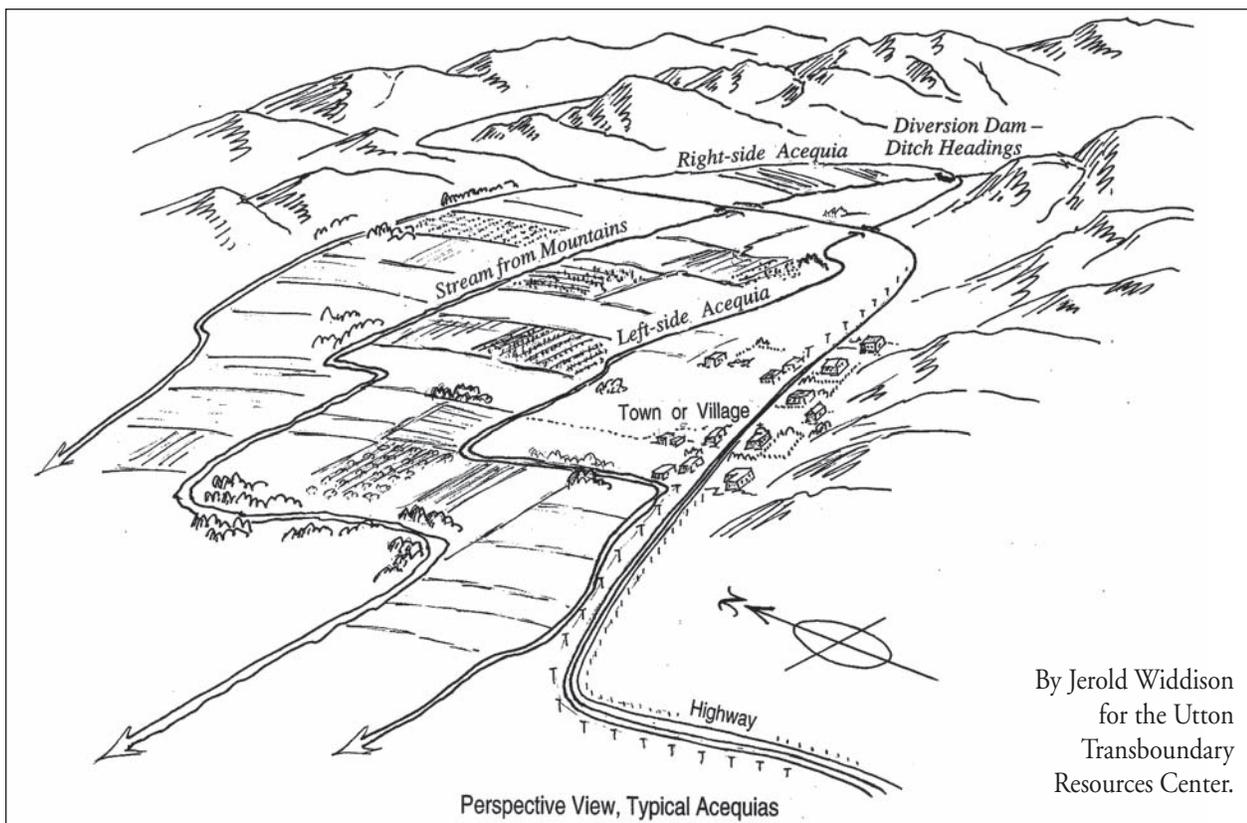


# Acequias

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 had practiced techniques for collecting and sharing water for centuries before the arrival of Spanish colonists in 1598. The Spanish settlers, in turn, brought technical knowledge and institutional frameworks for governing irrigation systems. Their knowledge had been transferred to them during the Moors’ seven-century occupation of Spain. Now both traditions remain important to an understanding of New Mexico’s acequia heritage and the continuing relevance of these “water democracies.”

“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  
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Transboundary  
Resources Center.

The ditches of each acequia system bring water from a 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. Each acequia, however, is more than its water-distribution facilities. As local organizations, the acequias are important in providing social and economic cohesion 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 under increasing development pressures.

grounded in knowledge of their local areas, 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."

"Anglo" newcomers in the last half of the 19th century challenged these arrangements, viewing as primitive the local peoples' ecological adaptations to the arid land. Instead, they embodied an ethic based on America's "manifest destiny," 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. After 1879, furthermore, they arrived in droves by railroad, so that in the next thirty years the Territory's population jumped more than 170 percent.

Each acequia, however, is more than its water-distribution facilities.

### History

By 1846, when General Stephen Watts Kearny claimed New Mexico as a territory of the United States, the Spanish inhabitants had practiced acequia 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, which followed in 1848, also recognized the rights and property of Hispanic New Mexicans. It pledged that "property of every kind" would be "inviolably respected" by the United States (Article VIII).

