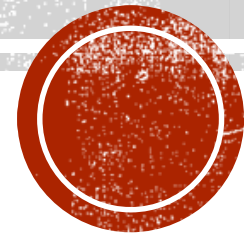


FROM DIVERSION TO DESAGUE

**Contemporary (and not-so contemporary) Issues
Surrounding the Acequia Easement**



October 16, 2021

New Mexico Acequia Association
Enrique Romero, Esq.
Director of Legal Services

OUTLINE

- What is the “acequia system” and how does the law protect its integrity?
- Why are acequia easements and their protection important?
- Statutes and case law
- Local land use ordinances
- Federal law



WHAT IS THE ACEQUIA SYSTEM?

- Diversion (*presa, compuerta, atarque*)
 - *Where acequia takes water from the source (river, spring, etc.)*
- Main canal, mother ditch (*acequia madre*)
- Lateral ditches (*venitas, linderos*)
 - *Vary in size*
 - *Some venitas have their own commissions or mayordomo, charge assessments, etc.*
- Drainages (*desagues*)
 - *Arroyos*
 - *Rivers*
 - *Other acequias*
- Infrastructure
- Traditional Points of Access



ACEQUIA SYSTEM = ACEQUIA NETWORK

ACEQUIA NETWORK

- **Any irrigation ditch and its associated infrastructure**, including but not limited to: any community ditch as defined by state law, any acequia, acequia madre, versa, lateral, vena, venita, lindero, presa, whether or not currently in use; any acequia diversion, compuerta, headgate, desague, field drainage or outlet for the conveyance of water, whether or not currently in use; and any and all acequia infrastructure, whether or not currently in use.
- The Acequia Network includes any applicable easement and required setbacks under this code. The acequia network also includes **all traditional or historical access points** and rights of way to any part of the Acequia Network herein defined. The acequia network includes traditional acequia alignments, whether or not currently in use.

City of Española Irrigated Lands Protective Overlay District (Proposed)



WHY PROTECT THE ACEQUIA EASEMENT?

- Beneficial use is the basis, measure, and limit of one's water right
 - NM Constitution Article XVI Section 4
- **Access** to water is key to beneficial use
 - Section 72-8-3, NMSA 1978
 - Section 73-2-5, NMSA 1978
 - Section 73-2-64, NMSA 1978
- Protection of real property
 - Water right
 - Community ditch easements dedicated to a public use (*Albuquerque v. Garcia*)
- The proper functioning of the Acequia System depends on the proper functioning of its component parts
 - Water delivery
 - Governance



WHAT IS THE ACEQUIA EASEMENT?

“By this proceeding the City of Albuquerque has attempted to condemn the entire ditch running longitudinally through certain of the streets of said city, and the principal question presented by the record relates to the power of the city to condemn an irrigation ditch, in actual use as a community ditch, for conducting water for the irrigation of lands, and to appropriate said ditch to the use of the public as a street, thereby destroying said ditch.”

City of Albuquerque v. Garcia, 1913-NMSC-006, ¶ 2, 17 N.M. 445, 130 P. 118



WHAT IS THE ACEQUIA EASEMENT? (CONT'D)

“Our Territorial Supreme Court in the case of the Albuquerque Land & Irrigation Company v. Gutierrez, 10 N.M. 177, 61 P. 357, said:

‘It is undoubtedly true that the diversion and distribution of water for irrigation and other domestic purposes in New Mexico, and other western states where irrigation is necessary, is a public purpose.’

These cases would seem to dispose of the question as to the public use of the acequia in question, adversely to the contention of appellee. It is our view, therefore, that the use to which the irrigation ditch in question was devoted, was a public use, and consequently the city would not have the right to condemn the same and thereby destroy it, unless such right was expressly or by necessary implication conferred upon the City by the Legislature.”

City of Albuquerque v. Garcia, 1913-NMSC-006, ¶¶ 9-10, 17 N.M. 445, 130 P. 118



STATE LAW — §73-2-5, NMSA 1978

- **Easement:** “An easement is ‘a liberty, privilege, right, or advantage which one has in the land of another.’” *Cox citing Kennedy v. Bond*, 80 N.M. 734, 736, 460 P.2d 809, 811 (1969)
- Establishes an easement for **irrigation ditches**
 - **Five years continuous use** for purpose of irrigation
 - Statutory “Prescriptive easement” (*Cox v. Hanlen*, 1998-NMCA-015, 124 N.M. 529, 953 P.2d 294)
 - Evidence of open, uninterrupted, peaceable, notorious, adverse use under claim of right for prescriptive period with the owner's constructive or actual knowledge (*Cox*)
 - Prescriptive period = 5 years under statute



