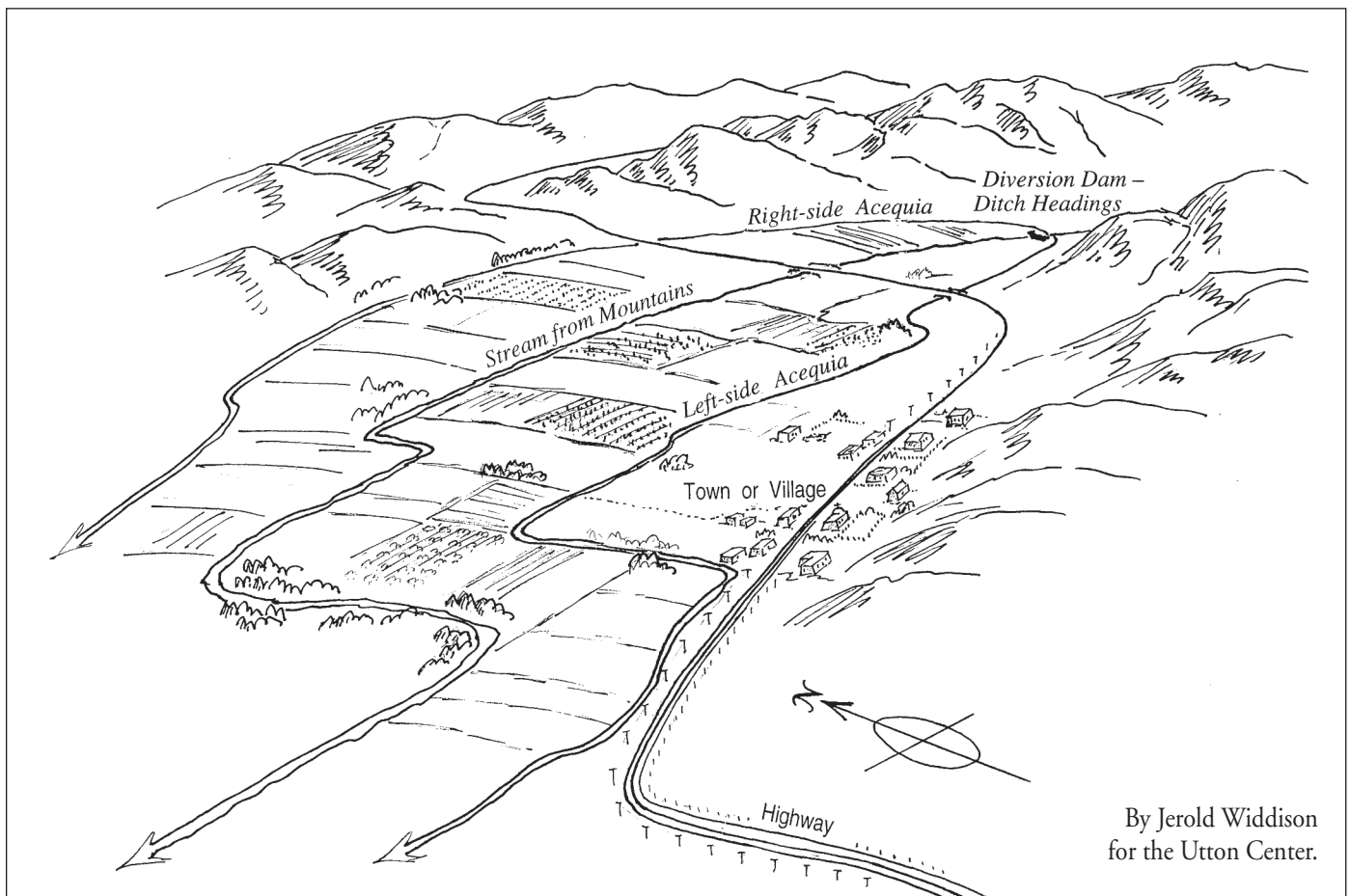


Acequias

Acequias are community irrigation systems in the villages and pueblos of New Mexico. They have deep roots in two ancient traditions—Pueblo Indian and Spanish. The Pueblos collected and shared water for centuries before the arrival of Spanish colonists in 1598. The Spanish settlers brought technical knowledge and institutional frameworks for governing irrigation systems, which originated in the Moors' seven-century occupation of Spain. Both traditions remain important to an understanding of New Mexico's acequia heritage and the continuing relevance of these "water democracies." Today, these traditions must meld with state law as the legislature has provided that acequias are "political subdivisions" or local governmental entities with all the attendant rights and responsibilities.

“Thousands of families continue to derive all or part of their subsistence or livelihood from their ranchitos, small-scale farms and ranches. More importantly, acequias endure in large part because of attachment to place, the miracles made possible with water and the cultural longing to continue ancestral practices and pass them on to future generations.”

Paula Garcia,
Executive Director,
New Mexico Acequia
Association



By Jerold Widdison
for the Utton Center.

The ditches of each acequia system bring water from a spring, river, or mountain stream to a community. The acequias include the diversion dams, headgates, flumes, and other features needed to transport water for irrigating fields, gardens, croplands, and pastures. The acequias, however, are more than water-distribution facilities. As local organizations, they are important for the social and economic cohesion they provide to their communities. The acequias are historic, integral parts of the culture and heritage of New Mexico. And, as it turns out, they play a role in addressing current issues facing New Mexicans: responding to the demand for supplies of fresh local food, and meeting the need for more efficient water use as development and climate pressures increase.

History

In 1846, General Stephen Watts Kearny claimed New Mexico as a territory of the United States. The Spanish and Pueblo inhabitants, until then Mexican citizens, had practiced acequia-based irrigation in the province for more than two centuries. The Kearny Code decreed that the “laws heretofore in force concerning water courses...shall continue in force.” The Treaty of Guadalupe Hidalgo of 1848 recognized the end of the war between the United States and Mexico and the rights and property of the former Mexican citizens. At Article VIII, the Treaty pledged that “property of every kind” would be “inviolably respected” by the United States.

