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Author(s): Frances Levine

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*Dividing the Water:
The Impact of Water Rights Adjudication
on New Mexican Communities*

FRANCES LEVINE

La Agua es Vida; Let's Share It is a slogan seen on bumper stickers, campaign buttons, and walls in the Pojoaque Valley north of Santa Fe. The indirect reference is to a water rights adjudication properly known as *State of New Mexico ex. rel. Reynolds vs. R. Lee Aamodt, et al.* (U.S. District Court Case No. 6639). The *Aamodt* case was filed by the State Engineer Office in April 1966 to adjudicate the water rights of more than 2,250 non-Indian individuals and twenty-eight community ditches along the four rivers (Rio Nambe, Rio Tesuque, the Rio en Medio and Rio Chupadero) that comprise the Rio Pojoaque stream system.¹

Within the Pojoaque drainage lie the Tewa-speaking pueblos of San Ildefonso, Pojoaque, Nambe, and Tesuque, and the non-Indian settlements of Nambe, Pojoaque, Jacona, Cuyumunge, Tesuque, Rio en Medio, and Chupadero. These villages are still populated primarily by Hispanic people, although there has been a progressive growth in Anglo-American settlement within the last generation.

Since filing of the Rio Pojoaque adjudication, the impact of the case has reached far beyond the communities of northern New Mexico. The sentiment behind the slogan seems to be that the water rights adjudication process has threatened or has destroyed the accommodations that have been established among Pueblo, Hispanic,

1. For a discussion of the importance of the Aamodt adjudication to issues of Pueblo Indian water rights see Charles T. DuMars, Marilyn O'Leary, and Albert E. Utton, *Pueblo Indian Water Rights: Struggle for a Precious Resource* (Tucson: University of Arizona Press, 1984).

FRANCES LEVINE is professor of anthropology at Santa Fe Community College. She has served as an expert witness in the fields of archaeology and ethnohistory in water rights adjudications of the Jemez River, Red River, Rio Hondo, and Taos stream systems.

and Anglo-American communities in the valley by centuries of sharing water and reallocating it among themselves according to fluctuating supply.²

In this paper I will examine some of the ways in which anthropological and historical evidence has been used in the Rio Pojoaque and other water rights adjudications. My goal is to examine the social costs to communities of the legal tactics that have been used in past adjudications.

BACKGROUND OF WATER RIGHTS ADJUDICATION

Traditional water rights practices have evolved since the seventeenth century or colonial period to balance competing uses of the limited water supplies of New Mexico.³ Since 1907 the New Mexico surface water code, based on the system of prior appropriation, has governed the acquisition of water rights. A ground water code was adopted in 1931, and was also based on the doctrine of prior appropriation. The surface water code, contained in Chapter 72 of New Mexico Statutes Annotated, seeks to confirm the validity of all surface rights which existed prior to its establishment. Beneficial water uses made prior to 1907 must be sanctioned by the State Engineer Office, and uses made after 1907 must be permitted by that office. New Mexico water law is based on three principles: (1) All surface and ground

2. That the loss of community control and community traditions among rural Hispanic and Anglo-American communities is the end-result of water and other resource management by state and federal agencies is concluded by F. Lee Brown and Helen Ingram, "The Community Value of Water: Implications for the Rural Poor in the Southwest," *Journal of the Southwest* 29, 2 (Summer 1987):179–202 and Sue-Ellen Jacobs, "Top-Down Planning: Analysis of Obstacles to Community Development in an Economically Poor Region of the Southwestern United States," *Human Organization* 37, 3 (Fall 1978):246–56.

3. Michael Meyer, a historian who testified in the Aamodt adjudication, traces the legal history of water rights acquisition, use, and litigation in his synthesis *Water in the Hispanic Southwest* (Tucson: University of Arizona Press, 1984). Meyer is also the author of "The Living Legacy of Hispanic Groundwater Law in the Contemporary Southwest," *Journal of the Southwest* 31, 3 (Autumn 1989):287–99. Slightly different perspectives on some of the points researched and discussed in more detail by Meyer are found in William B. Taylor, "Land and Water Rights in the Viceroyalty of New Spain," *New Mexico Historical Review* 50 (July 1975):189–212; and by Richard E. Greenleaf, "Land and Water in Mexico and New Mexico, 1700–1821," *New Mexico Historical Review* 47 (April 1972):85–112. Ira G. Clark, *Water in New Mexico: A History of Its Management and Use* (Albuquerque: University of New Mexico Press, 1987), provides a comprehensive overview of water resource management under territorial and state statutes.

water belongs to the public and is subject to appropriation for beneficial use; an appropriator does not own the water, only the right to divert it; (2) beneficial use is the basis, the measure, and the limit of the right to use water for agricultural, domestic, recreational, municipal, and industrial uses; and finally, (3) priority of appropriation gives the better right, so that first in time equals first in right.

