



What Came Prior to Prior Appropriation?:

Acequia Culture,
History, and the Law



Land Grants, Acequias, and the Law
October 15-16 • Canon de Carnue Land Grant

Features of “Prior Appropriation Doctrine”:

- **Non-riparian lands can use the water.**
- **Strict priority: “First-in-Time-First-in-Right”.**
- **Beneficial use:** must occur for right to be created, and determines the nature & extent of the right
- **Non-impairment of prior appropriators** by new appropriators.
- **Forfeiture (i.e., tract-specific).**
- **Water right transfers.** Individual water right owner can change the Place of Use, or Purpose of Use, or Point of Diversion, subject to non-injury rule.

Pre-1600 – Indigenous communities, time immemorial

1600 - 1800s

Establishment of land grants and acequias

1848

Treaty of Guadalupe Hidalgo between US and Mexico

1851

Territorial water code codifies ancient acequia practices

1898

Within 50 years, most of communal lands lost.

1907

NM Water Code: prior appropriation doctrine, severability of water rights

1980s

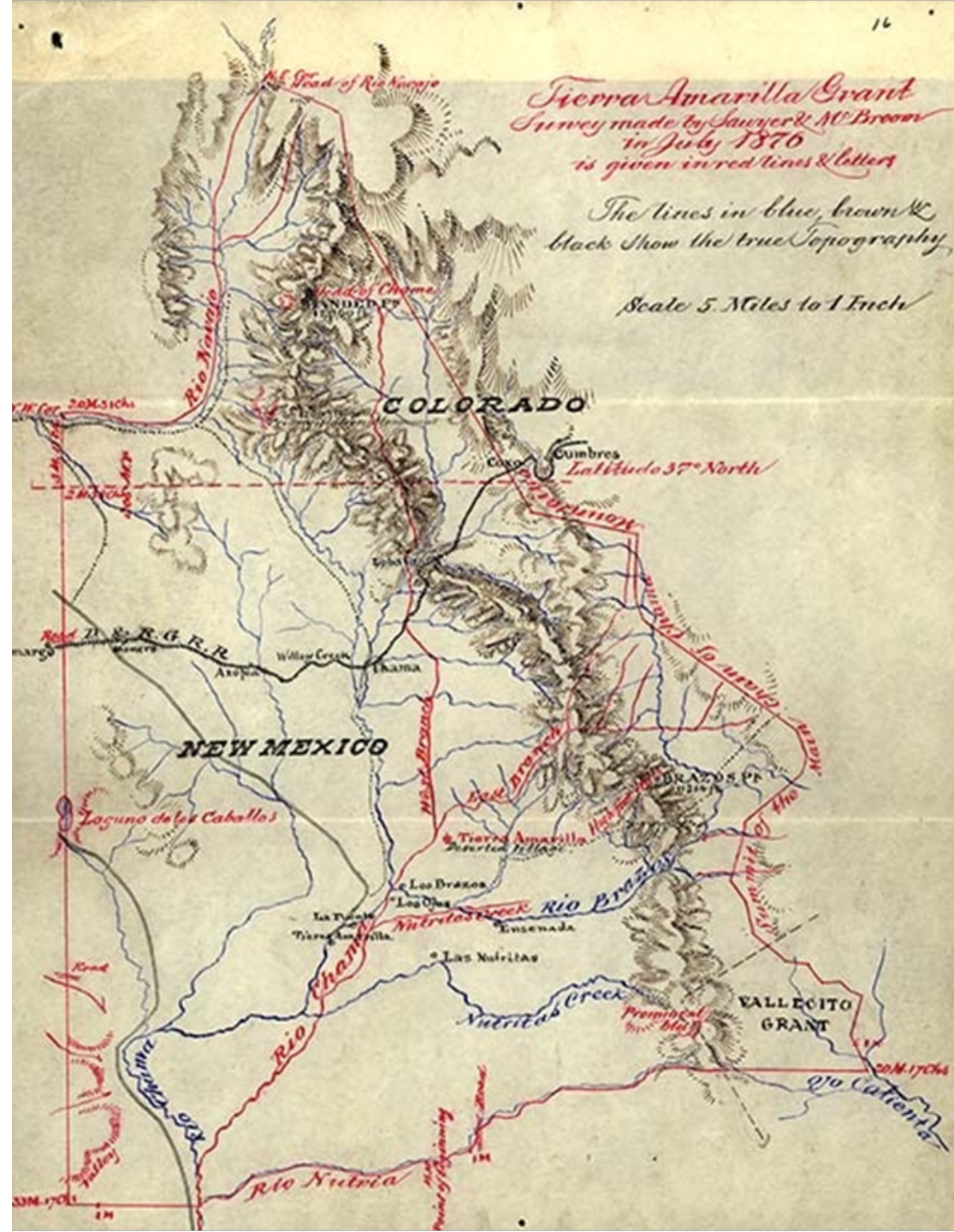
Acequias organize to defend water rights in adjudication defense and to protest water transfers

