Acequia Rights in Law and Tradition

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The statutes governing acequias or community ditches reflect the development of New Mexico under various political regimes.[1] They illustrate the relationship between individual property rights and common resources, the tension between cultural persistence and institutional change, and the evolution of the complex management structure that characterizes water control in the West today. Control of water in arid regions breeds concentration of power. It requires new patterns of interaction, new institutions, and profound organizational change. In that context the acequias of northern New Mexico appear to be an example of a persistent human-scale relationship between farmers and water, a quaint reminder of a time, if it ever existed, when people interacted with arid lands instead of dominating them technologically. Do acequias still function as local water management organizations, or have they been replaced by the more hierarchical institutions which have proliferated in the West?

To attempt to answer this question I reviewed the history of acequias as codified in statutes, and compared acequias to the other statutory irrigation organizations in New Mexico. This analysis showed that while acequias are not the most powerful irrigation organizations in the state, neither are they the weakest. Acequia rights and powers have changed through time, along with the rise of the other irrigation institutions. Their role in water management is currently threatened by statutory requirements for the adjudication or determination of water rights based on the prior appropriation doctrine. That doctrine requires that water be administered according to

1. The laws governing acequias or community ditches are found in Chapter 73 of New Mexico Statutes Annotated, Sections 73-2-1 through 73-2-64. Special provisions governing acequias in some counties are found in Sections 73-3-1 through 73-3-11 (N.M.S.A. 1978). Other provisions are scattered through Chapter 72, the general water law code.

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the priority date of the right, or time the water was first put to beneficial use. Priority administration is not always compatible with the traditional water allocation systems of acequias, which do not depend on dates of first use.

WATER ALLOCATION IN NEW SPAIN

After the reconquest in 1692, disputes over land and water resources were resolved by local Spanish colonial administrators informally through mediation, or by balancing several factors in a procedure similar to weighing the equities.[2] One of the elements weighed in apportioning water rights (*repartimiento de aguas*) was "prior use."[3] Unlike that element's operation under the prior appropriation doctrine, however, prior use alone did not confer a better right. Prior use was only one of at least seven elements which colonial officials considered in the allocation of water.[4] Mayordomos and acequia officials continued throughout the colonial period and the territorial period to allocate water according to several factors, including need, in addition to the factor of prior use.

Mayordomos and ditch commissioners are required by statute to allocate the water entering their ditches based on custom, equity, and right.[5] Most Taos acequias, for example, have oral agreements with

2. Michael C. Meyer, *Water in the Hispanic Southwest* (Tucson: University of Arizona Press, 1984), p. 145.

3. Ibid., pp. 148–49.

4. According to Meyer the seven elements include just title, prior use, need, injury to third parties, intent, legal right, equity, and the common good.

5. N.M. Stat. Ann. §73-2-47 (1978) states: "It shall be the duty of all the ditch commissioners of the State of New Mexico, where two or more ditches are constructed from and supply water from the same source or river and within the limits of a precinct, to have a meeting the first Monday of April of each year for the purpose of making a true, just and equitable apportionment and distribution of the water of their respective ditches, and it shall be the duty of the superintendents of said ditches respectively to apportion or distribute the water in said ditches among the persons entitled thereto to the use of the same, in accordance with the orders of said ditch commissioners and not otherwise." See N.M. Stat. Ann. chap. 73 art. 2, Ditches and Acequias, for the context of this statute. N.M. Stat. Ann. §72-9-2 (1978) states: "In all cases where local or community customs, rules and regulations have been adopted and are in force and in all cases where such rules and regulations may be adopted from time to time by the majority of users from a common canal, lateral or irrigation system, and have for their object the economical use of water and are not detrimental to the public welfare, such rules and regulations shall govern the distribution of water from such ditches, laterals and irrigation systems to the persons entitled to water therefrom, and such customs, rules and regulations shall not be molested

other ditches on the same stream describing how water was traditionally divided, and how it should be divided. Some acequias even have written agreements embodying their traditional allocations.[6]

HISTORY OF ACEQUIA STATUTES

The Recopilacion (compiled laws) of 1681 and the Plan of Pitic of 1789 both addressed the Spanish interest in founding agricultural settlements in New Spain and in providing for their irrigation needs by constructing community ditches.[7] At least sixty acequias were constructed according to these regulations in the seventeenth century, and more than one hundred were dug in the eighteenth century. More than three hundred community ditches were constructed in the nineteenth century.[8]