STATE LAW — §73-2-5, NMSA 1978 (CONT'D)

- Negative easement
 - Makes it illegal to **interfere** with easement or **prevent access** to ditch
 - ***Appears*** to allow “alterations” or changes to location of ditch by “servient estate” so long as those changes do not interfere with the use of or prevent access to ditch
 - ***But...only for*** irrigation ditches after 1941 amendment
 - Irrigation ditches in **use prior to 1941** amendment require permission of “dominant estate” before making any changes or alterations to ditch
- Nearly all acequias were constructed prior to 1907
 - 1907 water code recognized existing uses and allowed diversions without a permit from OSE
 - Water rights on an acequia share the same priority date



STATE LAW — §73-2-5, NMSA 1978 (CONT'D)

- Affirmative Easement
 - Establishes what easement owner is permitted to do
- “[T]he easement created pursuant to this section shall be adequate to allow for reasonable maintenance, use and improvements to the ditch.”
- Broad standard – easement law places limitations on what easement owner may do



PREVENTING VIOLATIONS OF SEC. 73-2-5

- Servient estate (burdened property owner):
 - What is **interference** with easement?
 - Moving location of ditch but keeping ditch within easement, covering and closing ditch even if doing so *does not interfere with beneficial use of water (Archibeck)*
 - What is **preventing access** to easement and ditch?
 - Erecting fence, moving of berm (narrowing) making it impossible for use of tractor to maintain; remand on culverts and water gates (Cox)
- Dominant estate (acequia, water right owner):
 - What is **reasonable**?
 - Using mechanized tools to clean and maintain ditch (Cox)
 - No set distance – continuous use beyond prescribed distance can create additional irrigation ditch easement rights (Cox)



WHO DECIDES WHETHER AN EASEMENT EXISTS?

- *Deaf Smith County Grain Processors v. Dixon*, 116 N.M. 523, 864 P2D 812 (Ct. App. 1993)
 - Facts: Irrigator constructed new lateral ditch from Ditch A to Ditch B, using Ditch B as a delivery conveyance to land he had a right to irrigate from Ditch A
 - Absent a change in purpose of use, place of use or point of diversion, the District Court, not the OSE, has jurisdiction to determine whether an irrigation ditch easement exists
 - “Nothing in Section 73-2-5 suggests that a determination of rights **under that statute** is to be made by the State Engineer rather than by the district court.”
 - “[The Court does] not view a **change in the vehicle of transport of water for a particular use to constitute a change in the use of water** within the meaning of Section 72-5-24, at least in the absence of a provision in a decree or license mandating a specific means of transport.”



PROSECUTING VIOLATIONS OF §73-2-5

- What are the legal remedies?
 - Criminal complaint by DA, mayordomo or commission
 - Misdemeanor
 - Fine of \$300-\$1000
 - 90 days jail
 - Civil complaint by DA, mayordomo or commission
 - Civil penalty not to exceed \$5,000 for knowingly, intentionally or willfully violating law
 - Suit for damages by DA, mayordomo, commission or owner of dominant estate
 - Injunctive relief



LOCAL LAND USE ORDINANCES

- Taos County Ordinance 2015-02 (Section 1.2.2)
“It is the goal of these regulations to ...**protect the quality and quantity of the water resources and acequias...**”
- Town of Taos Water Policy Statement (13.04.010)
“**Encourag[e] the maintenance of the Taos Valley's acequia system** for irrigation purposes”
- City of Española Comprehensive Plan Ordinance 2017-10 (Embrace, Protect and Restore the Acequias: The Pulse of the Española Valley)
“[T]he acequias are not an insignificant part of the local landscape and **should be protected to the greatest extent possible...**Beyond protection, the city should pursue restoration of the acequias where needed and appropriate”



TAOS COUNTY LUR 4.8.1.N - GOOD

- R. **Acequias.** No acequia, whether on-site or off-site, shall be disturbed in any way by building development or construction activity unless approved or deemed approved by the acequia commission. See Summary of Limits Table in I. above and the following:
1. All applications for development on a parcel containing an acequia, or a parcel within 20 feet of the nearest bank of an acequia, shall be submitted by the applicant for review by the applicable acequia commission. The acequia commission has thirty (30) calendar days upon receipt of the application to respond. Failure of the acequia commission to respond within thirty (30) calendar days shall be deemed approved.
 2. An acequia shall remain open and uncovered, absent express permission to the contrary by the Acequia commission, be readily accessible for use and maintenance, be unobstructed from fences, culverts or other impediments, and acequia easements recognized by New Mexico law shall be honored.



