

## Conflicting Norms in the Struggle for Communitary Governance in the *Acequias* of the Upper Rio Grande Watershed

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This paper offers extended commentary on the challenges posed by the law and ethos of prior appropriation, long dominant in the western United States as the foundation of water rights, for a newly resurgent commitment to communitary water conservation and management in the hispano *acequia* communities of the south central part of the State of Colorado, lying in the headwaters bioregion of the Rio Grande watershed known as the “Upper Rio Grande,” or the “Rio Arriba.” The historical succession of water rights regimes in the Rio Arriba *acequia* communities has involved a cycle of conquest and colonization beginning with an earlier phase of Spanish-Arabic, and later Mexican, law incorporating indigenous water practices and norms of Pueblo Indian cultures. After the American war against Mexico that ended in 1848, the legal institutions regulating land tenure and water use in this bioregion were defined by the Anglo-American law of appropriation, which after a brief period of accommodation of the earlier hispano communitary water institutions, imposed a unitary system of private ownership of water. (Hicks and Pena, 2003) That historical succession of water rights regimes, and especially the abrupt and often violent shift occasioned by the coming of the law of appropriation, has produced conflicting structures of right and duty that to this day compete for the allegiance of *acequia* water users. The *acequia* farmers live in a social and legal landscape defined by competing understandings of water. On the one hand, water is a privatized commodity under state law, saleable, and potentially uncoupled from locality. On the other hand, water is an in-place resource, created by the labor of *acequia parciantes*,<sup>i</sup> and allocated among them on the basis of need and equitable sharing, consistent with the older Hispanic law and with current *acequia* norms.

In earlier work (Hicks and Pena (2003) we have written about the uneasy relationship faced by the *acequia* communities of the State of Colorado between the formal system of appropriative water rights and the enduring local set of communal water norms grounded in practices developed under earlier Spanish and Mexican colonial law. In this paper, we wish to point that earlier work forward while reframing it to be of use to the current *Justicia Hidrica* project. Here we will describe the role of the historical pattern of rights accumulation, and the accretion of water norms within the *acequia* communities, as factors that will shape the future of *acequia* institutions in Colorado. We hope that this brief account of the dynamic and troubled relationship between conflicting sociocultural norms and water use rules in a particular landscape may speak to the challenges of achieving true pluralism in water institutions elsewhere.

At this writing, the Colorado *acequias* stand at an important crossroads. In April 2009, the State of Colorado adopted a new statute granting formal recognition to *acequias*, as political and operating entities, and providing qualified protection for some of the most distinctive and necessary features of *acequia* water governance and allocation. (Acequia Recognition Law, 2009) The legislation came after a long history of marginalization of *acequia* institutions. For more than a century, it had been wrongly understood that legal water rights in Colorado were always based on rights of prior appropriation, and that only this system was uniquely suited to water needs and environmental conditions in the state. (Hicks and Pena, 2003) That received history was never completely accurate, but it was asserted vigorously over the course of the decades and became a major underpinning of the law and ideology of water rights in Colorado. As a result, an essential part of the process leading to the adoption of the new *acequia* law was the re-representation to the Colorado legislature of the state's own water history as one including *acequias*, not as outliers or oddities, but as effective institutions, orderly, effective, true to place, and expressive of a valid culture of water. *Acequias* were thus, as a consequence of the legislative process, placed within a shared narrative of citizenship and civility, and the water and land ethic of previously disregarded communities of hispano farmers was recognized and celebrated.

But the earlier hegemony of the law of prior appropriation, and its vitality as the still generally prevailing law, continue to matter for the prospects of reviving *acequia* institutions through the new law. The content of the new law itself reflects that hegemony, and there is the additional challenge that the new law exists in a context of other laws and institutions that support the prior appropriation system or its values as elements of a comprehensive consolidated structure of rights and understandings of water justice that press constantly against the communal, place-centered norms of the *acequia*. This is to say that the recognition of *acequias* has come late in the day, as an exception to a strongly established structure of rights and values. The possibilities created by the new *acequia* law will be achieved only by swimming upstream against a rather strong current.