Yet during the "Territorial" period from 1848 until the granting of statehood in 1912, New Mexico experienced a quiet revolution in the rules governing its water. The Indian pueblos and Hispano acequia communities that had controlled the water locally and had developed among themselves customs for its equitable allocation ceased to be the only appropriators of surface water. The practices they had worked out,

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 mechanisms – 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, while authority to allocate such rights was centralized in the office of the Territorial (now State) Engineer. Passage of the Reclamation Act by Congress in 1902, introducing a federal role in water development, aided these trends.

As inadequate as the American government has been in respecting the property guarantees of the Treaty of Guadalupe Hidalgo for both Hispanos and Indians, 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.

The post-1914 state of affairs has been summarized by UNM professor G. Emlen Hall 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 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 early years of the 20<sup>th</sup> century.

### Statutes Recognizing and Regulating the Acequias

In those early years, approximately a century ago, almost every aspect of the acequia system came to be the subject of state laws. 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.

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 early years of the 20th century.

The major statute pertaining to the acequia system is the 1907 “Acequia Act” (NMSA 1978 Chapter 73, Articles 2 and 3). In being recognized as “political subdivisions of the state” (73-2-28 NMSA 1978) acequias also had their autonomy restricted. The Act ensured that local practice conformed to uniform standards in a number of matters. Membership criteria and rules for election and duties of each acequia’s *comisión* and *mayordomo*, for instance, were defined (73-2-12 and 73-2-13).

Several court decisions have also been important. Recently, for example, a dispute arose about whether voting should be on a “one-member-one-vote” basis or a “one-acre-one-vote” basis. In *Wilson v. Denver*, 125 N.M. 308, 961 P.2d 153 (1998), the New Mexico Supreme Court found that Sec. 73-

3-3 provided for alternative methods in calculating “interest” in an acequia for voting. Thus, in its bylaws, an acequia can adopt either method.

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.

As political subdivisions of the state, acequias also have standing to protest any water right transfer application (72-5-5). This provision includes the right of an acequia to protest a transfer application by a *parciante* of that acequia (because the transfer could affect the hydraulic viability – or the corporate integrity – of the acequia itself). It also allows an acequia to protest an application elsewhere in the state, which, if granted, might undermine the stability of the acequia institution.

Since passage of the water conservation and public welfare statute in 1985 (72-5-23), individual acequias and associations of acequias have been able to exercise their right to protest a number of water transfer applications they believed would produce negative public welfare impacts should the transfers be approved. 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.

...acequias have long realized that the blunt application of the prior appropriation doctrine does not make for good neighbors.

### Reconciliation with Other Laws

“Prior appropriation” is the basic concept in New Mexico’s water law, but 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. Chapter 72 states that local or community rules and customs “shall not be molested or changed.” In addition, if the custom of an acequia predates the Treaty of Guadalupe Hidalgo, the custom falls within the protection of the Treaty. Section 72-4-19 states that adjudication decrees shall also include “such other conditions as may be necessary to define the right and its priority.” Finally, the State Constitution, at Art. XVI, Sec. 1 states, “All existing rights to the use of any waters in this state for any useful or beneficial purpose are hereby recognized and confirmed.”

Since 1987, in addition, acequias themselves have been recognized to have the power to acquire water rights from *parciantes*, to transfer them, and to protect them from loss for nonuse. This provision (73-2-22.1) enables an acequia to keep water rights in the community by acting as a local “water bank.” To a limited degree then, this provision shifts the concept of *parciantes* ownership of water rights back to the older concept of communal ownership.

In 2003, the New Mexico Legislature further strengthened the acequias’ power to acquire water rights by enacting Sec. 73-2-55.1. This section codifies the acequia’s power to reallocate water temporarily to a water bank to augment the acequia system when that water isn’t being put to beneficial use. Water is not subject to loss for non-use, and the water bank is not subject to recognition or approval by the State Engineer. Hence the water is not subject to appropriation by other parties, as long as no change in the point of diversion or a change of purpose of use has occurred.

In 2009, the legislature afforded acequias yet another statutory protection of their water rights. By amending Secs. 3-27-1 to 3-27-3 NMSA 1978, the legislature prohibited municipalities from condemning acequia water rights in satisfying their 40-year growth plans. The statute also specifically prohibits municipal condemnation of water sources used by, stored by, or water rights owned or served by a community ditch, irrigation district, conservancy district or political subdivision of the state.