1990s

Statewide acequia and land grant organizations

2000s

Acequias authorized to regulate water transfers.



Pueblo agriculture and irrigation ditches

At Hawikuh, part of the Zuni Pueblo complex, Coronado observed vast fields of maize and noted, “...**these Indians worship the water**, because they say it makes the maize grow and sustains their life...”

At Acoma Pueblo, the Espejo expedition documented irrigated fields noting, “These people have their fields two leagues distant from the pueblo, near a medium-sized river, and **irrigate their farms by little streams of water** diverted from a marsh near the [San Jose] river.”

Source: Research compiled in *Acequia Culture: Water, Land, and Community in the Southwest*, Jose Rivera, 1998, where he cited Letter of Coronado to Mendoza, August 3, 1540, *Narratives of the Coronado Expedition 1540-1542*, George P. Hammond and Agapito Rey, eds., Albuquerque, 1940.

Prior to colonization, irrigation was but one of many other techniques used by Pueblo farmers including terracing, water harvesting, and gravel mulching over large landscapes. Sylvia Rodriguez coins the term “**acequiazation**” to describe the major shift in irrigation by Pueblos toward greater use of irrigation ditches.

Source: *Water, Sanctity, and Place*. Sylvia Rodriguez, School of American Research, 2006.

Meanwhile, in Spain...

Moors from north Africa governed most of modern-day Spain for nearly 800 years, 711 A.D. to 1492 A.D., during which acequias were widespread throughout Al-Andalus.

The word *acequia* has Arabic roots. As-saqiya means, “water bearer.” Other words such as *atarque*, *noria*, *presa*, *tarea*, etc. are also of Arabic origin.

The allocation of water was guided by the **Islamic Law of Thirst which holds that all living things have a right to water.**

A compilation of medieval practices in addition to Moorish customs were codified into the **Laws of the Indies governing the settlement of Spanish colonies.** First was in 1573 and re-compiled in 1681.

Sources: 1) Hicks and Pena article reference to Water Laws in Moslem Countries, Dante Caponera, 1973.
2) Ordenanzas de Descubrimiento, Nueva Poblacion de las Indias dadas por Felipe II en 1573, cited in Rivera, 1998.

Settlement through the Spanish and Mexican colonial period (1600s-1800s)

Promulgated in 1789, the Plan de Pitic stated and clarified how Spanish colonial law would be applied in Nueva España (from Rivera, 1998).

- Land divided into suertes (individual parcels)
- Acequia madre should channel water to parcels
- An *alcalde* or *mandador de aguas* should be appointed to apportion water
- Lists and schedules should be established with days and hours of irrigation
- Shared labor in proportion to size of irrigated suertes or apportioned water

During this period, groups of families could petition for a community land grant—merced which included common lands (ejidos) and suertes (individual parcels) which were irrigated by acequias.

Acequias de Común and the Role of the Mayordomo

During the Spanish and Mexican period, management was more informal and based on **local custom** and centered on the role of the mayordomo.

Michael Meyer notes that by the end of the 18th Century, acequias de común had proliferated widely. The term “mayordomo” was documented in 1813 and 1819.