A number of aspects of the statutes are at variance with tradition. Although water rights are established appurtenant to specific lands, they may be sold, exchanged, and severed from that land. Most Hispanics, Indians, and rural Anglos believe that land and water are—or should be—inseparable.⁴ New Mexico, unlike some other western states, does not distinguish among the beneficial uses of water. Agricultural and stock water are given no greater protection than industrial and recreational development. This had led to some intense intra-community conflicts in which irrigation ditch users sell water rights to non-traditional users.⁵

Priorities among water users are only implemented in times of water shortages. Then, those with the earliest dates take the water first, other users following in succession according to their dates of appropriation. The State Engineer may conduct priority administration based on a priority call by a senior user or on his own initiative. Priority administration is similar to the way in which community acequias regulate their own members in times of shortage. An impor-

4. Frances Leon Quintana made this point emphatically in her paper entitled, "Land, Water, and Pueblo-Hispanic Relations in Northern New Mexico," delivered at the Applied Anthropology meeting in Santa Fe on April 8, 1989 and published in this issue of *Journal of the Southwest*. The negative impact of water rights transfers on traditional village economies is also among the concerns expressed by the Upper Rio Grande Working Group in their report entitled, "The Course of Upper Rio Grande Waters: A Declaration of Concerns" (Albuquerque: Southwest Hispanic Research Institute, Natural Resources Center, Native American Studies Center, University of New Mexico, 1985).

5. Sylvia Rodriguez discusses the effects of water marketing in Taos County in "Land, Water, and Ethnic Identity," in Charles L. Briggs and John Van Ness's edited edition, *Land, Water, and Culture: New Perspectives on Hispanic Land Grants* (Albuquerque: University of New Mexico Press, 1987). One situation described by Rodriguez was the basis of John Nichols' caricature, *The Milagro Beanfield War* (New York: Holt, Rinehart and Winston, 1974). An important New Mexico case involving water rights transfers is *Ensenada Land and Water Association, et al. vs. Howard M. Sleeper and Hayden and Elaine Gaylor vs. Steve Reynolds*, Nos. 8782 and 8830, Consolidated. The district court overturned the State Engineer's decision involving a transfer, finding that the transfer was contrary to the public welfare. The court held that the new use, intended for a ski area and recreational development, would be detrimental to traditional uses. The court of appeals reversed the district court on the grounds that the State Engineer did not have to consider public welfare. Since the *Sleeper* decision, New Mexico has amended state law to permit the consideration of public welfare in water rights transfers.

tant difference is that in the traditional division of water, shortages are usually shared by all of the ditch users, and the water is allocated upon factors other than priority date. In a priority system it is possible that those with more recent dates may get no water at all, since the most senior rights can take their full allotment before any water is released to holders of junior rights.

In addition to establishing priority dates, the adjudication process establishes the right of a party to appropriate a fixed quantity of water for a specific purpose. Water rights adjudications usually proceed in two phases. The technical phase consists of a hydrographic survey, usually performed by the State Engineer Office, to identify, map, and report the status of water use in a particular stream system or a ground water basin. In this phase, anthropologists and historians have worked with the hydrographic survey staff, and increasingly directly with communities, to date community ditch systems and to determine the patterns of individual use that are the basis for determining the priority of appropriation of water in a stream system.

On the basis of this research, each water user is sent an offer of judgment by the State Engineer Office. That offer is a legal document defining the amount and purpose of a water right; the ownership of that right; the place of use and point of diversion or source of the water; and the priority date. The water user can sign the offer, or can object to the determination of any element of the offer.