During the “Territorial” period from 1848 until statehood in 1912, however, New Mexico experienced a quiet revolution in the rules governing the use of its water. The practices the communities had worked out

were grounded in knowledge of their local areas and their traditions. These practices obliged appropriators to monitor each other’s behavior and to sanction those who took more than their share, or who failed in their responsibilities to the collective that held their limited rights to the resource that was the “lifeblood of the community.” The Pueblo and Hispano acequia communities exerted local control over water and developed customs among themselves for equitable allocation. But increasingly, they ceased to be the only appropriators of surface-water.

“Anglo” newcomers in the last half of the 19th century challenged these arrangements, viewing the local peoples’ ecological adaptations to the arid land as primitive. Instead, they embodied an ethic based on America’s “manifest destiny.” The newcomers were fueled by the belief that they could and should bend nature to human will. They promoted ambitious ideas about what irrigation agriculture could accomplish in New Mexico’s Rio Grande and Pecos river valleys. Furthermore, after 1879 they arrived in droves by railroad so that in the next 30 years the Territory’s population jumped more than 170 percent.

To these entrepreneurs, local control of the Territory’s water by small-scale irrigators meant waste and inefficiency. But the acequia system was too entrenched for the territorial legislature to replace it directly. Instead, legislators created new mechanism—water companies, irrigation districts, and later conservancy districts—through which control of major tracts of land and the water rights appurtenant to them moved from community control into private hands. The legislature centralized authority to allocate such rights in the office of the Territorial (now State) Engineer. Passage of the Reclamation Act by Congress in 1902, introduced a federal role in water development and aided these trends.

As inadequate as the United States’ government has been in respecting the property guarantees of the Treaty of

As local organizations, they are important for the social and economic cohesion they provide to their communities.