By the 1800s, the **role of the mayordomo** was an amalgam of residual Spanish laws and almost two centuries of **local customary practice**. (Rivera, 1998)

- Allocating water in an equitable basis
- Convening irrigators for the spring cleaning
- Monitoring allocation, guarding against violations of local rules
- Settling conflicts

Acequias were autonomous, allocating water based in equity, managing labor, building/maintaining ditches without centralized control.

The role of mayordomo in mobilizing workers for the annual *saca de la acequia*, in equitable distribution of water, and in maintenance of irrigation works has endured for centuries in New Mexico.



Repartimientos de agua

“Custom originally arose out of conflict, secreted like a pearl around the grain of perpetual dispute. Rather than crystallize into a static measure, custom persists as the ongoing, elastic process of negotiation or conciliation itself, or meeting year after year to divide the water according to an agreement forged in crisis long ago.” – Rodriguez, 2006.

Laws and customs were commonly used for allocating water equitably by the mayordomo to parciantes (propetarios) within an acequia. **Customs also evolved to allocate or share water between acequias** on a stream system as necessary.

Rodriguez gives two examples from the Taos Valley:

- Rio Pueblo de Taos – Agreement by territorial probate judge 1878, court case in 1910, and custom continues today: 4 days Pueblo, 3 days downstream acequias.
- Rio Lucero – A 1893 court decree divides the stream roughly in thirds: Pueblo, El Prado, and Arroyo Seco (sobrante).

Source: Water, Sanctity, and Place. Sylvia Rodriguez, School of American Research, 2006.

19th Century - Territorial period – post-war, post-Treaty

After the US annexed the northern half of Mexico following the war and Treaty of Guadalupe Hidalgo, territorial water laws codified some ancient acequia customary practices.

Kearny Code (promulgated in 1846 during occupation of Mexico) stated that Mexican water institutions would continue under US sovereignty.

Territorial water laws of 1851 and 1852 codified extant acequia customary practices in Spanish: *acequias de común, trabajos comunes, repartición con justicia, etc.*

In 1880s, the territorial legislature instituted a new provision for an elected three-member commission for each acequia in addition to mayordomo.

1898 Territorial Water Commission:

“it is our deliberate and unanimous conclusion that the principles governing the law of water...are sufficiently just, progressive, and simple...”

Early 20th Century Water Codes, Early Statutes, and Case Law

1905 and 1907 water codes recognized acequias as valid water institutions and “grandfathered in” pre-1907 water rights but they codified the allocational authority of the territorial engineer.

Snow v. Abalos, 1914-NMSC-022, and *State ex rel. Cmty. Ditches v. Tularosa Cmty. Ditch*, 1914-NMSC-069, made clear that acequias no longer owned and controlled water rights, but that water rights were held by individuals and were governed by the state with regard to beneficial use.

Altogether, the water codes and case law created new challenges for acequias in New Mexico with regard to transferability (severing water rights from irrigated land) and loss for non-use through forfeiture.

However, the water codes and eventually state laws retained some recognition of customary practices of **repartimiento** or water sharing:

“It shall be the duty of all the ditch commissioners, where two or more ditches...supply waters from the same source or river ...**to have a true, just and equitable apportionment of the water for their respective ditches...** and it shall be the duty of the superintendents of ditches to apportion the water in said ditches among the persons entitled to the use of the same...” NMSA 1978, Section 73-2-47.

Acequias autonomous in allocation

Who has rights and how much

Allocation subject to custom

State Engineer centralized power

Allocation based on equity

Prior appropriation

Acequia water as a commons

Individuals own water rights

Water is attached to land

Water rights are severable from land

Implications of new water regime for acequias:

- Tensions between custom and prior appropriation, often prompted by adjudication suits that quantify ownership, priority date, and amount of water
- Commodification of water, conflicts/protests, loss of water rights out of acequias

Endurance of Acequia Customs and Culture:

In their extensive law review article in 2003, Hicks and Peña extensively document the shift to prior appropriation as well as the endurance of customary acequia practices in Southern Colorado:

*“The striking aspect of water management in the Culebra acequias is the persistence of **water practices and customs grounded in allocational principles of Mexican water law long since superceded.***

*Water rights, now defined by the law of prior appropriation, remain situated in a tradition that views **water as a communal resource...***

*Water is still viewed as an **asset in-place tied to the landscape and to the community that built the irrigation structures that first made the water available.**”*

Source: Community Acequias in Colorado’s Rio Culebra Watershed: A Customary Commons in the Domain of Prior Appropriation, Gregory A. Hicks and Devon G. Peña, University of Colorado Law Review, Volume 74, Number 2, 2003.