The legislative assembly of the territory of New Mexico protected the existing acequias in 1851 when it passed a law prohibiting disturbance of their courses. In 1866 the territorial legislature ordered that deteriorating ditches be re-established. Acequias were recognized as community organizations in 1895 when the legislature declared them public involuntary quasi-corporations with the power to sue and be sued, to contract, and to assess fees from ditch users. The 1895 statute provided that acequias be managed by three commissioners and one mayordomo, to be elected by users of the ditch. Water users could vote in proportion to their interest in the ditch, based on amount of irrigated land or amount of water rights.[9]

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or changed, unless so desired by the persons interested and using said custom or customs, but nothing in this section shall be taken to impair the authority of the state engineer and water master to regulate the distribution of water from the various stream systems of the state to the ditches and irrigation systems entitled to water therefrom under the provisions of this article."

6. A 1936 agreement between the communities of Arroyo Hondo, DesMontes, and Valdez divides the waters of the Rio Hondo into thirds. A stipulation between the Arroyo Hondo ditches and the DesMontes ditches, adopted in 1978, assigns Arroyo Hondo ditches a priority date of 1815 and the DesMontes or Cuchilla ditches a date of 1816. A separate stipulation between all three communities assigns the Valdez ditches a priority date of 1823.

7. See the thorough discussion of the scope of the Plan of Pitic in Meyer, *Water in the Hispanic Southwest*, especially chapter two and page 112.

8. Wells A. Hutchins, "The Community Acequia: Its Origins and Development," *Southwestern Historical Review* 31 (Jan. 1928):261–84.

9. These provisions are still in effect. See Sections 73-2-6, 73-2-11, 73-2-12, 73-2-14, and 73-2-21 N.M.S.A. 1978.

The New Mexico Supreme Court decided in 1941 that while acequias own their ditches and works, no one owns the water in the ditch. Individual water users acquire the right to use the water in the ditch when they apply it to their lands. In 1907 the territory of New Mexico adopted a water code providing that surface waters could be acquired by permit from the territorial engineer by individuals who diverted and beneficially used the water.[10]

Acequias always had the right to build ditches across private property, and to take property or easements across it for just compensation. In 1913 the New Mexico Supreme Court held in *City of Albuquerque v. Garcia* that a municipality, which also had the right to condemn private property, could not take an acequia by condemnation because it was already devoted to a public use. Acequias were not private land subject to eminent domain.[11]

The 1965 state legislature declared acequias political subdivisions of the state, and the 1988 legislature created an acequia fund to provide grants to ditch associations involved in stream adjudications. It was not until 1987 that the legislature provided that acequias could acquire water rights themselves, apart from the individual rights of the users along the ditch.[12]

OTHER IRRIGATION INSTITUTIONS IN NEW MEXICO

For at least three hundred years acequias were the only species of water management and distribution organization in New Mexico. Now there are drainage districts, water user associations, artesian conservancy districts, irrigation districts, conservancy districts, soil and water/watershed conservation districts, water and sanitary districts, irrigation districts created to cooperate with federal reclamation projects, and electrical irrigation districts. Has the power associated with water control been diffused or become more concentrated,

10. *Snow v. Abalos*, 18 N.M. 681, 140 P. 1044 (1914) was a case brought by a member of the Mesilla Community Ditch in southern New Mexico. The court held that the individual water rights holder is a necessary party to the adjudication of his water rights. The court did not say that the community ditch or acequia cannot also be joined. Surface water acquisition is governed by Chapter 72 of N.M. Stat. Ann. 1978; see Section 72-5-1.

11. *City of Albuquerque v. Garcia*, 17 N.M. 445 (1913).

12. See Sections 73-2-28, 73-2A-1 through 73-2A-3 (Ditch Fund), and 73-2-22.1 (acequias may acquire water rights).

and how is it distributed among these numerous water management institutions?

To answer this question I compared the statutory powers of acequias to those of the other organizations with an irrigation purpose: water user associations, artesian conservancy districts, irrigation districts, and conservancy districts. Predictably, power is not evenly distributed among these institutions. Arrayed on a continuum of least to most statutory power, water user associations have the least, while the most formidable powers are concentrated in the conservancy districts. Among those, the Middle Rio Grande Conservancy District wields powers not shared by other districts.

