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Enabling Instream Rights in the Mill Creek Zanja

Tyler Fields

Always plenty of money for lawsuits,
but none to improve the water supply.
-An owner of Zanja flow rights,
  mid-19th century

Abstract

The Mill Creek Zanja is a 200-year-old, twelve-mile canal cut from the banks of a nearby stream. The Zanja was built originally as an irrigation canal to serve agriculture and industry in what is now Redlands, California located just outside Los Angeles. Since the Zanja’s construction in the early 19th century, the “rights” to the waters of the Zanja have been intensely litigated, highly sought after, and heavily debated. Today, the Zanja flow is around 40,000 to 50,000 acre feet per year. The water is used primarily by the City of Redlands for drinking water and by Crafton Water Company for local agrarian interests. Visually, the Zanja appears to be a stream meandering through the region. The law, however, sees the Zanja as nothing more than a manmade pipe. As such, no riparian, appropriative, or instream rights can attach to it. This paper argues that the Zanja has immense instream right potential and that in order to enable instream rights, the Zanja ought to be declared a “natural” stream. This paper discusses the application process to obtain instream rights as well as the community stakeholders who have an interest in dedicating instream rights in the Zanja. This paper then further outlines and articulates how the Zanja might be declared “natural” by a California court in order to enable the instream right potential. Ultimately, this paper concludes both the naturalization and instream right efforts would be successful as applied to the Zanja.

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I. Introduction

In the early part of a hot summer in the mid-1980s, Dennis Kottmeier leaned back in his chair on his porch and looked out over the stream running next to his house. He moved to this area of the Inland Empire and specifically this house on Zanja View Drive because it was more secluded and away from the hustle of downtown Redlands and the nearby county capital of San Bernardino. This area was no secret. Not only had a number of other relatively high-profile individuals secreted their residence away out here, but the area had been the source of much litigation in the late 1800s for its richness in resources. As a local lawyer, Kottmeier was all too familiar with the heated battles the area produced. Though, for now, the soon-to-be appointed county chief district attorney enjoyed the solitude of his abode and the mindfulness the flowing stream brought along its banks. As he looked out over the water, he noticed the water beginning to slow. Within the hour it was but a trickle, barely escaping the gravel it washed over. Within weeks, vegetation near the stream began to wilt and his neighbors confirmed the same was happening to their property. Most did not understand why this was happening, but Kottmeier knew. Upstream water companies and local municipalities were increasing their use of the water. Kottmeier knew this wasn’t really even a stream, it was more of an irrigation canal, but it had been around so long everyone considered the Sankey, the local name for the stream, to be a permanent fixture in the area. Kottmeier and sixty-nine other property owners banded together to file suit against the upstream users hoping to restore water in the stream they so loved. They lost. Forty years later, the issue may yet rise again. This is that story.2

The Mill Creek Zanja (Zanja) is a 200-year-old, twelve-mile canal3 cut from the banks of nearby Mill Creek and serves a portion of the Inland Empire and the City of Redlands. The historic scarcity of water in the region combined with well-financed investors keen on drinking up as many water rights as possible over its two centuries in existence makes it one of

2. This story is written with some creative license for presentation, but largely based actual events. Mr. Kottmeier still lives on Zanja View Drive and in the 1980s, the local residents did band together to fight the reduction of the Zanja and they did lose. For further discussion, see infra note 94.

3. When describing bodies of water, many sources use words like channel, waterway, stream, watercourse, ditch, canal, and river interchangeably and especially so when discussing the naturalization process. This article uses the word “canal” or “Zanja”, though when quoting opinions or analogizing to case language, other terms are used. This distinction, while relevant in other contexts, is not relevant for this article. From a trial strategy point of view, the word “canal” is recommended over words like “ditch” when describing the Zanja, since “canal” connotes a more aesthetic body of water compared to words like “ditch” or “drainage channel.”
the most litigious bodies of water in California history. Famous California figures like Leland Stanford and Diego Sepulveda have all held rights in the Zanja at one point in its history. Of all the ownership changes and battles fought both inside and outside of court, one thing has remained constant: the necessity of water in the Zanja.

This paper argues that legally, it can and ought to be considered a naturalized stream. Currently, the law considers the Zanja a purely functional method of transport and courts have declared it essentially nothing more than a manmade pipe. As such, the users of the Zanja actually hold rights in the feeder creek, Mill Creek, and property owners whose land runs adjacent to the Zanja have no water right to it at all. Individuals and various entities have rights to the waters of Mill Creek and they use the Zanja as their method of transport. It is this legal status as merely a method of transport that this paper contends must be upended by declaring the Zanja a natural stream.

The key question, however, is why? After 200 years in existence, does it really matter whether the law considers it a pipe or a natural stream? The answer is yes, because the major difference between a pipe and natural stream is the potential for instream right dedication. Instream rights are a form of beneficial use that the state of California recognizes when approving water use permits. Some water right holders exercise their right to irrigate their farm, others exercise their right by dedicating their entitlement to “instream flow” which leaves the water in the stream for

4. Telephone Interview with Larry Burgess, Dir. Emeritus, A.K. Smiley Pub. Library (Apr. 8, 2020) [hereinafter Burgess Interview] (noting that this proposition might be more local legend than fact, but nonetheless illustrating that one of an expert’s first thoughts when asked about the Zanja is “litigation”).
5. Hinckley, supra note 1, at 1, 7. Horace Hinckley’s reports are relied on for some of the history and initial references to early lawsuits. Hinckley was the head of the Bear Valley Mutual Water Company for almost forty years between 1945 and 1983. His works are considered highly reputable in the community and more about him and his family can be found in various articles on the history of the area. See, e.g., Hinckley Family Continues Role in Redlands, REDLANDS DAILY FACTS (Jan. 19, 2012), https://perma.cc/5LTE-QJAL. Much of Hinckley’s report is also confirmed in a WPA report written around the same time. WORKS PROGRESS ADMIN., HISTORICAL OUTLINE OF THE MILL CREEK ZANJA 1819-1936 (year of publication unavailable).
7. Telephone Interview with Stephen P. Stockton, President, Museum of Redlands (Apr. 1, 2020) [hereinafter Stockton Interview]. Stephen Stockton is also the former general manager and chief engineer of the San Gorgonio Pass Water Agency, former engineer at the San Bernardino Valley Municipal Water District, and a current water consultant.
8. Id.
conservation or recreational purposes. Only natural waterways are eligible for instream rights and manmade pipes are not. As applied to the Zanja, in the event a Zanja right holder wanted to exercise their right by leaving water in the canal thereby utilizing instream rights, they currently risk forfeiture of that right. Leaving water in the Zanja while it is legally a pipe would be an inefficient use of this property right and result in the loss of that right. Declaring the stream to be naturalized thus paves the way for right holders to dedicate their use of the Zanja water to instream rights.

The remaining question then is, who would leave the water in the Zanja? Are there really enough people who have an interest in instream rights of the Zanja? The answer, again, is yes and the reasons range from conservation & recreation to culture & heritage. That is where this paper begins.

As such, this paper tells the story of the Zanja and the charm it has carried along its banks for over two centuries carving a path into the hearts of local residents. Before going any further though, this article would be remiss not to note the local pronunciation of the Zanja. Further, the stakeholders appealed to throughout this paper would likely dismiss the piece at the outset without such an acknowledgement. In Redlands, the Mill Creek Zanja is affectionately referred to as the “Sankey” (pronounced San-Kee). For purposes of this paper, however, it is referred to as the Zanja because courts often refer to this particular Zanja—and similar canals in California—as Zanjas.

This paper proceeds in three main Parts. Part II gives a brief history of the Zanja and Part III outlines the process by which instream rights can be obtained. Part III examines the conservation and recreation potential of the Zanja that the State will look for when approving an instream right application. Part III then analyzes the stakeholders who would buy, donate, and transfer their Zanja water rights to instream flow rights and why they might be interested in doing so. Part III also includes an analysis of the opposition to such an effort and concludes with a brief note on the community’s demonstrated efforts to finance preservation projects in the past. Part IV analyzes the legal doctrine surrounding naturalizing an artificial waterway which makes the use of the instream right mechanism

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10. See infra Part III.
12. The historical record indicates this resulted sometime in the mid 1800s from a series of spelling errors and local frustrations at attempting to pronounce and spell the Spanish word for “ditch,” which is “Zanja.” Several muddled attempts at recording various property interests and 200 years later, it remains the Sankey. See generally Tom Atchley, Sankey or Zahn-ha, a Redlands Controversy, REDLANDS DAILY FACTS (May 11, 2013, 12:00 AM), http://perma.cc/9YXX-HGD9.
possible. Part IV looks at the two standard bearer cases of *Chowchilla Farms, Inc. v. Martin*\(^{13}\) and *San Gabriel Valley Country Club v. Los Angeles*\(^{14}\) as well as a number of other sources to arrive at the conclusion that it can and should be declared a naturalized stream. Part V and VI outline the procedural next steps to take and conclude the paper.