Examples of 20th-21st Century Water Sharing:

- Rio Chama – Prompted by administration of the Rio Chama and need to distinguish between native and imported Colorado water.
- Taos Valley – Customs of sharing (repartos) documented as part of the Abeyta adjudication and water rights settlement.
- Jemez Valley – Water sharing agreement between Jemez acequias and downstream Pueblos of Jemez and Zia.
- Anton Chico – 1970s court decree ordering rotation between east and west side acequias and appointment of a “water master” to oversee the rotation.
- Embudo Valley – Revival of historic customary sharing based on drought, documented started in 1990s and continues with frequent meetings during the irrigation season.
- Rio Santa Barbara – Sharing agreement put in place in recent years due to prolonged drought.
- Note: OSE Active Water Resource Management Regulations (AWRM) (upheld in *Tri-State Generation & Transmission Ass’n v. D’Antonio*, 2012-NMSC-039) provide for “Alternative Administration,” including water sharing agreements. However, some of the above examples are autonomous and do not involve OSE.

Acequia Resistance to Commodification and Policy Reforms: 20th and 21st Centuries

- Through most of 20th century, acequias continued to operate primarily by custom including equitable allocation, water sharing, etc.
- By 1980s, acequias had to organize for common defense in adjudications.
- Also, in the 1980s, acequias filed some of the first protests to water transfers (e.g. Ensenada Community Ditch).
- Acequias, through the latter 20th century and to the present day, have filed numerous protests to raise concerns about impacts of water transfers to their respective communities.
- In 2003, acequias advocated to change state law so that acequias would have the authority to approve or deny water transfers. NMSA 1978, Sections 73-2-21.E, 73-3-4.1, and 72-5-24.1 (2003).
- This policy reform gave acequia communities a measure of self-determination by making decisions about water use and the future of their communities.

1992 – Pecos Valley Learning Center, Acequia de Vado de Juan Paiz, Anton Chico in Guadalupe County

SANTA FE/REGION

DEATH

Acequias: 'This is our bloodstream'

But money may prove stronger than tradition

By BIDDLE DUKE
The New Mexican

Francisco "Kiko" Padilla knows that nothing good ever came from selling water rights to outsiders. He watched in the 1960s as subsistence farmers in towns along the Gallinas River south of Las Vegas sold their land and their water rights to vast nearby ranches. They're ghost towns now.

Saturday, Padilla spat out the abandoned village names with bitterness: "La Junta, Park Springs, Chaperito, La Liendre, Los Torres. They're nothing. Nothing. There's water. But no farming, no people. The ranches own the water and they don't want to use it. . . They bought the water just for investment."

Now, a company is after water rights on Padilla's acequia, El Vado de Juan Paiz, which snakes its way through the little subsistence farming communities of Dilia and Anton Chico, tucked along the banks of the Pecos River, 80 miles southeast of Santa Fe.

The Pecos River Learning Center has applied with the State Engineer's Office for permission to buy 45 acre-feet of water — or about 15 million gallons — a year from a willing El Vado de Juan Paiz ditch association



Photos by Steve Northrup/The New Mexican

Francisco "Kiko" Padilla stands beside El Vado de Juan Paiz near Dilia, N.M. the El Vado de Juan Paiz, near where | They're just waiting for someone to

Paiz and the other ditch that serves the communities.

In dry years, acequias, which usually dry up in July, would cease to run in early or mid-June, weeks — perhaps months — earlier than usual they said. Fewer parcels could be irrigated. The community, like their alfalfa, vegetable and fruit crops, would shrivel.

