

UNCERTAIN WATERS AND CONTESTED LANDS: EXCAVATING THE LAYERS OF COLORADO'S LEGAL PAST

TOM I. ROMERO, II*

INTRODUCTION

During one of his judicial tours throughout Colorado in the 1870s, Judge Moses Hallett, the “John Marshall” of the Colorado legal system, recognized that many of the same jurors who served in one location would re-appear for jury service in the next.¹ When Judge Hallett asked the reason for this strange coincidence, the local sheriff responded: “The benches are so rough and splintery, Judge, I have to choose only those men who wear leather seats in their trousers.”² The result, according to Judge Hallett, was to introduce “a qualification for jury service unknown either to the statute or common law.”³ The sheriff’s solution illustrates the imaginative ways that Coloradans have often confronted legal challenges during the past 150 years. Set against an environment short on water but rich in natural resources, taking place in a geographic space once settled by a multitude of Native American tribes and claimed

* Western Legal Studies Fellow at the University of Colorado’s Center of the American West, School of Law, and Department of History. B.A., University of Denver, 1995; M.A., History, University of Michigan, 1999; J.D., University of Michigan Law School, 2000. Currently a Ph.D. Candidate in the University of Michigan’s Department of History. In cooperation with the University of Colorado’s Center of the American West, School of Law, and Department of History, as well as the Faculty of Federal Advocates, I am engaged in a two-year project identifying and cataloguing resources related to the legal history of Colorado. I wish to acknowledge Patricia Nelson Limerick, Richard Delgado, Jean Stefancic, Andrew Needham, Laurie Blumberg-Romero, and Daniel Barash for helpful comments and editorial suggestions that significantly enhanced the ideas presented in this Article. In addition, I am indebted to Judge John Kane, Senior Judge for the U.S. District Court for the District of Colorado, whose historical vision inspired this project.

1. Golding Fairfield, *The Original “Rush to the Rockies,”* 36 DICTA 131, 138 (1959).

2. *Id.*

3. *Id.*

by a handful of growing nation-states, and formulated in a region that millions would eventually call home, the legal history of Colorado is replete with similar examples of judicial adaptation and seat-of-the-pants innovation.

This Article explores innovation and transformation in Colorado's legal past. Focusing on the legal struggles surrounding the state's "uncertain waters" and "contested lands," I trace the relationship between law and jurisprudence⁴ to Colorado's exceptional geographic and cultural positioning in the history of the American West. From the contentious and continuous struggles over natural resource development to the bitter and violent clashes in labor and human relations, Colorado litigants, lawyers, and judges confronted questions and forged solutions in uncharted legal territory. In adjudicating the claims of a variety of interests, Colorado courts have been battlegrounds for legal disputes that expose the complex and contentious social, cultural, and historical processes beneath legal claims. In the process of adjudicating such disputes, Coloradans anticipated many of the legal challenges that face the region today. From resource use to racial tension, Colorado courts attempted to provide original solutions to the claims of a multiplicity of people and interests.

Part I of this Article will outline the centrality of Colorado to the legal "frontiers" of the American West. Detailing an expanded understanding of the "frontier" in legal discourse, this section explores Colorado's unique geographic position vis-à-vis Western legal history. Part II examines the social, cultural, and political history beneath Colorado Water law. From the development of the doctrine of prior appropriation to the emergence of water issues in voting rights disputes, water law and jurisprudence in the state unleashed a flood of social and political uncertainty among Colorado's varied communities. Finally, Part III discusses legal and extra-legal claims to land in the state. Beginning with the large-scale movement of ethnic-Europeans, Mexican Americans, and American Indians to Colorado in the nineteenth century and continuing today with the expansion of the suburban and urban metropolis, land dis-

4. My use of the terms "law" and "jurisprudence" in this Article is meant to contrast the relationship between the body of rules, standards, statutes, and principles promulgated by a government ("law") and the interpretation and implementation of these laws ("jurisprudence") by judges, lawyers, government officials, and lay people. See BLACK'S LAW DICTIONARY 854-855, 884-885 (6th ed. 1990).

putes in the state tested the limits of citizenship, democracy, and the rule of law. In the end, excavating the many layers beneath Colorado's legal past reveals a bonanza of legal and historical gold in which to better understand and appreciate the centrality of Coloradans' legal experience to continuing transformations in American and North American law and jurisprudence.

I. ON THE EDGES OF COLORADO'S LEGAL FRONTIERS: LAW AND HISTORY IN THE AMERICAN WEST

What is known about Colorado's legal past is limited. Most of the handful of texts written specifically about Colorado's legal history have been accounts of "great" lawyers and "great" judges.⁵ Although these stories have identified some of the watershed issues⁶ and prominent figures⁷ in Colorado's legal past, they provide only partial and anecdotal evidence rather than a systematic examination of the historical development of law and jurisprudence in the state.⁸ Accordingly, such histories

5. See, e.g., JOHN L. KANE JR. & SHARON MARKS ELFENBEIN, *FROM GUNS TO GAVELS: A HISTORY OF THE FEDERAL TERRITORIAL AND DISTRICT COURTS OF COLORADO* (1991); ALAN J. KANIA & DIANE HARTMAN, "THE BENCH AND THE BAR": A CENTENNIAL VIEW OF DENVER'S LEGAL HISTORY (1993); Symposium, *Colorado Legal History*, 36 DICTA 103 (1959); Symposium, *Six of the Greatest: A Tribute to Outstanding Lawyers in Colorado History*, 26 COLO. LAW. 3 (1997); Symposium, *Five of the Greatest: A Tribute to Outstanding Lawyers in Colorado History*, 27 COLO. LAW. 5 (1998); Symposium, *Six of the Greatest: A Tribute To Outstanding Lawyers In Colorado History*, 28 COLO. LAW. 5 (1999); Symposium, *Six of the Greatest: A Tribute To Outstanding Lawyers In Colorado History*, 29 COLO. LAW. 5 (2000).

6. See sources cited *supra* note 5.

7. See sources cited *supra* note 5.

8. See, e.g., Albert T. Franz, *Colorado Appellate Courts—The First Hundred Years*, 36 DICTA 103 (1959). In his article, Justice Franz of the Colorado Supreme Court assessed the first hundred years of work in Colorado's appellate courts. In his analysis, Justice Franz makes the rather remarkable observation that a history of Colorado's appellate courts "cannot be history in such a sense. Striving to dispense justice in accordance with principles, norms and standards which have been tried, tested and found good in the crucible of the Judeo-Christian ethic of the people, its history is generally one of stability and somewhat colorless constancy." *Id.* at 103. Franz notes, "[t]his history would be impossible to summarize and present in narrative form." *Id.* at 110. Justice Franz refers readers to the Colorado Reports as evidence of his observations. *Id.* Unfortunately, such evidence fails to give readers a sense of the changing personalities serving in Colorado's appellate courts, the specific political, social, and cultural issues each court encountered, and any explanation for why change in jurisprudence did or did not occur.

have given us little perspective into the culture, constituencies, and biases driving legal decisions and law-making in Colorado.⁹ Likewise, most general histories about Colorado have given little consideration to law and jurisprudence. While historians have produced a sizeable amount of literature about Colorado,¹⁰ the Rocky Mountain West,¹¹ the Great Plains,¹² and the American Southwest,¹³ they have been less productive in assessing the importance of law to the historical development of Colorado.¹⁴ Consequently, the literature concerning Colorado's legal past is a litany of parallel but disconnected conversations waiting to be joined. Although much has been written about Colorado law and a great deal about Colorado society, scholars have barely scratched the surface when it comes to the relationship between these issues.

9. Not all legal histories about Colorado have had such shortcomings. See, e.g., GORDON MORRIS BAKKEN, *THE DEVELOPMENT OF LAW ON THE ROCKY MOUNTAIN FRONTIER: CIVIL LAW AND SOCIETY, 1850-1912* (1983); Barbara Bintliff, *A Jurisdictional History of Colorado Courts*, 65 U. COLO. L. REV. 577 (1994); Robert G. Dunbar, *The Origins of the Colorado System of Water-Right Control*, 27 COLO. MAG. 251 (1950); Gregory J. Hobbs, Jr., *Colorado Water Law: An Historical Overview*, 1 U. DENV. WATER L. REV. 1 (1997); Billie Barnes Jensen, *Let the Women Vote*, 41 COLO. MAG. 23 (1964). Such works, however, remain few and far between.

10. See, e.g., CARL ABBOTT ET AL., *COLORADO: A HISTORY OF THE CENTENNIAL STATE* (1976); ROBERT G. ATHEARN, *THE COLORADANS* (1976); STEPHEN J. LEONARD & THOMAS J. NOEL, *DENVER: MINING CAMP TO METROPOLIS* (1990).

11. See, e.g., ROBERT W. LARSON, *POPULISM IN THE MOUNTAIN WEST* (1986); DUANE A. SMITH, *ROCKY MOUNTAIN MINING CAMPS THE URBAN FRONTIER* (1992); DUANE A. SMITH, *ROCKY MOUNTAIN WEST COLORADO, WYOMING, AND MONTANA, 1859-1915* (1992).

12. See, e.g., RICHARD E. JENSEN ET AL., *EYEWITNESS AT WOUNDED KNEE* (1991); WALTER PRESCOTT WEBB, *THE GREAT PLAINS* (1981); ELLIOT WEST, *THE CONTESTED PLAINS: INDIANS, GOLDSEEKERS, AND THE RUSH TO COLORADO* (1998).

13. See, e.g., SARAH DEUTSCH, *NO SEPARATE REFUGE: CULTURE, CLASS, AND GENDER ON THE ANGLO-HISPANIC FRONTIER IN THE AMERICAN SOUTHWEST, 1880-1940* (1987); RAMÓN GUTIÉRREZ, *WHEN JESUS CAME, THE CORN MOTHERS WENT AWAY: MARRIAGE, SEXUALITY, AND POWER IN NEW MEXICO, 1500-1846* (1991); DAVID J. WEBER, *THE SPANISH FRONTIER IN NORTH AMERICA* (1992).

14. Coloradans forged distinct legal concepts such as fairness, justice, citizenship, and equality during critical moments in their history. Whether the historical inquiry revolves around the Sand Creek or Ludlow massacres or the rise of Colorado's extractive or high-tech industries, law and legal culture is often a footnote rather than a central theme in the historical narrative. See, e.g., WEST, *supra* note 12, at 299-308; ATHEARN, *supra* note 10, at 196-97.

A. *Fool's Gold?*

If we return to Judge Hallett's territorial adventures and his observation about the development of a local Colorado practice, the story stands as a symbol of common sense pragmatism among Colorado's citizens. In a state where the historical compass has been measured by the industrious miners of 1859, or the hardy cowboys of the cattle industry, the history of Colorado is well-stocked with references to individual initiative, political freedom, and uncomplicated practicality.¹⁵ As Justice Albert Franz of the Colorado Supreme Court described: "In the beginning necessity begot improvisation. A young and raw frontier met the exigencies of the situation in typical American fashion" [by establishing a] "simple, direct, and quick" legal system.¹⁶ Not surprisingly, like many adaptations Coloradans made during those times, the "leather-seat" and similar innovations had no lasting impact in the common or statutory law of the state, region, or nation.¹⁷ Such stories make it easy for scholars to consign the state's legal and jurisprudential innovations to a long-past and completely "defunct frontier process."¹⁸ In essence, there appears to be an abundance of "fool's gold" on the surface of Colorado's legal past.

Colorado has dramatically changed over a century and a half. Since gold was first discovered in 1859, mining companies, railroads, and foreign investment have transformed arid landscapes.¹⁹ During the twentieth century, cities and towns became regional governmental and technical hubs of the nation, while the "open range" vanished as private and suburban

15. See, e.g., ABBOTT ET AL., *supra* note 10; ATHEARN, *supra* note 10; COLORADO AND ITS PEOPLE (Leroy Hafen ed., 1948); JEROME C. SMILEY, SEMI-CENTENNIAL HISTORY OF THE STATE OF COLORADO (1913); WILBER FISKE STONE, HISTORY OF COLORADO 1918-1919; CARL W. UBBELOHDE, A COLORADO HISTORY (1965).

16. Franz, *supra* note 8, at 104.

17. According to James Grafton Rogers, early courts in Colorado "ceased to legislate, adjudicate civil cases and enforce law and order" in a little less than twenty years. James Grafton Rogers, *The Beginnings of Law in Colorado*, 36 *DICTA* 111, 115 (1959). Thus, "[t]hey served the cause of law and order well but briefly." *Id.* at 119. Yet, Professor Rogers does point out that in relation to water and mining law, early Colorado courts "created principles and practices which became permanent jurisprudence." *Id.* at 115.

18. Michael P. Malone, *Beyond the Last Frontier: Toward a New Approach to Western American History*, 20 *W. HIST. Q.* 409, 409 (1989).

19. ABBOTT ET AL., *supra* note 10, at 20-70.

ownership swallowed "free land."²⁰ With these changes, the formative "frontier" conditions that had driven law and jurisprudence in Colorado have seemingly become extinct.²¹ Given the tendency of legal historians to dismiss Colorado's past,²² the more consequential question is this: why should scholars pursue any study about law and jurisprudence in Colorado?

1. Jurisprudential Frontiers

The importance of Colorado's legal history lies—in part—in re-imagining the meaning of the "frontier." Rather than an outdated and irrelevant process, legal scholars should understand the concept of "frontier" in its dynamic sense. For example, Americans during the twentieth century have used "frontier" and associated words like "pioneer" to describe such disparate things as fasteners ("Velcro: The Final Frontier"), presidential policy proclamations ("The New Frontier"), dramatic television programming ("Star Trek: The Final Frontier"), and African-American achievements ("Jackie Robinson: A baseball pioneer").²³ According to Professor Patricia Nelson Limerick, "historians of the American West might puzzle over the shifting definitions of the word 'frontier,' but few . . . experience any confusion when they see [the word]."²⁴ Although the "frontiers" of the twentieth and twenty-first centuries are certainly different from those of the nineteenth century, constantly emerging jurisprudential frontiers have forced Colorado lawyers, litigants, and judges to consider anew the conditions that have shaped and continue to shape Colorado.

Not surprisingly, the idea of the "frontier," if not its precise meaning, is extremely well established in Colorado law. Recently, Colorado courts have used the term to assess issues

20. See generally LEONARD & NOEL, *supra* note 10, at 235–478.

21. This assumes that one is using the term "frontier" to describe the "sophistication of legal systems administered at outposts of settlement." John Phillip Reid, *The Layers of Western Legal History*, in *LAW IN THE WESTERN UNITED STATES* 5 (Gordon Morris Bakken ed., 2000).

22. Kermit Hall, *The Legal Culture of the Great Plains*, *LAW AND THE GREAT PLAINS: ESSAYS ON THE LEGAL HISTORY OF THE HEARTLAND* 10 (John R. Wunder ed., 1996).

23. PATRICIA NELSON LIMERICK, *SOMETHING IN THE SOIL: LEGACIES AND RECKONINGS IN THE NEW WEST* 74–92 (2000).

24. *Id.* at 75.

ranging from jury service²⁵ to patents,²⁶ to the litany of cases involving companies with either "frontier" or "pioneer" in their name.²⁷ While Colorado courts and litigants have used such imagery to invoke a certain well-functioning past,²⁸ what is most striking about the "frontier" is its continued persistence in Colorado law and jurisprudence in relation to the myriad of issues touching water and land. As Parts II and III of this Article demonstrate, in areas as distinct as prior appropriation and school-bussing litigation, water and land disputes have constantly forced courts to push the boundaries of law and jurisprudence in the Centennial State.

The physical environment, however, does not by itself explain the jurisprudential frontiers faced by Colorado's legal participants. Rather, it is the historical processes, including the often disparate responses of people to place, landscape, and resources that explain the development of legal and jurisprudential innovation. As a result, the legal "frontiers" encountered by Colorado litigants, lawyers, and judges may help us better understand and appreciate contemporary solutions to long-simmering historical and legal dilemmas that have shaped the contours of the past and present of the American West.

2. Colorado's Legal Past as the Legal History of the American West

During the last several years, histories about many subjects in the American West have become increasingly sophisti-

25. See *People v. Kriho*, 996 P.2d 158, 169 (Colo. Ct. App. 1999) (referencing the positive history of Colorado's jury system).

26. See *T.A. Pelsue Co. v. Grand Enter., Inc.*, 782 F. Supp. 1476, 1494 (D. Colo. 1991) (determining the "pioneer" status of a collapsible tent).

27. A search on Westlaw provided over 214 hits using "frontier" or "pioneer" in a case title search. A large majority of these cases involved companies named after one of these words.

28. The *Kriho* court provides a compelling example of such reverence in relation to a criminal prosecution of a Colorado juror: "The danger of such overreaction is that we could impair public confidence in a jury system that has served Colorado well since pre-territorial days when its early settlers formed *ad hoc* People's Courts and Miners' Courts." 996 P.2d at 169.

cated and specialized in content.²⁹ The legal history of the region, however, has not followed a similar pattern. Outside of a few articles and books, law has been noticeably insignificant to many "western" scholars.³⁰ Indeed, Professor John Phillip Reid laments that

there may be no area more neglected than what some have started to call western legal history. So little has been written of the legal history of the American and Canadian West that we may be only guessing when we say there is a western legal history to be researched and written.³¹

Here rests the potential for students of Colorado history to transform how scholars have understood not only western legal history, but the history of the American and North American West. Situated at the center of the Rocky Mountains, resting in the margins of the Great Plains and the periphery of the southwestern deserts, Colorado is "in fact the meeting point for three major sections within the American West": mountains, plains, and deserts.³² Consequently, the history of Colorado symbolizes the historical experience of Westerners to their geographic space.

Colorado's vast expanse of mountains running through the center and western half of the state "is an area where the federal government still owns over half the land and where history has been the study of human intrusion threatening the precarious ecological balance."³³ From the gold and silver rush bonanzas of the late nineteenth century to the ski pilgrimages of the late twentieth and early twenty-first century, legal disputes in and about Colorado's mountains have represented not only the lofty dreams and grandiose visions of migrants to the

29. For examples of the historical sophistication and breadth of recent studies on the American West, see *A NEW SIGNIFICANCE: RE-ENVISIONING THE HISTORY OF THE AMERICAN WEST* (Clyde A. Milner II ed., 1996); *THE OXFORD HISTORY OF THE AMERICAN WEST* (Clyde A. Milner II et al. eds., 1994); RICHARD WHITE, "IT'S YOUR MISFORTUNE AND NONE OF MY OWN": A NEW HISTORY OF THE AMERICAN WEST (1991).