II. The Origins and History of the Mill Creek Zanja

Immensely important to the narrative of both naturalization of the Zanja and the eventual instream right potential is the local history. In evaluating whether an artificial waterway can be considered natural, courts look to the degree of permanence the artificial waterway was constructed with,\(^{15}\) what the community of landowners views the artificial waterway as,\(^{16}\) and more broadly examines the total history of the artificial waterway.\(^{17}\) As such, this paper starts at the Zanja’s beginning, over thirty years prior to California’s admission to the Union.

In 1819, during the Spanish colonization of California, an Asistencia mission was set up by Spanish priests in what is now Redlands, California\(^{18}\) to serve the nearby Mission San Gabriel in the Los Angeles area.\(^{19}\) In the same year, the priests contracted with a local tribe of Native Americans to assist them in building a twelve mile irrigation “zanja” that would bring water to the region and irrigate the farms being built in the surrounding area.\(^{20}\) Legend has it that the original builders used the shoulder blade bones of cattle as spades and grass woven baskets to move the earth and pave the way for water to flow down to the Asistencia.\(^{21}\) This canal formed the basis of what is the Zanja today.

The Asistencia was sacked by a neighboring tribe fifteen years later and the canal left in some disrepair for the next five years.\(^{22}\) As a result, in 1839, Jose del Carmen Lugo applied for and received a charter from the Mexican government for eight leagues worth of the Rancho San Bernardino area.\(^{23}\) This grant included, not only the old Asistencia, but specifically a

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16. *Id.* at 450.
17. *Id.*
18. Today, Redlands is located about 65 miles directly east from downtown Los Angeles.
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
water right to the Zanja and the water brought to the area by it. Thus, began what would become the permanent resettlement of the San Bernardino area.

California was admitted to the United States in 1850 and in 1851 a large portion of the Rancho San Bernardino area and accompanying Zanja water rights was sold to the Mormon Church. The U.S. Land Commission for California approved the Zanja water rights sold to the Lugo family after the annexation and by 1859, the litigation had already begun. Some of this litigation is highlighted below, but a number of Zanja water right specific decisions have created a traceable history of the varied allocation plans. The water was primarily allocated on an hourly rate meaning that most often, a user exercised their right by taking the entirety of the flow for a specified number of hours. Most prominent among these agreements was the famed “3:00 pm to 9:00 pm” agreement. In short, the upstream users determined that if they took all of the flow of the Zanja between 3:00 pm and 9:00 pm, the empty Zanja flow would not be felt by the downstream users until the middle of the night. As such, much of the litigation in the late 19th and early 20th centuries centered around enforcement and tweaks to this deal as land ownership splintered and ranches expanded both up and downstream. In an effort to coordinate among the rapidly fragmenting ownerships, in 1882, the Crafton Water Company (Crafton Water) was formed by a number of upstream users to begin consolidating their flow of the Zanja into one central irrigation distribution mechanism.

Over the next 100 years, a mountain of litigation ensued. The Zanja and the water it carried were the lifeblood of the region and the number of

24. Hinckley, supra note 1, at 2.
27. Index to US Surveyor General maps, Cal. Secretary St., (last visited September 26, 2020, 0:300 PM), http://perma.ccQMF3-MZ5N (enter “Lugo” in the search bar and see identification number MC 4:4–138); see also Hinckley, supra note 1, at 2.
28. The cause of the first lawsuit is worth nothing. It arose partly due to the water allocation system. At the time, the Zanja was allocated based on the number of children living on that plot of land. See Hinckley, supra note 1, at 3. For example, if six families had Zanja rights and each family had seven children, the total number of children on the Zanja would be forty-two. Each family then had a right to 7/42 or 16% of the total “flow hours” of the Zanja. See infra note 29 (explanation of “flow hours”).
29. See Hinckley, supra note 1.
30. Id. at 4.
31. See infra note 33.
32. Hinckley, supra note 1, at 9.
33. See e.g., Barton Land & Water Co. v. Crafton Water, 152 P. 48 (Cal. 1915); Craig v Crafton Water, 74 P. 762 (Cal. 1903); Roberts v. Krafts, 74 P. 281 (Cal. 1903); Cave v. Tyler, 65 P. 1089 (Cal. 1901); Cave v. Crafts, 53 Cal. 135 (1878); Barton Land & Water
lawsuits filed reflects its importance and financial value.\textsuperscript{34} Everything from local agriculture, vineyards, power plants, and even a furniture plant sprung up around the shores of the Zanja.\textsuperscript{35}

Around the same time, the City of Redlands (City) was forming and beginning to attract more than just agrarian interests. Settlers of all backgrounds came to Redlands and by 1910 the population had swelled to over 10,000.\textsuperscript{36} In 1926 the City voted to issue a bond to begin purchasing water rights from current Zanja owners.\textsuperscript{37} By 1939, the 3:00 pm to 9:00 pm agreement had moved to a ten day flow schedule.\textsuperscript{38} This means that the total number of hours an owner had a right to was out of the 240 hours in ten day period as opposed to the 168 hours in a seven day week period.\textsuperscript{39}

As such, in 1939, the City owned 92.65 hours and Crafton Water owned 127.5 of those 240 total hours.\textsuperscript{40} Thirteen other owners possessed hour rights, though the biggest owner after the City and Crafton Water was an estate with just 4.5 hours.\textsuperscript{41}

Fast forward to today, Crafton Water and the City still own roughly half of the flow hours and split the amount evenly on the same ten day schedule.\textsuperscript{42} Both utilize somewhat more efficient mechanisms at their intakes than the dirt lined canal built in 1819, but the Zanja itself remains in place. At times, it is now so full it is even considered a flood hazard.\textsuperscript{43}

It is estimated that both Crafton Water and the City each receive an average of 20,000 – 25,000 acre feet of water per year, but it is worth noting that

\textsuperscript{34}. Charles Hand, \textit{Dug Some 182 Years Ago, The Zanja Was a Lifeblood to What Became Redlands}, SAN BERNARDINO SUN, 2002 (clipping and library records do not include date and page number).

\textsuperscript{35}. supra note 34; Mark Landis, \textit{Bartons Were Active in Early Development of SB Valley}, REDLANDS DAILY FACTS (Feb. 3, 2009, 12:00 AM), http://perma.cc/FM7D-M9Y1.

\textsuperscript{36}. 1 U.S. CENSUS BUREAU, POPULATION, GENERAL REPORT AND ANALYSIS 87 (1910).

\textsuperscript{37}. Hinckley, supra note 1, at 16.

\textsuperscript{38}. \textit{Id}. at 19.

\textsuperscript{39}. Hinckley, supra note 1, at 19.

\textsuperscript{40}. \textit{Id}. 

\textsuperscript{41}. \textit{Id}.

\textsuperscript{42}. Stockton Interview, supra note 7.

\textsuperscript{43}. Burgess Interview, supra note 4.
this varies significantly. The feeder creek, Mill Creek, is fed almost exclusively by snowpack in the San Bernardino Mountains which is extremely volatile. The City’s primary use of their right is for drinking water and Crafton Water still distributes their entitlement to upstream agrarian property owners. Importantly, if the Zanja were to be naturalized, the court order would likely recognize the existing allocation mechanism of “hour flow” and import the current ownership stakes of those hours. As such, Crafton Water and the City would then maintain their rights. This prevents all manner of would be appropriators from upending 200 years of transactions and be consistent with previous naturalization recognitions as well. As such, this paper proceeds on the premise that if the Zanja were to be naturalized, these two entities, as well as other smaller right holders, would maintain their current stakes in the Zanja flow.

In short, the history and nature of the Zanja is rich and diverse. The court will have a lot to look at when it examines whether or not it is possible to declare this a naturalized stream. Figure 1 represents the current path of the Zanja in red which flows from right to left (east to west) on the map.

44. Stockton Interview, supra note 7. A caveat to this is that the City also owns shares in Crafton Water, which makes the split likely closer to two-thirds of the water to the City and one-third to agrarian users.

45. See Bear Mountain Snow History, ON THE SNOW, (last visited Sept. 26, 2020, 06:00 PM), http://perma.cc/KJ85-DDSZ (comparing the 2018/2019 figures of 133” of snowfall with the 2017/18 season noting just 36” in the Big Bear area).

46. Stockton Interview, supra note 7.

47. The realities of how the water of the Zanja are traded is more nuanced than this. Senior appropriators are guaranteed certain minimums in drought and the trading market for both shares in Crafton Water and flow hours generally is complex too. Regardless, the trading details do not change the argument of this paper. Additionally, the import of these previously existing stakes in the Zanja is the equitable solution given the long-term reliance on ownership of these rights. Finally, since dedicating one’s “flow hours” could prove difficult, a more useful measuring tool will need to be developed.

