

Forest Service Continues to Challenge Acequias' Pre-Existing Rights

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Acequia parciantes and the United States Forest Service are still battling, 13 years after the issue first reared up, over what constitutes “routine or normal maintenance” as opposed to “improvements or construction” of acequias on USFS land. At issue is whether the acequias, which predate the Forest Service, must obtain a special use permit to work on their presas or ditches that cross forest lands if the work is deemed more than maintenance by the USFS. The latest acequia commission to tangle with the Forest Service is the Abeyta-Trujillo Acequia Association, northwest of Abiquiu in the beautiful Rio Chama Valley. I’ll get to the details of this acequia’s ordeal after a brief history of this 13-year confrontation.



Abeyta-Trujillo Acequia courses through Chama Canyon, 2011. Photo by Tim Seaman

In 2001 we thought the issue of acequias’ pre-existing rights was resolved with the release of a letter by then Regional Forester Eleanor Towns to New Mexico Legal Aid attorney David Benavides over acequia access on the Nacimiento Community Ditch (NCDA): “. . . no special-use authorization is required for the presence or use of the ditch,” and “no special-use authorization is required to conduct normal

maintenance or minor improvements to maintain the capacity of the ditch.” Unfortunately, in the ensuing years the Forest Service has unfailingly interpreted her words “minor improvements” to mean *any* kind of improvements other than routine maintenance.

In a case just a year later involving Abiquiu parciante Virgil Trujillo, who attempted to rehabilitate an acequia that had actually been damaged due to Forest Service negligence, John Miera, then the Española District Ranger, cited Trujillo, telling him he needed a special use permit to not only take heavy equipment across Forest Service land but to even use the ditch. Trujillo responded: “You better cite me right now because I’m putting water in this ditch this afternoon, and you better be prepared to cite everyone in northern New Mexico if you think you have the authority to stop people from exercising their pre-existing water rights.”

In the mid 2000s the USFS, again in the person of John Miera, who was then the Camino Real District Ranger and subsequently in the Special Project Division in the Carson Supervisor’s Office, went after five acequias in the Peñasco area, insisting they needed special use permits to complete their rehabilitation projects, which were in danger of losing funding if not completed in a timely fashion. At a 2006 meeting in Peñasco Miera asserted that “maintenance” of acequias only includes removal of silt, reduction of erosion, maintaining water flows, and the replacement of a compuerta or presa that exactly replicates the structure being replaced. He claimed, for example, that replacing a presa made of logs and hay bales with gabions and cement, even in the same location as the previous dam, did not fall within regular maintenance.

Acequias, on the other hand, assert that work essential to the functioning of their ditches, that allows them to distribute the full amount of their allotted water rights, and remains within their easements should not be subject to Forest Service regulation. They rely on the 1866 Congressional Act that acknowledges the validity of existing easements without the necessity of a permit or other authorization. The Act states: “Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have bested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes of aforesaid is hereby acknowledged and confirmed.”

At the Peñasco meeting in 2006 Miera made it clear that the Forest Service was dismissive of Town’s 2001 letter and was relying instead on the Federal Lands Policy and Management Act (FLPMA) of 1976 that “includes the right to reasonably regulate the exercise of vested water rights and accompanying rights

of way obtained under the 1866 Act where such rights and rights of way lie within national forest.” In other words, even though parciantes have established easements and acequias, the Forest Service claims it has the authority to regulate them.

Several miles of the Abeyta-Trujillo Acequia, and its presa, lie within the El Rito Ranger District of the Carson National Forest. The acequia was forced to sign a 20-year permit with the Carson in 2012 for the first phase of a pipeline project.

The regulatory permitting process includes four steps: 1) submitting a SF 299 permit; 2) conducting a NEPA analysis; 3) obtaining a special use permit; and 4) implementing and monitoring the project.