Guadalupe Hidalgo for both Hispanos and Pueblos, it did recognize early on the importance of the acequias. In 1851, the legislative assembly acknowledged the legitimacy of customary and traditional acequia rules in the Territory's first water laws. Successive territorial assemblies both expanded acequia authorities and limited their autonomy. By the end of the 19th century, acequias had been designated quasi-public corporate entities. But their real power rested in their control of access to water. They could decide whether water was "unappropriated" and available to be put to new use. They assigned preference to different uses in times of shortage. They gave the communities access to water not as a property right but in exchange for members' acceptance of the rights and responsibilities of participating in ditch governance.

Soon enough, however, the enactment of New Mexico's water code in 1907, together with a series of decisions over the next decade in state courts, resulted in the loss of some of these community acequia powers. In a 1914 decision, *Snow v. Abalos*, which affirmed the acequias' corporate powers, the New Mexico Supreme Court said that "[w]hile a ditch through which water is carried is owned by the constructors as tenants in common, water rights acquired by the parties are not attached to the ditch but are appurtenant to the land to be irrigated." Water rights were thus understood to be owned solely by individual *parciantes* (acequia members), an understanding that existed until the state enacted an important change in the law in 1987.

UNM Emeritus Professor G. Emlen Hall summarized the post-1914 state of affairs as follows:

The power to decide who would have access to a common source of water was...sent up to a state bureaucrat, the New Mexico State Engineer.... [T]he power to rank uses was sent down to individual irrigators. So long as the use was "beneficial" (and almost all uses were), then the choice [was better left to

From an acequia perspective, then, much of the recent legislative history of water rights in New Mexico chronicles a struggle to regain a measure of the community control of water that was lost in the early years of the 20th century.

individuals]. Finally, water rights became property rights—the expression of individual ownership—and not the corporate political will of a community ditch association.

From an acequia perspective, then, much of the recent legislative history of water rights in New Mexico chronicles a struggle to regain a measure of the community control of water that was lost in the early years of the 20th century.

Statutes Recognizing and Regulating the Acequias

Approximately a century ago, almost every aspect of the acequia system came under state law. Most of the laws confirmed to some extent, at least, the traditional structure and gave legal status to the acequia system within Anglo-style law-making. Some laws may be said to have reconciled the acequia system with other provisions and principles of law that might have conflicted with it. Other laws have wrestled with emerging problems that affect or impinge upon the acequia systems, mostly having to do with water rights.

The main statutes about the acequia system are found in the 1907 "Acequia Act" in Chapters 73, Articles 2 and 3 of the water code. The designation of acequias as "political subdivisions of the state" restricted their autonomy. The Act ensured that local practice conformed to uniform standards in a number of matters. For example, it defined membership criteria and rules for election and duties of each acequia's *comisión* (commission) and *mayordomo* (ditch master). NMSA 1978, §§ 73-2-28; 73-2-12 and 73-2-13.

The Acequia Act also provides that the rights of a member may be suspended if the member fails to provide labor or payment of assessments to maintain the ditch. Further, the *mayordomo* can collect a civil penalty in magistrate court from *parciantes* who fail to provide either labor or payment. Similarly, members are prohibited from damaging the irrigation works or taking water contrary to order of the mayordomo or commissioners. Such offenses are criminal misdemeanors that may be prosecuted in magistrate court, and acequias may also seek injunctive relief.

Reconciliation with Other Laws

Prior Appropriation: “Prior appropriation” forms the foundation of New Mexico’s water law. Acequias have long realized that the blunt application of the prior appropriation doctrine does not make for good neighbors. Acequias typically developed sharing agreements in times of water shortage. Such agreements have found legal backing, resting on both statutory and constitutional authority. Local or community rules and customs are protected under the law. In addition, if the custom of an acequia predates the Treaty of Guadalupe Hidalgo, the custom falls within the protection of the Treaty. One of the adjudication statutes states that adjudication decrees shall also include “such other conditions as may be necessary to define the right and its priority” so that a court may consider custom in determining water rights. NMSA 1978, § 72-9-2 and § 72-4-19. For more information, please see the chapters “Adjudications” and “Basic Water Law Concepts” in this edition of *Water Matters!*.