30. See *supra* notes 12-13.

31. Reid, *supra* note 21, at 5.

32. ABBOTT ET AL., *supra* note 10, at 15.

33. *Id.* at 16.

region,³⁴ but the often paralyzing intimidation and bitter conflict between people, government, and the environment.³⁵

Coloradans have also attempted to seek their fortunes in the semi-arid plains that roll gently east from the Rocky Mountains. Hence, a diverse group of people and communities, from nomadic hunters and traders of Plains Woodland culture to yeoman-inspired farmers and ranchers, have transformed the landscapes and environments in the Colorado plains.³⁶ In this section of the state, legal and extra-legal conflict over agriculture, aridity, and natural resource development have shaped the irrigated farms and sizable ranches running between the small towns of Fort Morgan, Sterling, Rocky Ford, La Junta, Grover, and Lamar.³⁷ Like the mountains, the ecological demands of the region have fashioned and often shattered the fortunes of the region's inhabitants. Consequently, the plains gave rise to competing visions of land use and control.³⁸ The end result is that violence and hardship—from the 1864 Sand Creek Massacre to the Dust Bowl of the 1930s—have regularly characterized the historical experience of the region.³⁹

Finally, Colorado's legal past and its relationship to the American West is defined by the people working and living in the expanse of deserts running through the southern half of the state. At once the home of a variety of ethnic and racial groups, Colorado's deserts form the northern fringe of the American Southwest:

In historic terms, this great arc of land curving from Monterey on the Pacific to Corpus Christi on the Gulf of Mexico constituted the Spanish borderlands In the twentieth century, it can be defined as a zone of cultural contact, the place where the nation's dominant Anglo American culture has been forced into grudging acknowledgement of the so-

34. See, e.g., *Pizza v. Wolfe Creek Ski Dev. Corp.*, 711 P.2d 671 (Colo. 1986) (involving a person skiing down difficult terrain at a winter resort). As early as 1859, migrants to Colorado's mountains believed "that this was to be the big adventure of their lives . . ." ATHEARN, *supra* note 10, at 18. This process was repeated over and over as Colorado boosters promised riches and opportunity in Colorado's mountains. *Id.* at 87–105, 348–70.

35. See, e.g., discussion *infra* notes 108–45, 221–69.

36. See, e.g., discussion *infra* notes 112–21, 221–31; see also WEST, *supra* note 12, at 17–32, 317–37.

37. See ABBOTT ET AL., *supra* note 10, at 16.

38. See WEST, *supra* note 12, at 33–58, 317–37.

39. See *id.* at 299–307, 327–30.

cial patterns of American Indians and Spanish-speaking peoples.⁴⁰

Accordingly, water and land disputes have historically served as a proxy for important questions regarding the meaning of human rights, citizenship, and democracy in a multiracial society. In vying for land, resources, and cultural, political, and legal space, American Indians, Latino/as, Japanese Americans, and Anglos in Southern Colorado have continually pushed the boundaries over meanings of race and nation.⁴¹

Despite having the same constitution, statutes, and common law, Coloradans have not shared the same understandings, needs, and interests. To be sure, "[d]ifferences between the economic needs of the Eastern and Western slopes have appeared repeatedly as the source of bitter disputes over currency inflation, political representation, water diversion, and

40. ABBOTT ET AL., *supra* note 10, at 18. The terminology used to describe the various communities in this Article has a contentious and by no means settled genealogy. Accordingly, I attempt to use terminology in the ways that people of each population labeled and distinguished themselves both from one another and from other ethnic and racial groups. When I use the term "Latino/a" I refer to people, both citizen and non-citizen, with Spanish surnames or who are Spanish-speaking from Mexico, Central America, and South America. I use the term "Hispano" to identify Mexican Americans from New Mexico and Southern Colorado. I attempt to restrict use of both the terms "Spanish American" and "Chicano/a" to ways that contemporaries understood the terms. Thus, "Spanish American" refers to American citizens of Latin American descent while "Chicano/a" refers to both non-citizens of Mexican descent *and* American citizens of Mexican, New Mexican, or Southern Coloradoan descent. "Mexican American" is used to describe all American citizens of Mexican descent, regardless of their political orientation or length of residence in the United States. In terms of "African Americans," I use the term "Negro" only when used by contemporaries of the time. The term "Black" will be used interchangeably with "African American." As for "Asian Pacific Americans," I use this term to describe all American citizens of Asian descent, regardless of their political orientation or length of residence in the United States. "Asian" refers generically to all non-citizen Asian immigrants. When appropriate, I attempt to refer to specific subgroups (Japanese, Japanese Americans, Chinese, Chinese Americans, etc.) using the same parameters. I use the term "American Indian" and "Native American" interchangeably to refer to indigenous peoples who identify with specifically recognized tribes in the United States and Canada. When appropriate, I will attempt to refer to specific tribes and nations. Finally, I use the terms "White" and "Anglo" interchangeably to refer to both citizens and non-citizens of European descent. When appropriate, I will refer to specific European ethnic groups.

41. See discussion *infra* notes 270–368.

conservation.”⁴² Ideological differences between city dwellers and rural residents have driven conflicts over such issues as land and resource use,⁴³ sexual orientation,⁴⁴ and religious freedom.⁴⁵ Cultural and social differences concerning property, political autonomy, and ideology among people of color and Whites have catalyzed intense debate over the procedural and substantive meaning of civil rights.⁴⁶ Whatever the issue, in battling for control over the mountains, in irrigating and harvesting its plains, and in negotiating the property and human rights demands of a multiracial and multicultural desert, Coloradans have prefigured and shaped law and jurisprudence in the American West.

The importance of Colorado’s legal history lies beneath layers created by legal conflicts over mountains, plains, and desert.⁴⁷ More precisely, Colorado’s uncertain waters and contested lands reveal striking social, cultural, and political differ-

42. ABBOTT ET AL., *supra* note 10, at 18. The Western Slope of Colorado lies to the West of the Continental Divide, while the Front Range is the region just east of the Rockies, where the mountains meet and turn into Colorado’s plains.

43. See, e.g., *Sanchez v. Taylor*, 377 F.2d 733 (10th Cir. 1967); *Rael v. Taylor*, 876 P.2d 1210 (Colo. 1994) (disputing access to a Mexican Land Grant located in the San Luis Valley); *Am. Water Dev., Inc. v. City of Alamosa*, 874 P.2d 352 (Colo. 1994) (seeking to control water located under San Luis Valley for use in metropolitan Denver).

44. See, e.g., *Romer v. Evans*, 517 U.S. 620, 623–24 (1996) (noting discrepancies between cities such as Aspen and Denver over the inclusion of gays and lesbians in civil rights ordinances).

45. See, e.g., *State v. Freedom from Religion Found., Inc.*, 898 P.2d 1013 (Colo. 1995) (examining an effort to remove Ten Commandments from statue located on state capital grounds).

46. Several newspaper articles covered the struggle between American Indian and Chicano/a activists with Italian-American activists over the continued celebration of Columbus Day in Denver. See, e.g., Lynn Bartels, *Italians Navigate Their Way to Permit*, ROCKY MTN. NEWS (Denver, Colo.), July 11, 2001, at 4A; Ann Carnahan et al., *147 Arrested at Parade Standoff: Vulgar Words, Tense Confrontations Greet Columbus Day March, but Peace Prevails*, ROCKY MTN. NEWS (Denver, Colo.), Oct. 8, 2000, at 4A; John C. Ensslin, *Indians Vow ‘Vigorous’ Protests*, ROCKY MTN. NEWS (Denver, Colo.), Oct. 3, 2000, at 4A; Dan Luzadder, *Columbus Parade Gets Go Ahead*, ROCKY MTN. NEWS (Denver, Colo.), Sept. 30, 2000, at 5A.

47. As Professor Reid points out:

To explore the potentials—to vaticinate the whats and the whys of western legal history yet to be written—we should chuck aside conventional historical categories such as biography, or familiar areas of law like torts. . . . Better to think of western legal history by its layers—not layers of historical knowledge but layers of “western” specificity.

Reid, *supra* note 21, at 5. In the case of Colorado, such specificity is found in the nexus of issues created by mountains, plains, and desert.

ences about law among inhabitants of the state's mountains, plains, and deserts. It is a state where law and jurisprudence are intricately connected to community values, regional identity, political control, environmental consciousness, demographic transformations, religious, racial, and ethnic tensions, and the demands of an extractive and post-extractive economy. As the literal and symbolic nexus of the American West, Colorado's special physical geography created the conditions for an exceptional socio-legal landscape. For these reasons, the legal layers beneath Colorado's mountains, plains, and desert are the key to understanding the past, present, and future of law and jurisprudence in the American West.

II. UNCERTAIN WATERS

Defining the American West has always been a tricky proposition. Yet, if scholars have found any common feature, it has been the fate of the "great rivers" that run throughout the American West.⁴⁸ Most of these great rivers diverge from Colorado's mountains: "The Rio Grande ties the state to the Southwest, the Colorado to the range and plateau country of the Mountain West, the Platte and Arkansas to the Great Plains."⁴⁹ In Colorado and much of the American West, "lack of water is the central fact of existence, and a whole culture and set of values have grown up around it."⁵⁰ As a result, disputes over ac-

48. ABBOTT ET AL., *supra* note 10, at 15. The notion that water, or more precisely, aridity, is the defining historical feature of the American West was first advanced by Walter Prescott Webb in a 1957 essay. Walter Prescott Webb, *The American West: Perpetual Mirage*, HARPERS MAG., May 1957, at 25. This thesis has been embraced by historians such as NORRIS HUNDLEY, *THE GREAT THIRST: CALIFORNIANS AND WATER—A HISTORY* (1992); DONALD WORSTER, *RIVERS OF EMPIRE: WATER, ARIDITY, AND THE GROWTH OF THE AMERICAN WEST* (1985). *But see* WHITE, *supra* note 29, at 3. Professor White notes that historians and geographers "often use aridity to distinguish the West from other sections But what about western Oregon, western Washington, and northern California, let alone eastern parts of Nebraska, Oklahoma, Kansas, Texas, and the Dakotas" *Id.* Accordingly, White asks whether such areas are "to be excluded? Aridity certainly separates vast sections of the West from the East and South, but it also divides the West itself." *Id.* In this Article, I argue that legal tensions generated over the control of and use of water (whether in arid, semi-arid, or humid places) in relation to the unique cultural and social reality of the region ties the entire American West together.

49. ABBOTT ET AL., *supra* note 10, at 15.

50. MARC REISNER, *CADILLAC DESERT: THE AMERICAN WEST AND ITS DISAPPEARING WATER* 12 (1993).

cess to and control of Colorado's water resources give us a glimpse into the dynamic and often contentious ways that westerners have used law and jurisprudence to control one of the region's most vital and uncertain resources.

Beginning early in their history, Coloradans worked to harness the energies of these rivers as they passed through Colorado's arid and semi-arid lands.⁵¹ As early as five or six hundred years before the arrival of the Spanish in the American Southwest, the Anasazi instituted an elaborate system of water control.⁵² Professor Michael Meyer notes: "On Chapin Mesa at Mesa Verde in Southwestern Colorado they built check dams and an irrigation ditch more than four miles in length."⁵³ On the eastern plains, Wichitas and Quiviras established horticultural villages along watercourses.⁵⁴ As one lived further from the mountains, "[s]treams became progressively more valuable In the drier, more exposed land [Wichitas and Quiviras] farmers were tied closely and absolutely to the vital veins of water running through the open country."⁵⁵

As various native groups moving in and out of the region made claim to water resources, disputes over control and access to waters shaped early human experience in what was to become Colorado.⁵⁶ Unfortunately, the archaeological and historical record regarding water conflict among Colorado's Native Americans prior to Spanish conquest is relatively small.⁵⁷ As Professor Meyer notes, "[w]ater disputes undoubtedly occurred in pre-conquest America, especially in the desert regions. Harnessing water for productive purposes required the cooperative effort of many, but subsequent allocation schemes were a source of potential conflict."⁵⁸ As a result, communal priorities and environmental change dictated how water would be used.⁵⁹

51. "Semi-arid" and "arid" refer to those regions that receive less than twenty inches of annual precipitation. *See generally* Webb, *supra* note 48, at 25; DONALD WORSTER, *UNDER WESTERN SKIES: NATURE AND HISTORY IN THE AMERICAN WEST* 23 (1992).

52. MICHAEL C. MEYER, *WATER IN THE HISPANIC SOUTHWEST: A SOCIAL AND LEGAL HISTORY, 1550-1850*, at 11-14 (1984).

53. *Id.* at 12.

54. WEST, *supra* note 12, at 38.

55. *Id.*

56. *See id.* at 17-32.

57. MEYER, *supra* note 52, at 18.

58. *Id.*

59. Peter Iverson, *Native Peoples and Native Histories*, in *THE OXFORD HISTORY OF THE AMERICAN WEST* 15 (Clyde A. Milner II et al. eds., 1994).

"If their population increased or if drought or a reduction of available resources forced them to move, Indians would attempt to expand their hunting and gathering domain through war with their neighbors."⁶⁰

Given the centrality of community in the native world-view,⁶¹ it is doubtful that native peoples of Colorado considered water a commodity to be bought, sold, or traded.⁶² Yet, its prominence in the economic, social, and political systems of various native groups foreshadowed the water laws that Spanish, Mexican, and American people would develop during the nineteenth century.⁶³ In damming rivers, irrigating fields, and distributing water according to a system of rules and customs, American Indians understood its value in their dry and thirsty land.

A. *Agua and Gold: New Mexican and Territorial Antecedents to Contemporary Water Law*

In the middle of the nineteenth century, when New Mexicans settled in what was to become the southern half of Colorado, the contemporary water law of the American West began to take shape. As early as 1852, in the San Luis Valley, Hispano settlers imported the basic concepts and principles that would make up the foundation of Colorado's water law. Using a system of community appropriation and distribution of headwaters developed in the desert southwest, New Mexicans seamlessly translated their water law system to the extremes of mountain weather and living.⁶⁴ Accordingly, these settlers brought a highly developed system of Spanish and Mexican water law and legal innovation⁶⁵ that "was designed to protect in-

60. *Id.*

61. *See id.*

62. *See* MEYER, *supra* note 52, at 18.

63. *See infra* Part I.A-B (discussing Spanish, Mexican, and American water laws).

64. *See* Wells A. Hutchins, *The Community Acequia: Its Origin and Development*, 31 SW. HIST. Q. 261 (1928); Dunbar, *supra* note 9, at 241.

65. Fundamentally, law and legal innovation played a prominent role in the history of Spain and Mexico. According to Professor Meyer:

Because of the disparate invasions of the Iberian Peninsula following the collapse of Rome, the rulers of Spain, long before the discovery of America, were familiar in the problems inherent in trying to reconcile the interests of different races and different cultures, as well as in juxtaposing the demands of conquerors with the concerns of the conquered.

dividual rights, to encourage private initiative and entrepreneurship, to stimulate economic development, and even to accumulate personal wealth."⁶⁶ Especially in relation to rights associated with groundwater, the system represented

incipient capitalism, a glorification of the sanctity of private property and a celebration of *laissez faire*. With but very few exceptions, a person could do what he wanted with his groundwater resource even if it prejudiced the interests of his neighbor Groundwater law represented free enterprise with but very few constraints.⁶⁷

Yet, New Mexican surface water law balanced these individual values by recognizing the needs of the larger community. Importantly, the "law recognized that unbridled individual ambition would never produce a harmonious society and viewed justice not as a metaphysical abstraction but as an attainable goal."⁶⁸ As a result, New Mexicans enshrined the concept of normative restraint, a commitment towards understanding the reasonable use of a surface water resource, in order "to check monopoly, limit the influence of irresponsible locals, protect the disadvantaged, and most importantly to encourage equity."⁶⁹ By balancing private property rights in relation to the needs of the common good, New Mexican settlement in the southern reaches of Colorado introduced legal principles that would become the basis of Colorado's legal water regime.⁷⁰

MEYER, *supra* note 52, at 105–13. Consequently, the export of Spanish law and jurisprudence to the Americas resulted in a highly adaptive legal regime in both Spanish and independent Mexico. *Id.*

66. *Id.* at 179.

67. *Id.* For an assessment concerning the property rights of women in Spanish and Mexican law, see MARÍA E. MONTOYA, *TRANSLATING PROPERTY: THE MAXWELL LAND GRANT AND THE CONFLICT OVER LAND IN THE AMERICAN WEST, 1840–1900* (2002).

68. MEYER, *supra* note 52, at 179.

69. *Id.*

70. In the early 1850s, the water rights of southern Colorado's residents were registered with:

[T]he Constabulary of Taos, the Mexican body which governed Nueva Mexico, whose authority was grand-fathered in after the 1848 [Treaty of Guadalupe-Hidalgo with Mexico], until the Territories of New Mexico and Colorado were established. The first water right in Colorado was the San Luis People's Ditch, also known as the Acequia Madre A plaque along the Acequia Madre near Vega outside town reads: "San Luis People's Ditch, the oldest continually used ditch in Colorado, with court decree priority No. 1, and dating from April 10, 1852, dug by the

By the 1870s, after the gold rush and homesteading⁷¹ radically altered the demographic composition of the state,⁷² Colorado litigants, lawyers, judges, and legislators applied southern Colorado's water law principles to reject the Anglo-American common law doctrine of riparian rights.⁷³ The riparian rights doctrine, which originated in the English common law,⁷⁴ provides that the right to use water is dependent upon a user's proximity to the water source, and water users cannot seriously diminish the availability of water to other users downstream.⁷⁵ Water, in the riparian doctrine, is "not separate property but an incident of land ownership."⁷⁶ Beginning with the first Miners Courts and Claims Clubs in 1859, however, Coloradans understood that the Anglo-American doctrine was ill-suited for the semi-arid and arid landscape.⁷⁷ Influenced heavily by the experience of the Gold Rush in California and changes in Mexican groundwater law, Colorado miners developed the "first in time, first in right" rule that became the foundation of prior

pioneer settlers of Colorado. Colorado's greatness is built upon irrigation."

Bill Weinberg, *Contested Sierra: Development Threatens Pueblo-Hispano Land-Based Ways*, NATIVE AM. AKWE-KON'S J. INDIGENOUS ISSUES, Dec. 1997, at 45, 45. The "property rights" claimed by the San Luis Valley's Hispano settlers were subsequently recognized immediately by the Colorado legislature as lawmakers gave the residents the first claim to water even though mining was the territory's dominant industry. See Act of Feb. 5, 1866, 1866 Colo. Sess. Laws 61.