The second phase is the legal process of the adjudication or the court's final determination of the quantity of water each user has a right to divert and use for a specific beneficial purpose. During this phase, historians have been called as expert witnesses in northern New Mexico cases to address water rights and water uses of Pueblo and Hispanic communities under prior sovereigns (Spain and Mexico). Anthropological and archaeological testimony has been used in adjudications to explain aboriginal Native American and customary Hispanic water use strategies.

There are three classes of participants or parties in water rights adjudications. The State of New Mexico, through its water resource management agency, the State Engineer Office, participates in the process as the stakeholder of all the water in the state. Communities often see the State Engineer as withholding or denying water through adjudications. The State Engineer, on the other hand, maintains that the office is mandated by statute to perform an independent analysis of claims and available water supply and to ensure that adjudications

proceed on a correct factual and legal basis. The United States Attorney, within the Justice Department, participates in suits as the protector of federal rights, including those of Indian tribes, the National Park Service, the Forest Service and other federal agencies. In addition, Pueblos and Indian tribes have their own attorneys. Individuals and groups of water users, such as mutual domestic water systems and associations of community ditches, participate to protect their interests in the water they use. The State Engineer Office is usually the plaintiff, bringing suit against non-Indian defendants or against the United States as trustee for Indians. In some cases, such as the Jemez and Taos adjudications, the United States and the Pueblos have joined the state as plaintiffs.

As a result of the alignment of the parties, public perception seems to be that the only issues involved in adjudications are the definition of Indian rights versus those of non-Indians. This is only one of the many inter-ethnic and intra-community conflicts that accompany water rights adjudications. The way in which evidence is presented and arguments are structured to establish priorities, and the quantity of water historically used by individuals and communities, have heightened controversies in specific cases.

THE TACTICAL ISSUES OF WATER RIGHTS PRIORITIES

Priorities have been assigned in one of two ways. Ditch-wide priorities specify one date for all of the land served by a ditch. Tract-specific dates assign a unique date to each parcel of land—usually to each field or adjacent fields—served by a ditch. Ditch-wide dates were assigned to the non-Indian ditches in the Jemez River adjudication by agreement between the United States and the State of New Mexico. The assignment of ditch-wide dates was based on the assumption that the ditch was built at one time to serve all of the lands under it. Traditional subsistence-based communities, it can be argued, develop acequia systems as one of the first acts in creating a settlement.⁶ For many communities, particularly in northern New

6. John P. Wilson reviews the historical documentation, hydrological possibilities, and archaeological evidence for early irrigation systems in Sierra County, New Mexico, in "How the Settlers Farmed: Hispanic Villages and Irrigation Systems in Early Sierra County, 1850–1900," *New Mexico Historical Review* 63 (October 1988):333–56. His kind of systematic review of numerous lines of evidence is needed in water rights-related research.

Mexico, documentary evidence for early settlement and land use practices is nonexistent, and funds to carry out extensive archaeological surveys and the excavations that would be needed to support founding dates are not available.

In the Rio Pojoaque adjudication tract-specific dates have been offered to non-Indian water users by the United States, and ditch-wide dates have been offered for the same ditches by the state. The United States has also offered tract-specific dates in the adjudication of the Rio Hondo stream system encompassing the Rio Hondo, the Rio Bonito, and the Rio Ruidoso in Chaves and Lincoln counties. The United States Attorney argued vigorously in the adjudication of the Rio Hondo system and in the Taos area adjudication that New Mexico law mandates tract-specific dating because the priority date is an element of an individual's water right.⁷ The State of New Mexico argues that ditch-wide dates are an administrative and practical means for setting priorities. The state asserts that it is often not possible to determine when individual tracts of land were first put to beneficial use. The state also argues that priority administration in which adjacent lands have different dates would be a physical and practical impossibility.

What difference does it make to communities whether they have ditch-wide or tract-specific dates? Tract-specific dates may increase the number of disputes among water rights claimants as neighbors compete for the earliest priority on a ditch. Tract-specific dates make it impossible for *parciantes*, or ditch users, to unite for common defense if they disagree with the priority assigned to their property. It is a divisive tactic, making it more difficult for individuals and communities to join in opposition to claims that the United States has filed for federal water rights, and for individuals to protest effectively other uses which may infringe on more traditional uses. If tracts are the focus of the conflict, it reduces the power of the traditional acequia organization as an arbiter of disputes and as the organization that manages the distribution of the available water. The long-term effect would then be to erode the social and political bonds that acequias have had in the agricultural communities of New Mexico.