Water Right Transfers: Irrigation water rights

are attached to the land on which water is used, but they may be severed from the land and transferred to another tract. The loss of acequia water rights through market transfers has increased as development pressure threatens to take land out of agricultural production. When water is transferred out of an acequia system, the system may no longer function. It takes water to move water and if the amount of water to be transported is reduced sufficiently, there will not be enough in the acequia to reach the land at the end of the ditch. NMSA 1978, § 72-5-23.

To address this concern, the 2003 legislature enacted statutes to protect acequias from water right transfers if such transfers will harm the acequia or its members. Under these statutes, an acequia may incorporate language into its bylaws that gives it decision-making authority over proposed transfers of acequia water rights. The State Engineer cannot approve a transfer application into or out of the acequia unless the he receives the acequia commission’s written approval of the action. The commission must make a decision regarding the transfer within 120 days of a request for approval. An applicant, whose transfer has been blocked, can appeal to the district court. If an acequia’s bylaws do not address proposed transfers, the written approval is not required, and the State Engineer considers the application just as any other transfer request. NMSA 1978, §72-5-24.1; §73-2-21(E) and § 73-3-4.1.

As political subdivisions of the state, acequias also have standing to protest water right transfer applications, which may have an adverse effect on their functioning. The statute provides that an acequia can protest a transfer application by one of its *parciantes* because the transfer could affect the hydraulic viability—or the corporate integrity—of the acequia. It also allows an acequia to protest an application elsewhere in the state, which, if granted, might undermine the stability of the acequia institution. NMSA 1978, § 72-5-5.

The statute specifically prohibits municipal condemnation of water sources used by, water stored for use by, or water rights owned or served by a community ditch, irrigation district, conservancy district, or other political subdivision of the state.

The statutes set for some of the bases for objecting to a transfer. Acequias and acequia associations can protest a water transfer application if they believe the transfer will be detrimental to existing water rights, are contrary to conservation of water, and/or will be detrimental to the public welfare. Thus far, however, no hearing or ruling by the State Engineer has fully determined how effectively this statute can protect acequia water rights, because “public welfare” is undefined in the statute. NMSA 1978, § 72-5-23; § 73-2-21(E); and § 73-3-4.1.

Water Rights and Water Banks: In 1987, the state legislature recognized acequias’ power to acquire and own water rights. They can use and transfer the water rights, and protect them from loss through nonuse. In addition, the legislature passed a 2003 statute that allows acequias to create “water banks” to allow members to temporarily reallocate their water to others on the acequia without having to apply for an OSE transfer permit or put their rights at risk of loss through non-use. To a limited degree then, this provision shifts the concept of *parciante* ownership of water rights back to the older concept of communal ownership. NMSA 1978, § 73-2-22.1.

Condemnation: In 2009, the legislature afforded acequias another protection of their water rights when it prohibited municipalities from condemning acequia water rights in satisfying their 40-year plans. The statute specifically prohibits municipal condemnation of water sources used by, water stored for use by, or water rights owned or served by a community ditch, irrigation district, conservancy district, or other political subdivision of the state. NMSA 1978, § 3-27-2.

Challenges and Concerns

Water Rights, Adjudications, and Transfers: Notwithstanding the statutory changes just described, the two dominant concerns of the acequias at present are 1) securing their water rights through satisfactory adjudication settlements and 2) maintaining control over

Acequias and acequia associations can protest a water transfer application if they believe the transfer will be detrimental to existing water rights, are contrary to conservation of water, and/or will be detrimental to the public welfare.

water rights transfers out of their systems. As it happens, recently proposed water rights settlements in the *Aamodt* and *Abeyta* cases utilize creative water-sharing arrangements as alternatives to the exercise of senior aboriginal water rights. These may provide good examples for the future.