71. The Homestead Act of 1862 promoted settlement of the public domain and in turn encouraged permanent settlement in much of Colorado and the American West. See Homestead Act of 1862, ch. 75, § 1, 12 Stat. 392 (repealed 1976).

72. In the ten years following the discovery of gold in Colorado, whites became the dominant racial group in Colorado. See WEST, *supra* note 12, at 323-27.

73. Robert G. Dunbar, *The Adaptability of Water Law to the Aridity of the West*, 24 J. WEST 60, 60-62 (1985). But see, DONALD J. PISANI, WATER, LAND, AND LAW IN THE WEST: THE LIMITS OF PUBLIC POLICY, 1850-1920, at 1 (1996). Pisani notes that "[p]rior appropriation was not invented in the . . . West" as parts of Massachusetts, New York, and other eastern states adopted a form of the doctrine at the beginning of the nineteenth century. *Id.* Pisani concedes, however, that due to the doctrine of prior appropriation, the American West "was the first part of the country in which water could be used far from the channel of a living stream and became a commodity that could be bought and sold like coal, timber, or land." *Id.*

74. Dunbar, *supra* note 9, at 257.

75. Dunbar, *supra* note 73, at 57.

76. Dale Goble, *Making the West Safe for the Prior Appropriation Doctrine*, in LAW IN THE WESTERN UNITED STATES 153 (Gordon Morris Bakken ed., 2000).

77. See KANE JR. & ELFENBEIN, *supra* note 5, at 26-27, 29-30.

appropriation.⁷⁸ As Stephen Sturgeon points out, "in sharp contrast to riparian rights, a miner could now dam up and divert an entire stream flow As long as he had the senior claim to use that water and continued to use the water in a 'beneficial' way, the other[s] . . . downstream could not challenge his actions."⁷⁹

Despite its usage among miners, the adoption of the prior appropriation scheme by Coloradans was by no means settled. In the early 1860s, the Colorado legislature enacted a series of statutes that appeared to adopt both the common-law riparian rights doctrine⁸⁰ and that of prior appropriation.⁸¹ The conflict between statutes had far reaching implications. According to Professor Dale Goble, "[a] change from riparian to appropriative water rights . . . arguably violated both private property rights of riparian landowners and the fundamental allocation of power between the federal and state governments."⁸² Consequently, Coloradans called upon their courts to settle the confusion that the state legislature had created.

In approaching the problem, Colorado courts "simply asserted that the issue did not exist."⁸³ As Justice Helm of the Colorado Supreme Court argued in *Coffin v. Left Hand Ditch Company* in 1882, "we think [that the prior appropriation] doctrine has existed from the date of the earliest appropriations of water within the boundaries of the state."⁸⁴ Notably, Colorado courts embraced prior appropriation as a result of the unique ecological challenges facing Colorado's residents. According to Justice Helm,

78. Stephen Sturgeon, Wayne Aspinall and the Politics of Western Water 4 (1998) (unpublished Ph.D. dissertation, University of Colorado at Boulder) (on file with University of Colorado Norlin Library).

79. *Id.*

80. For the move towards the riparian doctrine, see Act of Nov. 5, 1861, § 1, 1861 Colo. Sess. Laws 67; Act of Aug. 15, 1862, § 13, 1862 Colo. Sess. Laws 44, 48. According to Professor Dale Goble, "[a]lthough these provisions did not expressly adopt riparian rights, they did reflect the common law's limitation of the use of water to those 'on the bank, margin, or neighborhood' of the stream and the associated principle of equitable allocation of water in time of drought." Goble, *supra* note 76, at 155.

81. For the Colorado legislature's early actions towards developing a theory of appropriation, see Act of Mar. 11, 1864, § 32, 1864 Colo. Sess. Laws 49, 58.

82. Goble, *supra* note 76, at 153-54.

83. *Id.* at 156.

84. *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443, 446 (1882).

[w]ater in the various streams . . . acquires a value unknown in moister climates. . . . [V]ast expenditures of time and money have been made in reclaiming and fertilizing by irrigation portions of our unproductive territory. Houses have been built, and permanent improvements made; the soil has been cultivated, and thousands of acres have been rendered immensely valuable, with the understanding that appropriations of water would be protected. Deny the doctrine of priority or superiority of right by priority of appropriation, and a great part of the value of all this property is at once destroyed.

We conclude, then, that the common law doctrine giving the riparian owner a right to the flow of water in its natural channel upon and over his lands, even though he makes no beneficial use thereof, is inapplicable to Colorado. Imperative necessity, unknown to the countries which gave it birth, compels the recognition of another doctrine . . .⁸⁵

The end result of such reasoning is that Coloradans, through the judicial process, established vast property rights in the American West's most scarce resource—water.⁸⁶

B. Navigating for the Public Good

In spite of extending property rights in water, Coloradans understood the public interest served by water in the semi-arid and arid lands of the state. Consequently, "Colorado was the first western State to create a state-wide system of public control of water rights."⁸⁷ As early as 1861, the Territorial Legislature provided for commissioners to "apportion, in a just and equitable proportion, a certain amount of . . . water" in counties with an insufficient supply.⁸⁸ In 1875, after drought catalyzed fervent conflict between the cities of Greeley and Fort Collins over their rights to water,⁸⁹ delegates to the Colorado constitu-

85. *Id.* at 446–47; see also *Yunker v. Nichols*, 1 Colo. 551, 553 (1872) (asserting that the "rules respecting the tenure of property must yield to the physical laws of nature" in a "dry and thirsty land" such as Colorado).

86. See COLO. CONST. art. XVI, § 6; *Strickler v. City of Colorado Springs*, 26 P. 313, 316 (Colo. 1891) (holding that "[a] priority to the use of water [for irrigation] is a property right" that may be sold and transferred separately from the land upon which the right arose).

87. *Dunbar*, *supra* note 9, at 241.

88. Act of Nov. 5, 1861, § 4, 1861 Colo. Sess. Laws 67, 68.

89. See *Dunbar*, *supra* note 9, at 242–44.

tional convention incorporated Article XVI, section 5 to the state constitution. This section provides: "The water of every natural stream not heretofore appropriated within the State of Colorado is hereby declared to be the property of the public, and the same is dedicated to the people of the State."⁹⁰

In 1879⁹¹ and 1881,⁹² the Colorado legislature divided the state into water districts coterminous with the South Platte, Arkansas, and Rio Grande Basins.⁹³ In each district, Colorado legislators appointed water superintendents to divide water based upon vested rights. To enforce these rights, the 1879 Act as well as the 1903 Adjudication Act⁹⁴ granted Colorado judges the ability to determine priority. Importantly, the 1879 Act introduced science and technology into the courtroom.⁹⁵ Thus, judges could adjudicate water rights based upon testimony from engineers regarding cross-section measurements, capacities, and gradients.⁹⁶

In addition to the judicial and legislative regulation of water, Colorado provided for a great deal of executive control over water matters in the state. The primary person responsible for the enforcement and administration of water law remains the State Engineer, who is appointed by the governor.⁹⁷ Accordingly, the State Engineer supervises local engineers for each of Colorado's water divisions who make hydrographic surveys of each stream and collect data regarding dams and reservoirs.⁹⁸ Moreover, Colorado has several boards that help formulate water policy and its legal implementation.⁹⁹ One of the primary boards is the Colorado Water Conservation Board, "which was established in the 1930s to help oversee the state's water development. The board does a variety of tasks, [such as] coordi-

90. COLO. CONST. art. XVI, §5.

91. Act of Feb. 19, 1879, §§ 19–20, 1879 Colo. Sess. Laws 94, 99–100.

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

93. See Dunbar, *supra* note 9, at 259–60.

94. See Act of Apr. 11, 1903, § 1, 1903 Colo. Sess. Laws 297, 297.

95. See Dunbar, *supra* note 9, at 254.

96. *Id.*

97. See G.E. RADOSEVICH ET AL., EVOLUTION AND ADMINISTRATION OF COLORADO WATER LAW: 1876–1976, at 96–97 (1976).

98. See LEGISLATIVE COUNCIL SUBCOMMITTEE ON WATER PROBLEMS, REPORT TO THE COLORADO GENERAL ASSEMBLY 1–2 (1955).

99. For example, the Irrigation District Commission, the Public Irrigation District Commission, the Colorado Water Congress, the State Planning Commission, the State Board of Registration for Professional Engineers, and the State Board of Examiners and Land Surveyors. See *id.*

nate the various water districts in the state, develop and analyze water project proposals, prepare legislation, and lobby the state and federal government."¹⁰⁰

As a result of Colorado's experience and innovation with water law and jurisprudence, litigants and legislatures of other states in the North American West turned to Colorado for guidance. According to Professor Robert Dunbar, "most of the seventeen Western States adopted with modifications Colorado's centralized administrative system" in providing for the adjudication of water rights to special water courts.¹⁰¹ Moreover, "Colorado's [influence in water law and jurisprudence did not] end at the borders of the United States. The water institutions of both Australia and Canada were in some measure patterned after those of Colorado."¹⁰² In addition to its administrative regime, Colorado became the first state to adopt the doctrine of prior appropriation.¹⁰³ Consequently, "prior appropriation became known as the Colorado doctrine" as its basic principles spread throughout the law and jurisprudence of much of the American West.¹⁰⁴

Through judicial, legislative, and executive innovation, Colorado has created a widespread regime committed to water. By developing the doctrine of prior appropriation while ensuring public regulation of a precious commodity, Colorado settlers, litigants, lawyers, judges, and legislators synthesized principles and institutions in order to promote the "multiple use of a finite resource."¹⁰⁵ Justice Gregory Hobbs of the Colorado Supreme Court argues that Colorado's water laws and rights

guarantee security, assure reliability, and cultivate flexibility. Security resides in the system's ability to identify and obtain protection for the right of use. Reliability springs from the system's assurance that the right of use will con-

100. Sturgeon, *supra* note 78, at 6.

101. Dunbar, *supra* note 9, at 262.

102. *Id.*

103. Sturgeon, *supra* note 78, at 5.

104. *Id.*; see COLO. CONST. art. XVI, § 7 ("The right [to appropriate] the unappropriated waters of [the] natural streams [of the state for] beneficial uses shall never be denied."). For the adoption of the "Colorado Doctrine" by other Western states, see *Clough v. Wing*, 17 P. 453 (Ariz. 1888); *Drake v. Earhart*, 23 P. 541 (Idaho 1890); *Stowell v. Johnson*, 26 P. 290 (Utah 1891); *Moyer v. Preston*, 44 P. 845 (Wyo. 1896).

105. Hobbs, Jr., *supra* note 9, at 1.

tinue to be recognized and enforced over time. Flexibility emanates from the fact that the right of use can be transferred to another, subject to the requirement that other appropriators not be injured by the change.¹⁰⁶

From prior appropriation cases to water administration disputes, Colorado provided many of the intellectual tools needed to adapt law to the environmental and subsequent developmental contingencies of the American West.¹⁰⁷

C. *Whose Water Is It Anyway?*

Despite the veneration of Colorado water law in the legal history of the state and the American West, we know surprisingly little about the reception, acceptance, or rejection of that body of law by most Coloradans. What evidence we do have, however, suggests that the history of water rights adjudication, especially among non-lawyers, has generated a great deal of uncertainty among the state's populace. Professor Sturgeon provides a telling example in the story of Josie Morris, who in 1914 settled near Dinosaur National Monument and attempted to use nearby Cub Creek to water her livestock: "Not long after Josie settled at this site, a neighbor challenged her use of the water in Cub Creek. He did so, not in the stereotypical Western way of a gunfight, but by taking Josie to court."¹⁰⁸ In applying the prior appropriation doctrine to the facts of the case, the court determined that Josie's neighbor had the senior property right.¹⁰⁹

[T]he court ruled that Josie could not continue to draw water from Cub Creek. It further warned that if any water from the spring on her property drained into the creek, the spring could be considered a tributary of Cub Creek; and the neighbor would be entitled to that water as well.¹¹⁰

106. *Id.*

107. See PISANI, *supra* note 73, at 17–23. Although noting that the "principles contained in the Colorado laws spread throughout the mountain West," Pisani makes clear that each western state adapted the doctrine and the administrative system to the peculiar economic demands of each state. *Id.* at 17.

108. Sturgeon, *supra* note 78, at 2.

109. *Id.*

110. *Id.*

Unfortunately, Colorado's water law left Josie precious few options.

In order to comply with the court's decision, and still preserve her option to use the spring, Josie built several small ponds to catch the [spring] water and even flooded some of her own pastures to prevent any spring water from washing into the creek. Only by impounding the water (and in the case of her fields, wasting it) was she able to preserve her right to use it.¹¹¹

Josie's experience demonstrated the ways that a non-lawyer attempted to exercise her rights and understand Colorado's complex water laws. Despite showing a great deal of flexibility in exercising her rights, the prior appropriation doctrine certainly must have undermined the security Josie felt in relying on Colorado's legal system.

Not surprisingly, the precarious relationship that Coloradans had with their water rights has contributed to an often fatalistic vision of the semi-arid and arid lands of the state.¹¹² For example,

In the late 1860s, Elizabeth Custer found an abandoned ranch in eastern Colorado. Its owner left a crude sign that with minor rewording could have spoken for thousands of [Coloradans] knocked to their knees during hard times: 'Toughed it out here two years. Result: Stock on hand, five towhead and seven yaller dogs. Two hundred and fifty feet down to water. Fifty miles to wood and grass. Hell all around. God Bless Our Home.' . . .

111. *Id.*

112. In using the concept of "visions" to analyze the way that people perceived water and law in Colorado and the American West, I am heavily influenced by Professor West's discussion of the stories that people brought to the state in order to justify their use of power and resources. As Professor West notes:

These overarching stories describe how a people fit into their surroundings and what their purposes have become. They argue that certain beliefs and values are natural, self-evident expressions of a people being exactly where they are and nowhere else . . . There is no obvious words or phrase for these radical reconceptions. They might be called "living myths" or "stories lived forward."

WEST, *supra* note 12, at xxiii. Consequently, this concept is adapted in this Article to describe the different visions of land, politics, culture, economy, and resource use that Coloradans brought to their understanding of law, legal institutions, and legal culture in the state.

The pattern was repeated over and over, in the calamitous droughts of the 1890s, the Dust Bowl of the 1930s, and the great witherings of the 1950s.¹¹³

Although Colorado water law did not cause these droughts, the prior appropriation doctrine left little room for sharing water in times of shortage and in turn exacerbated the perilous conditions that many Coloradans faced.¹¹⁴ The property nature of the water right made sharing an unthinkable option. As the Colorado Supreme Court indicated in 1959, "It is not reasonable to suppose that priority of right to water, where water is scarce, or likely to become so, will be lightly sacrificed or surrendered by its owner."¹¹⁵ Importantly, the Colorado Supreme Court suggested the lengths to which people would go to protect what they viewed as an absolute property right. In invoking terms of religion and war in relation to the water right, the Colorado Supreme Court revealed the extent to which Colorado's doctrine of prior appropriation may have pitted Coloradans against one another.

Moreover, property rights in water transform and occasionally destabilize the region. Since the 1950s, the Denver metropolitan area, the ski industry, and other members of the booming recreation economy could not have grown without adequate access to millions of gallons of surface and ground water.¹¹⁶ Yet, "the postwar boom and several 1950s droughts caused a shortage" which led to the imposition of restrictions on the use and access to Colorado water resources.¹¹⁷ Consequently, "[t]hese restrictions led some suburbs to establish their own water agencies, thus fragmenting metropolitan supplies" and politics.¹¹⁸

Perhaps most important, Colorado water law has tested the ability of Colorado municipalities to guarantee the quality of water provided to its residents. The Colorado Supreme Court recently sketched out one city's health and environmental challenges brought about by the historical application of the doctrine of prior appropriation:

113. *Id.* at 328–30.

114. Christine A. Klein, *The Constitutional Mythology of Western Water Law*, 14 VA. ENVTL. L.J. 343, 348 (1995).

115. *Saunders v. Spina*, 344 P.2d 469, 473 (Colo. 1959).

116. LEONARD & NOEL, *supra* note 10, at 458–60.

117. *Id.* at 459.

118. *Id.* at 460.

[The city of] Thornton currently derives the majority of the water it provides to its customers from water rights on the South Platte River and Clear Creek. Because Thornton is located downstream from other municipal and industrial users in the Denver metropolitan area, much of the water available for diversion under Thornton's junior rights is polluted by runoff and effluent discharges before it reaches Thornton's diversion points. Not surprisingly, the quality of this water has been gradually deteriorating, resulting in present or projected future problems for Thornton in complying with the standards set in the federal Safe Drinking Water Act

Compounding the city's water quality problems, projections developed by Thornton and its consultants indicate that Thornton's population can be expected to rise steadily and substantially over the next fifty years, greatly increasing the demand on the city's water supply system.¹¹⁹

Thornton's historical experience with prior appropriation is a microcosm of the natural resource challenges facing the American West. As such cases illustrate, "conflicts over water demonstrate that in the West natural realities can often clash with legal fictions and result in complicated solutions."¹²⁰ Such conflicts expose deep environmental concerns and comparatively recent regulations that accompany rapid demographic change. Indeed, "[u]rbanization and expanding environmental consciousness [as well as development, and population pressures] have put new demands" on a legal regime that many consider "old" and "unyielding."¹²¹ Unfortunately, our limited historical understandings of the litigants adjudicating water law cases, the rights that people claimed, their concept of justice and of right and wrong, and their willingness to accept novel or even extra-judicial solutions, belie our inability to deal with the uncertain future of western water.

119. *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1, 19 (Colo. 1996).

120. *Sturgeon*, *supra* note 78, at 2.

121. David H. Getches, *The Metamorphosis of Western Water Policy: Have Federal Laws and Local Decisions Eclipsed the States' Role?*, 20 STAN. ENVTL. L.J. 3, 4 (2001).

