

Keeping Water on the Land

Water Banking and Other Conservation Tools for Acequias

I'm here to talk very specifically about two important statutes that were passed in 2003 regarding the ability of acequias to keep water rights within their ditch systems.

About 15 years ago, when the McCune Foundation was just beginning to solicit applications for funding, the Taos Valley Acequia Association went down to talk to them in their offices. The first question they asked was, "Are the acequias in Taos really alive and well?" Those were urban people, it was a little bit offensive. We didn't let them know it was offensive, but we did give them an answer to the question. The answer is, well, the acequias have been here, by now it's 406 years. Our full intention, our full expectation is that they're going to be here at least for another 406 years. Actually, as you see the pattern of development, contrary to popular belief, especially in urban areas of the state, the prospect that agriculture, especially acequia-based agriculture, will continue to thrive is a very good one. Acequias are very much alive and well. And even in a urbanizing area, we're finding that the pattern of development is really consistent with maintaining agriculture--and even traditional agriculture. A number of presentations this morning were very interesting from that per-

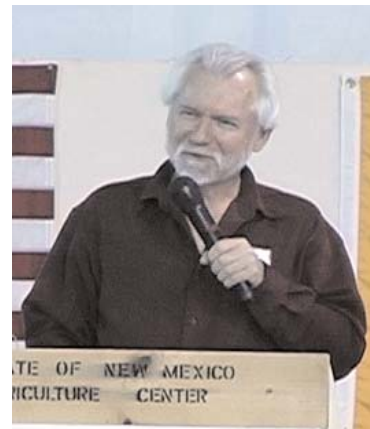
spective.

Residential development can be, in many ways, compatible with maintaining traditional agricultural practices. In the future, you're likely to see an increasing proportion of income, even within the Taos Valley, coming from agriculture. Agriculture and tourism are extremely compatible. I think the town of Taos and other urban areas in the state are just getting used to that idea. After all, what we do--what we have to sell, what we have for people to come and visit--is traditional agricultural communities and an ecosystem that is founded on traditional agriculture.

The Taos Valley is going to be here forever. The reason the Taos Valley as we know it is here in the first place is because the acequias spread out all the water and created this environment that's so attractive. So our first industry is tourism. Still, statewide our third industry economically is agriculture. People have gotten used to the idea over the past 30 years of viewing agricultural water as water that's basically being held in reserve for higher and better uses. Common perception still exists that as development increases in this poor state, as our needs for more urban residential uses and industrial uses increase, we have a ready

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source for all the water that's going to be needed for that development in the acequia system. In fact that's a very short-sighted point of view, and I believe I'm seeing some trends in the state to recognize that it is very short-sighted. Typically, New Mexico comes out either last, or next to Mississippi, as the poorest state in the country. We have a very high low-income population. That low-income population, which needs jobs, is by and large the agricultural population. Water is our most important resource in a desert area. That resource is still owned by the people who tend to be unemployed, underemployed and poor. So development of our agricultural resources is a most economical use of our water. Transferring it to new industrial uses, or industries like Intel, which are very water-intensive, really doesn't make sense if you're concerned with the public welfare in the State of New Mexico, if you're concerned with answering the problems of poverty. And when you are in a high-poverty state, that's not just a problem for the people who are poor, it's a problem for the state as a whole.

In 2003, two laws were passed that we in Taos have been working on for more than ten years to get passed. One is the Acequia Water Banking Law, and the other one is the Acequia Transfer Law. Let me give you a little bit of history about them, but first, the Water