To better understand the nature of the challenge, let us begin with the actual language of the new *acequia* law. It is strong language, vivid and encouraging. But, as will be seen, it requires affirmative choice by *acequia parciantes* to translate *acequia* norms into legally mandated rules. It also limits the extent to which communal claims on water can diminish the prerogatives held by individual rights holders under the system of prior appropriation. Robust *acequia* institutions will be possible, but only through compliance with and accommodation to the requirements of the law of appropriation, the structure in which the *acequia* law is nested. Acequia associations will have to negotiate what accommodations are in order to guarantee that they can sustain a growing capacity for autonomy in the administration of water rights within their perceived jurisdictions. Here is the law, in its entirety:

Concerning The Recognition Of Acequias, And, In Connection Therewith, Authorizing Acequia Ditch Corporations.

*Be it enacted by the General Assembly of the State of Colorado:*

SECTION 1. Legislative declaration. (1) The general assembly hereby finds that:

(a) The first nonnative Americans to settle in Colorado were Hispanics from colonial Mexico, who brought with them their ancient irrigation practices based on a community ditch called an "acequia", pursuant to which water was treated as a community resource and allocated based upon equity and need rather than priority of appropriation;

(b) Colorado's territorial session laws from 1868, 1872, and 1874 recognized the validity of acequias within the counties of Costilla, Conejos, Huerfano, and Las Animas, including the requirement for irrigators to contribute labor to the upkeep of the acequia and a preference over other diversions for acequias' diversions regardless of priority;

(c) As the general assembly recognized in the following excerpt from Senate Joint Resolution 02-028, the continued operation of these historic acequias is an "essential foundation for the sustenance of the local economy":

"WHEREAS, Spanish American settlers founded the Town of San Luis in the Culebra Valley in 1852, thus making it the oldest town in Colorado; and

"WHEREAS, In keeping with their ancestors' acequias tradition, these settlers quickly initiated an irrigation system; and

"WHEREAS, The oldest water right in Colorado is attributed to the San Luis People's Ditch, with a priority date of April 10, 1852, in the amount of 21 cubic feet per second from Culebra Creek in Costilla County; and

"WHEREAS, Originally, the land adjacent to the Ditch was divided into strips approximately 100 yards wide and 16 to 20 miles long, allowing settlers to have irrigated farmland near the Ditch and also to have access to range and timber land, and today, the Ditch is 4 miles long and irrigates 1,600 acres of farmland; and

"WHEREAS, The San Luis People's Ditch has been continuously operated for irrigation purposes for 150 years, thus making it an essential foundation for the sustenance of the local economy; . . ."

(d) Upon adoption of Colorado's constitution, the prior appropriation system became the law governing water allocation; and

(e) The prior appropriation system is, in fundamental ways, inconsistent with the community-based principles upon which acequias were founded.

(2) The general assembly hereby determines that:

(a) Notwithstanding the constitutional establishment of the prior appropriation system, communities that were historically served by an acequia have used informal methods to continue to allocate water based upon equity in addition to priority and to treat water as a community resource; and

(b) Recognition by the general assembly of the continuing existence and use of acequias, while continuing to comply with the constitutional requirements of priority administration of tributary water, is critical to preserving the historic value that acequias provide to the communities in which they are located.

(3) The general assembly hereby declares that the purpose of this act is to promote and encourage the continued operation of acequias and the viability of the historic communities that depend on those acequias.

SECTION 2. Article 42 of title 7, Colorado Revised Statutes, is amended by the addition of a new section to read:

7-42-101.5. Acequia mutual ditch - definition - powers. (1) For purposes of this section, "acequia" means a ditch that:

(a) originated prior to Colorado's statehood;

(b) has historically treated water diverted by the acequia as a community resource and has therefore attempted to allocate water in the acequia based upon equity in addition to priority;

(c) relies essentially on gravity-fed surface water diversions;

(d) supplies irrigation water to long lots that are perpendicular to the stream or ditch to maximize the number of landowners who have access to water;

(e) has historically been operated pursuant to a one landowner-one vote system; and

(f) has historically relied on labor supplied by the owners of irrigated land served by the acequia.

(2) Subject to any contrary provision of subsection (3) of this section, the procedural and substantive requirements of this article other than this section that apply to the creation, powers,

duties, and governance of a ditch corporation subject to this article shall be deemed to apply to the creation, powers, duties, and governance of an acequia ditch corporation.