48. Redlands Historical Timeline, ESRI, https://perma.cc/T9UN-SNMY. The map displayed in Figure 1 can be viewed with this link by toggling the “Appendix” portion of the timeline, changing the Basemap to “Topographic” and then selecting the boxes next to “Mill Creek Zanja” and “Mill Creek Zanja – Lines” from the Layer List.
III. Instream Flow Rights and the Zanja

However, before this paper arrives at the legal doctrine of naturalization, again the question arises of who is interested in such an effort and why they are interested. Does it matter that the City owns a right to half of the water and is not allowed to leave it in the Zanja even if they wanted to? Are there any shareholders in Crafton Water who might want to sell, donate, or transfer their right to an instream flow right? If they did, is it possible in California to do so? This paper answers these questions with a resounding “yes” and outlines the basic pillars of instream flow doctrine in California then applies them to the Zanja. The stakeholders and interests in an instream right effort are the wildlife and ecosystems built up in and around the Zanja, the City itself in culture and recreation, the University of Redlands where the Zanja snakes through campus, property owners with land adjacent to the Zanja, and the local residents of Redlands. Not to be left out, there will be opponents of the instream and naturalization efforts as well. The opponents would be the City because of the use of the Zanja as a source of drinking water and both public and private developers who already face large hurdles when building near the Zanja.

A. Securing Instream Flow Rights in California

There are two legal avenues to secure water in streambeds in California: instream right dedication and forbearance agreements. Obtaining instream rights requires an application to the state and its
As such, instream rights are the long-term solution and comprise most of the discussion below. Forbearance agreements are discussed in the capacity that they may be helpful in the short run to support the long-term goal of obtaining instream rights approval. The processes for each, relationship between the two, and application to the Zanja are each considered in turn.

In California, courts were long reluctant to recognize instream rights as a valid use in accordance with California’s prior appropriation doctrine. In 1991, however, the state legislature overturned the courts and specifically recognized instream flow as a beneficial use of water in California. The law specifically allows anyone who is entitled to water, whether by riparian, appropriative, or otherwise, to file a “change petition” application the State Water Resources Control Board (Board) to dedicate those rights in order to “preserve or enhance” (1) wetland habitats (2) fish and wildlife resources, or (3) recreation on or in the water.

The code outlines a few caveats as well. The instream flow cannot increase the amount of water the user would otherwise be entitled to and cannot unreasonably affect another user’s legal use of the water. Similarly, the change petition process also allows the right holder to dedicate only a portion of their entitlement to instream flow, for example, during a particular time of the year or in pursuit of a short term or long term goal.

Various other California water laws have emphasized the importance of

49. See infra note 52.
50. It is worth noting at the outset that there are a number of state agencies and nonprofit entities who are willing and able partners in instream flow dedications that could be enlisted to help as well. Among them are the California Department of Fish and Wildlife, California Department of Water Resources, California State Coastal Conservancy, the National Fish and Wildlife Foundation, National Oceanic and Atmospheric Administration – Fisheries, Resource Conversation Districts, State Water Resources Control Board, Wildlife Conservation Board, and U.S. Fish and Wildlife Service. See PRACTITIONER’S GUIDE, supra note 11, at 6.

51. Cal. Trout, Inc. v. State Water Res. Control Bd., 90 Cal. App. 3d 816, 819 (1979). This decision upheld a rejection of the plaintiff’s application to the state water board where plaintiffs sought to exercise their water rights by not taking possession of the water and leaving the water in the local stream for conservation purposes (the action known today as “instream right dedication”). The court noted that “the entire history . . . of appropriation in California . . . involves possession of the water, evidenced by some form of diversion or physical control over it.”
53. Id.
54. Id.
55. PRACTITIONER’S GUIDE, supra note 11, at 11.
instream flow transactions moving forward, though the instream process has been used less than forty times and never in San Bernardino County.

To apply this change petition application process to the Zanja and assuming for argument’s sake it was already declared a natural stream, a particular shareholder in Crafton Water might file such a petition with the Board indicating that rather than use the total 5,000 acre feet of water they are entitled to for irrigating their orange grove, they prefer to leave half of that water in the Zanja to enhance the wildlife habitat surrounding the Zanja. This use of instream rights is the long term legal way to ensure water remains in the Zanja.

In addition to instream rights, there is also the potential for a forbearance agreement. A forbearance agreement is simply a contract between two parties; usually one party has no water right and the other party possesses a water right. The party with no right pays the other side not to exercise their water right in their regular fashion, but to leave the water in the stream instead. The upside is that this requires no approval by the Board and can be recorded with the county as a covenant that runs with the land. The downside, however, is that such an agreement does not preclude non-party junior appropriators from diverting more water and worse, the water right is then subject to forfeiture after five years. Applied to the Zanja, a major conservancy organization might contract with the above shareholder in Crafton Water by paying them to leave their 2,500 acre feet of water in the Zanja and skip the change petition process altogether. While this is only a short-term way to increase instream flow, it is a potentially useful tool if further studies are required to demonstrate the conservation value or potential habitat that the Zanja plays for some wildlife. For example, if the initial change petition filed with the Board falls just short of approval, a forbearance agreement might be utilized to secure water in the Zanja for several years while a more robust record of fish, flora, and recreation is built for a new change petition.

Given the short-term nature of forbearance agreements, the long-term plan ought to be obtaining approval from the Board for instream flow dedication of the Zanja. In order to obtain approval from the Board, the purpose for the right dedication must align with (1) the preservation of a...
wetland habitat, (2) the conservation of fish and wildlife resources, or (3) recreation. As such, each stakeholder who has an interest in the instream flow, if not aligned with one of the three uses outlined by the law, will need to state their primary purpose as one of them instead. Auxiliary and secondary benefits of leaving water in the stream like city heritage or property owners who prefer to look out at a flowing stream rather than a dry ditch, will all likely not carry water in dedicating rights to instream flows. However, for purposes of analysis, these stakeholder’s secondary subjective motivation for pursuing instream rights is still relevant to this paper as it demonstrates who has an interest in Zanja naturalization and the subsequent instream right dedication.

Addressing the first two statute approved reasons for dedicating a right to instream flow, there is a wildlife conservation interest in leaving water in the Zanja, however, there is likely not an argument for a wetland habitat. Redlands is, by definition, approaching a desert classification receiving just over an average of thirteen inches of rain per year. As such, the naturally occurring vegetation around the City is sparse and limited mostly to water efficient plants and animals. This rules out the wetland habitat classification. However, in and around the Zanja, vegetation is vast and numerous. Tall trees line the Zanja and multiple species of Hedera creep around the shores along with a number of other plants that have sprung up over the 200 year history. A study conducted by botany students at the University of California Riverside discovered over 100 different species of plants on a half mile section of the Zanja alone. In the 1980s, the San Bernardino Valley Municipal Water District contacted the State Office of Historic Preservation to inquire as to the potential adverse effects of reduced streamflow in the Zanja. The agency was advised that such a reduction or worse, total abatement in flow, would indeed have an adverse effect on the plant life surrounding the stream. As such, the vegetation and plant life dependent on the Zanja is extensive and ripe for the conservation cause.

With respect to fish, the historical record is robust with testimony of rainbow trout that lived in the Zanja and nearby streams when the flow was more consistent. While current studies in the Zanja specifically are lacking, studies of the fish in the feeder stream, Mill Creek, which is a

63. Climate Redlands – California, U.S. CLIMATE DATA (last visited Sept. 27, 2020, 06:00), https://perma.cc/3FNQ-JSJD.
64. A LICE V AN BOVEN, REDLANDS HISTORICAL SOC’Y, APPLICATION FOR NATIONAL REGISTRATION OF HISTORICAL PLACES (1976), https://perma.cc/W54C-PK9C.
65. Reply to Respondent’s Opening Brief at 5, Mill Creek Zanja Ass’n, slip op.
66. Id.
tributary of the much larger Santa Ana river, suggest sufficient wildlife is and previously was dependent on the Zanja. Each of the Santa Ana and Mill Creek streams has an extensive record of rainbow trout and the even more elusive sea-faring cousin, the steelhead trout. While the origins of some of the rainbow trout may be rooted in hatcheries from the early 20th century, genetic analysis of at least some of the steelhead suggests they are native further bolstering the case for instream flow protection purposes. On its face, the Zanja possesses the necessary facets of playing home to multiple species in an otherwise water starved area, though multiple additional studies will need to be conducted in order to obtain instream right approval from the Board. All in all, the case for conservation is readily available and, when properly conducted, could be made.

Addressing the third statute approved instream purpose, there is also a recreation interest in the Zanja. The California Code of Regulations defines “recreation” in the context of beneficial uses of water as “the use of water for resorts or other recreational establishments, boating, swimming, and fishing.” The Zanja itself possesses no resorts on its banks, is not large enough for boating and only deep enough for swimming in parts, so the primary argument will need to be for fishing and any fishing recreation establishments founded upon its banks. Assuming the success of the conservation efforts above with respect to returning various trout to the Zanja, fishing recreation will likely be comparatively easy to demonstrate in the change petition application.