D. Regions and Cultures Apart

In addition, Colorado water law has reflected the deep social, political, and cultural tensions among citizens of the mountain, plain, and desert regions of the state. The conflict among these regions is seen most clearly in the water rights struggles between people located in Colorado's Western Slope and Front Range. Whereas the Western Slope receives nearly seventy percent of the state's total precipitation, "over 80 percent of Colorado's population currently lives in the 150 by 50 mile region just east of the Rockies."¹²² Due to the municipal and agricultural water demands of its residents, Front Range cities, and Denver in particular, built a series of tunnels through Colorado's mountains in order to divert water away from the Western Slope and to the Front Range's burgeoning metropolitan areas.¹²³ As a result, "a total of thirty-seven [trans-mountain] diversion projects (varying in size), have been built in the state of Colorado, which divert approximately 650,000 acre-feet of water from the Western Slope to the Front Range."¹²⁴

In the tradition of water disputes in the state, Western Slope and Front Range residents turned to Colorado's courts to settle rights that each region claimed. Each case brought into focus dramatically different understandings of the nature of water rights and local control.¹²⁵ A prominent example recently resolved itself in southern Colorado's San Luis Valley, where a broad coalition of locals fought for years to keep "outsiders"

122. Sturgeon, *supra* note 78, at 8.

123. *Id.* at 8-9.

124. *Id.* at 9 ("One acre-foot is approximately the amount of water an urban family of four uses in one year.").

125. No series of cases symbolizes this struggle more than the so-called "Colorado Trilogy" in which the United States Supreme Court determined that the United States and Colorado's Native American Tribes needed to bring water claims to state court. In these cases, front range developers, western slope residents, the federal government, and American Indians each claimed water rights for very different needs. See *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976); *United States v. Dist. Court of Eagle County*, 401 U.S. 520 (1971); *United States v. Dist. Court for Water Div. No. 5*, 401 U.S. 527 (1971).

from pumping groundwater out of the region.¹²⁶ In the late 1980s and early 1990s, the "outsider" was Denver-based American Water Development, Inc. (AWDI) which wanted to "drill 97 wells . . . and pump as much as 200,000 acre feet a year" from the San Luis Valley to the Denver suburbs.¹²⁷ As one proponent of AWDI claimed, San Luis Valley water was essential for suburban growth on the Front Range.¹²⁸ In order to tap this resource, AWDI immediately claimed legal right to the aquifer beneath the San Luis Valley.¹²⁹

Proponents of AWDI, however, failed to grasp the importance of water to the social, political, and cultural lives among the Valley's residents. As one resident of the Valley explained, "In the San Luis Valley, there is a saying that you can steal a man's wife, but don't steal his water."¹³⁰ Consequently, Valley residents engaged in an intense legal battle to prevent AWDI from claiming the vital resource.¹³¹ Fearing the impact that the AWDI project would have on their lives and livelihoods, Valley lawyers used treaties, land surveys, congressional actions, and water court determinations to protect the water rights of the

126. As early as 1976, the Houston Natural Gas Corporation proposed building a nine hundred mile coal slurry that would transport coal from Walsenburg, Colorado to Houston, Texas by mixing it with water taken from the San Luis Valley. Described by Denver water developers as "competition for water between energy and agriculture," the plan garnered intense opposition from the Valley's residents who believed the struggle involved nothing less than "life and death." See Peggy Strain, *Water, Land, Life—It's All One in Valley Pipeline Debate*, DENV. POST, Nov. 13, 1977, at 3; see also Ted Delaney, *Water Binds, Divides Neighbors*, COLO. SPRINGS GAZETTE TELEGRAPH, July 9, 1989, at B1. At the end of the twentieth century, the politics of water manifested itself in *Am. Water Dev., Inc. v. City of Alamosa*, 874 P.2d 352 (Colo. 1994), and *Sanchez v. Colorado*, 97 F.3d 1303 (10th Cir. 1996). Although ostensibly two separate legal actions, the issue of water rights became embroiled in efforts to create a minority-majority voting district in the San Luis Valley. See discussion *infra* notes 127–44.

127. Julia Rubin, *Residents Mistrustful of Canadian Developer: Prospect of Huge Colorado Desert Aquifer Sets Off Water Rights Battle*, L.A. TIMES, July 30, 1989, at 22; see also *Thirsty Denver Area May Pipe from Aquifer*, OMAHA WORLD HERALD, Aug. 26, 1989, at 15.

128. Rubin, *supra* note 127, at 22.

129. *Am. Water Dev., Inc.*, 874 P.2d at 352.

130. Delaney, *supra* note 126, at B1.

131. *Id.* In 1991, Valley residents overwhelmingly approved a ballot measure that borrowed over \$400,000 in order to continue the legal battle against AWDI. Eric Reguly, *Thirst for Profit Fuels Water War*, FIN. POST, Feb. 18, 1991, at 7.

region's diverse residents.¹³² In this struggle, "many residents of the Valley—from Republicans to Democrats, from hippies to crusty potato farmers . . . united against" AWDI.¹³³ A retired water division engineer noted: "It's the first time I've seen the people of this valley get together and fight something."¹³⁴

Such unity did not last long. In 1993, a group of Mexican-American residents in the San Luis Valley filed suit to create a minority-majority voting district in the Valley.¹³⁵ Although a prominent part of the social, economic, cultural, and political fabric of the San Luis Valley, Mexican Americans had not represented the region in the state House of Representatives since 1936.¹³⁶ Rather than political equality, Mexican Americans in the Valley often encountered racial-bloc voting, school segregation, and overt acts of discrimination.¹³⁷ Opponents of the suit, however, recognized the threat that political redistricting of the Valley represented to many of their water interests. As early as 1991, AWDI foes charged that attempts to boost the ability of Mexican Americans to elect lawmakers were "an effort to dilute our representation, done under the guise of minority-bloc voting."¹³⁸ On its face, the suit threatened to "split the San Luis Valley, leaving [many of its residents] without a locally elected state representative, and hence without a defender of their water in state government."¹³⁹

At the time that redistricting was being initially considered in Colorado, the Hispanic League of the San Luis Valley opposed the litigation—largely as a result of its efforts to pro-

132. See, e.g., Patrick O'Driscoll, *Water Export Bid Hits Dry Well*, DENV. POST, July 6, 1990, at 1B; Gary Theimer, *Water Appeal Killed: High Court Won't Take San Luis Case*, DENV. POST, Nov. 29, 1994, at B4.

133. Jennifer Gavin, *Valley Residents Expected to Fight District Breakup: AWDI Water Battle Unites San Luis*, DENV. POST, Nov. 11, 1991, at 1B.

134. Julia Rubin, *Battle Brews Over Development of San Luis Valley Water*, ASSOCIATED PRESS, July 17, 1989, available at 1989 WL 4046657.

135. *Sanchez v. Colorado*, 97 F.3d 1303, 1306 (10th Cir. 1996).

136. Robert Kowalski, *Redistrict Bid Splits Hispanics: San Luis Valley Rift Centers on Race, Water*, DENV. POST, Apr. 20, 1997, at 2.

137. *Id.*

138. Gavin, *supra* note 133, at 1B.

139. Kowalski, *supra* note 136, at 2. The politics of water in the San Luis Valley, however, are much more complicated. As one of the *Sanchez* co-plaintiffs argued, the suit has "absolutely nothing to do with the water because we don't own any water." *Id.* Accordingly, *Sanchez* is alluding to the numbers of Mexican Americans in the Valley who have no land and thus no claim to water resources in the region. *Id.*

tect the water rights of some of its members.¹⁴⁰ After the 1992 elections, however, the Hispanic League reversed its position after an Anglo representative overwhelmingly defeated his Mexican-American opponent.¹⁴¹ As one member stated: "We don't think it's going to hurt the Valley by having two different districts How could we be hurt anymore than we already are? . . . We want to maintain the status quo? I hope not."¹⁴² After years of legal and political struggle, AWDI eventually lost its bid to develop the Valley's water resource,¹⁴³ while Mexican-American litigants prevailed on their right to create a minority-majority voting district.¹⁴⁴ Yet, very different concepts of what constituted a superior legal right, water or voting, opened huge rifts between the Valley's Mexican-American and Anglo communities.

As the water struggles of the San Luis Valley's residents demonstrate, there are multiple layers beneath the legal resolution to water disputes in Colorado. According to Professor Federico Cheever, "[o]n the surface, the fight is about maintaining the wells for potato farmers and maintaining the forage for grazing[,] . . . but it's really about maintaining an extraordinarily unique place, the sand dunes and the Hispanic community."¹⁴⁵ Ultimately, Colorado courts have dealt with complex questions that have not always been directly related to water allocation. In adjudicating the claims of a variety of interests, Colorado's legal disputes have exposed the complex and contentious social, cultural, and historical processes beneath simple claims of rights to the state's waters.

E. State Sovereignty in Colorado's Rivers and Streams

The history of Colorado water law also reveals important questions regarding state sovereignty in the American West.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Am. Water Dev., Inc. v. City of Alamosa*, 874 P.2d 352 (Colo. 1994). For a fuller exploration of the AWDI legal and political battle, see SAM BINGHAM, *THE LAST RANCH* (1996).

144. *Sanchez v. Colorado*, 97 F.3d 1303, 1303 (10th Cir. 1996); see also John Brinkley, *Court Stays Out of San Luis Fight: Legislature Can Draw Boundaries to Boost Hispanics' Strength*, ROCKY MTN. NEWS (Denver, Colo.), May 5, 1997, at 8A.

145. Michelle Nijhuis, *Running Low?*, U. DENV. MAG., Winter 2001, at 18, 22.

This point is illustrated most prominently in Colorado's battles with both its neighbors and the federal government to control the rivers running out of the state. Most importantly, Coloradans have had "to contend with the fact that the state actually controls less than one half of its own water."¹⁴⁶ Almost every other state in the American West "included claims to 'ownership' of all the water within their boundaries in their constitutions and statutes."¹⁴⁷ For Colorado, this posed a troubling dilemma: although "Colorado receives almost no surface water from any other states," the Colorado, South Platte, Arkansas, and Rio Grande rivers "deliver water to nine states and Mexico."¹⁴⁸ Thus, it was unclear how much water Colorado could use in order to meet the demands of its burgeoning agricultural and urban population.

Beginning in 1907, Colorado's neighbors and the federal government began to sue the state in the United States Supreme Court over control of its rivers.¹⁴⁹ First in *Kansas v. Colorado*¹⁵⁰ and then again in *Wyoming v. Colorado*,¹⁵¹ lawyers for Kansas and Wyoming argued that Colorado had deprived them of their fair share of water. In adjudicating the claims of each litigant, the Supreme Court articulated the doctrine of "equitable apportionment" to co-exist with western water law.¹⁵² The doctrine allowed the Supreme Court to apportion waters originating in Colorado when strict adherence to the doctrine of prior appropriation would not be reasonable.¹⁵³

To make matters even more complicated, the federal government claimed water flowing through Colorado's public lands in the *Wyoming* case.¹⁵⁴ Although the Supreme Court did not

146. Sturgeon, *supra* note 78, at 11.

147. Getches, *supra* note 121, at 7.

148. Sturgeon, *supra* note 78, at 11.

149. See *Kansas v. Colorado*, 206 U.S. 46 (1907).

150. *Id.* at 47.

151. 259 U.S. 419, 422-23 (1922), *vacated by* 353 U.S. 953 (1957).

152. *Kansas*, 206 U.S. at 117. "At the same time it is obvious that if the depletion of the waters of the river by Colorado continues to increase there will come a time when Kansas may justly say that there is no longer an equitable division of benefits . . ." *Id.* at 118; see also *Wyoming*, 259 U.S. at 497. Indeed, by 1995, the Supreme Court ruled in Kansas' favor. *Kansas v. Colorado*, 514 U.S. 673, 694 (1995) (holding that Colorado had for decades taken more than its agreed upon share of the Arkansas River).

153. *Wyoming*, 259 U.S. at 497; *Kansas*, 206 U.S. at 117.

154. *Wyoming*, 259 U.S. at 445; see also Sturgeon, *supra* note 78, at 12. The federal government attempted to assert rights to water flowing through Colorado's National Forests.

reach the question of federal control in its decision, an 1899 New Mexico case decided by the Court provided "that state-authorized water use must not interfere with federal rights to protect the flow of the stream and can be superseded by the exercise of federal powers over commerce and public land."¹⁵⁵ As a result of early twentieth century United States Supreme Court water law jurisprudence,

it became clear that the Court did not recognize the right of any state to legally claim complete control over the water within its own borders. Furthermore, the length, expense, and frequently mixed results of Colorado's legal battles suggested that the [state] court system ultimately would prove to be an unsatisfactory way to resolve water disputes.¹⁵⁶

Consequently, Colorado and other Rocky Mountain, Southwestern, and Plains states during the first half of the twentieth century established a system of compacts to define the use and distribution of water rights in rivers flowing from the Colorado River.¹⁵⁷

Prominent in the creation of the compact process and its legal justification was Colorado's first native-born United States Senator, Delphus E. Carpenter.¹⁵⁸ According to his biographer, "Carpenter's arguments in support of the constitutionality of interstate compacts focused on the preservation of state sovereignty."¹⁵⁹ In a speech to the Colorado Bar Association in 1921,

Carpenter argued that because all the states entered the Union on equal footing and because their powers of sovereignty were limited only by what had been delegated to the federal government . . . these states have the right under . . . the Constitution to enter into agreements or compacts with each other provided that they obtain the consent of Congress.¹⁶⁰

155. Getches, *supra* note 121, at 6; *see also* United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 708-09 (1899).

156. Sturgeon, *supra* note 78, at 13.

157. *See id.* at 12-13; REISNER, *supra* note 50, at 120-44.

158. *See* Daniel Tyler, *Delphus Emory Carpenter and the Colorado River Compact of 1922*, 1 U. DENV. WATER L. REV. 228, 231 (1998).

159. *Id.* at 233.

160. *Id.*

Yet, at what price did Coloradans achieve the fundamental right to establish compacts? As the Colorado Supreme Court pointed out nearly sixty years later, "the compact obligation has the effect of re-sorting settled water rights [The end result] would reshuffle the economies of the [affected region] according to a chronology of events unrelated to settled expectations derived from historical patterns of use" ¹⁶¹ In crafting a constitutional theory of state sovereignty regarding its water resources, Carpenter's legal reasoning reflected the pioneering role that Coloradans played in confronting the unique legal challenges of the American West. Unfortunately, Carpenter's philosophy held little flexibility as local, regional, and national conditions changed.

Despite the compact process, Coloradans found their water rights being diverted or dammed by a variety of competing and often conflicting local, state, and federal interests. At the same time that the state was entering into compacts with its neighbors, it became clear to many Coloradans that no theory of sovereignty could weaken Colorado or the American West's increasing dependence upon the federal government to help "reclaim" the region's semi-arid and arid lands. ¹⁶² Ironically, Coloradans needed the federal government in order to exercise their sovereign rights to water and to meet the emerging rights claims of the state and the American West's rapidly growing population. ¹⁶³

In 1902, the United States government established the Bureau of Reclamation to assist water development projects in seventeen states in the American West. ¹⁶⁴ Accordingly, it signaled a radically new relationship between the federal government and its citizens. The form of this relationship has been the subject of acrimonious debate:

161. *Alamosa-La Jara Water Users Prot. Ass'n v. Gould*, 674 P.2d 914, 923 (Colo. 1983).

162. See Tyler, *supra* note 158, at 233. According to Tyler, Carpenter's commitment to state sovereignty was a direct result of "his frustrating experiences with [the Federal Government] in the San Luis Valley. Colorado's legitimate irrigation projects along the Rio Grande were prohibited [by the Bureau of Reclamation] because of the federal government's concern about meeting treaty obligations with Mexico." *Id.*

163. See Hobbs, Jr., *supra* note 9, at 13-16.

164. See 43 U.S.C. §§ 371-431 (1994).

To some, it was America's first flirtation with socialism, an outgrowth of the Populist and Progressive movements of the time. To others, it was a disguised reactionary measure, an effort [through the promise of cheap and productive land] to relieve the mobbed and riotous conditions of the eastern industrial cities—an act to save heartless capitalism from itself. To some, its roots were in Manifest Destiny, whose incantations still held people in their sway . . .¹⁶⁵

Whatever its form, the "Bureau of Reclamation [became] the largest single provider of capital for major water development projects" in Colorado and the American West.¹⁶⁶ As a result,

[t]he federal government's entry into water development tended to eclipse the importance of state water law. Competition for . . . federally-funded water facilities . . . provided an incentive to do whatever was necessary to participate in the dam-building programs, including subordination of state water rights and conforming state policies to comply with federal goals.¹⁶⁷

Importantly, federal goals concerning water soon meshed with the desire of many Coloradans to protect and preserve the integrity of the state's lakes, rivers, and streams.

During the late nineteenth and early twentieth century, many Coloradans began to recognize some of the negative environmental and economic impacts of water development and as a result, they injected principles such as conservation, equity, and health into Colorado's legal regime.¹⁶⁸ As early as 1897, a Colorado appeals court considered the impact of mining on the state's rivers and streams. According to the court:

We live in a region not blessed with rains, and where all our industries, whether agricultural, manufacturing, or mining, are dependent absolutely on the waters of our streams, as to those purposes for which water is a necessity. It is therefore quite consonant with the apparent purpose and declared will of the people to subject the rights of the appropriators of the public waters of the state to such limitations as shall tend not only to conserve the property interests which the

165. REISNER, *supra* note 50, at 111.

166. Getches, *supra* note 121, at 11.

167. *Id.* at 11–12.

168. See Hobbs, Jr., *supra* note 9, at 12–13.

appropriators may acquire, but to preserve the remaining unappropriated waters in their original condition for the use and benefit of late comers, who by their labors and industry may further develop our interests and resources.¹⁶⁹

The Colorado Supreme Court recognized early the ecological impact that agriculture, mining, manufacturing, and commerce had on the state's water supply. Thus, concern for the health of the state's citizens became embedded in Colorado's jurisprudence as the Court upheld state and local measures controlling the pollution of waters and streams.¹⁷⁰ As the Colorado Supreme Court emphasized, "the design of such acts is not to take property for public use It is intended to restrain and regulate the use of private property so as to protect the common right of all the citizens of the state."¹⁷¹

By the 1970s, such principles contributed to diminishing the federal government's role in many proposed water projects.¹⁷² Yet, the federal influence on state water law did not similarly wane. With the passage of legislation such as the Clean Water Act,¹⁷³ Clean Air Act,¹⁷⁴ Federal Land Policy and Management Act,¹⁷⁵ National Forest Management Act,¹⁷⁶ and Endangered Species Act,¹⁷⁷ Congress created a "new kind of [legal] federal presence" in Colorado and the American West.¹⁷⁸

169. *Suffolk Gold Mining & Milling Co. v. San Miguel Consol. Mining & Milling Co.*, 48 P. 828, 832 (Colo. Ct. App. 1897).