(3) An acequia ditch corporation may be organized pursuant to this article, and a ditch corporation organized pursuant to this article may convert to an acequia ditch corporation, if:

(a) at least two-thirds of the irrigated land served by the ditch is platted or organized into long lots, the longest axes of which are perpendicular to the stream or ditch;

(b) surface water rights provide all of the water rights used for irrigation in the ditch, and such water rights have had substantially uninterrupted use since before Colorado's statehood;

(c) the irrigated land served by the ditch is located wholly in one or more of the counties of Costilla, Conejos, Huerfano, and Las Animas; and

(d) as required pursuant to section 7-42-101, the stockholders of the ditch file articles of incorporation, or an amendment to the articles of incorporation, that state the stockholders' intention to create or convert to an acequia ditch corporation.

(4) an acequia ditch corporation, if its articles of incorporation so state, may specify in its bylaws that:

(a) its elections may be held pursuant to a one landowner-one vote system;

(b) owners of land irrigated by the ditch can be required to contribute labor to the maintenance and repair of the acequia or, in the alternative, to pay an assessment in lieu of such labor;

(c) water in the ditch may be allocated on a basis other than pro rata ownership of the corporation; and

(d) the corporation has a right of first refusal regarding the sale, lease, or exchange of any surface water right that has historically been used to irrigate long-lot land by the acequia.

**SECTION 3. Safety clause.** The general assembly hereby finds, Determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

To summarize the statute's principal elements: It recognizes *acequias* as among the oldest institutions in the United States for local self-governance of natural resources and situates them

as a vital part of Colorado's water history; and, it acknowledges their continuing relevance and effectiveness in the communities where they survive. It notes their typical governance rule of one-irrigator-one-vote, irrespective of size of land holding, and celebrates their distinctive water allocation practice in times of scarcity of affording access to water based on principles of equitable sharing and necessity. It acknowledges inconsistencies between the operation of the law of prior appropriation and the informal practices to which many *acequia parciantes* adhere. It views as a public good the promotion and encouragement of *acequias*. It then defines which irrigation systems shall be eligible to organize themselves formally as *acequia* "ditch corporations" and describes the rights and powers they will enjoy. Those rights and powers are specifically the right to hold elections on a one-landowner-one-vote basis, to demand labor or assessments to maintain the system, to allocate water within a given *acequia* on the basis of need and equity, and to enjoy a right of first purchase in the event of proposed private transfers of water historically used to irrigate land served by the *acequia*.

What is perhaps most striking about the new law is the tension between the very generous and embracing descriptions of historical *acequia* norms and practices and the rather constrained set of substantive powers conferred on the newly authorized *acequia* ditch corporations. In the all-important matter of being able to assure that water historically used on *acequia* lands will remain tied to those lands, the new corporations have a right under the new statute to purchase water proposed to be transferred, not a right to bar the transfer. That right to purchase, necessarily at a fair market price and within a reasonable period of time, is not the same as a recognition that *acequia* water is a communitary asset, created by and belonging to the *acequia*, with the irrigator having a usufructuary right to the water only during the time of his occupancy of the irrigated land. Such would have been the understanding under relevant Spanish and Mexican law (Hicks and Pena, 2003), but that scope of recognized communitary rights would have been completely inconsistent with Colorado's constitutional protection of individual water rights.

We wish to be clear that the conferral of a right to purchase is a significant new right, important because it recognizes the existence of community claims on water, but it does not represent a revival of the older Mexican communitary law. It is the product of an accommodation in which individual freedom to transfer is adjusted by giving *acequias* the first right of purchase, typically known as a "right of first refusal." The *acequias* will yet have to assemble the necessary money when they wish to buy these rights. Similarly, the statute's giving power to *acequias* to distribute water within their boundaries on bases such as need and equity rather than on the basis of legally decreed shares, asks very little of the generally prevailing law of water allocation. That is because all rights holders on a given *acequia* typically enjoy equal seniority of rights, so that any voluntary re-allocation among them would be within the structure of existing temporal priority and also without consequence for the structure of water priorities beyond the boundary of the *acequia*.

Further, the law is rather carefully couched in other respects, not only leaving intact the core structure of appropriative rights and making the creation of *acequia* ditch corporations a matter of election by irrigators, but arguably undermining something of the essential subversiveness of *acequias* with their long history of under-the-radar governance and off-the-board communitary water allocation practices. Thus the new *acequia* law offers legal recognition of heretofore informally constituted local water institutions, and supports more effective action by them as quasi-governmental entities, but at the cost of their absorption into the body of the law and of the possible loss of their virtues as voluntary and autochthonous associations.