TAOS COUNTY LUR – DEFAULT SETBACKS

LIMITS – Zoning Clearance, Administrative, Special Use and Major Development	Less than 2ac.	2 ac. or more	COMMENTS
Minimum setback from acequias, and legal lateral (venitas) acequias ²	10 ft. 20 ft.	10 ft. 50 ft. commercial 20 ft. residential	Measured from the nearest bank of acequias.

(2) More or less if established in acequia bylaws.



TAOS COUNTY LUR – NOTICE

Section 7.1.1 Applications, appeals and/or hearings identified in the Taos County Land Use Regulations that require public notice, unless otherwise specified, shall require three (3) types of notification by the applicant to persons and entities, as more fully described in Sections 7.1.2, 7.1.3, and 7.1.4

Section 7.1.4 Notification by First Class U.S. Mail

5. Any acequia that is within the property of the development or contiguous to the property.



TAOS COUNTY LUR — “ACEQUIA”

ACCESS - A means of entrance to or exit from a property.

ACCESSORY STRUCTURE OR BUILDING - A structure or building located on the same lot or parcel as the principal structure, the use of which is incidental, subordinate, secondary to, and under common ownership with, the principal structure or building.

ACCESSORY USE - Use of land, found on the same lot or parcel as a principle use, that is subordinate, incidental and secondary in size and character to, and related to and customarily associated with, the principal use.

ACEQUIA - Referring to both the irrigation ditch and the organization of parciantes who use the ditch. The acequia transports surface water from its source, e.g. a stream, a spring, watershed, a river, or a reservoir, to irrigate lands used primarily for agricultural purposes. Also, an acequia is a form of public corporation that is a political subdivision of the State of New Mexico. Like all other political subdivisions, acequias are competent to exercise those powers the legislature has delegated to them, expressly or by necessary implication.

ACEQUIA, COMPUERTA - The head gate that diverts water from a stream into the irrigation canal.

ACEQUIA, COMMISSIONERS - Elected officials elected by those having water rights in the Acequia who have general charge and control of all affairs pertaining to the Acequia.

ACEQUIA EASEMENT - A right to use the land of another for the purpose of conveying or receiving water for irrigation or other use.



ACEQUIA MADRE DEL LLANO CASE

- *Eli Sanchez v. Board of County Commissioners of Taos County and Edmund Healy, A-1-CA-37995*
 - Developer enclosed open irrigation ditches (laterals of a laterals) serving his property and another serving neighboring property
 - Built wall preventing access to junction box that splits water into three lateral irrigation ditches
 - Traditional access to junction box was via developer's property



ACEQUIA MADRE DEL LLANO (CONT'D)

- County Commission – Upheld Planning Commission’s approval of permit – no “acequia” within 20 feet of project

- District Court – Upheld County Commission decision

“The question is whether a lateral of the mother ditch which is located on the subject project site would require review and approval from the acequia commission. If such approval was necessary, the county’s decision would not have been in conformance with the law.”

“The Acequia Madre del Llano is not within 20 feet of the project.”

- Court of Appeals Decision
- Petition of Writ for Certiorari Filed
- Supreme Court denial of petition S-1-SC-38867 (October 1, 2021)



ACEQUIA MADRE DEL LLANO (CONT'D)

- **NMAA Amicus:**

“It is not disputed whether there is an easement on the Property...but rather whether the County was required to address Healy’s actions related to the easement in the permitting proceedings for the Permit. The LURs require compliance with state law, especially as they pertain to acequia easements. In this case, **placing ditches in culverts without the express approval of the Acequia Madre del Llano is contrary to the County’s own regulations**...and analogizing from the Court’s holdings in *Posey* 1953-NMSC-019, ¶60 (“A pipe line cannot be substituted for a ditch”) and *Cox*, 1998-NMCA-015, ¶¶ 38-39, such action smacks of unreasonable interference.”

