE PARCIONERÍA: MEMBER MUNICIPALITIES

Although the legal pursuit of an unencumbered right of way ended in a major victory for the Parcionería, it never possessed corporate rights in water until it was recognized as a community of irrigators in the twentieth century under the provisions of the 1879 Water Law. How did the Parcionería transform a right of way into a system of public water distribution? How were rules and regulations instituted? What organizational forms were at its disposal?

One possibility was for the Parcionería to allocate exclusive rights to water directly to farmers or to fields. This would have required partitioning water. Unlike other natural resources, such as animals, fields, surface ore deposits, or

[26] CAJVV [1607] 1734 folios 71v–78v. See also the voluntary agreement ending the dispute between Hospital's contribution to the annual maintenance of the dam, CAJVV 1734 [1591] folios 111v–135.

standing timber, water's fluid nature makes it extremely difficult to partition without costly and sophisticated absolute, volumetric, measuring devices. Ownership shares of intermingled water are almost impossible to determine. In contrast, during the early settlement of the North American West, when land was unowned and unfenced, the practice of branding was adopted to solve the problem of establishing ownership of cattle in intermingled herds (Dennen 1976:424). Once landownership was established on the Great Plains, animals could be fenced in and excluded relatively easily with barbed wire. In response to the difficulty of partitioning water, water rights are commonly assigned to specific parcels of land (Repetto 1986:13). Allocating exclusive rights to water would have entailed enormous costs to the Parcionería in the negotiation, monitoring, and enforcement of literally hundreds of contracts for the delivery of water in bulk to end users and many more, if water was further partitioned and delivered to a field.

Another possibility, and the one that emerged, was to contract with town and village councils, which, in turn, contracted for delivery of water to end users. This minimized costs to the Parcionería by radically limiting the number of contracts and passing on to intermediaries the costs of contracting with end users. The solution built on the practice that municipal councils used to manage collectively owned pastures, forests, and water and to assign water rights to fields since the Reconquest. The *Partidas* recognized such councils as corporate bodies and granted them riparian rights to the water passing through their territorial boundaries. The Parcionería, thus, took shape as a quasi-corporate confederation of municipal councils. The dam and main canal from the river to points where councils diverted water for their own use was considered jointly owned by members of the confederation. Once diverted from the main canal, councils claimed water as their own property under the aegis of riparian rights with the power to distribute it as they saw fit. As stated succinctly in an eighteenth century document, "The waters called the Presa de Gualtares [an alternative name for the main canal of the Parcionería at the time] . . . are of public and common use not subject to the dominion of a community or an individual [until] each one of the villages which runs along its course converts them to its use avoiding obstructing the flow to lower villages."[27] Water so obtained became a corporate asset, *propio;* and councils often exercised their perceived rights to alienate by sale or rental the water and canals that passed through their municipal boundaries. Benavides, for example, annually let a contract for the rental of fishing rights "on its rivers and presas" to third parties.[28]

No known copies survive of the contracts between the Parcionería and individual municipalities establishing the terms of their membership in the

[27] AJVG 1759 Carta ejecutoria folios 65–65v; also in ARCV/RCE 1759 leg. 1640 num. 33.
[28] For a contract from the mid-eighteenth century, see AHP Caja 10.228 folios 27–27v.

confederation. Nor is it known if these were in written form. Later documentation does refer back to them allowing one to reconstruct negotiating agendas. The Parcionería was concerned, in general, with establishing the terms of access of a municipality to its water, including the contribution in cash, kind, and labor to the initial construction and subsequent maintenance of the infrastructure of dam and main canal. Specific terms can be reconstructed in three cases. Benavides was given access to water from the main canal "from sunup to sundown" but was not required to contribute to the costs of either the initial construction or the subsequent upkeep of the dam and the main canal; in return, it granted the Parcionería a permanent right-of-way to bring the main canal through its municipal boundaries.[29] Villares was given access to water and an additional privilege of four extra days of water a year, one in the first two weeks of April and the last two weeks of May.[30] Hospital de Orbigo was given water rights but was required to contribute disproportionately whenever cash payments had to be made to Turcia and Armellada for right of way.[31]

Enforcing contracts and incorporating subsequent changes were very important elements in the property rights structure of the Parcionería. Unlike better-known, large-scale, systems such as those of Valencia, no valley-wide water tribunal provided Orbigo presas with a forum for bringing disputes before a body of their peers.[32] Instead, arbitrated agreements were commonly used to resolve conflicts internal to presas; between a presa and its member municipalities, municipalities and end users; and between end-users. Parties could submit themselves voluntarily to arbitration and could be ordered to binding arbitration by a higher administrative or judicial authority. For example, in 1454 Villares and Villarejo were directed by the Corregidor to enter into binding arbitration to resolve a long-standing dispute over the use of a branch of the main canal of the Parcionería, called the Presa de Gualtares.[33] Two arbitrators (*jueces árbitros*) from Villamor and two from Veguellina were named by their respective councils, and a mediator (*tercero*) from Laguna was named jointly by Villares and Villarejo. In the agreement, Villares is assigned water the first three days of the week; Villarejo, the following three days of the week. Villares must allow users from Villarejo access to the presa to divert water during their days of the week. Villares must make sure their canals run in such a way that water flows to Villarejo, that is, that it returns to the natural corridor of the dry, ancient, river bed, the Huerga. Villares is given additional rights to four extra days of water a year in the first two weeks of April and the last two weeks of May. Villares and Villarejo were directed to widen the presa

[29] CAJVV 1734 [1524] folios 21–24v. A later dispute over Benavides' privileges is documented in AHP Caja 11.070 Folios 130–131v.