Rio Nambé, Rio Pojoaque, and Rio Tesuque: The *Aamodt* settlement agreement for the Rio Pojoaque watershed resolves the water rights of the Pueblos of Nambé, Pojoaque, San Ildefonso, and Tesuque). The agreement protects existing acequia rights from priority enforcement by the Pueblos’ senior future uses. The Pueblos agreed to limit any priority enforcement during times of shortage to their existing uses. The U.S. Congress passed the *Aamodt* Litigation Settlement Act in 2010. This legislation approved the settlement and appropriated funds for a regional water system in the Pojoaque Valley. The water system is designed to help protect and restore the aquifer, which in turn should enhance surface flows in the streams in the Valley. Enhanced surface flows will protect acequia access to water. The court is conducting the *inter se* phase of the Pueblos’ rights. The subfile adjudication of non-Pueblo surface rights is nearly complete and the parties are working on domestic wells. Once this phase is completed, the court will conduct the *inter se* phase of the non-Pueblos’ rights. For more information, please see the chapters “Adjudications”, “American Indian Water Rights” and “Nambé, Pojoaque, San Ildefonso, and Tesuque Settlement” in this edition of *Water Matters!*.

Rio Taos and Rio Hondo Adjudication: The *Abeyta* settlement agreement also turns on Pueblo forbearance, though in a different way. Taos Pueblo and the non-Indian acequias in the Rio Pueblo de Taos and Rio Hondo river basins initiated settlement discussions in 1989. The 2006 settlement agreement is predicated on extensive technical research that provided hydrologic information upon which practical water sharing is to be based. Taos Pueblo will exercise its aboriginal water rights over time, but will offset its uses as they increase—acre by acre—through mechanisms such as acquisition and retirement of non-Pueblo uses. Thereby, the agreement protects the 55 acequias in the Taos Valley consistent with long-standing customs of water-sharing among the parties.

Middle Rio Grande: As the time draws nearer for the courts to determine water rights in the Middle Rio Grande Valley, some of the 72 acequias that were subsumed by the Middle Rio Grande Conservancy District (MRGCD) upon its creation in 1925 are seeking to learn what their rights might be, independent of the MRGCD. While a bill in the 2009 legislature that

The Court of Appeals held that because acequia commissioners are intimately familiar with the complex needs of their acequia and its members, the deferential standard of review provided in the statute helps assure that they retain the power to decide whether changes in an acequia system will harm the operation of the acequia and those who might depend on it for their livelihood.

would have limited MRGCD authority over acequias within its boundaries did not pass, the question of whether acequias have separate legal standing has not been foreclosed. The attorney general's office has said that the answer hinges upon satisfaction of a number of unanswered questions; the most important of which is whether the acequias were properly compensated after notice and hearing when the MRGCD was formed.

Water Right Transfer Challenges: Despite the clarity of the 2003 statutes, the power of acequia commissions over the water rights they govern has been challenged. The first

Q: Where are the Acequias?
How many are there?

A: They're widespread, located in the valleys of most New Mexico rivers and flowing creeks. There are about 700 of them.

Good information about acequias is scarce. NMSU professor Neal Ackerly gathered up facts and figures over a period of years and found at least a bit of data on 1,927 acequia systems that once operated or that were still operating. In his 1996 summary report, Professor Ackerly stated that more acequias existed in past years, but by about 1987 the number in existence had dwindled to 721.

Fluctuations in the number of acequias reflect the settlement history of the state, including current trends of urbanization and reduced small-farm activity and farm population. The number of acequia systems increased slowly during the 1700s and early 1800s. Then it appears that the numbers increased rapidly in the late 1800s and early 1900s, followed by a slow decline throughout the last half of the twentieth century.