- LUR 4.8.1.N.2

- “acequia easements recognized by New Mexico law shall be honored”

- LUR 1.2.4

- the intention of the regulations is to “augment and enhance...state laws”, not contradict



ACEQUIA MADRE DEL LLANO (CONT'D)

- “We conclude that the County's legislative body, in promulgating the Taos, N.M., LUR art. 4, § 4.8.1(N), consistent with other state legislative enactments concerning acequias, and the documented history of acequias, **intended for laterals to be subject to the same protection as an acequia**. Therefore, we determine that Taos, N.M., LUR art. 4, § 4.8.1(N) should be construed to mean that **an "acequia" refers to all types of acequias and laterals as provided for under Taos, N.M., LUR art. 2, § 2.1.2. Under this construction, the lateral at issue should not have been disturbed without "express permission" from the appropriate acequia commission for its operation and maintenance.** Taos, N.M., LUR art. 4, § 4.8.1(N) (seeking approval from the acequia commission). Accordingly, we reverse the district court's decision, and hold that **the impacted lateral in this case is in fact an acequia.**”

Sanchez v. Bd. of Cty. Comm'rs, No. A-1-CA-37995, 2021 N.M. App. LEXIS 32, at *25 (Ct. App. May 24, 2021)



TOWN OF TAOS 16.20.060.02 - BETTER

- A. Development: Any proposal for **development** on a property containing any portion of an **acequia network**, as defined by this Code, shall comply with the following requirements as part of the development approval process.
- ACEQUIA NETWORK: Any community ditch, as defined by State law, acequia (ditch), versa (lateral), vena or venita, presa (diversion), compuerta (headgate), or desague (field drainage or outlet) for the conveyance of water, including the applicable Town or Acequia Commission mandated maintenance easement and required setbacks under this Code.
- DEVELOPMENT: For the purposes of this section, "development" shall mean the placement or construction of any structure including, but not limited to, residential and commercial buildings, sheds, outbuildings, patios or other hardscape, greenhouses, bridges, **fences, walls, driveways, roads**, parking lots, utilities and drainage facilities. Development shall also include grading, excavation, and landscaping, including the changing of the contour or drainage of the land by the removal or addition of soils or retaining walls.