[30] CAJVV 1734 [1454] folios 46v–58. [31] CAJVV 1734 [1594] folios 136v–143v.

[32] On the Valencian water tribunal, see Fairen Guillen (1975), Glick (1970), Lalinde Abadia (1968–69:87–88), Tribunal de las Aguas (1988).

[33] CAJVV 1734 [1454] folios 46v–58. This was the first known reference to the Parcionería system.

during February and March during the next year. Presa judges (*jueces de la presa*) are mentioned, and irrigators are directed to clean their feeder canals, lest they be fined.

Another mandated arbitrated agreement resolved a dispute between Benavides and other Parcionería villages in 1524.[34] Two years prior to the dispute, Benavides added an extension to its canal to irrigate heretofore unirrigated land. Villares and Villarejo complained, arguing that Benavides only possessed rights to the water that it was already using and was failing to return excess water to the main canal to flow to downstream villages. The dispute was brought before the appelate judge, who ordered the parties to arbitration. The resulting agreement was far-reaching. Ten clauses implemented provisions to resolve the dispute and basic principles to guide future relations between the municipalities of the Parcionería. One key provision restated the rights of Benavides to water from the main canal as permanent and inviolable. The town was granted the additional extension to its canal, the issue which initiated the dispute. Restricted rights to rebuild the canal at a new location within its boundaries were also granted the town, including the right to distribute its water as it saw fit as long as the excess was returned to the main canal of the Parcionería. Provisions were also included to monitor Benavides' access to water. Wood posts would be set in the opening of the canal to delimit its maximum width, and stones were to be placed to indicate a maximum depth. Benavides was prohibited from raising the height of the dam diverting water from the main canal to the town canal. Nonresidents of Benavides using water to irrigate a field in the town were required to contribute labor for the annual reconstruction of the dam and main canal of the Parcionería or rent the field to a resident of Benavides; this provision was an important check on the potential for free riders stemming from nature of water rights of landowners (see below). A patch of land in Gualtares immediately downstream of Benavides was put under the latter's jurisdiction. Benavides agreed to contribute two wagonloads of alder branches to the repair of the dam and main canal.

Private arbitration had clear advantages over disputes submitted to an administrative or judicial tribunal: Arbitrators had special expertise and access to remedies tailored to the situation. Control over the choice of arbitrators, as Williamson argues (1985:250–2), helped restore confidence and trust to the social fabric more efficiently than unnamed and unknown bureaucrats. Arbitrated agreements were an essential part of the private governance structure of presas. Throughout the Orbigo, arbitrated agreements, together with formal contracts, concessions, regulations, and ordinances played an important part in later proceedings concerning water and soon filled notary, village, town, and church archives.

By constituting itself as a confederation of municipalities, the Parcionería

[34] CAJVV 1734 [1524] folios 21–24v.

was able to negotiate contracts with upstream holders of riparian rights for rights of way and with others for repairs and improvements to irrigation infrastructure. It monitored these contracts to ensure contractual partners abided by their terms and used the state legal system to enforce them and seek damages when terms were not observed. The presa was constantly on the lookout for encroachment by third parties, particularly upstream towns and villages who could shut off water flow. It substantially lowered costs by transferring to town and village councils the right to distribute water to end users. The solution was creative because it combined an acceptance of the historical role of the municipality as corporate resource manager, enshrined in the Partidas, with an organization that retained the autonomy necessary for the definition and defense of its property rights. How did the council use state and local law, in turn, to define and defend the right to distribute water to end users?

PROPERTY RIGHTS IN THE PARCIONERÍA: THE END USER

The last node in the network of contractual relations was between a council and the end user. Water in Orbigo municipalities was attached to land as a right in the sense of a complementary factor of production, in much the same way that rights to water were included in cartas de población and municipal charters as a concomitant of land and forests (Lalinde Abadia 1968–69:47*ff.*). Water attached to land was a use right rather than an absolute right; water could not be transferred separately from land and municipalities attached conditions to its access. End users were expected to keep clean feeder canals bordering their fields; contribute toward the costs of the construction and maintenance of irrigation infrastructure; and participate in corvée labor parties, *hacenderas*, called to maintain municipal hydraulic infrastructure and supply the municipality's contribution to the maintenance of the dam and main canal.

Contractual relations between a council and an end user were generally tacit and implicit and not written into documents conveying land. However, they occasionally surface in village and town ordinances and the documentation of legal disputes. The municipal ordinances assembled by the town of Benavides and the villages of Villares and Villarejo between 1699 and 1739 were unusually rich in this regard.[35] Taken together, these ordinances suggest that councils lowered the costs of distributing water to irrigators by using simple queuing mechanisms when water was ample and shifting to a system of turns, combined with a lottery in some instances, when water was scarce. Fines were used as enforcement mechanisms and graduated according to the severity of the infraction.

[35] Ordenanzas de Villares. AHP 1701 Caja 9.961 folios 13–30v; Ordenanzas de Villarejo. AHP 1699 Caja 9.961 folios 24–59; Ordenanzas de Benavides AHP 1739 Caja 10.221 folios 190–221.

AGUA SOBRANTE AND AGUAS PERDIDAS

Local law helped to make more functional the property rights associated with water in excess of the immediate requirements of a presa, municipality, or irrigator. This excess water, *agua sobrante,* flowed downstream. For presas, excess water was, and is, a very important complement to water diverted from the river, particularly during the months of July through August, when river levels fell drastically. Presas were engineered to connect their main canal with the drainage of an upstream presa to collect its excess water before it returned to the river. No matter how efficient upstream users were, some excess always flowed downstream to lower presas.