170. *People v. Hupp*, 123 P. 651, 655 (Colo. 1912) (upholding Colorado state statute regulating the discharge of such substances as refuse from slaughterhouses, slops, eating houses or saloons, or any other fleshy or vegetable matter which is subject to decay in the water); *City of Durango v. Chapman*, 60 P. 635, 637 (Colo. 1900), *overruled by* *People v. Horvat*, 527 P.2d 47 (Colo. 1974) (upholding a Durango ordinance that prevented the construction or keeping of any pigsty or any other edifice on the Animas River due to the ability of such operations to contaminate or render water impure or unwholesome).

171. *Hupp*, 123 P. at 654 (quoting *State v. Wheeler*, 44 N.J.L. 88 (N.J. 1882)).

172. Concerns regarding environmental quality and preservation led many policy makers to re-evaluate the impact of major water projects (e.g., dams) while questioning the power and influence of the Bureau of Reclamation. As a result, policy and resources shifted away from federal water projects and agencies throughout the nation. See REISNER, *supra* note 50, at 313-23; Getches, *supra* note 121, at 16.

173. 3 U.S.C. §§ 1251-1387 (1994).

174. 42 U.S.C. §§ 7401-7671(q) (1994).

175. 43 U.S.C. §§ 1701-1784 (1994).

176. 16 U.S.C. § 1600 (1994).

177. 16 U.S.C. §§ 1531-1544 (1994).

178. Getches, *supra* note 121, at 18.

In adopting such legislation, the water rights of Coloradans had been radically transformed. By seeking federal assistance to develop the state's semi-arid lands or to secure its conservation and protection, Coloradans forged highly ambivalent meanings of citizenship and federalism whose precise contours continue to change to this very day.¹⁷⁹

F. *Washing the Past Away*

The development of the compact and reclamation systems underscores the antagonism that Colorado leaders, from Judge Moses Hallett to Governor Bill Owens, have displayed towards "carpet-bagging" federal bureaucrats, while at the same time soliciting large-scale federal support for major reclamation projects.¹⁸⁰ Most Coloradans, however, have held complicated and often shifting ideas about federalism and water rights that balance the desire for political autonomy against the need for federal support. Accordingly, historical change has forced Coloradans to shift allegiances, repudiate long held beliefs, and stake contradictory claims to the water flowing through their state.

Nothing symbolizes the protean views that Coloradans have held toward water better than legal and political efforts to stop the building of the Narrows Dam in Weldon Valley, Colorado in the late 1970s and early 1980s. According to Marc Reisner, "the Narrows Project had a miraculous ability to turn everyone it touched into someone else. It turned a crew-cut,

179. See, e.g., Chip Cummins, *A Clash in La Plata County*, WALL ST. J., May 17, 2001, at A1; Todd Hartman, *Summitville Cost to Hit \$235 Million Under Proposal, Cleanup of Mine Could Take 100 Years*, ROCKY MTN. NEWS (Denver, Colo.), June 23, 2001, at 5A; Mike Soraghan, *Watt Applauds Bush Energy Strategy*, DENV. POST, May 16, 2001, at 1A; M.E. Sprengelmeyer, *Venom Drips Over Water Policy: Colorado Lawmakers Say That Being Forced to Give Up Rights is Extortion in Name of Environmental Protection*, ROCKY MTN. NEWS (Denver, Colo.), May 23, 2001, at 7A.

180. See KANE JR. & ELFENBEIN, *supra* note 5, at 9 (Moses Hallett quickly claimed Colorado "native" status in his jurisprudence); Wayne Allard & Scott McInnis, Editorial, *Feds Again Trying to Usurp Historic State Water Rights*, ROCKY MTN. NEWS (Denver, Colo.), Apr. 10, 2001, at 26A (criticizing new U.S. Forest Service water policy for undermining "life blood" of Coloradans); Theo Stein, *Forest Rules to Curb Logging, Roads GOP Lawmakers Vow to Fight Clinton Action*, DENV. POST, Jan. 5, 2001, at 1A (reporting Governor Bill Owens' denouncement of President Bill Clinton's ban on commercial logging, mining, and oil and gas development on 4.3 million acres in Colorado as "just another heavy-handed federal action").

rawboned young farmer like Don Christenson into an environmentalist. It turned a handsome young environmentalist like Senator Gary Hart into an avid water developer."¹⁸¹ And "it turned perhaps the three most powerful men in Colorado," water lawyer Glenn Saunders, state engineer Clarence Kuiper, and Governor Richard Lamm, into taking positions" that contradicted their past efforts to both develop and restrict the development of Colorado's water.¹⁸² Glenn Saunders, the former chief counsel of the Denver Water Board, who had used his legal acumen for more than thirty years to build dams on behalf of the city, represented Weldon Valley irrigation farmers like Don Christenson who opposed the dam.¹⁸³ Clarence Kuiper, who "never stood in the path of a water project, unless it was a project in another state that threatened his own state's [water] supply," vigorously attacked the economic and engineering integrity of the dam.¹⁸⁴ Finally, Governor Richard Lamm, who had built his political career as an environmentalist, actively supported the project.¹⁸⁵ As the positions taken by the protagonists in the Narrows Project demonstrate, local concerns, deep prejudices, informed opinions, and changing conditions shape the views of Coloradans towards their rights and their government.¹⁸⁶ A fuller exploration into these multiple dimensions may help legal historians and policy makers to appreciate and fully understand the complexity beneath the uncertain waters of Colorado's mountains, plains, and deserts.

Ultimately, water disputes in Colorado and the American West bring into focus the complex and contentious social, cultural, and historical reality behind such doctrines as prior appropriation and equitable apportionment. Water law has "actuated and dominated an amazing variety of social and economic relationships. It [has] dictated growth patterns, precipitated conflict, influenced the form of governmental institutions, and helped define how different social and ethnic groups related to one another."¹⁸⁷ The history of water law in Colorado provides the entry point to exploring the ways that Coloradans

181. REISNER, *supra* note 50, at 415.

182. *Id.*

183. *Id.* at 415-18.

184. *Id.* at 416.

185. *See id.* at 416-18, 432-34.

186. *See* Tyler, *supra* note 158, at 230.

187. MEYER, *supra* note 52, at 8.

and westerners have understood law and legal institutions. Yet, water law is only half the story of a fuller exploration of Colorado's legal past. In building homes, creating schools, and seeking out public and private services in the state, Colorado legal history has been shaped by the myriad of struggles taking place on the state's contested lands.

III. CONTESTED LANDS

If water law has shaped Colorado and the American West, legal battles over land have divided the state in ways exceeding geographic dimensions. This section assesses the clashing values and attitudes that Coloradans have historically held toward property and land use and its relationship to distinct differences among Colorado's residents. From battles between natural resource development companies, miners, and American Indians, to struggles to maintain the ethnic and racial heterogeneity of Colorado's neighborhoods and schools, Colorado's courts have served as battlegrounds of radically different visions about how Coloradans should parcel out physical, social, and political space. In the process, Coloradans transformed—but did not overcome—the rigid class and racial boundaries existing in the mountains, plains, and deserts of the state. Consequently, understanding the ability of Colorado and western courts to fashion doctrines regarding the state's contested lands is not only an examination of the distribution of land in the state, but also an exploration into the basic understandings and limitations of order, fairness, and citizenship in the fabric of North American law.

Colorado's contested lands have been intricately shaped by competing visions of property, labor, and land use. According to Professor West, 1859 marked a paramount moment as "waves of new experience[s] rolled from three directions into the continental center, and as they did they set loose changes that surpassed in speed and scope anything the region had known."¹⁸⁸ During the mid-nineteenth century, an assorted array of newcomers brought with them certain visions of land use that dramatically transformed Colorado's many landscapes.

188. WEST, *supra* note 12, at xxii; see also Charles S. Vigil, *Mexican Land Grants in Colorado*, in THE HISPANIC CONTRIBUTION TO THE STATE OF COLORADO 65-77 (Jose de Onís ed., 1976).

From the nomadic pastoralism of the bison-hunting Cheyenne to the entrepreneurial-minded American miners, farmers, and businessmen, Colorado's lands became locked in conflicting visions over its distribution and use.¹⁸⁹

During the past 150 years, law has played a fundamental role in the transformation of the ways that Coloradans have used their lands. During the 1850s, Colorado was a "politically unorganized territory and thus effectively beyond the reach of any government. Prospectors [in particular] could expect neither protection from Indians nor any sure way to record their claims."¹⁹⁰ Beginning in 1851, however, the federal government negotiated the Treaties of Fort Laramie (1851) and Fort Atkinson (1853) to curb contact between Cheyennes, Arapahoes, Lakotas, Comanches, Kiowas, Plains Apaches, and American travelers on roads along the Arkansas and Platte Rivers.¹⁹¹ In 1854, Congress passed the Kansas-Nebraska Act that ostensibly brought much of Colorado's lands under the jurisdiction of Kansas and American concepts of property.¹⁹² With the Act, American settlers thus imported an established vision of property and property rights that provided for the survey and platting of town sites, the recognition of city charters, and the need to make written claims to the land.¹⁹³ As a result, Colorado's nascent American legal institutions were often the only place to negotiate disputes arising from the disparate experiences and visions of Colorado's newcomers.

A. *This Land is Miner Land*

When the promise of gold lured over 30,000 men and a few women from the United States, Canada, Ireland, Germany, and Mexico to Colorado in 1859,¹⁹⁴ miners' courts provided a forum to resolve the disputes of an international population. For ex-

189. See WEST, *supra* note 12, at 63-93, 173-201.

190. *Id.* at 99; see also Rogers, *supra* note 17, at 112-13 (noting that while "Spain, France, Mexico, the United States, and perhaps even Great Britain and the Republic of Texas claimed sovereignty over" various parts of what was to become Colorado, "neither flags nor military discipline are law.").

191. WEST, *supra* note 12, at 100.

192. *Id.* at 99.

193. Richard Lawrence Hogan, "Law and Order" in Colorado: 1858-1888, at 30 (1982) (unpublished Ph.D. dissertation, University of Michigan, Ann Arbor) (on file with author).

194. ATHEARN, *supra* note 10, at 16; WEST, *supra* note 12, at 109, 117.

ample, in mining towns like Central City, "mining district[s] were] organized on a popular basis, granting citizenship rights to all who held valid claims that were legally recorded."¹⁹⁵ Because "[t]here was no significant American law on the subject,"¹⁹⁶ miners often used experience and common sense to govern disputes. In terms of experience, the miners developed codes that integrated elements of California, Spanish and Mexican law and custom that "generally limited pre-emption rights to one claim per person, specified the size of these claims, [and] stipulated that claims were valid" only after the claim had been "recorded and established [in] a miners' court."¹⁹⁷ The miner's court "operated as the adjudicator of all disputes, being subject only to the will of the assembled miners."¹⁹⁸ In terms of common sense, "some camps barred lawyers, others . . . prohibited saloons and gambling houses [as] most attempted to provide simple popular justice, without a lot of legal jargon or technical legislation."¹⁹⁹ Due to its simplicity, Colorado's mining law proved remarkably durable. According to Judge John Kane, "few mining cases were brought before the Territorial Supreme Court, because the miners' courts proved more efficient."²⁰⁰

Like Colorado water law, Colorado's early mining law contained the simple principle of "first in time, first in right."²⁰¹ Thus, the miners' courts ostensibly worked to promote free enterprise and equal opportunity with its promise of access "to anyone with the gumption to go for it."²⁰² Yet, the democratic character of the courts and the miners codes was severely restricted in spite of their efficiency.²⁰³ In several mining districts, "[o]ld-timers' were able to monopolize the official positions and reduce the possibility of radical change."²⁰⁴ Moreover, many mining districts provided limited protections for non-

195. Hogan, *supra* note 193, at 43.

196. KANE JR. & ELFENBEIN, *supra* note 5, at 27.

197. Hogan, *supra* note 193, at 43-44; see also KANE JR. & ELFENBEIN, *supra* note 5

198. *Id.* at 44.

199. *Id.* at 44.

200. KANE JR. & ELFENBEIN, *supra* note 5, at 27.

201. Sturgeon, *supra* note 78, at 4.

202. Daphne Werth, *Where Regulation and Property Rights Collide: Reforming the Hardrock Act of 1872*, 65 U. COLO. L. REV. 427, 443 (1994).

203. Hogan, *supra* note 193, at 43-44.

204. *Id.* at 43.

Anglo miners. American Indians lost land,²⁰⁵ African Americans could not vote or testify in court,²⁰⁶ and Chinese workers could expect to be expelled from many mining towns.²⁰⁷ Prefiguring battles that continue to this very day, miners' courts provided Colorado's earliest rationales for disfranchising people of color.

B. Labor, Land, and the Corporate Constitution in Colorado

As Colorado's mining industry transformed during the late nineteenth and early twentieth century, miners' courts proved unable to cope with the problems generated by the heavy industrialization of mining and the movement of individual miners into wage labor.²⁰⁸ Most important, Colorado's solitary prospectors transformed from enterprising entrepreneurs into wage-earning laborers.²⁰⁹ Whereas "labor sought shorter hours and a living wage, management fought to maintain control over the methods of production."²¹⁰ Hence, disparate visions of property propelled new conflicts in Colorado's contested lands.

Most prominently, the Western Federation of Miners (W.F.M.) and the Industrial Workers of the World battled against Colorado's mine owners and the state government during the late nineteenth and early twentieth centuries.²¹¹ Law and legal concepts played a fundamental role in the battle. For example, Colorado Governor James H. Peabody, in order to restore "law and order" in the state, authorized the use of the Na-

205. In 1862, the Colorado territorial delegate to Congress noted that miners were "entirely overrunning the hunting grounds of Ute Indians . . . taking out large quantities of gold, killing and driving out game," and that despite treaties conferring ostensible protection, "demand for Ute land continued unabated." *Cuthair v. Montezuma-Cortez Colo. Sch. Dist. No. Re-1*, 7 F. Supp. 2d 1152, 1156 (D. Colo. 1998).

206. JAMES A. ATKINS, *HUMAN RELATIONS IN COLORADO: A HISTORICAL RECORD* 19 (1968).

207. Richard Delgado & Jean Stefancic, *Home Grown Racism: Colorado's Historic Embrace—and Denial—of Equal Opportunity in Higher Education*, 70 U. COLO. L. REV. 703, 722 (1999).

208. GEORGE G. SUGGS, JR., *COLORADO'S WAR ON MILITANT UNIONISM: JAMES H. PEABODY AND THE WESTERN FEDERATION OF MINERS* 28–29 (1972).

209. *Id.* at 28.

210. *Id.*

211. J. ANTHONY LUKAS, *BIG TROUBLE: A MURDER IN A SMALL WESTERN TOWN SETS OFF A STRUGGLE FOR THE SOUL OF AMERICA* 226 (1997); SUGGS, JR., *supra* note 208, at 11.

tional Guard to suppress strikes, harass union leaders, and deport large numbers of union members.²¹² Yet, "[o]ne of the most telling lines of the Colorado struggle . . . [was the] curt dismissal of legal technicalities" by the state authorities.²¹³ As Major Thomas McClelland, the judge advocate of Colorado's National Guard stated, "[t]o hell with the Constitution; we are not following the Constitution."²¹⁴

The W.F.M. similarly rejected the legitimacy of existing legal institutions in order to justify their right to organize and strike against poor labor conditions. Thus, the W.F.M. "dedicated themselves to a 'revolutionary labor movement' whose goal was to emancipate the workingman from 'wage slavery.'"²¹⁵ Such goals posed a considerable threat to Colorado's major mining companies and their political supporters. Governor Peabody, for example, opposed eight-hour work legislation to "preserve the commercial and industrial enterprises of Colorado from assault and annihilation."²¹⁶ At stake was not only the right of an employee to control his or her hours, wages, or working conditions, but the very meaning of industrial property.²¹⁷

In resolving early industrial conflicts over property and land use, Colorado courts often "came down on the side of business in all pivotal decisions during the generation-long industrial war."²¹⁸ Such decisions had national implications. To illustrate, in 1909, the United States Supreme Court had occasion to consider the first significant martial law case in the United States since 1866.²¹⁹ In upholding the Colorado Supreme Court's decision that the governor had the right to suppress "insurrection and rebellion," Justice Oliver Wendell Holmes declared: "When it comes to a decision by the head of the State upon a matter involving its life, the ordinary rights of individuals must yield to what he deems the necessities of the moment. Public danger warrants the substitution of executive

212. SUGGS, JR., *supra* note 208, at 146-58.

213. LUKAS, *supra* note 211, at 226.

214. *Id.*

215. SUGGS, JR., *supra* note 208, at 24.

216. LUKAS, *supra* note 211, at 220.

217. SUGGS, JR., *supra* note 208, at 23-28.

218. KANE JR. & ELFENBEIN, *supra* note 5, at 29.

219. *Moyer v. Peabody*, 212 U.S. 78 (1909); see *Ex parte Milligan*, 71 U.S. (4 Wall) 2 (1866).

process for judicial process."²²⁰ By implicitly aligning the "life" of Colorado with that of its mineral developers, the United States Supreme Court sanctioned the vision of property and land use advocated by mine owners and their allies. Without the protection of fundamental civil rights and liberties, Colorado's industrial miners lost the ability to articulate a different vision of property and land use in the state.²²¹

C. *Homes and Habitats in Colorado's Oil Fields*

Today, the burden of history runs deep in Colorado's mining jurisprudence. As Colorado's legal institutions struggle to apply mining law²²² to contemporary visions of property and land use,²²³ litigants face the reality that mining law and jurisprudence have "given miners virtually free access to public lands and, until recently, free discretion to conduct mining subject only to lax regulation. These traditions create a strong sense of property rights in mining companies."²²⁴

For example, in the 1980s, oil wells were first drilled on Dennis Hoshiko's farm, located near Greeley, Colorado.²²⁵ Almost immediately, he called attorneys to determine his rights and those of the natural resource developers. Unfortunately, he

220. *Moyer*, 212 U.S. at 85.