A more difficult argument to make, though potentially worth exploring, would be expanding the scope of “recreation” in the eyes of the Board to include trail hiking in near proximity to the stream. This would be better categorized as an “aesthetic” use of the water and there is some evidence that the state of California as well as the Board is willing to recognize aesthetic purposes in instream rights. The 1978 Governor’s Commission to Review California Water Rights Law, which spurred the development of California’s eventual acceptance of instream flow dedications as a beneficial use, cites directly to the idea that “aesthetic,” “scenic,” and “leisure” are to be reasons considered by the Board in evaluating the reasonable use. Similarly, the California Water Code section 13050, in defining “beneficial uses” with respect to water quality

68. CTR. FOR ECO SYSTEM MGMT. & RESTORATION, STEELHEAD/RAIN B OW TROUT RESOURCES OF ORANGE COUNTY 375, 379 (2008), https://perma.cc/H8CX-4TAQ.
70. CAL. CODE REGS. tit. 23, § 668 (2020).
71. GOVERNOR’S COMMISSION TO REVIEW CALIFORNIA WATER RIGHTS LAW, FINAL REPORT (1978).
provisions, includes “aesthetic enjoyment.” Additionally, a number of other prior appropriation states have extended beneficial use doctrine to include aesthetics as it pertains to recreation in parks or waterways. The City has begun construction on a 2.2 mile trail system that will snake along the Zanja and connect a number of other trails throughout the City. The City also has designs on a much bigger, eleven mile system that would be implemented along with a nature preserve with the Zanja as the centerpiece. As such, the interest in having water in the stream is both the aesthetic and the recreational value of having water flowing freely next to the trail and throughout this preserve. At the very least, even if the aesthetic argument fails for the Board, it is still a secondary motive that will bring the City and several other stakeholders into the fold. If the aesthetic argument is not accepted, the arguments in favor of conserving the plant and fish life around and in the Zanja will likely carry the application to success.

B. Secondary Motives, the Opposition, and Local Resources for Instream Rights

Important to the analysis, are the secondary subjective motives that other stakeholders have in pursuing instream rights. Even if the Board does not find these motives compelling in approving the change petition, these motivations are relevant because they explain why a number of well financed and organized entities would collaborate to pursue such legal action. Among these considerations are the City’s aforementioned pursuit of trails and recreation, the centrality of the Zanja in City heritage, the University of Redlands, and local Zanja adjacent property owners.

Alongside the City and local resident’s interest in the aesthetic and recreational aspects of keeping water in the Zanja, there exists a deep cultural value and historical significance placed on the Zanja by locals and the City. As far back as 1910, local students began putting together what became known as the “Zanja Fiesta” which was, and in some form now is,
a party along the banks of the Zanja. In 1932, under the noses of the San Bernardino County Flood control and to much fanfare around the city, several citizens managed to have the Zanja declared a California historic landmark further strengthening the permanence of the Zanja in the community. In 1946 the City Council made a public promise to “keep the charm alive” when considering future changes to the Zanja. In the 1960s and 1970s when again faced with the prospect of altering the Zanja to take on a flood control function and potentially reducing the Zanja to a physical pipe underground, public outcry proved too much for the City Council and County officials who backed down on the project. By 1977, a charge was led to secure the Zanja’s designation as a federal historic landmark which almost certainly foreclosed on the ability of the state or national government to alter the structure or route of the Zanja. No matter how many controversies arise concerning development and alteration of the Zanja, the public support for it has prevailed every single time. The 200 year old canal holds a special place in the hearts of the City and the local residents. Returning the Zanja to its former glory by leaving water in the streambed would almost certainly garner wide-spread support. Accomplishing this on a long-term basis by securing instream flow rights would be a widely popular initiative.

A related stakeholder who has an interest in the preservation of the Zanja is the University of Redlands. The Zanja flows directly through campus and has been a central part of the University’s history since the

78. CAL. STATE OFFICE OF HISTORIC PRESERVATION, ZANJA CAL. STATE HISTORIC LANDMARK, No. 43 (Aug. 1, 1932).
79. Nathan Gonzales, Zanja (2010) (unpublished manuscript) (on file with author) (paper written as background on the Zanja for the local groups working to prevent further flood control mechanisms being implemented that would have altered the Zanja) [hereinafter Gonzales Paper].
80. Id.
82. There are too many controversies to list all in this paper. One recent example manifested itself in a developer’s attempts to alter the Zanja in 2007. The developer wanted to build an apartment complex on top of a portion of the Zanja while also expanding the Zanja for flood control compliance. Ultimately, the developer was defeated by local outcry and various City Council votes. The developer was forced to alter the building plans such that the changes to the Zanja would not be necessary to proceed. Council Approves Bulldogs Commons By Another Name, REDLANDS DAILY FACTS (May 16, 2007), https://perma.cc/6APA-KPXQ.
83. The University of Redlands is a private university with just under 5,000 students. The university was founded in 1907 and plays host to a number of local city functions. More relevant to this paper, the Zanja flows directly through campus in one of the least adulterated and most well preserved portions of the Zanja. See U. REDLANDS (last visited Apr. 14, 2020), https://perma.cc/39VT-W28C.
beginning. The “Zanja Fiesta” mentioned above began at the University and a version of it is still celebrated today.\footnote{100 Years Ago in Redlands: Alumni Raise About $1,000 for University’s Zanja Fiesta Stage, REDLANDS DAILY FACTS (June 21, 2019), https://perma.cc/6FLA-TWU7.} Moreover, the University built a Greek theater where they host commencement and other major events and the Zanja not only runs through it, but was central to the original design of the theater’s reflecting pool itself.\footnote{Gonzales Presentation, supra note 77, at 25.} More than one local official will confirm the University would leap at a chance to ensure water in the Zanja at least during the major events so as to add to the scenic aesthetic of having a stream flowing through campus and reflecting sound off of the water from the Greek theater stage.\footnote{Burgess Interview, supra note 4; Stockton Interview, supra note 7.}

Another group of parties interested in maintaining Zanja flow are property owners who possess no right to the waters of the Zanja, yet whose land is adjacent to it. As far back as 1864, property owners whose land ran adjacent to the Zanja tried to have the stream declared “natural” so that it might convey riparian rights.\footnote{Barton, slip op.} As narrated in Part I, in the 1980s, local property owners banded together to form the seventy strong Mill Creek Zanja Association to sue a number of upstream users.\footnote{Alan Mittelstaedt, Kottmeier Proud of His High Prosecution Rate, SAN BERNARDINO SUN, May 24, 1990, at 18.} Their argument was that the various water companies and municipal entities’ use of water from Mill Creek and the Zanja significantly reduced Zanja flow near their property depriving them of the scenic Zanja\footnote{John de Leon, Creek Water Rights Fight Could Go to Appeals Court, SAN BERNARDINO SUN, May 21, 1988, at B1.} flowing through their property and that all of the vegetation along the banks was dying. Through a series of lawsuits, the Association tried all manner of arguments, asserting at times they had a riparian right to the waters of the Zanja,\footnote{Reply to Respondent’s Opening Brief, supra note 65, at 1.} that they were entitled to water per a previous exchange agreement with the various entities,\footnote{Id. at 3.} and that a pipeline was constructed in secret different from the one noticed to the public that enabled the entities to take water from a different location in the Zanja instead of one that would have discharged waters upstream in the Zanja.\footnote{Id. at 5.} Ultimately the trial court gave a noncommittal ruling, both parties appealed to have it set aside, and several claims were dismissed and several were settled out of court, but the...
subjective motivations of the property owners remains relevant. As demonstrated by their willingness to fund and fight a multi-million dollar lawsuit, there is an immense and deep-seated motivation for property owners to maintain water in the Zanja. Any attempt at declaring the stream to be natural and the subsequent instream flow protection would be leapt at by the surrounding owners. Even today, properties for sale that are adjacent to the Zanja feature the on-site flowing stream as a main selling point. An increase in consistent instream flow would increase property values for these lands and serve as a personal motivation for these property owners to contribute to the litigation efforts.

Despite all of the enumerated positive effects that flowing water in the Zanja would have, a push for naturalization and subsequent rights it may confer would be and previously was opposed. Twice the court has declined to extend naturalized status to the Zanja, almost 100 years apart at that. Far more times have varied lawsuits been vehemently and successfully opposed by interested parties content with the status quo of the Zanja and keen to see it maintained. The two primary opponents of a modern effort would be City and local developers. At the moment, the City exercises its right to the waters flowing from the Zanja for drinking water coming from the feeder creek, Mill Creek. As a result, the City has a cheaply available source of drinking water that it will be reticent and resistant to give up, even in the name of City recreation and heritage. Similarly, public and private developers will also oppose any recategorization of the Zanja that confers additional protections to the already difficult to alter Zanja. Declaring the Zanja a naturalized stream attaches even more required environmental impact requirements for public projects and an array of regulations for private developers. Given that a lot of the undeveloped property in the Redlands is in areas near or affected by the Zanja, adding another layer of hurdles will undoubtedly be opposed.