The *Partidas* considered excess water a public good, inalienable and usable by anyone. No one could possess rights to it, nor could it be subject to concession. The importance of excess water in the Orbigo valley, however, endowed it with more finely discriminated property rights than those of a free good. The nature of these rights varied according to the parties involved in the contractual relations, that is, presas, presas and municipalities, and municipalities and end users, as well as the volume, variability, and predictability of the water.

In some instances, excess water was sufficiently predictable and abundant to motivate groups of downstream irrigators to organize to exploit it. For example, water leaving Villarejo, the lowest village served by the Parcionería, flows through an ancient river bed for about seventeen kilometers until it empties into the Tuerto River. Six municipalities—Huerga de Garabanes, Posadilla, Villagarcia, San Cristobal, Matilla, and Santa Colomba—organized an association to exploit the Parcionería's excess water. It was in this context of dependency on the Parcionería's supply of water that these downstream municipalities were mentioned in the 1587 lawsuit between the Parcionería and Santa Marina del Rey.[36] Then, as now, however, municipalities below Villarejo have never been considered members of the Parcionería. They never claimed formal or informal rights to the Parcionería's water; never contributed to the construction or maintenance of the dam or main canal in cash, kind, or labor; and rarely sent representatives to meetings of the Parcionería. Water leaving the Parcionería was claimed by the lower municipalities and was excluded from others not a part of this informal association.

The nature of the property rights to the Parcionería's excess water held by downstream villages contrasted significantly with villages in a similar position to another ancient and important irrigation system, the Presa Cerrajera. A royal concession to the Cabildo of Astorga of rights to the water of the Orbigo river in 1315 to irrigate land in the town of Santa Marina del Rey led to the construction of the Presa Cerrajera (Rodriguez Lopez 1981). In 1753, five

[36] AJVV 1587 carta ejecutoria. folio 25.

villages downstream of Santa Marina del Rey—Villazala, Santa Marinica del Páramo, Huerga de Frailes, Acebes del Páramo, and Villavante—sued Santa Marina del Rey for cutting them off from the excess water of the Presa Cerrajera and denying them half of the normal flow which, they argued, was their right. Santa Marina del Rey countered by arguing that the downstream villages held only rights to whatever agua sobrante was available. Villasala and the other villages responded with documentary evidence that they had paid half of the costs of an important earlier court case they shared with Santa Marina del Rey against upper villages. This evidence included their signatures to municipal ordinances of Santa Marina del Rey regulating irrigation practice and their contribution to the annual repair of the dam and main canal. Downstream villages won the case, and Santa Marina del Rey was instructed to limit its consumption of the water to ensure downstream flow.[37] The Presa Cerrajera example suggests that excess water could be converted into a more fully defined right than was true in the case of the Parcionería when the costs of system maintenance and lawsuits were contributed.

The quasi-corporate status of presas kept them from obtaining property rights in water until 1879.[38] Villages and towns, on the other hand, enjoyed a tradition, enshrined in the *Partidas*, of communal control over natural resources, including water. Cash-strapped municipalities throughout Spain attempted during the Middle Ages to transform excess water into a *propío* or corporate asset, capable of producing cash income (Lalinde Abadia 1968–69:66–70). In 1581, for example, Benavides sold rights to the lower villages of Moral and Villares to construct a canal and transport water to irrigate their fields.[39] In recent times, farmers irrigated thirty-five hectares of land within the municipality of Benavides with agua sobrante from Gavilanes. No evidence exists, however, to indicate that Gavilanes was compensated in any way.[40] More commonly, as will be seen below, municipalities transferred rights to excess water to mill owners.

Landowners were entitled to use, on an as available basis, small quantities of water from secondary or feeder canals which descended from upper fields and field sections being irrigated. For example, villages such as Hospital de

[37] ARCV/RCE 1756 carta ejecutoria. leg. 1634 no. 26.

[38] Although presas could not rent or sell water, *per se*, they could charge for the use of the main canal to deliver excess water to downstream users. In this century, the lower municipalities paid the Parcionería, now called the Presa de la Tierra, for the use of its canal to deliver excess water to them. This practice stopped only in 1947, when it was organized into a formally recognized irrigation community. Because the excess water was highly sporadic, particularly during the months of July to September, downstream municipalities paid on the basis of the number of days of water received rather than a fixed annual rent. The rental of hydraulic infrastructure to deliver excess water is connected to the 1879 water law. This law, in addition, afforded irrigation associations the possiblity of seeking permanent rights to the water they had used in the past under a prior appropriation doctrine.

[39] The 1581 document was included in a final writ issued to Villares and Moral in 1824. ARCV/RCE Leg. 2029 num. 22. For a case of the rental of excess water, see AHP 1732 Caja 10. 215 folios 232–233.

[40] APT Correspondencia miscelánea (unpaginated) Aug. 18, 1949.

Orbigo were divided into halves, and water was allocated to each half according to a weekly calendar. This practice, common throughout the valley, originated in the biennial *año y vez* system of cultivation and fallow introduced into León in the fifteenth and sixteenth centuries (Behar 1986:195). The lower half of the village could be irrigated with the excess water from the upper half. Similarly, the half being irrigated could be supplied with the excess water of an upstream irrigator while waiting for the next turn. First-come, first-served mechanisms were used to establish priority in access to water. Land divisions in some villages which lacked access to normal water for irrigation came to rely entirely upon excess water; such divisions are occasionally referred to as the *perdido*, the "lost" area, where water "disappears."