221. See SUGGS, JR., *supra* note 208, at 191-92.

222. See 30 U.S.C. § 22 (1872) (General Mining Law of 1872); 30 U.S.C. § 181 (1920) (Mineral Lands Leasing Act of 1920).

223. According to one study, "Colorado became the battleground" for testing the 1872 General Mining Act as Judge Hallett "handed down forty-two decisions on mining claims" during the late nineteenth century. Hence, "[m]any of these became the basis for mining statutes in other states." KANE JR. & ELFENBEIN, *supra* note 5, at 28. For more recent litigation, see *Shell Oil Co. v. Andrus*, 591 F.2d 597 (10th Cir. 1979), *aff'd*, 446 U.S. 657 (1980) (finding policy change made by the Department of Interior from 1920 to 1974 concerning oil shale value did not invalidate oil placer mining claims in Colorado under general mining laws and 1920 Mineral Leasing Act); *Visintainer Sheep Co. v. Centennial Gold Corp.*, 748 P.2d 358, 360 (Colo. Ct. App. 1987) (holding mineral claimant's staking of claims on sheep farmers' property in Moffat County, Colorado, constituted a trespass, as mineral prospecting rights were reserved in the United States, and General Mining Law of 1872). See also Robert H. Boyle, *This Land is Mine Land*, 194 OUTDOOR LIFE 50 (1994); Don H. Sherwood, *Mining in the Shadow*, 26 COLO. LAW. 161 (1997); Jon Margolis, *An 1872 Law Still Calls the Shots*, HIGH COUNTRY NEWS, Dec. 22, 1997, at 17; Shara Rutberg, *Amax Returns With a Vengeance*, HIGH COUNTRY NEWS, Dec. 8, 1997, at 3.

224. Werth, *supra* note 202, at 448.

225. Bob Kretschman, *Landowners Want Relief from Oil Drilling as the Work Picks Up, Some Property Owners in Weld County Want More Pay for Damage*, ROCKY MTN. NEWS (Denver, Colo.), Mar. 26, 1993, at 95A.

did not find much help. As Hoshiko told one reporter, "We have a lot of food and agricultural lawyers in Greeley, but very few were cognizant of oil and gas rights As the first oil boom developed in the early '80s, several people were faced with the same dilemma."²²⁶ What quickly became clear to Hoshiko and other Colorado farmers was that unless they held clear title to the mineral estate under their land, they had little ability to stop the drilling.²²⁷ Due to the fact that previous property holders in the county had severed the mineral rights from the fee simple properties,²²⁸ landowners soon found that energy companies could enter their land, "plant oil rigs, dig a waste pit and drill away."²²⁹ One commentator has called such practices "a western version of a 'right of way.'"²³⁰ If improperly reclaimed, an oil pit threatened not only a farmer's crops, but a family's water supply, and the aesthetic qualities of the admittedly human-made environment.²³¹

As Coloradans have applied mining laws, they have come into conflict with competing values. To many Coloradans, the state possesses scenic beauty, valuable wildlife, and ecological fragility that makes much of Colorado's lands unsuitable for mining activity. Even when such activity is tolerated, poor construction of mines and wells, lax management of facilities, and overzealous production can have devastating environ-

226. *Id.*

227. Thomas Heath, *Gas Drillers, Land Tillers Vie for Earth's Treasures; Energy Industry, Farmers at Odds in Colorado*, WASH. POST, Nov. 24, 1994, at A3.

228. Oil development on farms like Dennis Hoshiko's in northeastern Colorado did not mature until the 1980s when government incentives, technological advances, and legal rulings allowed energy companies to tap the oil abundance of Weld County's Denver-Julesburg basin. By the 1990s, the area, according to the Colorado Oil and Gas Association, had become "the most intensively drilled county in the United States." The ground for such development had been laid as a result of late nineteenth century grants to railroads, which severed the land and mineral rights. Heath, *supra* note 227, at A3; see *McCormick v. Union Pac. Res. Co.*, 14 P.3d 346 (Colo. 2000) (holding that oil was part of severed mineral estate as a result of Colorado history and custom).

229. Heath, *supra* note 227, at A3.

230. *Id.*

231. The farmers and ranchers of northeastern Colorado found an ally in their struggle, however, when the Colorado Supreme Court determined that oil development companies needed to pay the costs of reclamation. *Gerrity Oil & Gas Corp. v. Magness*, 946 P.2d 913 (Colo. 1997).

mental and legal consequences.²³² Colorado's experience with oil shale development provides a vivid example. As one commentator noted:

The shale rock itself contains relatively little oil—the riches providing only about 30 gallons per ton of rock That means that plans to develop 50,000 barrel-a-day plants carry with them the consequence that more than 50,000 tons of waste rock will be produced each day Additionally, shale plants consume great quantities of water. The Colorado Water Conservation Board has estimated that a 400,000 barrel-a-day shale industry would consume 100,000 acre-feet of water. That would be a hefty share of the estimated 250,000 acre-feet of water it is estimated Colorado has left for all uses The waste rock creates other problems. What is left after retorting operations is a fine, sterile powder. The black dust is high in mineral salts and contains some cancer-causing substances, although the health danger from such substances may be small The plants also will cause some air pollution, though proponents of the shale projects say the plants won't exceed national health protection standards.²³³

In order to forestall, if not prevent, the environmental challenges that natural resource development presented, Coloradans have a powerful array of environmental law at their disposal.²³⁴ As a result of very different ideas of land use,

232. The experience of the Summitville Gold Mine symbolizes such conditions. Opened high in the San Juan mountain range in southern Colorado, the Summitville Gold Mine had numerous problems, "including poor construction, efforts to continue mining during harsh winters and lax oversight by regulators." Hartman, *supra* note 179, at 5A. As a result, the mine sent water laced with acid and metals into the tributaries of the Alamosa River causing a complete termination of the river's aquatic life. The Environmental Protection Agency estimates that it will take \$235 million and at least one hundred years to clean the site. *Id.*; see also Philip M. Hocker, *Summitville Disaster: A True Picture of Too Many American Mines and Mining Companies*, KNIGHT-RIDDER TRIB. NEWS, Jan. 7, 1994, available at DIALOG, File No. 608.

233. Steve Wynkoop, *Washington Decisions to Govern Oil-Shale Development*, DENV. POST, Apr. 11, 1976, at 20.

234. Among the laws available are the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4331–4334 (1994), the Surface Mining Control and Reclamation Act ("SMCRA"), 30 U.S.C. §§ 1201–1270 (1994), the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901–6992 (1994), the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251–1387 (1994), the Safe Drinking Water Act ("SDWA"), 42 U.S.C. §§ 300(f)–300(j-26) (1994), and the Clean Air Act ("CAA"), 42 U.S.C. §§ 7401–7671(q) (1994).

Coloradans find themselves subject to competing ideas about how best to use Colorado's many lands.

D. Vision Quest: Coal, Culture, and Environment in Colorado's Native Lands

Today, many of Colorado's fiercest legal struggles regarding mineral, oil, and other natural resource development are taking place between state, local, and tribal governments and energy development companies.²³⁵ Such struggles often represent the preservation and transformation of a way of life. Consider, for example, the legal battle over mineral development in the lands within the Colorado Southern Ute reservation. The struggle began in 1864, when the Southern Ute tribe, the Uncompahgre Utes, and the White River Utes formed the confederated band of Utes.²³⁶ The tribes exchanged their claim to lands in Utah, New Mexico, and Colorado for approximately 15.7 million acres in southern Colorado.²³⁷ One provision of the treaty allowed the Utes to trade their land for land further west if minerals were found on their holdings.²³⁸ In the early 1870s, the Tribe ceded 3.7 million acres of the reservation after minerals were discovered in the middle of Ute land.²³⁹ Accordingly, the effect "was almost to sever the reservation, leaving the Southern Utes wedged between the southern boundary line of the [original] . . . [cession and the New Mexico border]."²⁴⁰

A Ute uprising in 1879 that killed an Indian agent led to an 1880 Act by Congress that further eroded the Utes' property rights and land holdings.²⁴¹ Most important,

[t]he central feature of the Act of 1880 was the termination of tribal ownership in the reservation lands, and the limitation of Indian ownership to such lands as might be allotted in severalty to individual Indians. The purposes of that provision were to destroy the tribal structure and to change

235. Cynthia Fessel, *The Right to Mine*, COLO. SPRINGS GAZETTE TELEGRAPH, June 23, 1991, at H1.

236. See *United States v. Southern Ute Tribe*, 402 U.S. 159, 162 (1971).

237. *Id.*

238. *Id.*; Brunot Cession, ch. 136, 18 Stat. 36 (1874).

239. *Southern Ute Tribe*, 402 U.S. at 162.

240. *Id.*

241. *Id.*

the nomadic ways of the Utes by forcibly converting them from a pastoral to an agricultural people.²⁴²

In what came to be known as the "allotment period," the United States in subsequent years opened much of the Ute land to homesteading and mineral exploration.²⁴³

Disputes concerning the classification of property that had been opened to development soon arose among Indians, homesteaders, and mineral developers.²⁴⁴ As a result of the confusion, President Theodore Roosevelt prevented future entries by withdrawing over one million acres of the land considered valuable for coal resources.²⁴⁵ Importantly, federal authorities sought to protect the interests of mineral developers who risked access to "valuable resources" as a result of conflicting homesteading claims.²⁴⁶ The 1909 and 1910 Coal Lands Acts "served to appease homesteaders who had entered in good faith upon land subsequently classified as coal lands" while allowing "for future land patents [that left] a reservation of coal in the United States."²⁴⁷ Together, these policies facilitated both non-mineral and mineral development in the Southern Utes land into the 1930s.²⁴⁸

The economic and cultural devastation that allotment created for American Indians, however, led Congress to pass the Indian Reorganization Act in 1934.²⁴⁹ The Act "returned to tribal ownership the remaining . . . lands of any Indian reser-

242. *Id.* at 163; see also 10 CONG. REC. 2059, 2066 (1880).

243. See The Homestead Act of 1862, ch. 75, § 1, 12 Stat. 392 (repealed 1976); The Coal Lands Act of 1873, ch. 279, 17 Stat. 607; The General Mining Law of 1872, 30 U.S.C. § 21-42 (1994). Such laws served several purposes. The homesteading law, for instance, allowed Americans to receive virtually free title to 160 acres of land in fee simple in exchange for five years of continued settlement and improvements to the land. The Homestead Act of 1862, ch. 75, § 1, 12 Stat. 392 (repealed 1976). The mineral laws, on the other hand, encouraged mineral developers to explore for mineral deposits and develop those mineral deposits without having to buy land. 30 U.S.C. § 22.

244. Katina L. Francis, *Mining Law—Ownership of Coalbed Methane—A Judicial Step Toward Efficient CBM and Coal Development*, Southern Ute Tribe v. Amoco Production Company, 33 LAND & WATER L. REV. 469, 470 (1998).

245. Southern Ute Indian Tribe v. Amoco Prod. Co., 874 F. Supp. 1142, 1149 (D. Colo. 1995).

246. Francis, *supra* note 244, at 470.

247. *Id.* at 470-71 (discussing the 1909 and 1910 Coal Land Acts, 30 U.S.C. § 81 (1994), and Act of June 22, 1910, ch. 318, § 1, 36 Stat. 583 (codified at 30 U.S.C. § 83 (1994))).

248. Amoco, 874 F. Supp. at 1151.

249. 25 U.S.C. § 463 (1994).

vation that had been open to homesteading. In 1938, Congress [strengthened the goals of the Act by conveying] the coal previously reserved to the United States . . . to the Southern Ute Tribe."²⁵⁰ Despite having title to approximately 200,000 acres of coal,²⁵¹ the Southern Ute Tribe lacked the skill and resources to develop, on their own, their natural resource estate.

By the 1990s, the Southern Utes had started their own production and pipeline operations to develop coal-bed methane gas (CBM) on the reservation.²⁵² CBM, a gas produced during the process of transforming buried plant materials into coal,²⁵³ provided a means by which the Southern Utes could achieve self-determination over natural resources located in their land. Prior to the 1990s, CBM "had little value as an energy resource" and its existence posed a "nuisance and a safety hazard" to not only energy developers but also residents of surrounding communities.²⁵⁴ In the 1970s and 1980s, however, "the U.S. Department of Energy stumbled upon coal-bed methane as a fuel source . . . [and] crews learned to free the gas by flushing massive amounts of water from coal beds."²⁵⁵ The potential value of CBM, in turn, led energy developers to claim parts of Colorado as the Rocky Mountain's "Persian Gulf of Gas."²⁵⁶ As a result of federal tax credits, cheaper technology, and exemptions from environmental regulation, Southern Utes entered the CBM business.

In 1991, the Southern Ute Tribe sued oil companies over ownership of the CBM contained in the coal estate that the Tribe acquired through the Indian Reorganization Act.²⁵⁷ Distinct differences over what constituted Ute property separated the parties in the case. For Amoco and other defendants, CBM was not part of the mineral estate conveyed by the Indian Reorganization Act and thus the oil companies "claimed the right to develop approximately \$200,000,000 worth of CBM con-

250. Francis, *supra* note 244, at 471.

251. Amy Callard, *Southern Ute Indian Tribe v. Amoco Production Company: A Conflict Over What Killed the Canary*, 33 TULSA L.J. 909, 917 (1998).

252. Susan Greene, *Drilling Tests Utes' Values*, SUNDAY DENV. POST & ROCKY MTN. NEWS, Sept. 9, 2001, at 9A.

253. Francis, *supra* note 244, at 469 n.1.

254. *Id.*

255. Susan Greene, *Coalbed Methane Fueling Dispute*, SUNDAY DENV. POST & ROCKY MTN. NEWS, Sept. 9, 2001, at 1A.

256. *Id.*

257. *Amoco*, 874 F. Supp. at 1146.

tained within the reserved coal.”²⁵⁸ The Southern Utes, on the other hand, “argued that the CBM was necessarily included in the reservation of coal to the United States in the 1909 and 1910 acts, and thus conveyed to the Tribe through the IRA.”²⁵⁹ The case eventually reached the Supreme Court where the key issue centered on the understanding of the Acts at the time they were enacted.²⁶⁰ As Justice Kennedy explained, “The question is not whether, given what scientists know today, it makes sense to regard CBM gas as a constituent of coal but whether Congress so regarded it in 1909 and 1910.”²⁶¹ Amoco’s argument prevailed, as the United States Supreme Court concluded that CBM gas was not coal under early twentieth century congressional understandings.²⁶²

As Colorado’s Southern Ute litigation demonstrates, contemporary mineral development hinges on unraveling the relationship of history, science, culture, and economy to Colorado’s contested lands. Since the end of the nineteenth century, mineral development companies have conducted exploration, extraction, and production activities on Indian lands, often leaving a blighted landscape, polluted waters, and unclean air.²⁶³ In the case of Colorado’s Southern Utes, many members view CBM pumps and compressors as “a cancer There will be portions of our land that will be so contaminated that they’ll be

258. Francis, *supra* note 244, at 472.

259. *Id.*

260. *Amoco Prod. Co. v. Southern Ute Indian Tribe*, 526 U.S. 865, 872–74 (1999).

261. *Id.*

262. *Id.* at 877. Justice Kennedy argued that:

To the extent Congress had an awareness of it, there is every reason to think it viewed the extraction of CBM gas as drilling for natural gas, not mining coal. . . . That distinction is significant because the question before us is not whether Congress would have thought that CBM gas had some fuel value, but whether Congress considered it part of the coal fuel. When it enacted the 1909 and 1910 Acts, Congress did not reserve all minerals or energy resources in the lands. It reserved only coal, and then only in lands that were specifically identified as valuable for coal. It chose not to reserve oil, natural gas, or any other known or potential energy resources.

Id.

263. Judith V. Royster, *Oil and Water in the Indian Country*, 37 NAT. RESOURCES J. 457 (1997). According to one commentator, the extraction of mineral resources from Indian lands is “only the tip of a huge . . . iceberg [whose] destructive potential [lies] hidden and uncomprehended.” DUANE A. SMITH, *MINING AMERICA: THE INDUSTRY AND THE ENVIRONMENT, 1800–1980*, at 9 (1987).

unusable for future generations.”²⁶⁴ Yet, as a result of an agreement with Amoco that gives the community a stake in the development of their own resources, CBM “drilling presents a conundrum for Southern Utes who, as shareholders of tribal land and mineral rights, profit so much that they’re known as one of the nation’s wealthiest tribes.”²⁶⁵

To many American Indians, land has “an incommensurate value, and money or other land, regardless of the amount, could not capture its value or compensate for its loss.”²⁶⁶ Not surprisingly, protection and preservation of land plays a prominent role in Colorado native thought. According to Dick Baughman, a member of the Southern Ute Tribe: “I have a sense of place in this land. My ancestors once roamed it. It didn’t belong to them. They left it as they found it Now, it’s in extreme danger of overproduction. I’m sure the Creator would want us to exercise some discretion and restraint.”²⁶⁷ Despite such views, the economic and political pressures of the twentieth century, “particularly underdevelopment, unemployment, and poverty[,] are forcing a growing number of Indian tribes to exchange the spiritual view of their once pristine environment for a commercial one.”²⁶⁸ In negotiating claims to such contrasting interests, Colorado courts have balanced a variety of different visions. As twenty-first century energy demands drive high levels of mineral development in the American West,²⁶⁹ understanding the legal history of all these visions provides insight into the choices and consequences Coloradans make about their lands.

264. Greene, *supra* note 252, at 9A.

265. *Id.*

266. Wendy Espeland, *Legally Mediated Identity: The National Environmental Policy Act and the Bureaucratic Construction of Interests*, in READINGS IN NATIVE AMERICAN LAW: RECALLING THE RHYTHM OF SURVIVAL 110, 114–15 (Jo Carrillo ed., 1998).

267. Greene, *supra* note 252, at 9A.

268. Roger Romulus Martella, Jr., Note, “Not in My State’s Indian Reservation”—A Legislative Fix to Close an Environmental Loophole, 47 VAND. L. REV. 1863 (1994).

269. See, e.g., Chip Cummins, *Gas Pain: Nation Wants Energy, and Drillers Find It in People’s Back Yards: Owners Have Little Recourse When They Learn They Don’t Own Mineral Rights*, WALL ST. J., May 17, 2001, at A1; Michael Davis, *Oil Industry Eager to Drill in Rockies*, HOUSTON CHRON., May 17, 2001, at 1, available at 2001 WL 3021354; Ann Imse, *Oil/Gas Panel Angers Local Authorities*, ROCKY MTN. NEWS (Denver, Colo.), June 1, 2001, at 27A.

E. This Land Is (Not) Your Land

The contest for land in Colorado has encompassed more than competing claims over the control and distribution of mineral resources in the state. As the history of the Southern Ute litigation illustrates, Colorado has been the epicenter for intense and often violent struggles regarding the place of people of color in both the physical geography and legal jurisprudence of the state. From the Treaty of Guadalupe-Hidalgo²⁷⁰ to the desegregation era of Denver Public Schools in the 1970s,²⁷¹ Coloradans have used legal institutions to both maintain and transcend the boundaries separating the state's Latino/a, American Indian, African American, Asian Pacific American, and White communities.