7. The Rio Hondo stream system adjudication is properly known as the *State of New Mexico, ex. rel. Reynolds v. L.T. Lewis, et al.*, Chaves County Nos. 20294, 22600, Consolidated (1956). The Taos adjudication is *State of New Mexico, ex. rel. Reynolds, The United States and the Pueblo of Taos as Intervenor v. Abeyta, et al.* No. Civ-7896-C (Rio Pueblo de Taos) and No. Civ-7030-C (Rio Hondo), Consolidated.

Many fear that this furthers the privatization that has strained traditional communities in recent years.⁸

Finally, the methods of determining tract-specific dates are often based neither on adequate research nor on valid assumptions. In the Rio Hondo adjudication, single documents, often deeds and homestead records, were the source of information to assign dates to tracts. These classes of documents were not intended to record water use, and so may only mention ditches if they were important in setting boundaries, or were counted as improvements to be included in the valuation of property. They certainly do not establish a contemporaneous relationship between the issuance of the document and the intent to use or the actual, beneficial use of water.

In traditional subsistence-based communities, ditches are part of the unifying concept of the community, although actual construction of a ditch might precede formal granting of title to land, or might post-date the founding of the settlement. Further, the particular lands served by the ditch might change yearly depending upon the fortunes of the *parciantes*, the crops, and the water supply itself. Ditch-wide dates should be drawn from historical and anthropological analysis of regional settlement and land use patterns, and should attempt to establish the most probable and supportable priority date consistent with the local water use traditions.

Ditch-wide dates allow *parciantes* to present a unified case on those issues in which they have a common interest. Those issues would include priority date, point of diversion, and the method of determining the quantity of water that can be applied per acre. It is then possible for each ditch, or an association of ditches, to hire a single attorney to represent their common interests. Sharing a common priority date would enable local traditions to continue to operate when water shortages demand implementation of priority administration.⁹ Ditch commissioners and *mayordomos* would then

8. Stanley Crawford's *Mayordomo: Chronicle of an Acequia in Northern New Mexico* (Albuquerque: University of New Mexico Press, 1988) records the yearly round of a *mayordomo*, or ditch master, illustrating the social relationships that underlie the maintenance of the ditch and the delivery of water. Water rights transfers and the sale of water rights in general were among the concerns expressed by the Upper Rio Grande Working Group ("The Course of Upper Rio Grande Waters," pp. 4–5, 16–18).

9. Members of the Upper Rio Grande Working Group have urged communities to file water rights declarations with the State Engineer in which all acequias using a common water source declare the same priority date. They suggest that by doing this, the burden of proof for the date, in theory at least, shifts from the community to the state. This is an

continue to have the recognized authority to set schedules for water delivery, and to decide on the preference among water uses—orchards, gardens, forage crops, etc. Ditch-wide dating recognizes the importance of acequias as a form of local self-government, and improves the chances that adjudications are less disruptive to communities.¹⁰

QUANTIFYING HISTORICAL WATER USE

The different standards of quantification for Indian and non-Indian water rights have particularly strained inter-ethnic relations in New Mexico. Federal law governs Indian water rights through the protection of aboriginal rights, treaty rights, and those rights that Native Americans had under prior sovereigns. Indian rights to water cannot be lost through non-use, and their rights to water can also include a consideration of what they need for future uses. Non-Indian rights are obtained and perfected under state law. These rights are quantified directly by the hydrographic survey as those existing uses that have not been lost through forfeiture or abandonment. The State Engineer has in recent years sought to understand the social, economic, and demographic factors that underlie lapsed water use in Anglo and Hispanic communities, but past use has little weight in securing water lost in the absence of extenuating circumstances.

In defending Pueblo Indian water rights, the United States has used a number of alternative arguments to quantify the amount of historically irrigated acreage. The United States argues that the tribes are entitled to a water right representing cumulative acreage; that is,

arguable position, but the importance of their position is that communities do have tools for protecting their water rights and for ensuring that local traditions are acknowledged in the adjudication process. See Emlen Hall, Ben Tafoya, and Lisa Chaves, "Techniques for the Protection of Community Water Rights in New Mexico," *Upper Rio Grande Waters: Strategies; Proceedings: A Conference on Traditional Water Use*, pp. 21–36 (Albuquerque: Southwest Hispanic Research Institute; Natural Resources Center; Native American Studies Center, University of New Mexico, 1987).