94. *Mill Creek Zanja Ass’n*, slip op. Ultimately, Crafton Water, the City of Redlands, the Mill Creek Zanja Association, and other interested property owners arrived at an agreement whereby minimum flows were to be guaranteed in the Zanja. The “minimum flow” was to be guided by the previous five year’s historic flow. This stipulation only covered one mile of the Zanja and thus, does not affect the outcome advocated for in this paper which applies to the entirety of the Zanja’s twelve mile length. Agreements and Declarations Of Covenants, Conditions And Restrictions Running With the Land, Art. I (July 29, 1993).
95. 2796 *Mill Creek Rd*, Mentone, CA 92359, ZILLOW, https://perma.cc/LA9Y-XGMD.
96. *Mill Creek Zanja Ass’n*, slip op.; *Barton*, slip op.
To the opponents, this paper points out three alternative perspectives. To the private property developers, having the Zanja declared a naturalized stream, while adding some administrative hurdles, only presents better investment opportunities moving forward. Property values increase with a view of a body of water.\textsuperscript{99} The long-term benefits of a naturalized and permanent stream next to the residential or even commercial real estate far outweighs the increased initial capital investment cost. To the public developers, this paper asserts that policy rather than fiscal reasons should control. These policy drivers include a general conservation interest, the Governor’s finding of a need for increased instream protections in the past several decades, and a public opinion moving towards a prioritization of the environment. Repurposing the Zanja for flood control or pipeline cost reduction is not aligned with any of these goals. In any event, continuing to fight the Zanja is already almost impossible given the state and federal historic landmark designations as well as the 200 year history of public opposition to Zanja repurposing projects. All of which indicates that any attempt in the modern era may be best summed up by the proverbial expression of “throwing good money after bad.” Put another way, public developers ought to accept any attempt at altering the Zanja as futile given its almost consistent failure to prevail in such conflicts.

Finally, the drinking water source debate is no small feat to overcome which this paper concedes. The City has aggressively pursued and invested millions of dollars in recent years to optimize efficiencies, protect the water sources from contaminants, and explore all possible solutions to water conservation in the City.\textsuperscript{100} Furthermore, the City has strictly adhered to state policy preventing tax payers from bearing a single cent of water provision costs.\textsuperscript{101} To this end, the solution lies in an examination of the quantity of water in question. Illustrative examples above discussed the hypothetical shareholder in Crafton Water who might choose to dedicate 2,500 acre feet of water to instream flow if the option were available. This is a roughly accurate representation of the amount of water needed to recreate the “babbling brook” or aesthetically pleasing stream flowing next to properties, trails, and is at least in the ballpark for fish and wildlife.\textsuperscript{102} Of course, a more exacting model can be arrived at to determine the optimal


\textsuperscript{100} CITY OF REDLANDS CONSUMER CONFIDENCE REPORT (2014); CITY OF REDLANDS CONSUMER CONFIDENCE REPORT (2015); CITY OF REDLANDS CONSUMER CONFIDENCE REPORT (2016) [hereinafter 2016 CONFIDENCE REPORT].

\textsuperscript{101} Id.

\textsuperscript{102} Stockton Interview, supra note 7; Mariska Obedzinski et al., \textit{Effects of Flow Related Variables on Oversummer Survival of Juvenile Coho Salmon In Intermittent Streams}, 147 TRANSACTIONS AM. FISHERIES SOC’Y 588 (2018) (noting that some salmon can survive in extremely low stream flow as long at least a “trickle” maintains the connection between various pools in the streambed).
annual acre feet for stakeholders and particularly that required for fish and wildlife, but the important takeaway for this paper is that the instream potential does not threaten a significant portion or potentially any of the drinking water source. As stated, the City has a right to around 20,000 to 25,000 acre feet of water per year from the Zanja. Not only is 2,500 a modest amount in comparison, but furthermore, in practice, the most likely event is that current shareholders of Crafton Water are the ones who would choose to sell, transfer, or donate their rights for instream purposes. This means that the City’s drinking water source is not threatened at all. The most poignant concern then for the City would be what to do in times of drought. As mentioned, the flow of the Zanja is volatile. During times when Mill Creek slows, the flow of the Zanja slows with it. In terms of allocation, because the Zanja is allocated on a ten day hourly schedule and not by amount, each user still gets some percentage of the Zanja even when the water is far below the average annual flow. While the solution for allocations during a drought is the subject of much debate and scholarship, for this paper, the risk that the percentage of flow dedicated to instream rights may dwindle during times of drought is acceptable risk. At the end of the day, much of the motivations in dedicating instream flow outlined above are far less important than the global need to plan for droughts. Fighting to protect the “gazebo rights” or aesthetic appeal of the Zanja during a drought risks undermining the entire thrust of this paper and as such, it deemed a worthwhile risk.

In a related vein and in response to the oft critique aimed at lawyers and law students with lofty ideals, there does exist a financial willingness and ability to execute this instream dedication. Given the high costs of funding litigation such as that of 1980s Mill Creek Zanja Association as well as the financing that would be required to mount a change petition for instream rights, it is a subject well worth highlighting. If there were any doubt about the willingness of local conservationists to fund extraordinary efforts, Jack Dangermond, owner and founder of the Redlands based tech giant Esri, extinguished all of it. In 2017, he purchased $165 million worth of coastal property just north of the City of Santa Barbara in California and donated it to The Nature Conservancy making for the largest donation to the group ever and establishing the 24,000 acre Jack and Laura

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103. Stockton Interview, supra note 7.
104. Bear Mountain Snow History, supra note 45.
105. Stockton Interview, supra note 7.
106. A final potential concern other than drought would be what to do in the event of a population explosion in the area. In the unlikely event it was to happen, a similar response is offered in that 2,500 acre feet is a relatively modest amount to dedicate to the environment and that given Redlands’ proximity to the mountains, there are a number of other readily available sources of drinking water should the necessity arise. Stockton Interview, supra note 7.
Dangermond Preserve.\(^{107}\) The generosity and financial willingness is not limited to Redlands’ wealthy elite or to conservation causes either. At the time of writing, the local community is engaged in raising the last of the $14 million required funds for the Museum of Redlands (MOR).\(^ {108}\) MOR is to be a modern cultural center to play host to a number of artifacts and history as well as serve as an event center for the town.\(^ {109}\) The funds have been raised through a combination of small and large private donors with no financial support from any level of government.\(^ {110}\) Along with these two monumental efforts, the City also boasts the longest running free summer concert series in the monolithic, 5,000 seat, outdoor theater: the Redlands Bowl.\(^ {111}\) Admission is completely free and funded exclusively by community contributions.\(^ {112}\) The takeaway from these examples is that the City and its citizens care deeply about the heritage of the town and are willing to fund, staff, and take on projects of immense magnitude and challenge. Even the Zanja itself has played a role in the fundraising ability of the community. The Redlands Family Service Association used to host their annual fundraiser, the “Dinner in the Grove” at the Paine ranch where the Zanja runs right through the property.\(^ {113}\) In years past, a few strings were pulled by locals to ensure enough water was in the Zanja at the time of the dinner such that the patrons might enjoy an evening next to a flowing stream.\(^ {114}\) In sum, the centrality of the deep ties to the land play an important role in the local’s ability to finance such efforts and are equally important when evaluating the considerable effort an instream flow dedication would require.

Having established that not only are there more than a few willing stakeholders who have an interest in instream rights, but that legally instream rights are also feasible to secure, this paper then turns to the mechanism that will make it all possible: naturalization.


\(^{110}\) Stockton Interview, supra note 7.

\(^{111}\) Redlands Bowl Summer Music Festival, REDLANDS BOWL (last visited May 1, 2020), https://perma.cc/8W8Y-K82S.

\(^{112}\) Id.

\(^{113}\) Telephone Interview with Nathan Gonzales, Archivist & Head of Special Collections, A.K. Smiley Pub. Library (Apr. 1, 2020) [hereinafter Gonzales Interview].

\(^{114}\) Id.
IV. The Mill Creek Zanja Ought to Be Declared a Natural Stream

In order to pursue instream rights dedication, a court must declare the artificial origins of the Zanja to be immaterial and that legally it is a “natural” stream. As noted, the Zanja must be declared natural because instream rights cannot attach to a pipe, which is what the law views the Zanja as currently. Winning naturalization is, concededly, no small feat given the resounding defeats such efforts have been handed in the past. However, the legal issue has never been approached in the direction advocated for by this paper. Previous naturalization defeats have stemmed from failures to override contractual obligations that stakeholders themselves agreed to or were just too early in the life of the Zanja for the naturalization doctrine to apply. This paper applies the overarching principles of naturalization without the stain of previous contracts signed by the plaintiffs and applies these principles well into the life of the Zanja where a record of naturalization in California has developed in the courts. As such, Section A considers the standard set by the California Supreme Court in *Chowchilla Farms, Inc v. Martin* and the relevant facts of the case. Section B then applies that standard to the Zanja and breaks the analysis up into the two main considerations listed by the *Chowchilla* court of (i) long-continued use and acquiescence by interested persons and (ii) circumstances at the time of construction. The conclusion reached is that the Zanja’s origins are immaterial and thus, for all legal purposes is considered natural.

A. The California Standard for Declaring a Stream to be Natural

In order to naturalize a stream, courts look to an array of factors. The California Supreme Court considered these factors at length in *Chowchilla* where it ultimately held that an artificially constructed watercourse could be declared naturalized in California. At issue in *Chowchilla*, were three channels of water: the Kings River, the San Joaquin River, and a man-made canal cut between the two. The Kings River and San Joaquin River parallel one another as they flow from the Sierra Nevada mountain range.