1. Laying the Lines of Difference: Treaties and Citizenship in the Rocky Mountain State

The lines separating Colorado's communities began to be drawn during the middle of the nineteenth century. During this time, Anglo settlers, federal officials, American Indians, and Mexican Americans waged war over the mountain, plain, and desert regions of the state.²⁷² At issue was who had the power to control the land. Yet, "the struggle had many more shadings than it seemed. [Each group] fought over power in its rawest, most common meanings — physical domination, the command of formal authority, the strength to say who could live where and how people had to behave."²⁷³ The victor of this battle, in turn, determined who belonged to a particular community and would be protected by its institutions. Thus, Coloradans' land struggles represent a deeper battle over the form and meaning of citizenship in the state's mountains, plains, and deserts.

The United States established the parameters of citizenship in Colorado during the nineteenth century through both

270. Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, Feb. 2, 1848, U.S.-Mex., 9 Stat. 922.

271. See discussion *infra* Part III.E.3.

272. See WEST, *supra* note 12, at 272-316; ATKINS, *supra* note 206, at 41-52, 96-97.

273. See WEST, *supra* note 12, at 331-32.

the conquest and purchase of land.²⁷⁴ In both cases, the United States sealed its territorial acquisitions and explanation of citizenship "by solemn and idealistic treaties."²⁷⁵ The first formal treaties of peace between the United States and Colorado's communities of color came at the end of the United States war with Mexico. In the Treaty of Guadalupe-Hidalgo,²⁷⁶ the United States allowed Mexicans living in southern Colorado to remain on their land and offered them the option of becoming American citizens.²⁷⁷ Importantly, "[a]s a part of their citizenship, the Mexicans had been guaranteed property and political rights as well as those of language, religion, and culture."²⁷⁸

Despite such assurances, however, Mexican Americans living in southern Colorado found their claim to land mired in endless litigation.²⁷⁹ In court, Mexican Americans faced "cultural barriers" revolving around language, misunderstandings of Mexican and Spanish property law, and preference for "American" litigants, values, and institutions.²⁸⁰ As early as 1868, the Territorial Supreme Court of Colorado declared: "It is enough to say, that the declaration in the case was in the Spanish language. It is not to be tolerated in this country, that judicial proceedings should be in any other than the adopted lan-

274. While the acquisition of land by the United States has often come about through use of armed forces, in many cases the United States purchased land in exchange for goods, commodities, and services. *Id.* at 272-316.

275. Christine A. Klein, *Treaties of Conquest: Property Rights, Indians Treaties, and the Treaty of Guadalupe Hidalgo*, 26 N.M. L. REV. 201, 202 (1996).

276. Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, Feb. 2, 1848, U.S.-Mex., 9 Stat. 922.

277. *Id.* at art. VIII-IX.

278. ATKINS, *supra* note 206, at 97.

279. *Id.* at 96-97.

280. Rebecca Tsosie, *Sacred Obligations: Intercultural Justice and the Discourse of Treaty Rights*, 47 UCLA L. REV. 1615, 1630-31 (2000). For a general analysis of the land and property rights problems the treaty created in the American Southwest, see Guadalupe T. Luna, *Chicana/Chicano Land Tenure in the Agrarian Domain: On the Edge of a "Naked Knife,"* 4 MICH. J. RACE & L. 39 (1998). For the contemporary problems created by the Treaty in Colorado, see the ongoing deliberations surrounding *Sanchez v. Taylor*, 377 F.2d 733 (10th Cir. 1967) and *Rael v. Taylor*, 876 P.2d 1210 (Colo. 1994). Importantly, these comparatively recent cases pit "Mexican law, with roots deeply embedded in a feudal economic system, against United States law, which is grounded in mercantilism and a market economy." Richard D. Garcia & Todd Howland, *Determining the Legitimacy of Spanish Land Grants in Colorado: Conflicting Values, Legal Pluralism, and Demystification of the Sangre De Cristo/Rael Case*, 16 CHICANO-LATINO L. REV. 39, 40 (1995).

guage of the nation.”²⁸¹ Thus, “while the Mexican people who remained on the ceded lands may have become American citizens, they were not accorded equal status.”²⁸² In short, Colorado’s Mexican Americans had become “second-class citizens.”²⁸³

In 1849, one year after the Treaty of Guadalupe-Hidalgo, the first formal treaty of peace was signed between the United States and Colorado’s native communities.²⁸⁴ Unlike the Treaty of Guadalupe-Hidalgo, however, this and subsequent treaties did not “contemplate the incorporation of Indians as citizens into the United States.”²⁸⁵ Rather, such treaties were “agreements between separate sovereigns, each of which agreed to assume the primary responsibility for its own citizens.”²⁸⁶ The 1849 Treaty thus represented the many treaties—and the conditions that each created—which would ensue between Colorado’s various native communities and federal authorities in Colorado during the next two decades.²⁸⁷

Most prominently affected by the treaty process were Colorado’s Southern Utes. Accordingly, the United States promised to give the Southern Utes food and supplies in exchange for peace between Mexican-American settlements and Utes in southern Colorado and the assurance that the Utes would devote themselves to farming.²⁸⁸ Skirmishes between Americans and Southern Utes and continued conflicts over the meaning and validity of the treaty, however, continued into the 1850s. As a result, the United States waged “a vigorous campaign . . . against the Utes” that resulted in the tribe giving up all claims to the San Luis Valley in the Treaty of Conejos in 1863.²⁸⁹ By the 1890s, the Utes remained the only American Indian group

281. *Dunton v. Montoyo*, 1 Colo. 99, 100 (1868). *But see* *Town of Trinidad v. Simpson*, 5 Colo. 65 (1879) (limiting the holding of the *Dunton* case to the use of English solely in the pleadings, and allowing interpreters to be assigned to non-English speaking litigants). In short, Colorado judges held ambivalent understandings about culture—and its impact in the exercise of a litigant’s rights—in their courtrooms.

282. Tsosie, *supra* note 280, at 1630.

283. LEONARD & NOEL, *supra* note 10, at 388.

284. ATKINS, *supra* note 206, at 42.

285. Tsosie, *supra* note 280, at 1622.

286. *Id.*

287. *See, e.g.,* WEST, *supra* note 12, at 271–316.

288. ATKINS, *supra* note 206, at 42.

289. *Id.* at 43.

living in Colorado.²⁹⁰ Yet, as a result of relocation and allotment,²⁹¹ Colorado's Utes became not only segregated from other Coloradans, but they retained few rights—at that time—to the vast lands that they once called their home.²⁹²

2. Covenants, Criminals, and Self-Determination

By the twentieth century, conquest, purchase, and relocation gave way to an ambivalent legal maintenance of racial and ethnic differences in Colorado's urban neighborhoods. While restrictive racial covenants in many Denver metropolitan communities²⁹³ prevented Mexican Americans, African Americans, Japanese Americans, and Jews from moving into these areas until the second half of the twentieth century,²⁹⁴ the Colorado Anti-Discrimination Commission passed one of the earliest fair housing laws in the nation after World War II.²⁹⁵ In battling over the meaning and form of racial and ethnic boundaries segregating Colorado's neighborhoods, Colorado's law and legal institutions catalyzed shifting and unstable concepts of local, state, and national citizenship.

a. Land, Loyalty, and Japanese Americans

The experiences of Denver's Japanese American community during the second half of the twentieth century provide telling examples about the relationship of property, race, and citizenship to Colorado's legal institutions. Not surprisingly, land played an important role in defining the limits of American citizenship. During World War II, Colorado experienced a major increase of Japanese Americans and Japanese aliens as a result of relocation from the west coast of the United

290. *Id.* at 47–50.

291. *See* discussion *supra* notes 236–48.

292. ATKINS, *supra* note 206, at 49–51.

293. These neighborhoods included McCullough, Clayton, Berger and Ashley, Crestmoor, Bonnie Brae and Chaffe Park, Illiff's University Additions, Regis Heights, Clingers' Gardens, and much of Jefferson County. *See* DENVER COMMITTEE ON HUMAN RELATIONS, A REPORT ON MINORITIES IN DENVER WITH RECOMMENDATIONS BY THE MAYOR'S INTERIM SURVEY COMMITTEE ON HUMAN RELATIONS 46 (1947).

294. *Id.*

295. COLORADO CIVIL RIGHTS COMMISSION, A TIME FOR CHANGE AND CHALLENGE: COLORADO CIVIL RIGHTS COMMISSION ACTIVITIES REPORT 26–30 (1969).

States.²⁹⁶ As early as 1942, the War Relocation Authority, under the direction of Secretary of Interior Harold Ickes, adopted regulations to depopulate Colorado's Japanese-American internment camp.²⁹⁷ Consequently, the War Relocation Authority encouraged "able-bodied [Japanese Americans] with good records" to move to Denver, Boulder, and other Colorado towns.²⁹⁸

Many Coloradans, however, feared the ability of Japanese Americans to move in and out of their communities. As one Denver news writer declared:

Anybody who swallows [Secretary of Interior] Ickes' statement that only those (Japs) [that] are loyal citizens or law-abiding aliens are receiving permission to relocate should stand on his head. The Japs are naturally a treacherous race. Neither Ickes nor anybody else knows what is going on in their heads. There were a lot of Japs out in California when the war started who were supposed to be loyal citizens of the United States. And they were all set to betray this country, if they got the chance. Nobody can guarantee the loyalty of these Japs to the United States.²⁹⁹

Although such images were by no means new,³⁰⁰ they directly influenced the policing of Japanese Americans moving into Colorado's urban areas. For example, the Denver police de-

296. "Colorado was one of several western states in which the government for security reasons had established a relocation center. The center at Amache, known as the Granada Relocation Center, was opened in the summer of 1942." ATKINS, *supra* note 206, at 121. See, e.g., Jonathan Shikes, *Forward into the Past: At Camp Amache, A School Project Reopens an Ugly Chapter of Colorado History*, WESTWORD, Sept. 13-19, 2001, at 35; Stephanie Chang, *Side by Side: Japanese Americans and Colorado, 1941-1945*, at 23-53 (1996) (unpublished B.A. thesis, University of Denver) (on file with author).

297. ATKINS, *supra* note 206, at 121.

298. *Id.*

299. *That's That*, DENV. POST, Mar. 17, 1944, at 2.

300. See Keith Aoki, *Foreign-ness & Asian American Identities: Yellowface, World War Propaganda, and Bifurcated Racial Stereotypes*, 4 UCLA ASIAN PAC. AM. L.J. 27, 27-37 (1996). As Aoki points out, images of the Japanese as a threat to the "security" of the nation began in the late-nineteenth and early-twentieth centuries as "Japan eclipsed China as a threat in the U.S. imagination." *Id.* at 34. During World War II in Denver, such images depicted the Japanese as "barbaric," "fiendish," and "partially-civilized." Dewitt Mackenzie, *Americans Must Realize They Are Fighting Barbaric People*, DENV. POST, Dec. 29, 1941, at 2. To make matters even more volatile, the first treason case involving Japanese Americans during World War II took place in Denver's federal district court. *Treason Trial of Jap-Americans Opens Tomorrow*, ROCKY MTN. NEWS (Denver, Colo.), Aug. 6, 1944, at 5.

partment stepped up its patrols of the Japanese American enclave located in the heart of the city in response to "citizen" demands that such action take place.³⁰¹

In addition to monitoring the boundaries of Japanese American neighborhoods, some Coloradans sought to protect their property by restricting the access, use, and purchase of Colorado land. The city of Denver, for example, contained the issuance of business licenses to Japanese Americans to one small area in the heart of downtown Denver.³⁰² Some Coloradans even attempted—through an Amendment to the Colorado Constitution—to prevent Japanese aliens from owning real estate in the state.³⁰³ Although the measure was barely defeated, Japanese Americans were in many cases barred from public discussion of the land matter.³⁰⁴

After World War II, Coloradans continued to use law to prevent Japanese Americans from owning property. As late as 1950, legal restrictions prevented World War II veteran, Katsuto Gow, from buying a home in a middle-class Denver neighborhood because of his race.³⁰⁵ After securing a loan to buy the house, Denver lawyers blocked Gow, his wife, and three young children from moving into the home as a result of a restrictive covenant attached to the property.³⁰⁶ Although the United States Supreme Court has ruled such covenants unenforceable,³⁰⁷ government authorities frequently acquiesced in the maintenance of such clauses. As Denver's attorney for the Reconstruction Finance Corporation stated regarding the exclusion of Japanese Americans from certain Denver neighborhoods, the "organization has a strict rule that it cannot make 'secondary loans' on property having a restrictive covenant

301. Maurice Leckenby, *Council Wants Japs Guarded*, ROCKY MTN. NEWS (Denver, Colo.), Mar. 10, 1942, at 1.

302. COMMITTEE ON HUMAN RELATIONS, *supra* note 293, at 8.

303. *Anti-Japanese Petition Filed With 8,000 Names to Spare*, DENV. POST, Mar. 7, 1944, at 24.

304. As one Japanese American stated, "I think this a fine example of Fascism in Denver . . . when people are so fearful of facing frank discussion that they invent a device to allow only sympathetic persons in, then they are afraid to face the truth." *Three American-Born Japs Barred from Meeting for Amendment 3*, ROCKY MTN. NEWS (Denver, Colo.), Nov. 3, 1944, at 8.

305. Edward Lehman, *Race Bias Bars Vet in Buying Home Here*, DENV. POST, Mar. 22, 1950, at 3 (The house was located in the Whittier neighborhood near Downtown Denver).

306. *Id.*

307. *Shelley v. Kraemer*, 334 U.S. 1 (1948).

unless the title is covered by an insurance policy."³⁰⁸ Unfortunately, many insurers refused to extend title insurance policies on such properties for fear of litigation.³⁰⁹ Even in death, racially restrictive covenants in some of Denver's most prominent cemeteries prevented Japanese Americans from being buried on their grounds.³¹⁰

b. Neighborhoods, Delinquency, and Chicano Self Determination

Like Japanese Americans, Mexican Americans migrating to Colorado found their access to and control over land dependent upon their citizenship within the larger community. In the 1930s, Coloradans accused Mexican aliens of moving to the state in order to get on the state's welfare rolls.³¹¹ In order to stop this practice, Governor Ed Johnson ordered the local National Guard to police the border between Colorado and New Mexico to prevent "indigent and alien" Mexicans from entering the state.³¹² One local Denver writer praised Johnson's action and further advocated "placing those who refuse [to leave the state] in concentration camps where they will be fed and housed, but not pampered."³¹³ Significantly, "United States citizenship afforded [Mexican Americans] no protection from Johnson's blockade against 'aliens'. Spanish Americans as well as Mexicans found themselves under arrest."³¹⁴

Efforts to restrict and limit the access of Mexican Americans to Colorado land continued into and after World War II as members of the Mexican-American community moved in large numbers to the state's urban metropolis.³¹⁵ In 1946, one local Denver newspaper praised a congressional investigation into "red activities among the Spanish-speaking."³¹⁶ According to

308. Lehman, *supra* note 305, at 3.

309. *Id.*

310. *Crown Hill Cemetery Bars Nisei War Hero*, ROCKY MTN. NEWS (Denver, Colo.), Mar. 23, 1949, at 5.

311. *Mexicans on Relief in Denver Found to Be Only 12 Percent of Total*, ROCKY MTN. NEWS (Denver, Colo.), Oct. 26, 1937, at 5; *see also* DEUTSCH, *supra* note 13, at 165.

312. *Troops Turn Aliens Back at Border*, DENV. POST, Apr. 20, 1936, at 1.

313. LEONARD & NOEL, *supra* note 10, at 391 (quoting ENGLEWOOD MONITOR, Apr. 3, 1935).

314. DEUTSCH, *supra* note 13, at 165-66.

315. RICHARD L. NOSTRAND, *THE HISPANO HOMELAND* 209 (1992).

316. LEONARD & NOEL, *supra* note 10, at 391.

the paper, congressmen were especially concerned that communist ideology "has led local peons to go about at night attacking white people walking alone."³¹⁷

Accordingly, to many Denverites, the greatest threat to property in the years after World War II came not from Japanese Americans, but from the city's increasing Mexican-American population. Most disturbing to many was the high rate of Mexican-American youths occupying the city's jails.³¹⁸ Although juvenile delinquency was by no means a problem unique to Denver, local government agencies explained delinquency as the peculiar problem of the Mexican American community.³¹⁹ In a 1950 report to the Denver Police Department, the Denver Area Welfare Council pointed out that "spot maps of cases of delinquent activity" recorded by the Juvenile Court and Juvenile Bureau found that the greatest location of "delinquency is in the area bounded generally by Market Street, Welton Street, North Downing and Cherry Creek with the Rude Center Area running a close second."³²⁰ These were parts of the city dominated by the city's Mexican-American citizens.³²¹

Reports prepared by city agencies for the Denver Police Department only confirmed and even magnified the "problem" of Mexican-American juvenile delinquency. As one official lamented:

It bothers me that the Spanish-American students who were good citizens are now turning toward the other side of the fence The Spanish-Americans might do well to consider that if this continues, one of them may be sent to

317. *Id.* (quoting WESTERN VOICE, May 9, 1946).

318. Robert Perkin, *Poorest of Denver's Poor*, ROCKY MTN. NEWS (Denver, Colo.), Feb. 1, 1954, at 28; Robert Perkin, *Can We Blame the Poor After Half-Century of This*, ROCKY MTN. NEWS (Denver, Colo.), Feb. 2, 1954, at 27; Robert Perkin, *No Running Water, No Heat*, ROCKY MTN. NEWS (Denver, Colo.), Feb. 3, 1954, at 35; Robert Perkin, *High Infant Death Rate Plagues Denver's Poor*, ROCKY MTN. NEWS (Denver, Colo.), Feb. 4, 1954, at 42; Robert Perkin, *Schools Can Help If They Are Used*, ROCKY MTN. NEWS (Denver, Colo.), Feb. 5, 1954, at 22; Robert Perkin, *What Are the Solutions to This Denver Problem*, ROCKY MTN. NEWS (Denver, Colo.), Feb. 6, 1954, at 5; *Our Spanish-American Articles*, ROCKY MTN. NEWS (Denver, Colo.), Feb. 7, 1954.

319. See DENVER AREA WELFARE COUNCIL, ACUTE YOUTH PROBLEMS 5 (1950).

320. *Id.*

321. Susan B. Baumunk et. al., *The Problem of Racism: An Attitudinal Study of Southwest Denver Residents* (1970) (unpublished M.A. thesis, University of Denver) (on file with author).