Rutgerd Boelens has written compellingly of how dominant legal systems re-contextualize traditional and indigenous rights so as to achieve a “managed pluralism.” In this view, the very processes of recognizing and accepting the history, claims and rationales of traditional and indigenous peoples become engines for confining and reshaping those claims and rules and the ways in which they are constructed and understood. The very acts of allowing the claims of a cultural minority to find some protection and operability within the dominant legal system thus makes those claims subject to the dominant legal system, forcing them to present themselves as intelligible to the dominant system and in its terms. (Boelens, 2009) Even considering that the originating culture is not a static thing and that it will continuously remake its practices and norms adaptively, the risk is that a managed pluralism will capture the process of adaptation.

Yet in spite of the deeply ambivalent ideology of the new *acequia* law and its only qualified commitment to the restoration of *acequia* governance and protection of *acequia* norms, this law may be a fitting tool, and perhaps the most realistic tool, for achieving a robust revival of *acequia* practices and the restoration of *acequia* watershed landscapes. It creates room for *parciantes* of individual *acequias* to renew their commitments to communal governance, and by speaking respectfully of *acequia* institutions invites water rights holders to revisit their commitments to the prior appropriation system and its logic of water as commodity. The law is not altogether true to the original premises of *acequias*, but it may yet be a valuable tool for retrieving *acequia*-hood and mediating the contradictions between individual and collective flourishing within present-day *acequia* communities. The pre-existing Hispano water regime would have been a constitutional impossibility in any case under modern Colorado law, and perhaps more alien than might be supposed to many *acequia parciantes*, products as they are of a lived water culture that includes both communitary values and individual rights. In the following paragraphs, we will describe the operation of those tensions and the possibilities the new law may offer for the protection of communitary water values and the restoration of the physical and social landscapes of the *acequias*, in spite of its limitations.

On the ground, as it were, there is a wide range of issues presenting immediate challenges and opportunities for *acequia* communities in re-knitting their social and physical landscapes. Each of them is the product of pre-existing commitments that the law has made to structures of public and private rights at odds with the restoration of strong *acequia* institutions. Indeed, there are so many threats to the endurance of *acequia* institutions that most of the will and capacity for

activism within *acequia* communities is being focused on addressing those chronic threats, not on mobilization to take advantage of the possibilities represented by the new Recognition law. Among the more serious threats are: (1) accelerating land development within critical and sensitive watershed areas; (2) a newly emerging possibility that the 80,000-acre historical montane commons constituting the watershed and snowshed for *acequia* irrigation waters, and known locally as La Sierra, might be purchased by the federal government and managed as a National Forest; (3) continued defections from the norms of *acequia* self-governance among newcomer *parciantes*; (4) lack of communication between the directors of the *regional acequia* association and member *parciantes* as a result of weak institutional capacity and engagement; (5) lack of investment of energy and commitment by *parciantes* in governance and management of irrigation systems; (6) the need for education of *acequia* leadership and *parciantes* on the content, meaning, and political possibilities of the new Recognition law. Considered as a group, these challenges arise from the set of private and public land and natural resource laws that govern watersheds in the American West, and from the atrophied commitment to *acequia* institutions that *parciantes* feel in a landscape that can seem diminished and beyond their control. The challenge to be faced is plainly one of renewed and effective engagement. It is beginning to occur, fraught as it may be, as the following examples indicate.

**Acequias in Land Use Politics.** Recent events in the watershed, have led to increased concern among members of the principal Colorado syndicate of *acequias*, the Sangre de Cristo Acequia Association, on the need to participate in and transform the application of the county's land use code and comprehensive plan to address incompatibilities between threatened uses of lands and the landscape management needs of *acequias*. The Association is particularly concerned with approved and planned subdivisions in sensitive areas deemed essential to acequia functioning and the maintenance of watershed quality and wildlife habitat values.