Banking Law basically says that acequias have the ability to bank water rights. That is, they can take water rights that are temporarily being unused by some of the *parciantes* [people who have rights to an acequia], put them in the water bank, protect them from forfeiture for non-use, which includes forfeiture and abandonment, most likely, and redistribute that water for use among the other *parciantes* in the system. The law, passed in 2003, basically affirms water law that existed prior to the Treaty of Guadalupe of 1848. Under Spanish and Mexican law, which is still the law that applies to pre-treaty water rights, water was a community resource--the idea that you could sever water rights from the land and transfer it out of the community off the ditch didn't exist. The idea that you could take water from the community and put it somewhere else is a new idea, actually. When somebody wasn't using the water they were entitled to as members of their acequia association, what happened was that everybody else who was still using the water used that additionally available water. What this new water banking law says is that you can still do that, and when you do that, you will be able to protect your water right from loss from non-use. Very simple concept, but it took us a long time to get that explicitly recognized as state law. In the Taos Valley Acequia

Association, we started working on that about ten years ago. In fact, the McCune Foundation was one of the foundations that supported that project. We went through a number of stages of trying to get that done, adopted by the state and agreed to by the State Engineer. But it really was kind of a fluke that we were able to do it in the end. There was a provision in state forfeiture laws that said that acequias could create conservation programs, and people who put their water rights into a conservation program could thereby protect their water from forfeiture or non-use. The problem with that statute was that we were never able to get the State Engineer to acknowledge an existing conservation program. It was also kind of a baroque procedure, because it required acequias to adopt some unspecified conservation measures. You had to say you were committed to doing something with the water in order to be able to protect water rights from forfeiture and abandonment. We actually at one point did have a conservation program that was approved by the State Engineer, but something happened with the office whereby that approval just evaporated. We never got to the point of saying, "Okay these are the conservation programs the ditch is going to have to adopt."

So it really was not a desirable way of protecting water rights from forfeiture. In 2002, the legislature, in order to meet

water delivery requirements to the State of Texas under the Pecos River Compact, had to consider a bill put before them by the State Engineer that created water banks, created the ability for local water-management entities--including acequias on the Pecos River--do to water banking. When they went to the New Mexico Acequia Association for approval, we told them that wasn't really the kind of water banking we had in mind. What we'd been talking about is just something that acknowledges the way we traditionally do business, which is that if someone doesn't use their water for a temporary period of time, the mayordomo just redistributes the water available among the other *parciantes*. There's always a shortage on every ditch at some point in the season; it doesn't involve any waste of water rights. It does not involve anybody ceasing to use that water beneficially. You can't have a water right in New Mexico unless you're putting that water to beneficial use. If one *parciantes* is not using his or her water, everybody else in the system is using that water beneficially for the same purposes.

That's the essence of the acequia water bank, we told the State Engineer, so we just want to get you to acknowledge that. So we said, we can support this Pecos River bill if you allow us to define acequia water banking. They said, well, " we can do that. Then we went back last year and said, Well, the legisla-

ture's already accepted the principle, now we need to make this general and statewide. There was also a three-year sunset clause on the Pecos River bill. By that time, the State Engineer had looked at it and said, Well, we don't really have any problem with this. And we did get that bill passed. These two bills are probably the most significant acequia legislation that has ever been passed in the State of New Mexico. Generally, our statutes address little minor things; they're not always consistent with Spanish and Mexican law, but this is something that gets us much closer to where we were. In general, I think we're seeing a trend on the part of the Office of the State Engineer to agree with us that the whole idea of water management in this state is that the State Engineer will manage water up to acequia head gates, but below the head gate, they don't really care what the ditches do with their water. That's specifically the job and the responsibility of the acequia association. Acequias are political subdivisions of the State of New Mexico. Their function is to administer water within their service areas. The State Engineer is willing to let us do that.

The banking bill says that you can put your water right in the acequia water bank as long as it does not involve a change of the point-of-diversion--that is the actual head gate of the ditch--for the purpose of use.

As long as you're not trying to transfer your water off the land or put it into a non-agricultural use, a non-acequia-based use, you can do this and the State Engineer does not need to approve the program, does not need to approve your transaction with the ditch. It's an entirely internal, not external, procedure. It doesn't allow you to transfer your water right outside of the ditch, or to transfer it to a non-agricultural use. On reflection, the acequia associations in the state have said, "That's not a bad idea." Everyone has an interest in transfers because any transfer of a water right has the potential to impair somebody else's water right, especially on the same ditch. We're perfectly happy to have that go through a State Engineer procedure. It's not easy to transfer a water right. We don't really want to see much of that happening, and we don't want that to facilitate it. We like to see that remain a relatively difficult process.