## 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 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.

The original *Aamodt* settlement agreement for the Pojoaque Creek watershed (involving the pueblos of San Ildefonso, Pojoaque, Nambé, and Tesuque) was initially released and presented to the public in 2004. Non-Pueblo water users expressed their concerns, and a revised settlement agreement took these interests into account and was presented to the court in 2006. In the new agreement, existing acequia rights are entitled to protection from priority enforcement of Pueblo users' senior future uses. The Pueblo water users agreed to limit priority enforcement to their existing uses. The court has approved quantification of water rights to surface water for individual tracts and is now working on determining priority of the many acequias.

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 resulting draft agreement, released in 2006, is predicated on extensive technical research that provided hydrologic information upon which practical water sharing is to be based. In this case, Taos Pueblo will exercise its aboriginal water rights over time, but the settlement provides mechanisms for the Pueblo to offset its uses as they increase – acre by acre – including 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.

As the time draws nearer for the State 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 seek to learn what their rights might be independently of the MRGCD. While a bill in the 2009 legislature that 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, perhaps, is whether the acequias were properly compensated after notice and hearing when the MRGCD was formed.

Meanwhile, the potential for loss of acequia water rights through market transfers has increased as development pressure threatens to take land out of agricultural production, especially in recent years. When water is transferred out of an acequia system, the system may no longer function. To address this concern, the Legislature in 2003 enacted Secs. 73-2-21, 73-3-4.1 and 72-5-24.1, creating a way for acequias to prevent water right transfers out of the system when such transfer will harm the acequia or its members.

Under these sections, an acequia may incorporate language into its bylaws that gives it decision-making authority over

proposed transfers of acequia water rights. If acequia commissioners find that a transfer would be detrimental to the acequia or community ditch or its members, it may deny a proposed transfer. Furthermore, under the new statute, the State Engineer must honor the decision of the commissioners. That is to say, the Office of the State Engineer may not approve an application for a transfer into or out of the acequia unless it receives documentation that the acequia commission has approved the transfer. The commissioners of the acequia have 120 days to make a determination. If, however, an acequia's bylaws do not address proposed transfers, then the transfer process will be within the purview of the State Engineer, just as with transfers not involving acequias.

Despite the clarity of the new statute, challenges have called into question the power of acequia commissions over the water rights they govern. The first test of the statute was a suit asking whether the deferential standard of review afforded the district court over an acequia commission's decision violated either of two clauses of the New Mexico Constitution. The Court of Appeals

Despite the clarity of the new statute, challenges have called into question the power of acequia commissions over the water rights they govern.

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.

The case was *Pena Blanca Partnership v. San Jose de Hernandez Community Ditch*, 2009 NMCA 16 (N.M. Ct. App. 2008), before the New Mexico Court of Appeals, which 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

**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.

The ups and downs of acequia numbers 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 the numbers increased rapidly – so it appears – in the late 1800s and early 1900s. But this was followed by a slow decline throughout the last half of the twentieth century.