The current struggle against subdivisions is an important one since it will partly determine the conditions under which *acequias* will operate in the future, but it is also one that diverts energy away from plans to implement the new Recognition law. Instead of devoting attention to a "Congreso de Acequias de Colorado" (Colorado Acequia Congress), the Association and its directors are focused on revising and strengthening the land use code to protect the watershed and *acequia* water rights. One particularly interesting effort focuses on discussions with the county planning office to amend the land use code. This would involve designating the Sangre de Cristo Association as a bonafide "referral agency" that can participate in the process of reviewing permits and also issue expert advice to the county land use office and commissioners on the impacts of proposals for land use changes and subdivision developments. It is currently being argued that the new Acequia Recognition law provides the legal rationale for the addition of acequia associations as referral agencies that can directly and officially engage land use and planning matters at the county level. Furthermore, the new Recognition Law does not include original provisions that would have allowed the acequias to form "Acequia Conservancy

Districts,” or alternately to convert existing Conservancy Districts into Acequia Conservancy Districts. Conservancy Districts are important political subdivisions in rural life in the United States, with taxing power and rights of consultation. Had the final draft of the law included these provisions then *acequias* would not have to battle to participate as referral agencies in land use decisions of relevance to acequia functioning and watershed management.

La Sierra: Private, Public, or Common Property? The watershed for the *acequias* in the Culebra River villages is the only one in Colorado (and indeed the entire Southwestern U.S.) that is currently under complete private ownership. La Sierra (Mountain Tract), as the 80,000 acre area is locally known, is one of the last remaining tracts of land in the Sangre de Cristo Mountain Range that is not part of the public domain owned and managed by state or federal government. However, despite being privately owned, these lands are also part of the historic common lands of the Sangre de Cristo land grant (issued in 1843 and settled in 1851). In a unique, precedent-setting decision, the Colorado Supreme Court ruled in 2002 in the case of *Lobato v. Taylor* to recognize the traditional use rights of the heirs and successors of the original Mexican land grant community, rights which had been opposed for many years by the private owners of the land. The decision means that although the lands are privately owned they are subject to the use rights, to gather wood and to graze livestock, of some 500 families that maintained these rights over the generations. The court’s ruling has compelled a *modus vivendi* between the private owners of the Mountain Tract and the local holders of commons rights, and a working relationship has been arrived at, though not without difficulty.

One of the consequences of having regained rights of access to the historic community commons has been to strengthen awareness among *acequia parciantes* of the need for good management of the Mountain Tract to assure the protection of the watershed and the value of commons rights. However, Ken Salazar, President Barack Obama's Secretary of the Interior and a native son of the San Luis Valley, visited San Luis this on August 28 of this year to participate in the dedication of the newly designated "Sangre de Cristo National Heritage Area" (SCNHA), and while there made a bombshell announcement: The federal government was actively planning to purchase all of the privately-held high mountain estates in the Sangre de Cristo Mountains in southcentral Colorado and northcentral New Mexico. Obviously, the families that have only recently won recognition of commons rights are now concerned that their life-long sacrifices and cherished traditional resource rights will once again be trampled, now as the result of a proposed "federalization" of La Sierra Commons. Local *acequia* farming families fear that even if the Obama Administration and Secretary Salazar make a deal that includes respect for and security of these historic use rights, the political reality is that when and in the event that Republican conservatives retake the Presidency and Congress those rights will likely be challenged and undermined. It has happened before and some local residents are pledged to engage in direct resistance to prevent a public domain enclosure that fails to secure and respect the historic use rights in perpetuity.

Others fear that the conversion of La Sierra to the public domain will close off the dream shared by the majority of the heirs to directly purchase the lands through a community land trust. This too has a precedent in the form of the Rio Costilla Cooperative Livestock Association (RCCLA) that wisely gained ownership control of a significant chunk of a southern portion of the Sangre de Cristo Land Grant in New Mexico.

Some heirs point out, rightly in our view, that the experience of Chicana/o people with federal ownership of lands once subject to rights arising under Mexican or Spanish land grants, has been anything but positive. They point to the bitter and tragic experiences of the *acequia* and land commons communities whose common lands were absorbed into the Vallecitos Sustained Yield Unit of the Kit Carson National Forest. Those communities' old-growth Ponderosa forests were destroyed by outside corporations, and they found themselves harassed by environmentalists who tried to shut down the traditional resource rights they had exercised and fought to protect for more than six generations. The management of federal forest lands has typically been driven either by the insistence of industry for destructive and non-sustainable resource extraction or by the efforts of environmental advocates to protect forest lands through preservation. Neither agenda has proved congenial to protection of use rights by Hispano farmers and ranchers, and the United States Forest Service has usually been backward in following its own regulations to invest in stabilizing traditional rural, cash-poor, and resource-dependent communities, communities that are capable of being effective stewards of the land.