So the State has accepted acequia water banking. What it means is that an acequia can just establish a program. We have been working for the last six months to develop documents that make it as easy as possible for an acequia to do that. We are acequia people, we know the limitations on our ability to maintain records, our ability to even get people to go to meetings, our ability even to get people to know when

they've changed the ownership of their water right. We know that the ditches don't have a big capacity for administration. The State Acequia Association has developed a water-banking document. It's a very simple document; it keeps paperwork to a minimum. What we're recommending is that water rights just be placed in the water bank. *Parciantes* can do that for a one-year period, then the relationship can be renewed annually. We just say, "Okay, fill out a document, tell what your water right is, identify where the property with the pertinent water right is, give it to the ditch and the ditch accepts it. And next year, if you want to take your water right out of the water bank, the ditch will remind you that you have that option. And if you don't say you're taking it out, it remains in there."

The actual period for your water right to be deposited in the bank is only one irrigation season. That's not too much to ask of the ditches, because they should be in touch with the *parciantes* once a year anyway, if only for the annual cleaning or the annual meeting. It's not too much to ask people to get back in touch with the ditch once a year in return for receiving the benefit of protecting their water right from loss. It doesn't involve any transactions at all. The legislation doesn't make that impossible, but it's not really the kind of thing we think most ditches are going to be

interested in doing. In general, ditches don't want to see water right commodified. This is to protect water rights and enable people to keep their water rights within the ditch, which preserves the ditch's ability to divert the same quantity of water.

Those are the benefits. This does not provide for the leasing of water rights by the ditch, or by the *parciantes*. If you want to lease water rights, even if the ditch wanted to lease water rights outside the community, they would have to go through the leasing statute. They would have to go through the existing State Engineer procedure.

We've developed a very simple format. The ditch, at its annual meeting, adopts the banking methodology, shows people this one-page form where they can say "Okay, I'm putting this water right, this amount of my water rights, in the water bank." That protects your water right from forfeiture, and it's very simple to administer. It doesn't provide for fees or anything like that. However, it does offer a very significant benefit. In New Mexico, your water right is subject to forfeiture if you fail to use it for four or more years in a row. Since 1965, the State can't just take it away without notifying you; they have to notify you that the State Engineer thinks you have not used your water right for at least four years--and from the date of receipt of that letter, you

have one year to make your water right good again by irrigating. That could catch a lot of people. The State hasn't started doing that yet; they haven't really started to put the squeeze on acequia water rights as we fear they may, especially as more and more areas of the state have their water rights fully adjudicated.

Acequias are one of the more organized political constituencies--we have a lot of power at the legislature, thanks to the fact that we have some very powerful legislators from the north. It's interesting to note that since we've gotten better organized, you find more and more recognition of the special status of acequia-based water rights, all of the special values, not only economic values but historical and cultural and ecological values, represented by the acequias. You're seeing acequias beginning to get excluded from proposals to make major, major changes in the way water rights are administered in the state. This year, for example, there are a couple of very important bills that they're looking at carefully, even though it's only a 30-day session at the legislature. One is critical management areas. This is a bill that provides for the State Engineers to designate critical management areas, areas where water rights are fully appropriated, a basin's been declared, and there's probably no groundwater available anywhere. For residential uses, it would

require that once an area's been designated as a critical management area, nobody can dig a private well anymore unless they transfer a water right from some other source.