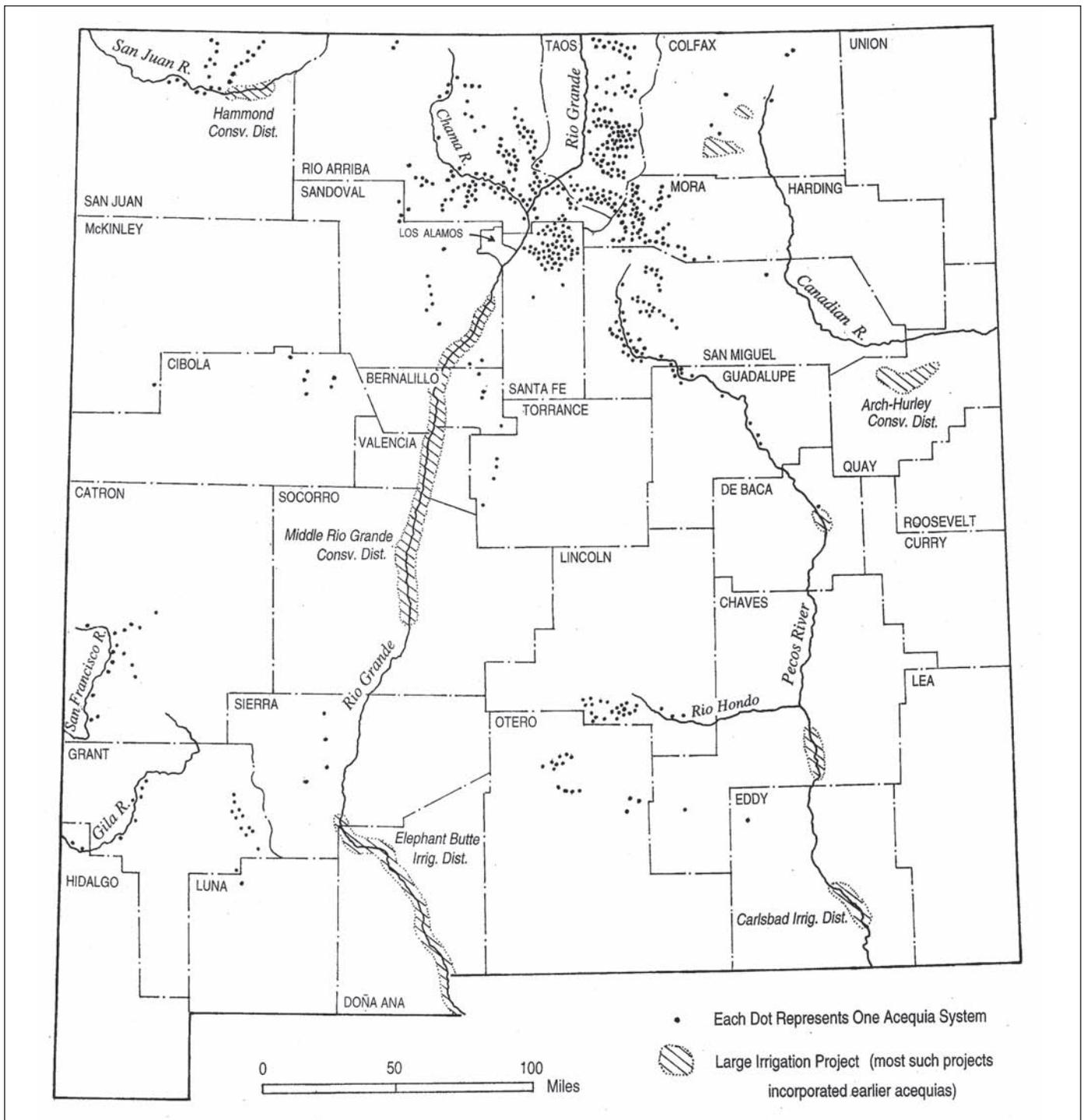
Government-sponsored irrigation projects also reduced the numbers of acequias. The MRGCD and the EBID, for example, absorbed and replaced the ditches of numerous acequia systems, also ending those systems as organizations.



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.



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 commissioners’ decision neither

violated the Constitution’s article XVI, section 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 the equal protection clause of article II, section 18. The court first reasoned that the legislature, in Section 73-2-21(E), did

**New Mexico Acequias**

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provide another procedure for appealing the decisions of acequia commissioners – appeal to district court – and therefore did not provide water rights owners a *de novo* appeal pursuant to article XVI, section 5.

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, which usually applies to general social and economic legislation such as Section 73-2-21(E), 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 the acequia system.

Management Division of the General Services Department.

**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 Sec. 73-2-5 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.

**Liaison and Assistance**

**Acequia Commission.** In 1987, the Governor created an Acequia Commission. This Commission advises the Governor and the Interstate Stream Commission, 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 Legislature established the Acequia Commission by statute (73-2-65). It is attached to the Department of Finance and Administration.

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

**Liaison at the State Engineer’s Office.**

Within the 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 has also worked in the Mimbres basin with a community liaison there whose focus is the broader water community, which includes municipalities and other entities. The OSE 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. The Liaison works with the Interstate Stream Commission, the Water Resources Allocation

**Other Acequia Concerns**

**Tort/Contract Immunity.** Acequias and their officers have tort immunity. As political subdivisions of the State, acequias fall within the protection of New Mexico statutes at Sec. 37-1-23, 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. They may request insurance and self-insurance coverage from the Risk

Program and the New Mexico Acequia Commission, as well as with the 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.

#### **Acequia Rehabilitation Programs.**

Acequias may be provided with operational and maintenance assistance by certain state and federal funding programs. The OSE/ISC, working in cooperation with the Army Corps of Engineers, is working on a computerized database to include information on all functioning acequia systems. This is envisioned as an “Acequia Geographic Information System” (AGIS), which would be a web-based, shared repository for acequia information. The system would be used for management, preservation, and engineering activities related to acequias and their associated communities. Limited funding, however, has resulted in slow progress.

**Technical Assistance.** 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 State Engineer’s Office as the primary grant source. Technical assistance involves planning, design, engineering and supervision of construction projects.

**Acequia Project Fund.** This 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 an additional \$100,000 in 2009. Grants from this fund will 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.

**ISC Loans.** The costs that an acequia needs to put forward for a construction or rehabilitation project may be covered by a loan from the Interstate Stream Commission. The loans are funded from the Irrigation Works Construction Fund (IWCF). This funding is provided by the Legislature on an annual basis.

#### **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 recent legislation to protect the acequias.

But 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, 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 Brigitte Buynak and Jerold Widdison (2007, 2008)

Expanded and updated by Lisa Brown, Jerold Widdison, and Susan Kelly (2009)

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