As a cautionary note I remind the reader that my analysis is statutory and therefore theoretical. As Thomas Glick observed in his works on the transfer of Spanish irrigation modes to the New World, water rights are society's idealized assessment of the best way to use water, given societal goals at the time of codification. Legal rights and practice thus represent the ideal and the real. As Glick summarized it, the legal structure provides the framework within which arrangements are worked out.[13]

With that caveat I compared the legal rights and statutory powers of the irrigation organizations in New Mexico, beginning with the least structure and least empowered: water user associations. The 1909 territorial legislature created water user associations as corporations which can sue and be sued, contract, and acquire property. The associations' purpose was to allow for mutual construction of storage reservoirs, diversion dams, irrigation ditches and canals, or to combine existing irrigation works into systems. Associations can take private property for those purposes under the Eminent Domain Code.[14]

The 1919 state legislature created irrigation districts with all the powers that water user associations enjoy, and more. The purpose of irrigation districts was to supply water for irrigation and to regulate and distribute that water. Districts can bring Quiet Title suits (to determine land ownership), acquire water rights, and "deal in lands and water rights." They can lease or rent their water outside the

13. Thomas F. Glick, *Irrigation and Society in Medieval Valencia* (Cambridge: Harvard University Press, 1970); and *The Old World Background to the Irrigation System of San Antonio, Texas* (El Paso: Texas Western University Press, 1972).

14. Water user associations are governed by Sections 73-5-1 through 73-5-9 N.M.S.A. 1978. See especially §§73-5-1, 73-5-4, and 73-5-9.

district. District-owned water rights are subject to forfeiture for non-use, but leasing unused water outside the district is not non-use. Irrigation districts support themselves by issuing bonds or by taxing the landowners within the district.[15]

Voting in irrigation districts is like voting by acequias in that it is proportional to the owner's holdings. In irrigation districts the owner gets as many votes as she has acres of land, up to one hundred. Both acequias and irrigation districts are subject to the criticism that larger landholders can control the outcome of elections.

Artesian conservancy districts were created in 1931 when the state began to regulate ground water. Their purpose was to provide for more effective management of ground water resources. The districts are involuntary corporations, and political subdivisions of the state. Artesian districts can appropriate ground water themselves, consistent with their purpose of providing for its more effective management, and they can protest others' applications to drill wells within or outside the district. The district can tax landowners within the district, and can borrow money against the tax proceeds. Artesian conservancy districts are the only irrigation organizations in New Mexico that have a statutory carriage loss allowance, an amount of water allocated to the district to account for losses sustained in conveying the water from the well to the place of use. Each district is allocated two acre inches a year for each acrefoot of water conveyed to account for evaporation and seepage.[16]

The most powerful of New Mexico irrigation organizations are conservancy districts. They were created in 1927 as public and quasi-municipal corporations for the purposes of providing flood protection (especially on the Rio Grande and Pecos), river control, drainage, water storage to supplement irrigation water, construction and maintenance of distribution systems for irrigation, and other improvements for the public health, safety, convenience, and welfare. The powers of conservancy districts make those of the other organizational forms seem trivial. Conservancy districts are political subdivisions of the state which can contract with other states or with districts in other states. They have a "dominant right of eminent

15. Irrigation districts are governed by Sections 73-9-1 through 73-9-62 N.M.S.A. 1978. See especially 73-9-14 and 73-9-15. Section 73-9-35 provides that the district distributes the water when it is in short supply.

16. Artesian conservancy districts are governed by Sections 73-1-1 through 73-1-27 N.M.S.A. 1978. See especially 73-1-2, 73-1-11, 73-1-25, and 73-1-26.

domain," allowing them to trump any other organization with a right to condemn private property for public use, even a municipality. Conservancy districts can take acequias, either though a specific procedure provided in their statutes or by using the Eminent Domain statute. A conservancy district can exercise this right even outside the district.[17]

Conservancy districts can acquire water rights, and those rights are not subject to forfeiture for non-use. Districts can issue conservancy bonds and levy taxes. The district is itself tax-exempt. Districts issue rules and regulations "in English only" according to their statute, while the other forms of irrigation organizations issue regulations in English and Spanish as provided by their statutes.

Conservancy districts can enforce their regulations, police their works, and remove buildings and structures. They have "unquestioned power" (in the language of the statute) to distribute water in times of shortage, notwithstanding the vested water rights of individuals. Voting is democratic: one landowner, one vote.

Unlike all other irrigation organizations, conservancy districts have a general grant of power to the limits of delegable legislative power to do whatever is necessary to put the water in the district to a "greater, better, or more convenient use." Preferred uses are: municipal and domestic, irrigation and manufacturing, and power generation and recreation, in that order. The Middle Rio Grande Conservancy District is exempt by statute from the audit requirement of all other conservancy districts.[18]

SUMMARY

The irrigation organizations which have been established this century all share the primary purpose of acequias: to distribute and manage irrigation water. Irrigation districts and conservancy districts, but not water user associations, have more statutory powers to accomplish that purpose than do acequias. The statutes of all the institutional forms, except acequias, contain a "necessary and proper" clause. In addition to their enumerated powers, the other institutions are empowered to do whatever is necessary and proper to carry out their purposes.