In sum, rather than the inalienable, free good of the *Partidas*, excess water became a resource with specified rights of exclusivity and transferability in formal and informal contractual relationships between presas, presas and municipalities, and municipalities and end users. It was simply too precious a commodity not to extract value out of its transfer to others. Ownership of excess water was not allocated homogeneously but varied in the degree to which the flow could be ascertained. In some instances, flow was variable but not fully predictable, a situation in which rights were generally easy to ensure, as was the case when the flow was not certain but unalterable (Barzel 1989:5). In the worst cases, excess water was highly variable and not fully predictable, such as in the case of the water leaving the Parcionería.

WATER RIGHTS OF MILLS

Water-driven horizontal millstones were widely used in the Orbigo valley to grind grains and flaxseed for subsistence consumption and market exchange. At least fourteen mills operated at one time or another on the main or secondary canals of the Parcionería, and water was an important source of energy. The *Partidas* were clear on the rights of landowners with respect to mills: While mills were forbidden on navigable rivers, unless one wanted to build on royal land, landowners were given the right to construct mills on their own land as long as they did not obstruct the existing rights of downstream millowners (*Partidas*, III, 37, 18).[41] Parcionería towns and villages consistently attenuated their rights by requiring petitions from interested parties to construct mills and granting formal concessions in the form of bundles of highly conditioned rights.[42] In effect, a straightforward right specified in the *Partidas* was more fully delineated in local practice. Why would councils institute concessionary procedures and condition rights?

One explanation for the transformation of landowner's rights in the *Partidas* into private rights of seigniorial lords and councils was the opportunity it

[41] To build a mill on royal land, one had to obtain a concession directly from the king or from the council holding jurisdiction over the land in question (Lalinde Abadia 1966–67:80–84).

[42] AHP 1685 Caja 9.803 folios 165–166v; AHP 1695 Caja 9.959 folios 122–126v; AHP Caja 10.700 1789 (unpaginated) 7 de junio de 1789; AHP 1731 Caja 11.064 folios 230–243v.

presented to generate income in the form of startup fees and annual rent. Mill concessions were considered, in this view, another corporate asset used to produce cash income.[43] The documentary evidence suggests that only occasionally did councils use mill concessions to generate revenue; more commonly, municipalities claimed that having their own mill was a source of pride, a savings in transport costs of grains, and permitted lower milling fees.[44]

A stronger explanation stems from fluvial geomorphology. The Orbigo, like most of the fast-flowing and annually flooding rivers of the upper Duero basin, did not under normal conditions allow the permanent installation of mills in the bed of the river. This changed when the Barrios de Luna dam came on line in the 1950s and controlled annual flooding on the Orbigo; by the time this happened, however, mills were no longer needed. In the Orbigo valley, mills were incorporated into new or existing canal irrigation systems based on diverted river water. In contrast, the slow-flowing, high-volume rivers of the great plateaus of the interior of Spain, the heartland of Old Castile, were much more suitable for larger, permanent mills which could be independent of irrigation systems.

Incorporating mills into irrigation systems caused enormous potential problems. Mill operators routinely manipulated water flow for a variety of reasons. When upstream flow declined, they closed off the gates to impound water in the mill pond and increase water volume. When the mill pond had to be cleaned periodically, fish collected from weirs, and millstones dressed, water had to be diverted away from the mill. Cutting off the flow of water by impounding or shunting it away from the mill represented a serious threat to farmers downstream. Villages and towns could not simply prohibit mill construction; grain and flax had to be processed, and farmers disliked long and frequent trips to another village or town to use its mill. Having at least one mill in a village provided a valuable service and a source of pride. Because of the threat to irrigators, however, mills had to be controlled. If a landowner were free to construct a mill on his property without conditions, the only way to police it would have been to evoke the clause in the *Partidas* prohibiting damage to downstream users.[45] Suing for damages in the courts, as we have seen, meant long waits and high costs. It was much easier to establish controls as part of an initial concession. As a result, councils negotiated contractual arrangements with prospective mill owners in which their obligations were specified in return for a bundle of rights which included those regarding access to water, planting trees, and collecting herbs along the banks of the mill

[43] Notwithstanding this "declaration of the freedom to construct a mill on one's property, its exercise must have been quite different, and the faculty was converted into a private right of seigniorial lords, corporations (councils)" (Gallego Anabirtarte 1986:131, author's translation).

[44] AHP 1728 Caja 10.213 folios 114–114v; AHP 1790 Caja 10.701 folios 467–468v.

[45] For an example of a suit brought by the village of Gavilanes against a millowner for the obstruction of downstream flow, see AHP 1713 Caja 10.048 folios 189–189v.

pond, as well as those to install weirs and traps to collect fish in the mill pond. Regulations established in foral legislation and municipal ordinances were another way of conditioning rights. Fueros, for example, often established measures to prevent the damage that mills situated downstream could cause to upstream mills through the manipulation of flow (Lalinde Abadia 1966–67:80–84). These rights were transferable to third parties through direct and indirect mechanisms, as long as mill operators met their obligations.

For their part, mill operators were expected to keep the canal clean from the point where the mill pond began to the point downstream where reinforced banks ended and water returned to the irrigation system. Mills were restricted to the use of running water during the growing season and could not impound water at this time. A clause often restricted the mill to agua sobrante.[46] In the winter months, from September to April, millers could operate and impound water as they wished. At this time, the agricultural cycle was at a standstill, so there was no problem with obstructing the flow of water downstream; and the demand for milling of harvested grain was at its highest. However, closing off the main canal to keep winter rains from inundating villages restricted water for milling. Although some water could enter the main canal from upstream presas, it was neither sufficient nor regular. As a result, the stone closures of main canals had to be sufficiently permeable to allow enough water in to drive the mills. The flow was, however, minimal; and millowners were careful to adjust operations to it.