115. *Mill Creek Zanja Ass’n*, slip op.
116. *Barton*, slip op.
118. *Id.* at 453.
119. *Id.*
120. The facts are slightly more complex than this: the third channel was cut a series of times and comprised of multiple different channels through a preexisting swamp in the area. For purposes of this paper and the relevant portions of the decision, examining only these three bodies of water is sufficient. *Id.* at 4–8.
in a general westerly direction toward the ocean.\textsuperscript{121} During periods of heavy rainfall and snowpack, the two rivers overflowed and over time created what became known as the Fresno Swamp in between the two rivers.\textsuperscript{122} This was an area of dense vegetation riddled with streams and ponds.\textsuperscript{123} Eventually, the swamp water would drain back into the San Joaquin River, taking the water from the Kings River with it.\textsuperscript{124}

Beginning in 1870, for fifty years, farmers developed this swamp between the two rivers and diverted the swamp waters to fit their needs by digging various canals.\textsuperscript{125} A series of smaller canal projects and reclamation works led to the development of the one main channel at issue: the Fresno Slough.\textsuperscript{126} The appellant-plaintiff in this case owned land riparian to the San Joaquin River; though his lands were “riparian” in that they were adjacent to the Fresno Slough some 15-20 miles away from the San Joaquin River denoted roughly by the red arrow on Figure 2 below.\textsuperscript{127}
Respondent-defendants planned to divert water above the intake for this slough thus taking water away from the downstream plaintiff users of the slough.\textsuperscript{128} It was this diversion plaintiff-appellants sought to enjoin.\textsuperscript{129}

On appeal to the California Supreme Court, three questions were presented, though only the second of which is what will comprise most of the arguments of this paper.\textsuperscript{130} The overarching legal theory of the case hinged on whether or not the slough was considered natural. If it was, then riparian rights attached to the plaintiff’s land and the defendants could not encroach on those rights by diverting water upstream.\textsuperscript{131} This “natural” state as a precondition to riparian rights is analogous to how the Zanja must be declared “natural” as a precondition to instream rights.

The \textit{Chowchilla} court first addressed whether the Fresno Slough had existed in a state of nature before any developments were made to the swamp.\textsuperscript{132} If the Fresno Slough existed in some colorable form before man, there was no reason to proceed to any other question as riparian rights clearly attached.\textsuperscript{133} The court upheld the lower court’s decision that the

\textsuperscript{128} \textit{Chowchilla}, 25 P.2d at 439.
\textsuperscript{129} \textit{Id.} at 440–41.
\textsuperscript{130} \textit{Id.}
\textsuperscript{131} \textit{Id.}
\textsuperscript{132} \textit{Id.}
\textsuperscript{133} \textit{Id.}
slough was not a natural waterway prior to the manmade developments.\textsuperscript{134} This question is less applicable to the Zanja as the whole purpose of the Zanja was to bring water to an area where none existed, not to organize preexisting water flowing through a swamp as in \textit{Chowchilla}.

The court then turned to the second and third questions. The second question was whether the new channel had existed for such a period of time that its origin was immaterial and it ought to be considered a naturalized waterway.\textsuperscript{135} The third question was whether there were any extraordinary circumstances where riparian rights would not attach like storm or flood waters.\textsuperscript{136} This third question is considered further in Section B, Subpart (ii).

It is the second issue that controls the situation for the Zanja. That is, has the Zanja been in existence for such a period of time that its origins are immaterial and thus, it can be considered a naturalized waterway? If so, the above outlined procedure to acquire instream rights to keep water in the Zanja may then be pursued. In determining that the Fresno Slough was considered a naturalized stream despite its artificial origins, the \textit{Chowchilla} court turned to the two aforementioned considerations.\textsuperscript{137} These are (i) long-continued use and acquiescence by interested persons and (ii) the circumstances under which the channel was constructed.\textsuperscript{138} Each is considered in turn.

\textbf{B. Applying the California Standard to the Zanja}

\textit{i. Long-Continued Use and Acquiescence}

In evaluating the long continued use and acquiescence, the \textit{Chowchilla} court considered both the length of the waterway’s existence and how the local community landholders view the waterway.\textsuperscript{139} The long term use and acquiescence factor is pervasive throughout the entirety of the common law’s decisions in evaluating naturalization. It is often considered independently as a factor and also as the backdrop for the other factors evaluated by the court. Even when other factors favor a ruling that a waterway is not natural, the length of use and acceptance by the community can provide the overriding reason to declare the stream natural.\textsuperscript{140} As such, it is considered first for purposes of evaluating the realistic strength of an argument for naturalization.

\textsuperscript{134} \textit{Chowchilla}, 25 P.2d at 443.
\textsuperscript{135} \textit{Id}.
\textsuperscript{136} \textit{Id.} at 459–60.
\textsuperscript{137} \textit{Id.} at 450.
\textsuperscript{138} \textit{Id}.
\textsuperscript{139} \textit{Id}.
\textsuperscript{140} \textit{Falcon v. Boyer}, 142 N.W. 427 (Iowa 1913).
First, the length of existence of the Zanja presents a strong case for naturalization. The Zanja has existed consistently in some form for 200 years.\textsuperscript{141} Not only is there a written record of the Zanja’s construction, but the mountain of litigation referenced above provides a robust record of the Zanja’s use, length of existence, and consistent source of water in the region.\textsuperscript{142} The litigation further provides a record of the flow amount and usage over its history and has continued to do so well into the modern era. Previous court decisions have held lengths of existence far shorter than 200 years sufficient to naturalize the stream. In fact, there is likely no artificial waterway older than the Zanja that has ever been considered by the courts in California.\textsuperscript{143} Various jurisdictions have explicitly approved of lengths of thirty years,\textsuperscript{144} twenty years,\textsuperscript{145} and even just sixteen years in California\textsuperscript{146} in order for a canal to be considered natural. As a result, the Zanja likely has one of the best cases for the length of existence factor ever presented to the courts.

Similarly, when turning to the local communities’ views on the subject, there is also a strong case for naturalization. Invoking Samuel Wiel’s scholarship on water rights in the western states, the \textit{Chowchilla} court noted that what the community of landowners view the water course as and the extent to which the community has adjusted to its existence is a relevant inquiry.\textsuperscript{147} Clesson Kinney’s treatise on the laws of irrigation and ensuing water rights notes that “where the artificial watercourse was not created by joint action of the owners, it may become such a one to which riparian right may attach, if the various owners along its course have always treated it as such.”\textsuperscript{148} Not only does \textit{Chowchilla} adopt such a consideration for California, but there is an extensive record of other jurisdictions accepting similar propositions.\textsuperscript{149}

Applied to the Zanja it becomes clear that the local community has long relied on the existence of the Zanja by virtue of all manner of agreements. As demonstrated by the litigation led by Kottmeier in the 1980s as well as current real estate listings, there is a modern reliance by

\begin{footnotes}
\footnote{141}{Hinckley, \textit{supra} note 1.}
\footnote{142}{\textit{Works Progress Admin.}, \textit{Historical Outline of The Mill Creek Zanja} 1819-1936, \textit{supra} note 5; see also \textit{supra} note 33 (collecting cases).}
\footnote{143}{The application for federal historic landmark designation claims the Zanja to be the oldest civil engineering project in California. \textit{Van Boven, \textit{supra} note 64.}}
\footnote{144}{\textit{Matheson v. Ward}, 64 P. 520, 520–1 (1901).}
\footnote{145}{\textit{Falcon}, 142 N.W. at 429.}
\footnote{146}{The court did note that one witness testified that the channel had existed for forty years, though in holding that it was a naturalized channel the court reverted back to the sixteen year timeline more well established by the record. \textit{Chowchilla}, 25 P.2d at 438, 446.}
\footnote{147}{\textit{Id.} at 450.}
\footnote{148}{\textit{Id.}}
\footnote{149}{The court lists cases from Kansas, Oregon, Wisconsin, New Hampshire, Delaware, Vermont, and Pennsylvania that support this acceptance. \textit{Id.} at 18.}
\end{footnotes}
local individual property owners in their acquisition and retention of property as it relates to the Zanja. Even if these individual property owners’ aesthetic purposes are not recognized by the law as defensible when estopping other appropriative uses, they are still relevant community members who hold property adjacent to the Zanja. While they are not putting the water to a riparian use as considered in *Chowchilla*, the property value increase or decrease as a result of the presence or absence of the Zanja water makes them relevant to community landowners who have relied on the Zanja. Similarly, the University constructed their campus with the Zanja in mind indicating a reliance and adjustment to the Zanja. The City and county have both significantly altered street layout plans, development propositions, recreation and trail planning, and drinking water sources based on the existence of the Zanja. Just as the plaintiffs in *Chowchilla* had developed and farmed the land based on their continued expectation of the Fresno Slough’s waters, here, an entire City has grown up around the Zanja with the expectation that it would remain.