Buena Vista, or even Canon City for the rest of his life while another boy may be six feet under while others are enjoying the many years of life they themselves could have.³²²

In conflating citizenship, property, confinement, and death, the official's statement summed up the challenge the Mexican-American youth posed to the Denver area. At one time potentially valuable citizens, Mexican Americans had become, in the minds of some, dangerous and near criminal outsiders who threatened to undermine the stability and apparent tranquility of Denver's neighborhoods and schools.

By the 1960s, a series of deadly altercations between Mexican Americans and the police demonstrated how contested land in Denver had become.³²³ Significantly, Denver's Mexican Americans began to challenge negative representations of the community.³²⁴ Calling themselves Chicanos and Chicanas, Mexican-American youth embraced the concept of self-determination and seized upon the issues of land to re-claim their neighborhoods.³²⁵ In March of 1969, Chicano/a youth in Denver articulated this vision in *El Plan Espiritual de Aztlán*—a Mexican-American Declaration of Independence.³²⁶ Accordingly, the preamble to the document focused directly on asserting sovereignty over Colorado's land:

In the spirit of a new people that is conscious not only of its proud historical heritage, but also of the brutal "Gringo" invasion of our *territories*, We, the Chicano *inhabitants* and civilizers of the northern *land* of Aztlán,³²⁷ from whence came our forefathers, reclaiming the *land* of their birth . . . We are free and sovereign to determine those tasks which are justly called for by our *house*, our *land*, the sweat of our brows, and by our hearts. Aztlán belongs to those that

322. Memorandum from Ed Lucas (Mar. 2, 1953) (unpublished manuscript collection of Denver Committee on Human Relations Collection) (on file in Box 2, Joint-City Project Folder in Denver Public Library Western History Collection).

323. ERNESTO VIGIL, *THE CRUSADE FOR JUSTICE: CHICANO MILITANCY AND THE GOVERNMENT'S WAR ON DISSENT* 18–24 (1999).

324. *Id.* at 20–21, 64–109.

325. *Id.* at 97–100.

326. *El Plan Espiritual de Aztlán* (Mar. 1969) (unpublished manuscript, on file with author).

327. "Aztlán refer[s] to the land of origin of the Nahuatl-speaking Mexica of Mexico, who are commonly, but incorrectly known as Aztecs. They came from somewhere in northern Mexico or the present-day American Southwest." VIGIL, *supra* note 323, at 98.

plant the seed, water the fields, and gather the crops, and not the foreign Europeans. We [will] not recognize capricious frontiers on the Bronze continent.³²⁸

Tapping into a discourse of land and rights, Chicano/a youth articulated a new vision of citizenship and land use in Colorado and the American Southwest.

As a result, young Chicano/a activists and community residents claimed public land in their communities. Throughout Denver's neighborhoods, Chicanos/as occupied and re-named parks, pools, and community centers.³²⁹ For example, Chicanos/as in northwest Denver occupied and renamed Columbus Park as La Raza Park in 1971.³³⁰ Living in a section of Denver that had once been known as Little Italy due to its once prominent Italian American population, Chicano/a youths took down the fence surrounding the park, attempted to utilize the park's facilities at all hours, and battled Italian Americans for their right to gather on the premises and in the surrounding neighborhood.³³¹ Not surprisingly, such actions again brought Denver's Mexican-American community into heated conflict with the police.³³²

Tensions in Denver's Mexican-American neighborhoods came to a head in March 1973 when the Denver police shot and killed Luís Martinez in the alley behind the headquarters for Crusade for Justice, an organization dedicated to Chicano/a self-determination.³³³ When police arrived at the scene, cross-fire from nearby apartments forced three of the four officers to retreat from one of the buildings. Minutes after departing, "the second story of the building exploded Before dawn medics counted one dead . . . and 16 hurt" ³³⁴ As historians Steven Leonard and Thomas Noel point out, "Denver was prepared for the violence. By 1973, bombings were nothing new; clashes between police and minorities had become routine."³³⁵ In at-

328. El Plan Espiritual de Aztlán, *supra* note 6, at preamble (emphasis added).

329. VIGIL, *supra* note 323, at 170-77.

330. *Id.* at 171-77.

331. *Id.*

332. *Id.*

333. John Ashton, *Gonzales Claims Police Conspiracy*; Dill Mum, DENV. POST, Mar. 19, 1973, at 3A; Harry Gessing & John Ashton, *1 Killed, 19 Hurt, 36 Held in Denver Gunfight, Blast*, DENV. POST, Mar. 17, 1973, at 1A; Jay Whearley & Jack Olsen, *Gun Battle Spontaneous*, DENV. POST, Mar. 18, 1973, at 1A.

334. LEONARD & NOEL, *supra* note 10, at 386.

335. *Id.* at 387.

tempting to redefine the terms and conditions upon which they would live as citizens, Denver's Mexican- American community tested the fragile lines separating law and order in Colorado's fractured neighborhoods.

3. Bussing Through Denver's "Tri-Ethnic" Frontier

Ironically, 1973 also saw an attempt by Colorado litigants, lawyers, and judges to transcend the strict neighborhood boundaries separating Denver's communities. During this year, the United States Supreme Court decided the first non-Southern school desegregation case to reach its chambers in *Keyes v. School District Number One*.³³⁶ One issue that particularly troubled both the Supreme Court and the trial court was determining how discrimination operated in cities like Denver, which contained more than just Black and White populations.³³⁷ As Justice Brennan's majority opinion made patently clear, unlike cities in the American South, "Denver is a tri-ethnic, as distinguished from a bi-racial community" in which the "overall racial and ethnic composition of the Denver public schools is 66% Anglo, 14% Negro, and 20% Hispano."³³⁸ Accordingly, past school desegregation cases gave the Court little guidance in dealing with the complications of the "tri-ethnic" student body attending Denver's public schools.³³⁹

Like Denver's Japanese-American and Mexican-American communities, Denver's African-American population increased dramatically in the years after World War II.³⁴⁰ Similar to the experience other communities of color in the area had in regard to land accessibility, African Americans faced the problem of residential segregation. As one study documented, [in] 1970 the metropolitan area counted 50,191 blacks, of whom 94 percent were in Denver, mainly in north central and northeast sections."³⁴¹

336. *Keyes v. School Dist. No. 1*, 413 U.S. 189 (1973).

337. *Id.* at 195.

338. *Id.*

339. *Id.* at 196.

340. LEONARD & NOEL, *supra* note 10, at 368.

341. *Id.* at 376.

Segregation of Denver's urban lands had ramifications that reached to the depths of Denver's public schools. Predominantly Black and Mexican-American schools

were receiving the ragged, worn-out, hand-me-down textbooks and were poorly equipped. There were no multicultural or bilingual courses. [Teachers of color] were only placed in minority schools [A]s a result of these and other deficiencies, the academic level in minority schools was allowed to lag a year or two below that of the white schools.³⁴²

Further, an intentional project of segregation was taking place. In efforts to prevent white-flight from the City and County of Denver, the Denver School Board throughout the 1950s and 1960s manipulated attendance boundaries and created "optional" attendance zones³⁴³ to create distinct minority and majority schools.³⁴⁴ Consequently, Mexican-American and African-American students in Denver became educationally as well as physically segregated from their white peers. After years of trying to politically dismantle the segregated character of the schools, African-American and Mexican-American parents eventually filed suit against the Denver Public School District in 1969.³⁴⁵

In adjudicating the legal issues, the trial court and United States Supreme Court needed to determine what constituted segregation in Colorado's schools. Reiterating a question posed by the trial court, Justice Brennan summarized the jurisprudential frontier facing jurists: "Should Negroes and His-

342. Frederick D. Watson, *Removing the Barricades from the Northern Schoolhouse Door: School Desegregation in Denver 1* (1993) (unpublished Ph.D. dissertation, University of Colorado, Boulder) (on file with author).

343. The experience of Barrett Elementary School is revealing. Opened in 1960, surrounding schools "suddenly became lily white."

[In order] to accommodate whites in areas that were becoming black, the schools permitted parents in those neighborhoods either to enrol [sic] their children in the local school or to send them elsewhere. That escape hatch was closed after a school became largely black so that there was not much chance that blacks would attend white schools. When white schools became crowded, students were bused to other schools. If a black school exceeded capacity, temporary classrooms were built.

LEONARD & NOEL, *supra* note 10, at 376-77.

344. Watson, *supra* note 342, at 7-34.

345. *Id.* at 40-124; *Keyes v. School Dist. No. One*, 303 F. Supp. 279 (D. Colo. 1969).

panos . . . be placed in the same category to establish the segregated character of a school?"³⁴⁶ The answer determined whether integration would impact a single school and neighborhood or whether it would encompass most of the Denver area.³⁴⁷

At the outset, the trial court attempted to resolve matters on a school-by-school basis.³⁴⁸ Recognizing the differential life experiences of racial and ethnic groups, Judge William Doyle pointed out that "it is often an over-simplification" to "place Hispanos as well as Negroes . . . all in one category and utilize the total number as establishing the segregated character of the school."³⁴⁹ Accordingly, Judge Doyle recognized that the different histories and problems of each group posed problems over what actually constituted a segregated school. Did equal numbers of African Americans, Mexican Americans, and Whites mean that a school was integrated or, if African Americans and Mexican Americans were counted as one, was it a segregated school?

Ultimately, the United States Supreme Court concluded that Denver's Mexican-American and African-American communities shared similar histories.³⁵⁰ According to Justice Brennan:

[T]he District Court itself recognized that "one of the things which the Hispano has in common with the Negro is economic and cultural deprivation and discrimination." This is agreement that, though of different origins, Negroes and Hispanos in Denver suffer identical discrimination in treatment when compared with the treatment afforded Anglo students.³⁵¹

Justice Brennan's conclusion was particularly surprising given the Court's past decision to treat Mexican Americans as White.³⁵² Thus, the *Keyes* case disrupted settled understandings of racial boundaries in Colorado and the American West's contested lands. In this reformulation, the Court apparently

346. *Keyes v. School Dist. No. 1*, 413 U.S. 189, 196 (1973).

347. *Keyes v. School Dist. No. One*, 313 F. Supp. 61, 68–69 (D. Colo. 1970).

348. *Id.* at 69.

349. *Id.*

350. *Keyes*, 413 U.S. at 197–98.

351. *Id.*

352. *Hernandez v. Texas*, 347 U.S. 475 (1954).

understood the importance of formulating "constitutional principles of national rather than merely regional application" in order to transcend the lines separating the nation's schools and neighborhoods.³⁵³

On remand, the federal trial court in Denver fashioned a district wide remedy for the entire Denver Public School system that recognized the complexity behind Denver's "tri-ethnic" reality.³⁵⁴ Ordering not only bussing, but the adoption of bilingual and multicultural programs in the entire district,³⁵⁵ the trial court provided a fleeting vision of unity and multiculturalism for Denver's fractured lands. Despite the efforts of Colorado's federal court to find common ground, however, many Denver parents worked to preserve Denver's racial boundaries.³⁵⁶ Accordingly, "[s]ome grumbled and talked of organizing an alternate school system. Some moved to the suburbs; others put their children in private institutions."³⁵⁷ Others turned to extra-legal and often violent means to maintain the homogeneity of their neighborhoods and schools.³⁵⁸ As early as 1970, Judge Doyle's rulings "apparently triggered the . . . dynamiting of 46 school vehicles. . . . Lawmen also protected School Superintendent Howard Johnson, who ran the troubled system from 1970 to 1973. He needed guarding, for the school district's headquarters were bombed."³⁵⁹

By 1974, anti-integrationists appealed to both recent fears about the impact of racial mixing³⁶⁰ as well as long-standing political differences dividing the regions of the state³⁶¹ in order to encourage Colorado citizens to pass the "Poundstone Amendment" to the State Constitution.³⁶² Touted by its supporters as a measure to deprive the City and County of Denver of power over the metropolitan area, the Amendment greatly limited the ability of the city to end metropolitan educational segregation

353. *Keyes*, 413 U.S. at 219 (Powell, J., concurring in part).

354. *Keyes v. School Dist. No. One*, 380 F. Supp. 673, 695 (D. Colo. 1974), *aff'd and rev'd*, 521 F.2d 465 (10th Cir. 1975).

355. *Id.*

356. LEONARD & NOEL, *supra* note 10, at 378-80.

357. *Id.* at 378.

358. *Id.* at 380.

359. *Id.*

360. *Id.* at 378-79.

361. One example of the rivalry is that between Denver and the Western Slope. See, e.g., *supra* notes 122-45.

362. COLO. CONST. art. XIV, § 3; COLO. CONST. art. XX, § 1; see LEONARD & NOEL, *supra* note 10, at 379.

by acquiring land through annexation.³⁶³ The amendment anticipated the United States Supreme Court's 1977 ruling in *Milliken v. Bradley*,³⁶⁴ which held that desegregation plans could not extend beyond the boundaries of a school district found by courts to be segregated. In this sense, Colorado's struggles with integration insured that Coloradans would owe no allegiance to their neighbors living in the state's segregated lands.

As the experiences of Colorado's communities of color demonstrate, legal claims to, and the maintenance of, boundaries between land have played long-standing roles in reconciling very different visions of fairness, equality, and citizenship. Even though the resolutions were often unsatisfactory to many, Coloradans have sought and continue to seek out legal institutions and mechanisms in their quest to protect the sanctity of their land. In securing the treaty guarantees of Colorado's Native communities,³⁶⁵ protecting the citizenship rights of relocated Japanese Americans,³⁶⁶ or challenging the integration of African Americans in Denver's public schools,³⁶⁷ Colorado litigants, police authorities, lawyers, and judges disturbed the racial and ethnic fault lines that have separated and continue to separate Colorado's lands. Hence, in an age of heightened concerns about

363. LEONARD & NOEL, *supra* note 10, at 379; see also Franklin J. James & Christopher B. Gerboth, *A Camp Divided: Annexation Battles, the Poundstone Amendment, and Their Impact on Metropolitan Denver, 1941-1988*, 5 COLO. HISTORY 154-63 (2001).

364. 433 U.S. 267 (1977).

365. See WEST, *supra* note 12, at 308.

366. See BILL HOSOKAWA, JACL: IN QUEST OF JUSTICE (1982); Carr Won't Jail Evacuee Japs, ROCKY MTN. NEWS (Denver, Colo.), Mar. 24, 1942, at 3.

367. See *Keyes v. School Dist. No. 1*, 413 U.S. 189, 189 (1973).

racial profiling,³⁶⁸ immigration, and the threat of terrorism, the mid-twentieth century legal experiences of Denver's Japanese Americans, Mexican Americans, and African Americans give historical perspective to the challenges facing contemporary society. Examining the racial and ethnic boundaries separating Colorado's contested lands provides critical insight into the assumptions, biases, and culture driving who will, and will not be, included in Colorado's legal regime.

F. This Land Was Made For You and Me

The future development and preservation of Colorado's and the American West's resource and culturally-rich lands are intricately tied to understanding the history, needs, and values of all its peoples. A cursory examination of Colorado's legal past reveals that competing visions of land have mirrored and anticipated intense regional, national, and international divisions over not only development of natural resources, but the rights extended to those living and working in the state's mountains, plains, and deserts. From industrial strife in Colorado's extractive industries, to courtroom struggles to develop CBM located in Southern Ute land, to the assertion of sovereignty in Colorado's neighborhoods, Coloradans pushed the boundaries over new meanings of land, property, and by extension, citizenship, in the United States.

Ultimately, contests concerning Colorado's lands have re-animated new visions of rights, expanded understandings of legal institutions, and complicated notions of citizenship and identity among an array of communities. Although groups as

368. For the major issues, see DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM (1999); Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. 425 (1997); David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L. J. 659 (1994); Amy D. Ronner, *Fleeing While Black: The Fourth Amendment Apartheid*, 32 COLUM. HUM. RTS. L. REV. 383 (2001); Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956 (1999); Lisa Walter, *Eradicating Racial Stereotyping From Terry Stops: The Case for an Equal Protection Exclusionary Rule*, 71 U. COLO. L. REV. 255 (2000); American Civil Liberties Union, *Arrest the Racism: Racial Profiling in America*, at <http://www.aclu.org/profiling> (last visited Mar. 13, 2002). For issues specific to Colorado, see Ed Quillen, Editorial, *DWI? What about PWA, DWB, DWH or DWTM?*, DENV. POST, July 10, 2001, at B7; Trent Seibert, *Governor Signs Racial-Profiling Bill*, DENV. POST, June 6, 2001, at B3; Kevin Vaughan, *Police Agencies Lauded for Racial Profiling Work*, ROCKY MTN. NEWS (Denver, Colo.), July 16, 2001, at 14A.

dissimilar as the Western Federation of Miners, Southern Utes, Anglo police officers, environmentalists, Chicano/a activists, mineral developers, Japanese American veterans, home owners, and school administrators used legal institutions and legal concepts for very different goals, each created a mosaic of historical and contemporary visions of community uniquely tied to place. Disputes over land and their legal resolutions became the basis upon which a diverse and often conflicted set of Coloradans defined themselves and imagined their role in a fractured American nation. In the end, unraveling the precise elements of this story will help us better comprehend the determinative role that law and legal institutions played and continue to play in the process of building homes, raising families, and forging communities in Colorado's contested lands.

CONCLUSION

Justice Gregory Hobbs of the Colorado Supreme Court once stated that "[r]ivers, plains, and mountains make us Coloradans."³⁶⁹ Although Coloradans have shared water and land, they have not shared the same historical or legal experience nor do they have similar needs and interests. Colorado's "uncertain waters" and "contested lands" are prisms into the entire legal history of the American West. From struggles over water rights and environmental regulation to class conflict and racial relations, the dramas played out in the mountain, plain, and desert regions of the state reflect the complexity and importance of Colorado's legal past to the constantly emerging "jurisprudential frontiers" of the American West.

At the boundaries of nations, states, cultures, and communities, Colorado's lawyers, judges, and litigants forged legal and jurisprudential innovation. In the end, understanding the many dimensions of the legal struggles over Colorado's waters and lands reveals the state's contribution to North American legal history. The many layers of this past await discovery. Indeed, somewhere beneath the surface of Colorado's rivers, streams, and lakes, and someplace between its vastly contrasting mountains, plains, and deserts lie important clues about the nature of law, order, and justice in North America.

369. Hobbs, Jr., *supra* note 9, at 2.