The location of the mill within an irrigation system was a key variable. Constructing a mill on a main canal close to the offtake of the river upstream of irrigable land represented the greatest potential for conflict with downstream irrigators. Locating a mill at the end of a secondary canal or along drainage outlets returning to the river represented a much less threatening situation. Millowners could impound water at will but were at the behest of upstream users. The best possible site was along a private canal allocated specifically for mills (*presa de los molinos*), which gave the millowner essentially private rights to water which could be transferred to others.[47]

Town and village councils, then, routinely attenuated the private rights of landowners to construct mills as specified in the *Partidas.* Regulations became incorporated into concessions for mills and local law. They rested on a detailed knowledge of hydrology and irrigation engineering and the priority of agricultural over industrial production. The state accepted local practice out of a pragmatic recognition of its efficacy.

[46] AHP 1789 Caja 10.700 (unpaginated) 7 de junio de 1789.

[47] See, for example, the contract in 1807 by the owners of a mill in San Feliz to supply the owners of an adjacent pasture with water from their private canal (*presa de los molinos*) under these conditions: The aqueduct that will supply water to the pasture can be no wider than a foot (*un pie*); and if it is found to be wider, pasture owners will modify it at their cost. If the mills are engaged in milling, pasture owners must wait until milling is finished before irrigating (AHP 1807 Caja 10.720 (unpaginated) 19 de Feb 1807).

CONCLUSION

Local law played a key role in the evolution of water property rights in northwestern Spain. In many ways, the property rights structure enshrined in the *Partidas* was more appropriate for the slow-flowing, high-volume rivers of the great plateaus of Old Castile than the geologically young, wide, and flat river beds and the annually flooding rivers of the upper Duero watershed. In the Orbigo valley, dams were forced to locate far upstream, endowing those holding riparian rights with the power to extract monopolistic terms for right of way from downstream irrigators. Excess water became a precious commodity, and engineers designed their irrigation systems to capture the drainage of upstream presas before it returned to the river. Water mills had to be installed in canal networks rather than river beds creating inherent conflicts between irrigators and mill owners.

Local law, steeped in local knowledge and practice, stepped into the breach to adjust property rights to these realities. Village and town councils required petitions for rights to construct mills and inserted regulations into concessions and ordinances. Contractual relations between presas, presas and municipalities, and municipalities and end users endowed excess water with specified rights of exclusivity and transferability. Presas adroitly transferred the governance costs of enforcing these rules to the small-scale, face-to-face, communities of towns and villages. These settings, rather than a large, alien, and artificial community of irrigators lent themselves to non-market transactional modes based on reputation, trust, and reciprocity.

The enforcement of these rules gave order to the turbulence of rural life. Normative ordering, while important to enforcement and dispute resolution, was but one aspect of a presa's success in assigning rights to water and formulating efficient allocation rules. Establishing and defending municipal boundaries, maintaining diversion structures, monitoring third-party encroachment, devising collective-choice arrangements and graduated sanctions, and negotiating construction and maintenance of hydraulic infrastructure were equally important.[48] Variant systems of normative ordering do not entirely capture the dynamic of legal pluralism in this regard.

[48] The difficulty in assigning absolute rights to water has resulted in a widespread pattern of assigning water rights to specific parcels of land (Repetto 1986:13). This was the practice in the Orbigo, and for this reason municipal boundaries became extremely important to defining and defending water rights. As Rubio Perez states, (Rubio Perez 1993:36, author's translation), the "survey of boundaries, *apeos, levantamiento de arcas*, [is] the most common means village councils used to reaffirm their rights and control over these spaces until the moment they were released from any form of dominance. One of the first obligations that ordinances impose on council officers is to renew and monitor municipal boundaries. . . . In spite of this, frequent legal disputes between municipalities over boundary problems force them in the sixteenth century to establish agreements to delimit the space controlled by each community." Given unpredictable flow, water was commonly allocated by Orbigo presas to villages and towns on the basis of proportionate shares, as elsewhere in Medieval Spain (Box Amoros 1992). Diversion structures had to be maintained and constantly monitored for sabotage.

Local law coexisted with state law and interacted with it rather than remaining separate. The dialectic at work was not one, however, of culture and power. No evidence suggests that local and state law articulated significantly divergent structures of meaning: The short time span and pioneer character of the repopulation of the Duero Basin restricted cultural heterogeneity. Hermeneutic methods, so useful for interpreting divergent symbolic structures underlying legal pluralism, are of little relevance here. Nor do explanations of legal pluralism deriving from resistance and evasion of state law fully illuminate the mutually constitutive nature of state and local law. New forms of state power, including disciplinary ideology and institutions of punishment (Foucault 1965, 1972, 1979; Ignatieff 1983), the manipulation of legality to absorb potential conflict in order to preserve the status quo (Gramsci 1971), and the emergence of rationalist natural law as a resolution to the legitimacy crisis (Habermas 1974, 1987) only came into existence with the modern state. One can find little evidence to associate Castilian law with these ends in Spain of the ancient regime or to find in local law resistance and evasion of these forms of state power. From the Reconquest until Ferdinand and Isabella, society was in a continual state of external conflict with Muslims and internal strife with feudal lords. Constantly changing alliances between the peasant orders, the Church, nobles, and the Crown kept the situation unstable.