This looming conflict, complicated by the labyrinthine legal and political context, is also diverting attention from the effort to implement the Acequia Recognition law. However, *acequia* association members have decided that unless the watershed is protected, and eventually re-established as a commons managed by the community of *acequias*, then no amount of legal recognition under state law will make a difference in the survival of *acequia* systems. The federalization of the lands, and especially the rumored creation of a national heritage park, would probably spell the end of the local farming community since this would bring unprecedented levels of pressure for development of and investment in private lands bordering the proposed federal lands. Those pressures would likely drive out many of the multigenerational farm families. This is exactly what has transpired in other communities where the public domain has brought not just extractive industries like mining and logging but second-home amenity industries that drive the price of farm lands to speculatively high levels and thus undermine local farming systems. However, there are other voices that point out how subdivisions are already crawling up the watershed and affecting *acequia* functioning and sensitive habitat or wildlife movement corridors. They further note that public domain designation would at the very least stop the subdivision threat from further undermining *acequia* and watershed integrity.

Defections from *Acequia* Customary Practice. A recurring threat to the *acequia* institutions of southcentral Colorado stems from the defection of *acequia parciantes* from the customary rules governing management of water flows. We have reported on this previously (Hicks and Peña 2003) and again note how the persistence of *acequia* self-governance depends on informal

commitments among irrigators to maintain the usually unwritten rules for the apportionment of water rights on community ditches. These conflicts have previously involved non-Hispano (usually Anglo) newcomers who misunderstand or frown on *acequia* practices as antiquated and inefficient. However, the more recent iteration of these conflicts involves another Hispano landowner. The case is a troubling sign of conflicts to come since the irrigator is someone who grew up in an *acequia* community but who is nonetheless willing to engage in activities that are detrimental to the survival and functioning of the *acequia* system.

The current conflict involves the unauthorized construction of *presas* (earthenwork dams) by the new landowner. In a letter written to the landowner by the President of the Sangre de Cristo Acequia Association, the local irrigators make a plea for conformity with *acequia* norms. The language of the letter illustrates the complexity of this problem and the importance of shared governance and mutual aid as central to the organization of *acequias* and is worth quoting at length:

The issue I am writing to you involves a very serious violation of both Colorado state law and the rules and norms of the Acequia de San Francisco. Specifically, we object to the construction of two earthen dams (*presas*) on your *vara* strip in San Francisco for purposes of creating ponds to water your livestock.

I will note that the use of ponds is incompatible with acequia functioning and this is one reason no one around here has constructed *presas*. It is contrary to ecological conditions and customary rules and practices.

Furthermore, our water courts have verified that pond construction either requires a separate adjudicated water right and this has proved difficult in an over-appropriated context, or it requires that the *parciante* (shareholder or irrigator on an acequia) must dry a corresponding amount of acequia flood-irrigated acreage before shifting the use of a decreed right to the watering of domestic livestock.

As you likely know, the historic acequias of the Culebra watershed, like those in northern New Mexico, have customary laws and regulations that were recently embraced as legitimate and enforceable under the State of Colorado's HB-09-1233, Acequia Recognition (short title). We consider your actions to also be in violation of these customary laws and regulations.

The letter goes on to propose in a "neighborly" fashion that:

There are alternative, more cooperative and non-confrontational ways to address the issue of livestock watering over the winter. Your neighbors traditionally share use of an alternative acequia for stock water until freezing stops the flow in winter. After the freeze, we all have to use our well pumps or we have to haul water to the livestock... We prefer to persuade you that the proposed use is not consonant with acequia values/practices. We are all very attentive to receiving our continuous flow rights, and too many compuertas and vara strips are downstream of your property.

It seems especially noteworthy that the local efforts to control defections and enforce compliance with *acequia* norms involves negotiating directly with landowners instead of immediately turning to the use of more formal legal instruments and institutions. This preference for traditional forms of face-to-face normative coercion may have worked in the past when most irrigators were members of multigenerational farming families, but changes in ditch membership may make this more difficult as an increasing number of newcomers reject these norms and insist on a more formalized legal resolution of the disputes. Again, the implementation of the Recognition Law could go a long way toward the “codification” of the historically applied informal norms so that they lend a more formal and institutionalized capacity as enforceable law. However, some *parciantes* are averse to this codification and prefer that the normative order of the *acequia* remain a local place-based matter. They fear that codification will make *acequias* and the rules of harmonious *acequia* functioning “too well known” and therefore subject to outsider-led revision and misappropriation.