According to commission treasurer Tim Seaman, however, the commissioners (the other commissioners are Cheryl Muceus and Pauline Hallock) signed the permit “under protest” as they believe the acequia should be allowed to do whatever is necessary to keep the ditch in repair without having to acquire a permit. In addition to the 1866 Congressional Act they are relying on a more recent USFS document, the US Forest Service Southwestern Region (Region 3) Manual, FSM 2700, at 2719.10.b, effective 05/15/2009, to support their position:

Routine Operation or Maintenance Activities Within the Scope of R.S. 2339 Right-of-Way. Acequias (irrigation ditches) in Arizona and New Mexico are vital institutions, critical to the health of local communities. Acequias that existed prior to National Forest reservation are afforded special rights and status under National Forest System Management. Under the Chief’s Policy relating to the Act of July 26, 1866 (Revised Statute 2339), continuing routine operation and maintenance of acequias is allowed without a special-use authorization being required.

They followed up the pipeline project with the “routine maintenance” of lining the remaining part of the ditch with a heavy plastic liner. Unfortunately, the liner failed during the 2013 irrigation season and the commission met with USFS representatives in August of 2013 to ask for emergency permission to complete the second phase of the project to replace the liner with pipeline.



Abeyta-Trujillo pipeline construction, 2012. Photo by Tim Seaman

The commission then submitted preliminary construction permits to the Forest Service for the second phase, requesting that the 20-year 299 permit be updated to include this part of the project. The project was completed in February of 2014 but shortly thereafter the Forest Service claimed the project was an “unauthorized construction project,” sent a criminal investigator to commissioner Seaman’s house, and sent a letter threatening to suspend or revoke the permit if the acequia did not complete extensive remediation by July 7, 2014. The commission maintains that the USFS failed to respond to its request in a timely fashion and needed to proceed with the second phase of the project in time for the 2014 irrigation season. The irony of all this, of course, is that the bureaucracy involved in the permitting process—evaluations that duplicated existing NEPA analyses and findings and would have never been completed in time to allow the acequia to replace the second pipeline section before the irrigation season commenced—is the root of the problem.

The Abeyta-Trujillo commission sent a letter to the New Mexico congressional delegation asking for help. Senator Tom Udall, former Senator Jeff Bingaman, and Representative Ben Ray Lujan’s offices have known about this issue for years; their staff people were at the 2006 meeting in Peñasco. This time around, Udall, Senator Martin Heinrich, and Lujan staff had already met with the USFS and requested a facilitated discussion between the Forest Service, the Abeyta-Trujillo Acequia Association, and the New Mexico Acequia Association (NMAA) to discuss the conflicting policies regarding the treatment of acequia maintenance and improvement. During that meeting the USFS informed the congressional staff

that the agency had just issued a demand for immediate remediation of recent maintenance activities within the Abeyta-Trujillo ditch and would not participate in a facilitated discussion with the acequia.

The delegation then wrote a letter to the Chief of the USFS, Thomas Tidwell, complaining about the Carson forest's position: "This apparently new, more inflexible stance from the Forest Service flies in the face of the Service's purported commitment to work more collaboratively with traditional users of the lands, such as land grants and acequias. We ask that your office assist in de-escalating the situation and engaging in discussions to find a path forward for reasonable acequia management that will not further strain relationships or lead to litigation."

A meeting took place earlier this week at the Rio Arriba County Chambers facilitated by the NMAA. Attendees included Regional Forester Cal Joyner and other USFS staff, representatives from the Peñasco area acequias with a history regarding this issue, and congressional staff. While everyone agreed there needed to be a better way to navigate this contentious terrain, there is still no consensus on what constitutes "maintenance" and what constitutes "improvements." The Acequia-Trujillo acequia agreed to the required restoration requirements and according to commissioner Seaman, the association will then terminate its 20 year Special Use Permit. The entire episode has embittered the commission, particularly the way in which the USFS conducted a "criminal investigation" that was disrespectful and insulting.

I contacted Representative Ben Ray Lujan's office regarding potential legislation to address this issue but haven't heard back; *La Jicarita* will follow up with any additional information we receive.

Addendum: During the course of this July 4th morning as I was preparing to post this article, two different neighbors complained to me about all the poaching of large diameter ponderosa pine and fir trees on the Camino Real Ranger District, particularly on U.S Hill and the El Valle Road. Apparently the USFS would rather spend its limited funding harassing acequia parciantes instead of setting up contract stewardship blocks for folks to harvest firewood in a sustainable fashion and use their "criminal investigators" to patrol the forests to prevent poaching and assist the local communities.