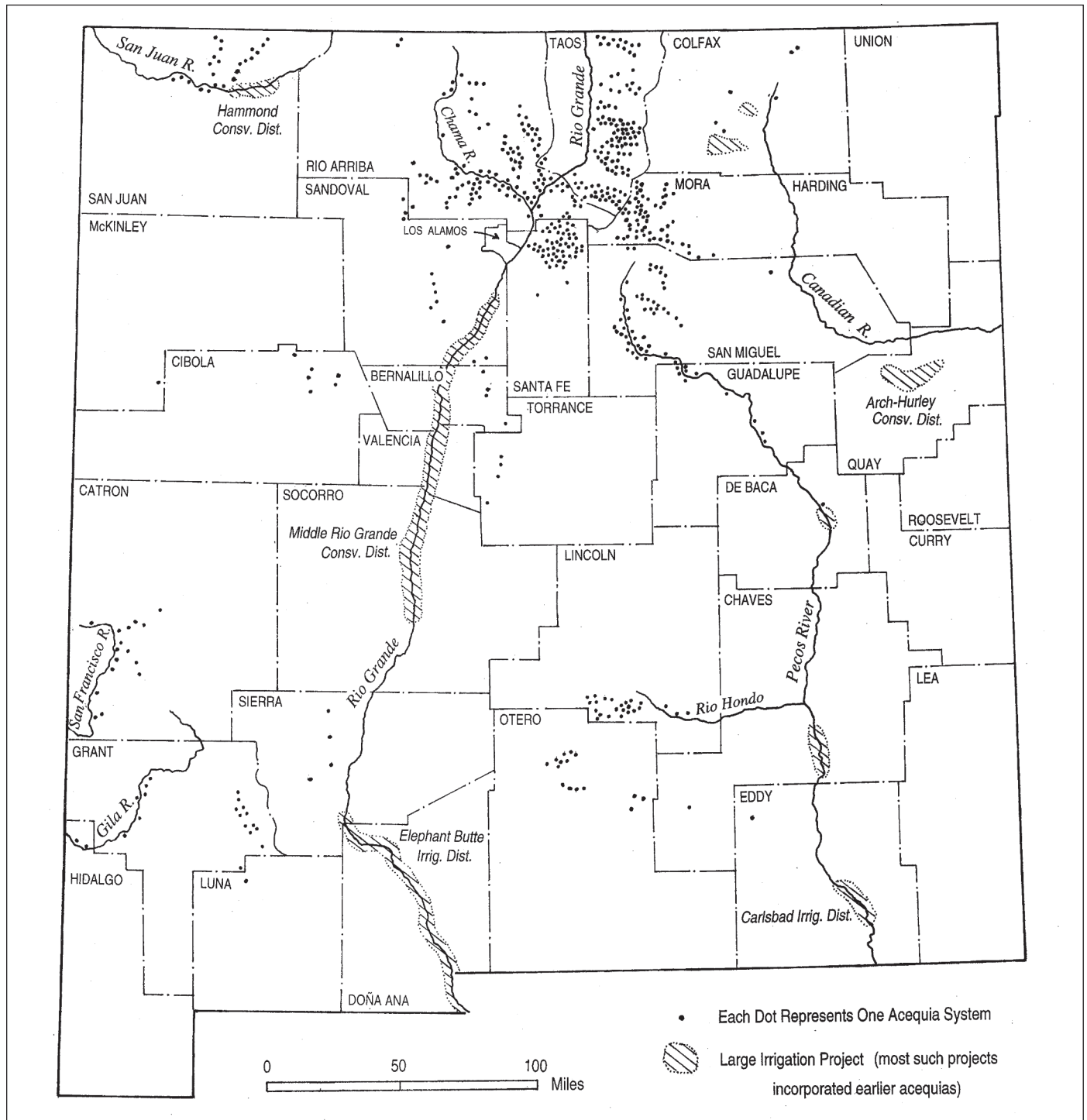
Government-sponsored irrigation projects also reduced the numbers of acequias. The MRGCD and the EBID, for example, absorbed and replaced the ditches of numerous acequia systems, also ending those systems as organizations.



Other acequias vanished as rural villages were abandoned and as traditional ways of life diminished.