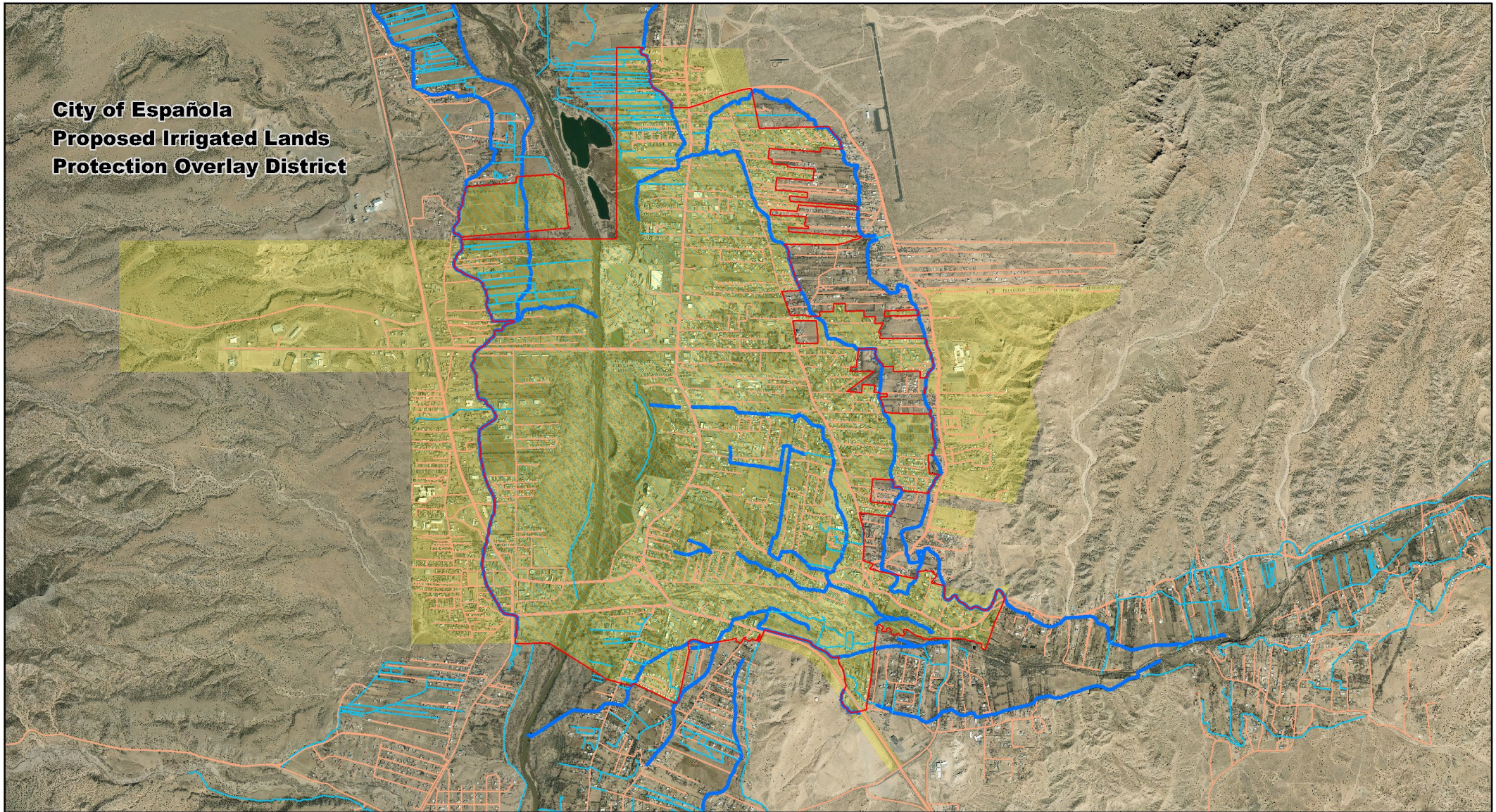








ESPAÑOLA ILPOD (PROPOSED) - BEST

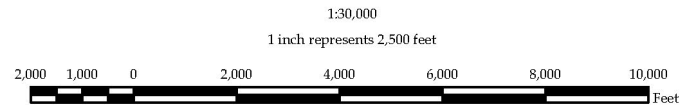
- ILPOD = irrigated lands protection overlay district
- Carrot and Stick Approach:
 - Recognizes and protects acequia easements
 - Requires acequia commission approval for any development
 - Plan for water rights
 - Offers developer incentives for keeping water in beneficial use (irrigation)



**City of Española
Proposed Irrigated Lands
Protection Overlay District**



-  Proposed ILPOD_Boundary
-  Española Incorporated Area
-  Main Ditches
-  Other Acequia Network
-  Major Roads
-  Roads



Aerial Photography from Spring 2014
North American Vertical Datum 1988

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July 29, 2019



FEDERAL LAW AND ACEQUIA EASEMENTS

- Where the Federal Government is the servient estate, the Act of July 26, 1866, ch. 262, § 9, 14 Stat. 253 (**R.S. 2339**) provided a Congressional **grant of easement** for irrigation ditches located on federal lands.
- The Federal Land Policy Management Act of 1976 repealed the statute but left unaffected easements that had vested prior to the repeal.
- Three criteria:
 - Ditch must have been constructed **before reservation of the federal land**, e.g., as National Forest, Wilderness, etc. to not be subject to federal permit requirements.
 - The ditch must serve a **still-valid water right**.
 - **No major alteration** of the ditch easement.
 - Any major alteration after reservation of the federal land, either as to **its capacity, or its location or course** is **outside the scope of the grant of easement** and is subject to federal permit requirements.



FEDERAL LAW AND ACEQUIA EASEMENTS

- **Nearly every acequia in New Mexico located on federal land fits these criteria**, and therefore has a **vested right-of-way** which must be honored by federal agencies, i.e., it is not subject to permit requirements for normal operation and maintenance.
- This is important because **permitting by federal agencies can be considered a major federal action which invokes NEPA**, environmental assessments, and a required payment by the acequia of a substantial cost-share for environmental assessment.



FEDERAL LAW AND ACEQUIA EASEMENTS

- *Southern Utah Wilderness Alliance (SUWA) v. Bureau of Land Mgmt.*, 425 F.3d 735, 748-49, (10th Cir. 2005)
 - Provides a detailed listing of which easement infrastructure activities on federal land are considered “**construction**” and therefore require consultation with the federal agency and possibly a permit; versus which activities are “**maintenance**” and are therefore **not subject to consultation and/or permit**.
 - In general, **upkeep, repair and replacement of infrastructure to “preserv[e] the status quo”** are considered “maintenance” and **will not require a permit**. *Id.*
- *SUWA* is a dispute about road easements on federal land, not ditch easements.
- The same 1866 Act of Congress that granted RS 2477 road easements on federal land that granted RS 2339 ditch easements on federal land.
- A court is therefore likely to define “construction” and “maintenance” similarly for ditch easements as for road easements, e.g., as far as maintenance being activities that “preserve the status quo” of the infrastructure.