17. Conservancy districts are governed by Sections 73-14-1 through 73-19-5.
18. See especially Articles 14 and 15, 73-14-1 et seq. and 73-15-1 et seq.

Justice John Marshall is credited with first asserting that "the power to tax is the power to destroy." Irrigation districts and conservancy districts have that power; acequias and water user associations do not. Irrigation districts and conservancy districts can issue bonds to generate revenue for themselves. Acequias can borrow money, but have no other means of raising revenue except through the largesse of the state legislature. The Acequia Fund established in 1987 indicates the legislature's recognition that acequias need financial assistance to participate in litigation affecting them.

ANALYSIS

How is it that acequias are the oldest of the water distribution organizations in New Mexico, but are among the least empowered? Acequias seem to have been outcompeted, for statutory powers and resources, by more bureaucratically elaborate and more complex and yes, more democratic, organizational forms. Perhaps acequias were best adapted to conditions of dispersed rural settlement and communal property. With the increasing importance of individual rights and private ownership in the development of the Anglo-American West, acequias may not have been able to successfully accommodate the tension between community ditches and individuals' water running in them. Yet acequias have persisted.

In the Taos water rights adjudication in northern New Mexico, the United States challenged the state's joining of acequias as parties to the lawsuit. The United States asserted that because acequias own no water rights themselves, but only deliver the water to their members who own rights, they have no interest in the case and should not be parties. The state argued that acequias need not own the water in the ditch to have an interest in its allocation, distribution, and management. At least, like artesian conservancy districts, acequias have an interest in the carriage loss or amount of water lost to evaporation and seepage from the headgate to the field. The court found that the acequias do have an interest in issues of common interest to their members, and are proper parties in the adjudication.[19] It is perhaps

19. Report of the Special Master, *State of New Mexico v. Abeyta*, filed November 23, 1988; Memorandum in Support of the Objections of the United States to the Report of the Special Master, Jan. 20, 1989; Response Brief of Community Ditch Associations to Objections of the United States to the Report of the Special Master, Feb. 8, 1989; Brief

significant that the right of conservancy districts, irrigation districts, and even water user associations to participate in litigation affecting their members' water rights is not questioned.

In that same adjudication the acequias' traditional and customary water allocation systems have confronted the prior appropriation system of distributing water. In a general stream adjudication like that of the Taos Valley all the elements of each individual's water rights are determined, including amount of irrigated acreage, point of diversion, place of use, and duty of water (amount applied to each acre). Because New Mexico water rights are governed by the prior appropriation principle that earlier use confers a better right, the priority date must also be determined.

Although the state completed its hydrographic survey in 1969 and most elements of Taos water users' rights were determined in the 1970s, priority dates were not assigned to most ditches. In the 1980s the state contracted with a historian to research the date of first use of each ditch in the Taos Valley. The state sent legal notices to each water user requiring the individual or the acequia to show why his date should not be that determined through the state's research. The main concern of irrigators receiving the notices was how to reconcile priority dates with their customary water allocation systems. Through time the mayordomos and ditch commissioners have worked out methods for distributing water between the ditches on each stream, not based on date of first use as is the prior appropriation method.[20]

Legal rights were only one component of traditional water allocation systems when acequias were the only irrigation organizations in New Mexico. Equity and sharing of common resources played a more important role. Now that the powers of acequias are codified, and new irrigation institutions have been created with even more statutory powers, acequias can persist only by ensuring that their

in Support of Objections, Feb. 8, 1989; Memorandum in Reply to the Response Memoranda of the State of New Mexico and the Community Ditch Associations to the Objections of the United States to the Report of the Special Master, Feb. 17, 1989.

20. See the discussion in chapter three of Meyer, *Water in the Hispanic Southwest*. In attempting to resolve this problem, the state of New Mexico has encouraged acequias to reach written agreements between the ditches on each stream, embodying their customary allocations, which can be incorporated in the court's final decree.

traditional methods of water allocation are incorporated in the statutory adjudication process and not eclipsed by it. The application of the prior appropriation doctrine should be flexible enough to accommodate the cultural heritage embodied in the earliest form of irrigation institution in New Mexico, the acequia. ✣