This is not to say that considerations of power lay outside the dynamic of local and Castilian law. The state, particularly after Ferdinand and Isabella, eventually embarked on a strategy of unification, and local law stood in its way. The recognition by the Ordenamiento de Alcalá in 1348 of the viability of local law at the least indicates competing legal ideologies rather than a coalescence of legal ideology and state power. It is in this sense that Kleffens can say: "To a large extent, the history of Spanish law is the history of the conflict between the particularist and the unitarian tendency" (Kleffens 1968:146). At the local level, the dynamic was one of multiple, competitive, domains of power rather than a unitary domain of state and local power. Villagers were caught up as subalterns in the constantly changing power struggles, and the royal court system provided them an alternative to seigniorial and ecclesiastical legal forums. Until the late nineteenth century, state law was never able to dominate fully local law. Although power was at issue, more precise formulations of the concept of power are needed to access fully its link with legal pluralism in Spain of the ancient regime.[49]

At the heart of the dialectic between local and state law were their mutually constitutive roles in defending and defining emergent property rights in water. Local and state law differed considerably in procedure. State law was normative in its uniformity, completeness, and generalizability and embedded in lengthy and costly procedures. Local law, in contrast, was *ad hoc*, pragmatic,

[49] See Williamson (1985:236–99) on the analysis of power in transaction cost economics.

and free to achieve quick and inexpensive resolutions. Informal, arbitrated agreements were predominantly oral, although scribes recorded final agreements. Traditional usages and customs informed judgments; recourse to written law was infrequent. Arbitrators, chosen for their expertise in the issue at hand, had recourse to flexible remedies.

Procedural differences, as well as variation in the characteristics of assets, resources, and types of contracts affected the costs of transacting. Lower transaction costs, however, do not entirely explain the choice of one legal arena over another. Local and state law were equipped to address issues of quite different scope. The avenue in Castilian law for establishing a permanent right of way through prior use offered an opportunity to Orbigo presas to relieve themselves of the exorbitant fees paid to holders of riparian rights. The 1587 ruling by the Chancillería of Valladolid granting it a permanent right-of-way was worth the high costs and long wait of pursuing the court case. Local law was preferable to state law in other instances. It was used to attenuate the rights attached to excess water and to landowners to construct mills in the Partidas. Subsequent appellate court rulings affirmed local law and practice.[50]

Rather than modern or colonial states, a preferable historical parallel to the evolution of water property rights in northwestern Spain is the expansion of states with low population density, abundant resources, and restricted cultural heterogeneity. The North American experience is suggestive. During the population expansion into the Great Plains and the West, squatter's rights were transformed into exclusive rights, with a requirement subsequently added that later appropriators respect the prior rights of those who have gone before (Umbeck 1977; Anderson and Hill 1975:176–8). In both cases, state law only selectively intervened in the definition and defense of property rights by providing contract guarantees, a definition of certain property rights, and a system of state courts for their defense. Much of the definition and defense of property rights occurred locally. Local law lowered the costs of the state legal system by providing precedents for the codification of law and the system of courts. Local law enabled property rights that, although specified in state law, proved unworkable in practice. Local legal systems commonly define and defend property rights in common pool resource management in countries with colonial histories as well as North Atlantic countries (Ostrom 1990; Tang 1992). Local legal institutions and cultural models of law are equally impor-

[50] For an early concession by a village council to a landowner to construct a mill, subsequently reviewed by the Corregidor, see AHP 1695 Caja 9.959 folios 122–126v. For a ruling of the Chancillería of Valladolid confirming a village council's regulation of the operation of a mill, see ARCV/RCE 1763 leg. 1658 num. 19. The final writ converting a portion of Santa Marina del Rey's excess water to a permanent water right of lower villages can be found in ARCV/RCE 1756 leg. 1634 no. 26.

tant as adjuncts to formal legal structures, particularly in the small-scale local settings such as village, neighborhood, and informal groups which persist in the transnational world in which we live.

REFERENCES

PRIMARY SOURCES

AAV = Archivo del Ayuntamiento de Villarejo
ACRPT = Archivo de la Comunidad de Regantes de la Presa de la Tierra
ADA = Archivo Diocesano de Astorga
AGA = Archivo General de la Administracion. Alcala de Henares
AGS = Archivo General de Simancas
AHDL = Archivo Historico Diocesano de León
AHP = Archivo Historico Provincial, León
AJVG = Archivo de la Junta Vecinal de Gualtares
AJVV = Archivo de la Junta Vecinal de Villares
APT = Archivo de la Presa de la Tierra
ARCV = Archivo de la Real Chancillería de Valladolid
ARCV/RCE = Archivo de la Real Chancilleria de Valladolid. Registro de Cartas Ejecutorias
CAJVV = Collection of transcriptions of twenty-one documents concerning the Presa de la Tierra from 1454–1612 made in 1734 and kept in the Archivo de la Junta Vecinal de Villares

SECONDARY SOURCES

Alvarez Alvarez, César. 1982. *El Condado de Luna en la baja edad media.* León: Colegio Universitario de León, Instituto Fray Bernardino de Sahagún.

Anderson, Terry L.; and Peter J. Hill. 1975. "The Evolution of Property Rights: A Study of the American West." *Journal of Law and Economics,* 43:1:163–79.

Arthurs, W. W. 1985. *Without the Law: Administrative Justice and Legal Pluralism in Mid-19th-Century England.* Toronto: University of Toronto Press.

Assier-Andrieu, Louis. 1987. *Le peuple et la loi: anthropologie historique des droits paysans en Catalogne française.* Paris: Libr. générale de droit et de jurisprudence.