The argument in opposition of this would point to the numerous attempts by county and local agencies to repurpose, cover, or transfer the Zanja’s contents into a piping system as plain evidence that various community land owners did, in fact, see the Zanja as either a product of a bygone farming era or that it was temporary given that its original use would have been defunct if the changes were permitted. While this may be evidence of one particular side’s view, the repeated defeats handed to the government entities that attempted to alter the Zanja indicate the prevailing view of the Zanja is one of permanence.

This raises a secondary policy argument in favor of naturalization that is slightly more attenuated than the stakeholders considered in *Chowchilla*. A number of the interested parties discussed in Part III, like the City in recreation or conservationists in the name of wildlife, clearly have an interest in the Zanja’s preservation and continued existence. However, they are likely not the “community land holders” envisioned by the *Chowchilla* court since their land is not riparian to the Zanja. Nevertheless, there is a worthwhile argument that they are still community stakeholders who have built a cultural heritage around the Zanja. As exhibited by the trail system, the Zanja fiesta, the fundraisers centered around dining next to the flowing Zanja, and the perpetual public outcry at any attempt to further develop the Zanja, the local community also sees the Zanja as a permanent fixture. This question, again, while not considered directly at common law for purposes of naturalization, is likely to obtain court consideration from a policy

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150. *Mill Creek Zanja Ass’n, slip op.; 2796 Mill Creek Rd, Mentone, CA 92359*, supra note 95.
151. *100 Years Ago in Redlands: Alumni Raise About $1,000 for University’s Zanja Fiesta Stage*, supra note 84.
perspective. In sum, both the consistent 200 year length of existence and prevailing local view of the Zanja as permanent cut in favor of declaring the stream natural.

ii. Circumstances of Construction

In evaluating the circumstances of construction, the Chowchilla court turned primarily to the case, San Gabriel Valley Country Club v. Los Angeles.152 There, the court also ultimately declared the artificial waterway in question to be “natural.” 153 The guiding principles established by San Gabriel and Chowchilla for the circumstances of construction are whether the waterway functioned as a natural drainage for the area, the degree of permanence with which the construction was undertaken, and the origin and character of the water’s source.

First, with respect to an examination of whether the waterway is a natural drainage channel, the Chowchilla and San Gabriel courts invoked a number of authorities. The central idea that emerged was that if in the production of the waterway, humans were simply consolidating water otherwise draining through the area into one singular channel, then that channel could be considered “natural.” 154 This was illustrated by San Gabriel where the plaintiff, a country club, brought suit against the County of Los Angeles.155 The county had built a flood control channel upstream from the country club that consolidated all of the area’s runoff into one concrete channel. 156 That channel then dumped the area’s runoff near country club’s land and flooded it. 157 The San Gabriel court held that the channel was a natural stream because the county had done nothing more than organize existing waters into one consolidated artificial channel.158

One excerpt of the San Gabriel doctrine is particularly apt:

We have referred to the Rubio Cañon wash [the concrete runoff channel] and the continuation of it through the plaintiff’s land as a natural water channel. In one sense it is not that. It did not exist as a definite watercourse, at least as far as the plaintiff’s land, before the region was settled up, but was created as the result of settlement. Nevertheless, it is natural in the sense that it was originally made by the waters themselves, and not by man, although it is possible that except for the acts of man the waters would not have been kept

152. San Gabriel Valley, 188 P. at 554.
153. Id.
155. San Gabriel Valley, 188 P. at 554.
156. Id. at 555.
157. Id.
158. Id. at 556.
together so as to make a channel. In any event it has now existed for such a length of time as the channel for the natural drainage of the watershed tributary to it that the manner of its creation is not material, and it has all the attributes of a water channel wholly natural in origin.\footnote{159. \textit{San Gabriel Valley}, 188 P. at 556}

Applied to the Zanja, initially it appears not to fit either of the descriptions from \textit{Chowchilla} where the swamp demonstrated the existing drainage area between the two rivers or \textit{San Gabriel} where there was extensive evidence that the surface water was already draining through the area. In contrast, the Zanja was a brand new channel cut from the banks of Mill Creek which flowed what appeared to be away from the City of Redlands as depicted earlier in Figure 1. Similarly, the Zanja was seemingly dug with the purpose of bringing water to an area where none existed. However, when the topography and flood history of the area are considered, it becomes clear that the Zanja fits the doctrine enunciated by the \textit{San Gabriel} court.

Turning first to the topography of the Zanja, again, initially it appears to be a brand new channel rather than a naturally occurring drainage area. However, when the map of the Zanja is overlaid onto a topographical map of the area, it becomes apparent that there is a natural slope that would allow water to flow in the direction the Zanja tracks. During times before the Zanja, the water could have flowed through the region in underground rivers or simply been prevented by a natural barrier at the intake of the Zanja. Just as the \textit{San Gabriel} court approved of an upstream user improving drainage areas by altering such natural barriers, here the removal of the natural barrier at the intake that paved the way for the Zanja is also acceptable for naturalization purposes. Figure 3 presents the topographical maps below representing the east and west halves of the Zanja and the surrounding topography.\footnote{160. Maps compiled by the City of Redlands on March 24, 2010, and provided to the author by Stephen Stockton.}
Figure 3.1
East Topography

Figure 3.2
West Topography
What these maps demonstrate is that the water of the Zanja follows the natural gradation of the land. On these maps, the water is flowing from right to left, or east to west. The brown lines represent the contours and the blue line represents the path of the Zanja. The elevation of each contour line is represented by a number in black lettering, examples of which are circled in red above on the West Topography map. Rivers and streams run from high elevation to low elevation per the laws of gravity. Thus, by examining the path of the Zanja it becomes clear the Zanja is flowing in the natural direction of the elevation when it starts at the high elevation in the east and flows towards the lower elevation in the west. If the Zanja ran parallel to the contours or perhaps cut across contours in a more linear fashion, there might be an argument that the drainage direction is unnatural and that the Zanja only flows because man cut the channel deep enough in parts to facilitate it. However, because of the natural winding from higher to lower elevation, this is evidence that area is a natural drainage and thus, the Zanja can be considered natural.

Interestingly, these maps also demonstrate the potential value of the local legend that the Zanja was originally dug with rudimentary tools like cattle bones and baskets. There is some disagreement about how feasible this actually was and some dispute about whether these were actually the tools used given the perceived difficulty of digging a twelve mile ditch with grass baskets and cattle bones. However, the natural topography suggests it may have been less labor intensive than initially thought and very possible to use such tools. Rather than cutting a brand new stream where water did not naturally flow, the topography shows the effort may have been more of a path clearing than formal construction. The local legend that it was built with basic tools suggests that the water may have been predisposed to follow the path anyway making it very much possible to carve the Zanja with nothing more than bones and baskets. Courts are more than willing to accept that man has “aided” the waterway in some way. Chowchilla expressly acknowledged this concept invoking a case decided by the Iowa Supreme Court. The Iowa court considered this human “aide” directly in Falcon v. Boyer. The court there, held the evidence indicated the water in question was predisposed to draining through the area and that “slight excavation in the ground tending to facilitate the flow of the water over their lands” combined with a twenty year history of use demonstrated the channel was now a natural watercourse. As a result, this local Zanja legend may demonstrate that rather than a feat of engineering, it may have simply been a slight excavation facilitating

161. Hinckley, supra note 1.
163. Falcon, 142 N.W. at 427.
164. Id. at 429.
otherwise natural drainage through the area. This again, cuts in favor of naturalization.

In addition to the natural topography, consider the flooding history of the Zanja as it relates to the natural drainage of the area. At present, the Zanja itself overflows and floods.\textsuperscript{165} At times, the Zanja actually presents a real hazard to neighboring properties when water levels rise.\textsuperscript{166} Similarly, during the course of the 20th century, there were numerous attempts by city and county agencies to repurpose the Zanja for flood control.\textsuperscript{167} This demonstrates that both at present and at least for the past 100 years, the Zanja has functioned as a natural drainage channel accepting the overflow of Mill Creek during the high season. Further, even before technology was perfected at the intake, the crudely dug ditch still paved the way for a devastating flood in 1938 when a significant portion of Redlands was wiped out.\textsuperscript{168} This indicates that even before flood control mechanisms were in place, the Zanja followed the natural drainage course of the water. The flood of 1938 indicates that the flood waters naturally drained in the direction of the City and that the ditch itself functioned more as a break in the natural levee rather than a total redirection of the river. Again, the court has readily approved of manmade improvements to a drainage area so long as it was naturally occurring in the first place.\textsuperscript{169} The repeated outflow of flood waters demonstrates the Zanja follows the natural drainage path of the area and that man simply facilitated increased flow in digging the Zanja.