Kent Breese, who is handling the application for the State Engineer's office, said the impact of the proposed upstream well is likely being overestimated by the residents.

But he said they might have a legal right to block the sale.

"An application can't be detrimental to public welfare," he said. "Is that a detriment to the whole state of New Mexico? Yes, maybe, because it's changing a way of life."

But Breese said the Pecos River Learning Center might not need the entire 45 acre-feet of water. An average household uses one-third of an acre-foot and domestic wells use about three acre-feet, he said.

"Are these people going to be able to prove beneficial use of this water over a reasonable period of time?" he asked.

Even though they won't be using the ditch, Pecos River Learning Center has offered \$500 a year to the acequia association to help defray the costs of ditch maintenance. It was a show of good faith by the company and was far more than the approximately \$125 a year Tenorio paid for ditch maintenance.

But Sullivan said the offer was a

Community

Pre-1907
19th Century

Spanish, Mexican, territorial laws provided for local decisions – water as a local commons

Water rights attached to the land, non-severable

Commodification

Post-1907
20th Century

State Engineer established to be state's water administrator

Water rights can be severed from the land through water transfers

Re-Communitize

2003 forward
21st Century

State Engineer still state's water administrator

Acequias authorized to decide about water transfers.

Water sharing agreements in place in several basins.

Acequias historically developed their own legal framework in N.M. before the advent of prior appropriation law in the U.S. There is some overlap between the two but not complete, depending on **what tenet of prior appropriation law** one is considering:

Non-riparian lands can use the water. Yes for both.

Strict priority. No for acequias. Very common for neighboring acequias to share shortages, although instances of *sobrante* rights or of senior preference existed. Over appropriation was addressed by allowing objections by existing communities to proposed new settlements or new land grants, so **non-impairment of prior appropriators** was recognized to an extent.

Forfeiture (i.e., tract-specific). No for acequias. As long as the acequia operated, all lands under it could be irrigated regardless of periods of non-use – no such thing as permanent loss for non-use.

Acequia as utility.

Water right transfers. No for acequias. A *parciante* did not own a private property right that was severable and could be moved out of the delivery system.

Case study: How has American jurisdiction addressed the customary systems of shortage sharing in the context of a system of strict priority? Prompted by stream adjudications. Are these customs that do not adhere strictly to priorities **legally recognizable**? These systems, based more on equity than priority, have for centuries played an important role in reducing conflict among neighboring acequias in times of shortage.

1. NMSA 1978, Section 72-9-2 (Local or community rules and customs “shall not be molested or changed”).
2. NMSA 1978, Section 72-4-19 (Adjudication decree shall also include “such other conditions as may be necessary to define the right and its priority”).
3. *Harkey v. Smith*, 1926-NMSC-011, ¶18, 31 N.M. 521, 531 (“This case differs from those arising on community ditches, where all of the rights are usually of the same dignity, and rotation is frequently awarded as a means of dividing the water on an equitable basis.”).
4. Numerous N.M. Territorial special legislative enactments designated shortage-sharing rotation systems (i.e., as if equal priority) among neighboring acequias or acequia communities. E.g., *Laws 1863-64*, p.27, § 5.

5. *State ex rel. Martinez v. City of Las Vegas*, 2004-NMSC-009, ¶30, 135 N.M. 375, 385, appears to overrule this idea: (“New Mexico does not recognize equitable distribution as the system of water law that survived the Treaty of Guadalupe Hidalgo.”)
6. Two recent cases, however, emphasize that the priority aspect of the prior appropriation doctrine is non-self-executing and is to be construed flexibly and in a manner so as to allow litigants (e.g., in a stream adjudication) to fashion alternative remedies to a priority call to address shortages. *Bounds v. State*, 2011-NMCA-11, 149 N.M. 484; *State ex rel. State Engineer v. Lewis*, 2007-NMCA-008, 141 N.M. 1.
7. To the extent the custom pre-dates the Treaty of Guadalupe Hidalgo, the Treaty would also support the continued validity of the practice.

Acequias have had mixed success thus far in gaining court-judgment recognition of these customs, winning recognition in some adjudications but not in others.