Barzel, Yoram. 1989. *Economic Analysis of Property Rights.* Cambridge University Press.

Behar, Ruth. 1986. *Santa María del Monte: The Presence of the Past in a Spanish Village.* Princeton University Press.

Benda-Beckmann, K. von; and F. Strijbosch, eds. 1986. *Anthropology of Law in the Netherlands: Essays in Legal Pluralism.* Dordrecht/Cinnaminson: Foris.

Box Amorós, Margarita. 1992. "El regadio medieval en españa: epoca arabe y conquista cristiana," in A. Gil Olcina and A. Morales Gil, coordinators, *Hitos históricos de los regadíos españoles,* 49–89. Madrid: Ministerio de Agricultura, Pesca y Alimentacion.

Butzer, Karl W.; Juan F. Mateu; and Elisabeth K. Butzer. 1985. "Irrigation Agrosystems in Eastern Spain: Roman or Islamic Origins?" *Annals of the American Association of American Geographers,* 75:4, 479–509.

Carlé, María del Carmen. 1968. *Del concejo medieval castellano-leonés.* Buenos Aires: Instituto de Historia de España.

Cheung, Steven N. S. 1973. "The Fable of the Bees: An Economic Investigation." *Journal of Law and Economics,* 16:1, 11–33.
Coase, R. H. 1988. *The Firm, the Market, and the Law.* Chicago: University of Chicago Press.
Corrales, I.; J. Carballeira; G. Flor; C. Pol; and A. Corrochano. 1986. "Alluvial Systems in the Northwestern Part of the Duero Basin (Spain)." *Sedimentary Geology* 47:2, 149–66.
Costa y Martínez, Joaquín. 1981[1902]. *Derecho consuetudinario y economia popular de España.* Zaragoza: Guara Editorial.
Critical Legal Studies Symposium. 1984. *Stanford Law Review,* 36:1 (January), 1, 2.
Dennen, R. T. 1976. "Cattlemen's Associations and Property Rights in the American West." *Explorations in Economic History,* 13:423–36.
Díez González, Florentin-Agustín. 1992. *La España del regadío y sus instituciones básicas.* Madrid: Gráfica 82.
Eggertsson, Thrainn. 1990. *Economic Behavior and Institutions.* Cambridge: Cambridge University Press.
Ellickson, Robert C. 1991. *Order without Law. How Neighbors Settle Disputes.* Cambridge: Harvard University Press.
Fairen Guillen, Víctor. 1975. *El tribunal de las aguas de Valencia y su proceso.* Valencia: Tribunal de las aguas.
Fitzpatrick, P. 1983. "Law, Plurality, and Underdevelopment," in D. Sugarman, ed., *Legality, Ideology, and the State,* 159–83. London: Academic Press.
Foucault, Michel. 1965. *Madness and Civilization.* New York: Random House.
———. 1972. *The Archaeology of Knowledge.* New York: Pantheon.
———. 1979. *Discipline and Punish.* New York: Random House.
Galanter, Marc. 1981. "Justice in Many Rooms." *Journal of Legal Pluralism,* 19:1, 1–47.
Gallego Anabitarte, Alfredo. 1986. "El derecho español de aguas en la historia y ante el derecho comparativo," in A. Gallego Anabitarte, A. Menéndez Rexach, and J. M. Díaz Lema, *El derecho de aguas en España,* 2 vols., 1–420. Madrid: Ministerio de Obras Públicas y Urbanismo.
García de Cortázar, José Ángel. 1985. "Del Cantábrico al Duero," in J. A. García de Cortázar, E. Portela, E. Cabrera, M. González, and J.E. López de Coca, *Organización social del espacio en la España medieval. La Corona de Castilla en los siglos VII a XV,* 43–83. Barcelona: Editorial Ariel.
Geertz, Clifford. 1983. "Local Knowledge: Fact and Law in Comparative Perspective," in *Local Knowledge,* 167–234. New York: Basic Books.
Glick, Thomas F. 1970. *Irrigation and Society in Medieval Valencia.* Cambridge, MA: Harvard University Press.
———. 1979. *Islamic and Christian Spain in the Early Middle Ages.* Princeton: Princeton University Press.
González Trevijano, Pedro José. 1989. *La costumbre en derecho constitucional.* Madrid: Publicaciones del Congreso de los Diputados.
Gramsci, Antonio. 1971. *Selections from the Prison Notebooks.* New York: International Publishers.
Griffiths, J. 1986. "What is legal pluralism?" *Journal of Legal Pluralism,* 24:1, 1–56.
Henry, S. 1985. "Community Justice, Capitalist Society, and Human Agency: The Dialectics of Collective Law in the Cooperative." *Law and Society Review,* 19:303–27.