Finally, evidence suggests even the feeder creek, Mill Creek, drains towards the City along the path of the Zanja. After the flood of 1938, local government was forced to build a barrier in the form of long high ground along the southern bank separating Mill Creek from the City.\textsuperscript{170} Figure 4 illustrates this.\textsuperscript{171}

\textsuperscript{165} Flooding, U. REDLANDS, https://perma.cc/4H5H-RA3W.
\textsuperscript{166} Flooding, supra note 165; see also Gonzales Interview, supra note 113.
\textsuperscript{167} Gonzales Paper, supra note 79.
\textsuperscript{168} Stockton Interview, supra note 7.
\textsuperscript{169} Falcon, 142 N.W. at 429.
\textsuperscript{170} Stockton Interview, supra note 7.
\textsuperscript{171} Photograph of Barrier, provided by Steven Stockton.
Figure 4.1

Figure 4.1 is taken from the vantage point of standing in the middle of the Mill Creek wash basin. Figure 4.2 demonstrates the location the photo was taken by the green circle and vantage point of the photograph by the accompanying green cone opening in the direction of the view. The red line in Figure 4.2 is the Zanja which flows from right to left. Pictured in the Figure 4.1 is Mill Creek. The City is just over the foothills in the background of the Figure 4.1 and the Zanja intake is just around the corner from where the photograph was taken, about 200 yards away.\[^{172}\] In Figure 4.1, the dirt bank pictured on the other side of Mill Creek with the pipe running into it was built by the City in conjunction with the Works Progress

\[^{172}\] This photograph is notable for the line of green trees that appear on the right half of Figure 4.1. The whitewashed rocks and brown foothills stand in stark contrast to this tree line that arises out of the dessert. This tree line is where the Zanja begins and is a visual representation of the extensive flora that has sprung up around the Zanja in an otherwise dry area.
Administration after the 1938 flood. What Figure 4.1 demonstrates is despite an enormous wash area for Mill Creek to meander through and make its way towards the Santa Ana River, the large blue visible river in the upper left corner of Figure 4.2, Mill Creek still naturally drains in the opposite direction and heads towards the City. Without the bank there, it would have continued working its way towards the City and in times of flood, continued to threaten the town. This indicates that the natural drainage area for this portion of Mill Creek is in the direction of the City and therefore the exact path that the Zanja tracks. In sum, the Zanja flood history, topography of the Zanja, and even the direction of Mill Creek suggest that the Zanja tracks a natural drainage path and thus, favors a natural classification.

A major counter argument is that the Zanja is different from the situations in Chowchilla and San Gabriel where above ground water was visibly draining through the area. The argument is that without the Zanja, the water may have never made it all the way into Redlands. Further, the argument is that none of the flooding history in Redlands would have ever happened without the Zanja breaking the natural levee. While California has not directly addressed the issue, the Washington Supreme Court has taken up the subject and the holding was acknowledged in dicta by the California Supreme Court. In Matheson v. Ward, the court considered two streams, one natural channel and one artificial. The natural channel was dammed and redirected into a totally new and different artificial channel which was then used for the next thirty years. The court held that the length of thirty years of acquiescence and long term use of the new channel meant it was now the natural channel. In that particular situation, the length of time in existence overrode any arguments about whether or not it was a natural drainage or a total reroute of the river. Applied here, the Zanja is analogous to the new artificial channel and Mill Creek is analogous the original dammed up channel. Applying the Matheson doctrine, even if the Zanja was deemed an entirely new route for the river and not within the same drainage area, the length of time in use and acquiescence by surrounding owners will likely control instead. As noted above, the length of time in existence is so strong, that any potential shortfalls in the natural drainage argument can thus be overcome.

Turning then to the degree of permanence with which the Zanja was constructed, this issue will likely not be considered at length by the court.
given the fact that 200 years of existence and use wipes away almost any argument that the Zanja was not intended to be permanent. When originally built, there is no indication that the Spanish colony of California and the mission system was intended to be a temporary venture. Similarly, even after the Asistencia was sacked, every major land deal for the next 100 years contained some negotiation about a right to the Zanja. As a result, there is an immense record of property purchases and capital investment in agriculture and industry, all of which indicates that not one interested party intended the Zanja to be just a temporary feature. Even in the modern context, there is no colorable argument that anyone intends for the Zanja to disappear. County flood control projects, city development and recreation projects, the University’s construction of their theater to include the Zanja as a permanent fixture, and the continued trading of shares in Crafton Water demonstrate that the Zanja’s existence is here to stay.

The final consideration in the circumstances of construction is the origin and character of the water and its source. Chowchilla considered the source of the water in the Fresno Slough as it related to the third question presented which was whether the flood waters were “extraordinary” and thus not subject to the regular rules allocating the water. After an extensive discussion on western state authority regarding annual flow of rivers, the court readily held that despite the volatility of the flow of rivers around California, as long as the source and cause of the volatility was the snow melt in the mountains, this volatility was immaterial. As such, the periods of flooding were to be considered the same as any other flow of the stream. While not directly applicable to this paper because of the riparian rights issue driving the inquiry in Chowchilla, it could be related in a colorable counter argument against naturalizing the Zanja. An opposing party might argue that while the source of some of the Zanja water is snowmelt, that an additional massive amount of the water is wastewater or runoff from the town and as such, no rights, whether instream or riparian, can attach. This argument would invoke a line of California cases stemming from Green v. Carotto, which held that “waste water” which flowed through the plaintiff’s land from an upstream user was not sufficient to be considered a “natural” stream. Since the origins of the water were “waste,” such rights could not attach. As applied to the Zanja, an opposing argument might be that most of the snowmelt and natural flow of the Zanja is taken by the City and Crafton Water so far upstream that most

181. Id. at 448.
182. Id.
183. Green v. Carotto, 72 Cal. 267, 685 (1887).
184. Id. at 686.
185. Id.
of the water actually present in the Zanja when it reaches the trails and local properties is just waste water running off the streets and farms during storms. As a result, just as the downstream users in Green could not attach rights to that waste water, the Zanja cannot have instream rights attached to that which is merely runoff flowing through town. Undoubtedly, a well-financed study could determine the true factual numbers behind the flow to further evaluate such a claim; however, more broadly this line of thinking from the Green court is distinguishable from the present case. Even if taken as true that much of the downstream Zanja flow is composed of runoff, this does not change the character of the Zanja itself. Every natural stream is composed of runoff of some sort, especially in periods of storm or flood. The Zanja follows suit in that much of the downstream flow may come from runoff or tributaries. Importantly however, there is no record of waste water discharge from plants or farms feeding into the Zanja that might indicate its character is similar to the “waste water” discussed in Green. As such, the character of the flow suggests it is a natural stream as well and merely fed by the various tributaries that drain into the Zanja throughout town. If anything, this argument would only bolster the fact that the Zanja is a natural drainage basin and further strengthen the case for naturalization.

V. Next Steps

With all of this in mind as a feasible process, the final question remains, how does this paper become reality? To the concerned citizen, wealthy conservationist, or other interested party who has been convinced by the paper and asks, “what now,” there are a number of available paths to pursue this venture. As stated, in the short run, a forbearance agreement would likely be prudent in order to conduct further studies of fish and wildlife. This means contracting with a current holder of a Zanja water right to leave the water in the Zanja for a short enough period of time that the right is maintained, but long enough to reliably establish the flora and fauna that would increase with water in the Zanja. Additionally, empirical data to back up the sentiment that the public and community land owners see the Zanja as central to the town would likely be a prudent piece of evidence to have ready for litigation in the event this notion was challenged. As noted, actually obtaining instream rights means that a right holder must file a

186 A well-known river illustrates this concept. The trickle that forms the Mississippi River is but .00001% of the river’s ultimate discharge in New Orleans. The river’s volume at the genesis averages 12,000 cubic feet per second. The total discharge at the mouth is 593,000 cubic feet per second. Mississippi River Facts, NAT’L PARK SERV. (Nov. 24, 2018), https://perma.cc/E3UA-JT4M. The point is that runoff and feeder streams can be responsible for a majority of a river’s composition and, assuming it is not primarily “waste water,” the law will not treat tributary sources as fatal to a stream’s designation as natural.
change petition with the State Water Resources Control Board. The Small Watershed Instream Flow Transfers working group has put together an excellent guide for parties hoping to pursue this process. Finally, in order to pursue the actual “naturalization” in court, a lawsuit is likely the best available option. The foremost opportunity would be for a Zanja right holder to file the change petition for instream rights with the Board and allow themselves to be formally rejected on the grounds that the Zanja is not a natural stream. With this rejection in hand, the holder can file suit against the Board in state court and in the cause of action, make the case for why the Zanja is a natural stream and that the Zanja should be eligible for the change petition process. Ultimately, the fact that litigation over Zanja rights has continued consistently throughout its 200 year lifespan indicates the next lawsuit might be right around the corner anyway. Approached correctly, the naturalization effort might be slipped into that lawsuit as well.

VI. Conclusion

In conclusion, the Zanja’s origins are likely immaterial. The 200 years in existence, constant reliance on that existence, and natural drainage direction of its flow means the Zanja’s artificial beginnings will likely serve as no impediment to naturalization. Moving forward this means that the opportunity for an organized group or individual is wide open to begin acquiring rights and dedicating them for instream purposes. The local residents of Zanja View Drive and future generations of Redlands locals may yet have the Sankey to enjoy for years to come.

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187. PRACTITIONER’S GUIDE, supra note 11.