Now that's basically a grab on agricultural water, because that's the only water there is. As it is, the state law right now allows everyone the right to dig a private well, with entitlement to a three-acre/feet per year quantity for their primary residence. There's been a lot of concern about that, and justified concern grows because lots and lots of people have been digging private wells. In most areas--rural areas in particular--we don't have community systems to provide for domestic wells. In a very rural state, a very big state with a small population, the right to have water through your domestic well is a very important right. However, in areas like Taos, which are still rural but has a lot of residential development in rural areas, there's a lot of pressure on the aquifers. Our aquifers are going down because there's too much demand. So it's very reasonable to say that we need some kinds of controls in these domestic wells, because the water's not available. And as new people come in, they have the same water right to domestic use as the people who have been here already, and so you're going to start impairing the long-term residents. We are seeing that in Taos County. What we're saying, however, is that

the solution to that is not to destroy the acequia system. The acequias are not a water buffalo for residential uses. The acequias embody too many values, including economic value.

As I said before, future economic development in Taos definitely involves a very significant agricultural component. It's a perfect area in which to do that, given all the cultural values and given the nature of tourism here. Value-added agricultural products--a thriving agricultural community--is very consistent with a premier tourism economy. So in this bill for critical management areas, which probably hasn't been fully enough vetted among all the interested parties and probably won't pass this year, there is an explicit exclusion from acequias. There's an expediency transfer process that the bill provides for, and it says specifically, "This does not include transfers from acequias." So there's an ability to protect acequias in that bill. The other bill you've probably heard something about, which also probably has not been fully vetted by the interested groups, is the one to create a user fee for water. Again, acequia uses are explicitly excluded. Other agricultural uses are not. So there's a real consciousness that acequia waters are unique; acequia waters are not just like all other agricultural waters, and it creates a political problem for us because we have good relationships with other agricultural

users, and we don't want to see them damaged, but there's a recognition of the importance of acequias. The other bill that was passed this year was the Acequia Transfer Bill. This bill essentially gives acequias a first crack at denying an application to transfer a water right off of or onto an acequia. It says that if somebody wants to transfer a water right off your ditch or transfer a water right onto your ditch, if your ditch has passed a bylaw that says that in general transfers may be detrimental to the ditch or its parciantes, the commission has the right to deny that transfer application. What you first have to do is pass the bylaw, and you need to be really careful about how you do it. You do it according to your existing bylaws, so that it's not subject to legal challenge as having been done arbitrarily or contrary to law. Pass the bylaw that says transfers of water rights may be detrimental, so that any applications to transfer must be approved by the commission. The commission will review that as to whether it's detrimental in an informal public hearing by the commission on the application to transfer. If the commission says it would be detrimental and does not approve the transfer, then the applicant for that transfer cannot even submit a water right transfer application to the State Engineer. The only entities excluded from that requirement of having first approval of the acequia before the transfer goes

to the State Engineer are Indian pueblos. Not even all Indian tribes, but Indian pueblos. This is a little more difficult to deal with administratively. You have to pass a bylaw that requires you to be extremely careful that you give due process to the applicant, otherwise the decision of your commission to deny a transfer is very liable to be contested.

The statute provides for appeal to the District Court. You still don't need legal advice to do that because acequia commissioners legally have the power to defend the interests of the ditch in court. The state acequia association has also developed a document for a water rights bylaw, and it's also available there, if it ever happens that you need to go through this procedure. We're willing to help you make sure that you do this in the right way and are as little subject to legal challenge as possible. Again, this goes back to the Spanish and Mexican viewpoint about the nature of acequia water rights. It's a community right. You can't just take your water right out of the ditch and put it somewhere else without that affecting the rest of the community, so it should be a community decision as to what happens.

Will acequias ever exercise this authority? Most likely, they will. Frequently, someone needs water for domestic use, and they have the ability to connect to the mutual domestic well in the community. Is the ditch

commission going to say that's detrimental? Most likely not, especially in view of the fact that one of the legal uses for acequia water is residential. Acequias have the power to manage water rights and water rights decisions at the local level.

That's a good way of looking at these two bills. They acknowledge that there will be changes in the nature of water use within a community. They grant that the decisions about this change should be at the community level, rather than by the State Engineer. They recognize the power of the communities to do their own planning about the use of this critical resource.