Acequias have always been most numerous along the upper Rio Grande and its many small tributaries. Ackerly listed 172 systems in Rio Arriba County and 125 in Taos County. But acequias are also found in 14 other river basins, utilizing 130 streams and a number of springs.

Most acequia systems were established by early-day Hispanic settlers, but some, such as those in the Mimbres Valley, involved quite a few Anglo settlers early in the 1900s. In such places, just as in northern New Mexico, the acequia system was found to be a useful agricultural and community-building concept.



test of the statute was presented in *Pena Blanca Partnership v. San Jose de Hernandez Community Ditch*, which asked whether a district court's deferential standard of review of an acequia commission's decision violated the New Mexico constitution. The Court of Appeals held that because acequia commissioners are intimately familiar with

the complex needs of their acequia and its members, the deferential standard of review provided in the statute helps assure that they retain the power to decide whether changes in an acequia system will harm the operation of the acequia and those who might depend on it for their livelihood.

New Mexico Acequias

By Jerold Widdison
for the Utton Center.

The case involved appeals to the district court from decisions of two different acequias. In one case, the commissioners of the San José de Hernandez Community Ditch denied an application from Peña Blanca Partnership to transfer rights to a subdivision that were once appurtenant to agricultural land served by the acequia. In the other case, commissioners of the Acequia del Gavilán denied Richard Cook's application to transfer water rights once appurtenant to 10 acres served by the acequia, to a pond in order to offset evaporative losses of the pond.

The Court of Appeals determined that in each case, the acequia commissioners' decisions did not violate the Constitution's article XVI, § 5, which provides a *de novo* appeal to the district court from a decision on matters of water rights made by an administrative body "unless otherwise provided by law," nor violated the equal protection clause of article II, § 18. On the first issue, the court reasoned that the legislature provided a procedure for appealing commissioners' decisions to district court, and therefore, water rights owners were not entitled a *de novo* appeal.

The second challenge asserted that the standard of review for the district court, as set out in the statute—whether "the commissioners acted fraudulently, arbitrarily or capriciously" in denying a transfer—violates equal protection principles because other determinations concerning water rights are afforded a *de novo* standard of review. That argument also failed when the court applied a rational basis review of the statute and determined that there is no separate constitutional right to a particular standard of review. Again, because acequia commissioners are intimately familiar with

the complex needs of their acequia and its members, the deferential standard of review provided in the statute helps assure that they retain the power to decide whether changes in the system will harm their acequia system.

Other Acequia Concerns

Tort/Contract Immunity: Acequias and their officers enjoy tort immunity. As political subdivisions of the State, acequias fall within the protection of New Mexico statutes, which provide immunity for governmental entities. Moreover, the Tort Claims Act expressly provides tort immunity for acequia members acting within the course of their duties. In 2006, the legislature amended the law to protect officers, volunteers, and employees of community ditches or acequias from tort claims while acting within the scope of their duties. These individuals may request insurance and self-insurance coverage from the Risk Management Division of the New Mexico General Services Department. NMSA 1978, § 37-1-23; § 41-4-13.

Easements: Another matter has to do with easements on lands over which ditches lie. If an irrigation ditch has been in use for five years, it is "conclusively presumed" that the landowner has granted an easement for it. In 2005, the legislature amended to provide for prosecution and penalties for interference with such an easement. It is unlawful to interfere with an easement or to prevent access to the ditch, and interference is punishable as a misdemeanor. In addition, the mayordomo or acequia commissioners may file a civil complaint. NMSA 1978, § 73-2-5.

Acequia Commission: In 1987, the Governor created the New Mexico Acequia Commission. This Commission advises the Governor and the New Mexico Interstate Stream Commission (ISC), as well as the U.S. Army Corps of Engineers. The Commission considers issues involving rehabilitation of acequia infrastructure and state and federal funding and acts as a liaison between local acequia organizations and state and federal governments. In 1993, the

If an irrigation ditch has been in use for five years, it is "conclusively presumed" that the landowner has granted an easement for it.

legislature established the Acequia Commission. It is attached to the Department of Finance and Administration. NMSA 1978, § 73-2-65.