10. Clark, *Water in New Mexico* (pp. 100–114), reviews the administrative and regulatory powers granted to mayordomos and acequia commissioners through a series of territorial statutes. The actual partition of water in most communities is governed by local custom, seasonal water supply, and intra-community dynamics. See Crawford, *Mayordomo*, for an explanation of the manner in which ditch commissioners in the Dixon area partitioned the water during a drought.

to the total of all of the lands they might have irrigated or dry-farmed in the past. The United States has made this calculation in various ways using historic crop reports or water rights declaration files. In the Pojoaque and Jemez adjudications, the United States used the distribution of archaeological sites on the Pueblo grant lands to infer that the tribes occupied and therefore must have irrigated all the lands on the grants within the reach of current ditches at some time in the past. In the Pojoaque adjudication the court severely and summarily rejected the anthropological and archaeological evidence as too imprecise to establish which lands had been historically irrigated.

The line of argument used in the Pojoaque and Jemez adjudications followed a normative view of land use and of archaeology. First, it assumed that the proximity of an archaeological site to a current ditch suggested that they were contemporaneous features of a landscape. The argument does not take into account how land use practices, and the land base itself, may change through time. Secondly, the argument for cumulative acreage has been based on a stereotype of Pueblo farming practices that is currently in dispute among archaeologists and ethnohistorians. The archaeological record of the Southwest contains a diversity of rainfall and runoff dependent farming and conservation agricultural features, which suggest that irrigation systems were not central to the apparently complex social organization of the prehistoric Pueblos. The argument that irrigation was the unifying factor in Pueblo social organization does not take into account the economic risks, social and logistical costs associated with irrigation-dependent farming.¹¹

In non-Indian communities, the hydrographic survey is the principal means of documenting the extent of an individual's water right. While the survey is an indicator of past use, it serves as a limitation on future uses. The hydrographic survey is not sufficient to explain when, how, or why specific lands were used or abandoned. Increasingly, community-based associations are employing local people and expert witnesses to augment the documentary record and the hydrographic survey with oral history and studies of traditional practices and local conditions that may mitigate the loss of water rights.

11. See, for example, Linda Cordell and Amy C. Earls, "Subsistence Systems in the Mountainous Settings of the Rio Grande Valley," in *Prehistoric Agricultural Strategies in the Southwest; Anthropological Research Papers, No. 33*, pp. 233–41 (Tempe: Arizona State University, 1984); Anne I. Woosley, "Agricultural Diversity in the Prehistoric Southwest," *The Kiva* 45, 4:317–36.

CONCLUSIONS AND RECOMMENDATIONS

The role of the state in the adjudication process seems to be becoming more of a perceived threat than a real threat as communities begin to gain a broader understanding of the adjudication process and as they assert themselves more. Communities and individuals react negatively to the very act of quantifying a water right because it places a limit on future needs and options. The very basis of water rights laws in New Mexico is at variance with traditional practice in most instances. Public ownership of water and beneficial use are concepts that make little sense to anyone but lawyers. To most people, especially those with agrarian values, the idea that water can be separated from the land to which it is appurtenant, the idea that the right to use water can be lost through non-use, and the idea that non-consumptive uses (i.e., conservation, in-stream flow, etc.) are not beneficial uses are confusing or absurd. Priority of appropriation, a concept which protects the earliest uses, is also at variance with tradition, but may be more understandable to some people because it is a basis for asserting a property right.

The individualized focus of prior appropriation precludes the community basis for water, and may no longer be an appropriate basis for the award of rights to this precious resource. As public participation in the adjudication process increases, there will be more conflicts over the basis of water rights. New issues, such as water quality, in-stream flow, and other non-consumptive uses are emerging in public debates on the adjudication process. River basin management, negotiated water rights, and other planning strategies have been recommended as alternatives to the expensive and lengthy litigation process. Defining an appropriate basis for the award of water rights remains a critical problem for communities and for the legal system. To be successful, that is to lessen the inter-ethnic and intra-community conflicts while continuing to protect water rights, it will be necessary to balance traditional uses, environmental issues, and the power relationships among competing water uses. ❖