Hinojosa Y Naveros, Eduardo de. 1974[1896]. "Origen del régimen municipal en León y Castilla," in *Obras*, vol 3, 271–317. Madrid: Ministerio de Justicia. Consejo Superior de Investigaciones Científicas.
Ignatieff, Michael. 1983. "State, Civil Society and Total Institution: A Critique of Recent Social Histories of Punishment," in D. Sugarman, ed. *Legality, Ideology and the State*, 183. New York: Academic Press.
Instituto Geológico y Minero. 1982. *Mapa Geológico de España.* 1:50,000 Hojas 128–9, 160–1, 193, 231–2.
Kagan, Richard L. 1981. *Lawsuits and litigants in Castile, 1500–1700.* Chapel Hill: University of North Carolina Press.
Kairys, D. ed. 1982. *The Politics of Law.* New York: Pantheon Books.
Kennedy, D. 1982. "Antonio Gramsci and the Legal System." *American Legal Studies Association Forum*, 6:32–37.
Kleffens, Eelco Nicolaas van. 1968. *Hispanic law until the end of the Middle Ages.* Edinburgh: Edinburgh University Press.
Lalinde Abadía, Jesús. 1968–69. "La consideración jurídica de las aguas en el derecho medieval hispánico." *Anales de la Universidad de La Laguna*, 6:1, 44–93.
Lazarus-Black, Mindie; and Susan F. Hirsch, eds. 1994. *Contested States: Law, Hegemony and Resistance.* New York: Routledge.
Libecap, Gary D. 1989. *Contracting for Property Rights.* Cambridge: Cambridge University Press.
López Morán, Elías. 1902. "Derecho consuetudinario y economía popular de la provincia de León," in Joaquín Costa *et. al., Derecho consuetudinario y economía popular de España*, tomo II, 231–329. Barcelona: Manuel Soler.
Maas, Arthur; and James Anderson. 1978. . . . *And the Desert Shall Rejoice.* Cambridge, MA: MIT Press.
Macías y García, D. Marcelo. 1928. *El Obispado de Astorga a principios del siglo XIX.* Orense: Imp. La Popular.
Martínez y Martínez, Francisco. 1983. *El derecho consuetudinario en Altea: villa del Reino de Valencia.* Altea: Aitana.
Masachs Alavedra, Valentín. 1948. *El régimen de los ríos peninsulares.* Barcelona: Instituto Lucas Mallada de Investigaciones Geológicas.
Merino Rubio, Valdo. 1976. "Diego Fernández de Aller y la constitución del patrimonio territorial de los Quiñones." *Tierra de León*, 24:40–56.
Merry, Sally Engle. 1988. "Legal Pluralism." *Law and Society Review*, 22:4, 869–96.
———. 1992. "Anthropology, Law and Transnational Processes." *Annual Review of Anthropology*, no. 21:357–79.
North, Douglass C. 1990. *Institutions, Institutional Change, and Economic Performance.* Cambridge University Press.
North, Douglass C.; and Robert Paul Thomas. 1973. *The Rise of the Western World: A New Economic History.* Cambridge: Cambridge University Press.
Oliver Sola, María Cruz. 1991. *La costumbre como fuente del derecho navarro.* Pamplona: Gobierno de Navarra, Departamento de Presidencia.
Ostrom, Elinor. 1990. *Governing the Commons: The Evolution of Institutions for Collective Action.* Cambridge: Cambridge University Press.
Perez-Embid Wamba, Javier. 1986. *El cister en Castilla y León.* Valladolid: Junta de Castilla y León.
Polayni, Karl. 1957. *The Great Transformation.* Boston: Beacon.
Posner, Richard A. 1977. *Economic Analysis of Law*, 2nd. ed. Boston: Little, Brown.
Repetto, Robert. 1986. *Skimming the Water: Rent-Seeking and the Performance of*

Public Irrigation Systems, Research Report #4. Washington: World Resources Institute.
Richardson, J. S. 1983. "The Tabula Contrebiensis: Roman Law in Spain in the Early First Century B.C." *The Journal of Roman Studies,* 73:1, 33–41.
Rodríguez López, Pedro. 1907. *Episcopólogo asturicense,* 4 vols. Astorga: Imprenta de Porfirio López.
Rubio Pérez, Laureano M. 1993. *El sistema político concejil en la provincia de León.* León: Universidad de León, Secretariado de Publicaciones.
Rubio Recio, J. M. 1955. "La ribera del Orbigo." Ph.D. thesis. Madrid: Facultad de Filosofía y Letras.
Ruiz-Funes García, Mariano. 1983. *Derecho consuetudinario y economía popular de la provincia de Murcia.* Murcia: Academia Alfonso X el Sabio.
Scott, James C. 1985. *Weapons of the Weak: Everyday Forms of Peasant Resistance.* New Haven: Yale University Press.
Sol Clot, Román; and M. Carmen Torres Grael. 1974. *Historia de un canal 1147–1974.* Lérida: Artis Estudios Gráficos.
Starr, J.; and J. F. Collier. 1994. *History and Power in the Study of Law.* Ithaca: Cornell University Press.
Tang, Shui Yan. 1992. *Institutions and Collective Action: Self-Governance in Irrigation.* San Francisco: Institute for Contemporary Studies Press.
Teijón Laso, Evelio. 1949. "Introducción al estudio geográfico-humano de la región natural del valle del río Orbigo (León)." *Boletín de la Real Sociedad Geográfica,* 85:3, 231–309, 85:4, 452–507.
Tribunal de las Aguas. 1988. *Tribunal de las aguas de la vega de Valencia.* Valencia.
Umbeck, John. 1977. "The California Gold Rush: A Study of Emerging Property Rights." *Explorations in Economic History,* 14:197–226.
Vanderlinden, J. 1989. "Return to Legal Pluralism: Twenty Years Later." *Journal of Legal Pluralism,* 28:149–57.
Vassberg, D. E. 1984. *Land and Society in Golden Age Castile.* Cambridge: Cambridge University Press.
Wade, Robert. 1988. *Village Republics: Economic Conditions for Collective Action in South India.* London: Cambridge University Press.
Williamson, Oliver E. 1983. "Credible Commitments: Using Hostages to Support Exchange." *American Economic Review,* 73 (September), 519–40.
———. 1985. *The Economic Institutions of Capitalism.* New York: Free Press.