Liaison at the Office of the State Engineer: Within the Office of the State Engineer (OSE) there is an Acequia Liaison who assists acequias and *parciantes* with their water rights in adjudications. In recent years, the Liaison has worked in the Rio Gallinas and Rio Chama basins, and the Mimbres basin. In the Mimbres basin, he is working with a community counterpart whose focus is the broader water community, including municipalities and other entities. The Liaison has also worked extensively in the Taos and Santa Cruz adjudications with lesser involvement in the Jemez, *Aamodt*, and Red River adjudications. The Acequia Liaison may assist acequias with water allocation issues and governance questions in addition to adjudication issues. The Liaison works with the ISC, the Water Resources Allocation Program, and the New Mexico Acequia Commission, as well as with the OSE's Native American Liaison on issues between acequias and Pueblos.

Acequia [Adjudication] Fund: In 1998, the legislature created the Acequia and Community Ditch Fund, which provides funding to community ditches and acequias for legal representation and expert assistance in adjudications. NMSA 1978, art. 72-2A.

Acequia Rehabilitation Programs: Acequias may be provided with operational and maintenance assistance by certain state and federal funding programs. Starting in 1961, the U.S. Department of Agriculture has provided technical and financial assistance to acequias for rehabilitation projects. As administrations change over the years, funding cuts have ensued, leaving the OSE as the primary source grants. Technical assistance involves planning, design, engineering and supervision of construction projects.

The Acequia Project Fund was created in 2004, but endowed for the first time in 2007 with a \$100,000 private donation from the Healy Foundation. The Foundation donated

Within the Office of the State Engineer there is an Acequia Liaison who assists acequias and *parciantes* with their water rights in adjudications.

an additional \$100,000 in 2009. Grants from this fund provide financial assistance for acequia projects. Policies for determining funding were developed in 2009, including a provision that grants cannot exceed \$20,000 and projects must be completed in a two-year time frame. NMSA 1978, § 72-4A-9.1.

Irrigation Works Construction Fund Loans: The costs that an acequia needs to put forward for a construction or rehabilitation project may be covered by a loan from the ISC. The loans are funded from the Irrigation Works Construction Fund (IWCF). This funding is provided by the legislature on an annual basis. NMSA 1978, § 72-14-23.

U.S. Army Corps of Engineers Program: A major source of funding for acequia projects is the federal Water Resources Development Act of 1986. Because of the acequias' cultural and historic values, the U.S. Congress authorized the Secretary of the Army to ensure funding for diversion structures at an estimated \$40 million. These federal monies are matched at the state and local levels; the IWCF is a source of such non-federal cost shares.

Conclusion

Acequia members have historically fought to protect their rights. The voices of many acequia members have long been heard in the halls of the legislature. The New Mexico Acequia Association (NMAA) was formed in the 1990s. It is governed by the Congreso de las Acequias, a federation of regional associations of acequias. According to the NMAA, over 500 acequias are represented by the regional delegations. The NMAA has actively mobilized to define and press for passage of much of the legislation that protects the acequias.

Acequia issues should not be framed as preserving tradition versus meeting modern demands. Acequias benefit and play an important role in current developments of local foodsheds and, with the resurgence in popularity of organic food, acequias provide economic opportunity for members of rural communities. Further, in an arid state where every drop of water is studied and tracked, it has been shown that acequias provide recharge to our groundwater systems as water seeps into the earth beneath the flow. Following intensive studies of acequias in

northern New Mexico, Sam Fernald when Assistant Professor in Watershed Management at New Mexico State University concluded: “Acequia hydrology plays an important role in contributing to an ecologically healthy, agriculturally productive, and community-sustaining floodplain agroecosystem.”

By Brigette Buynak, Esq. and Jerold Widdison (2007)

Latest Update by Darcy Bushnell (2013)

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