Implications of Elinor Ostrom’s Winning of the Nobel Prize. Those of us who are concerned with the recovery and restoration of the "commons" as a matter of environmental justice were both surprised and delighted that our colleague, Professor Elinor Ostrom of the University of Indiana, was awarded the Nobel Prize in Economics for 2009. In making the case for Ostrom’s award, the Royal Swedish Academy of Sciences noted that:

In her book *Governing the Commons: The Evolution of Institutions for Collective Action* (1990), Elinor Ostrom objects to the presumption that common property governance necessarily implies a "tragedy." After summarizing much of the available evidence on the management of common pools, she finds that users themselves envisage rules and enforcement mechanisms that enable them to sustain tolerable outcomes. By contrast, governmentally imposed restrictions are often counterproductive because central authorities lack knowledge about local conditions and have insufficient legitimacy. Indeed, Ostrom points out

many cases in which central government intervention has created more chaos than order.

What is truly significant here is that it now becomes more difficult for opponents of Chicana/o and Native American livelihood rights to use the same old tired and washed-out ideological argument about the "Tragedy of the Commons" to negate the effectiveness and sustainability of commons management of natural resources. Indeed, that theory has been advanced by the proponents of the federalization of La Sierra to argue against local community ownership and stewardship of this "Last Commons." It is our expectation and hope that the Obama Administration will itself "think outside the box" and seriously ponder the possibility of a third pathway to resilience, social justice, and sustainability and endorse the establishment of what some local people envision as a protected "inhabited wilderness."

There are clearly problems with the type of environmental ideologies that pose either "private" or "public" lands as the two options before us. The third path, encompassed by the idea of the commons, has been proven through anthropological research to be a viable alternative and, in this context, one that would go much further to advance the principles of environmental justice that have become the hallmark of acequia land and water ethics.

Conclusion . While the perpetuation of local, place-based knowledge is essential to the long-term functioning and flourishing of *acequia* irrigation communities, this narrative indicates how much the prospects for *acequias* are situated in a landscape defined by law and the social consequences of law. The Acequia Recognition law is a meaningful change, but recent board meetings of the Sangre de Cristo Acequia Association attended by the second author reveal the scope of challenges facing *acequia parciantes* and their leaders.<sup>ii</sup> After a brief reading of the law, board members expressed elation and satisfaction that, "Finally, the government is starting to understand our way of life," as the Board President phrased it. However, the Board members were unanimous in their disappointment that the final draft of the law had failed to include the Conservancy District provisions. Many of them sensed that the law did not go far enough. A particular concern is the issue of banning the transfer of water rights away from the *acequias*. All the members understood that the law may celebrate *acequias* as a part of the cultural and historical heritage of the state but that it fails to respect and reintegrate vital aspects of customary practice. There is awareness that *acequia* law and the prior appropriation regime are incompatible and that some sort of accommodation is yet to be realized. Educating *parciantes* about the limitations and opportunities afforded by the law is understood to be vital as a foundation for effective future mobilization to strengthen *acequias*. And yet it is known that winning and sustaining the commitment of *parciantes* to make themselves available for the work that must be done to strengthen institutional capacity will be a continuing challenge. There is a wish to move forward with a Congreso de Acequias as a foundation for solidarity and for action, and to begin the long process of incorporating the *acequias* as ditch corporations under the Recognition law as a tool for mobilization, though the law is known to be imperfect.

As the Colorado *acequia* associations take their next steps, the strength of the ideology of the dominant law of prior appropriation will be of great consequence. It will be part of the context that shapes how the courts will choose to read the *acequia* statute, defining the extent to which a true pluralism of water institutions and water values will be allowed to exist in Colorado. And it will be part of the political and social context within the *acequia* communities as they and their individual *parciantes* make their decisions about whether to embrace the power conferred by the statute to move a bit closer to the communal management of water and watershed that existed when the *acequias* were first established.

## References.

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<sup>i</sup> The *acequia parciantes* are the members of the community of users who build and maintain a ditch and who share in its waters.

<sup>ii</sup> In the interests of full disclosure, please note that the second author of this article is a member of the Acequia Association Board, elected to serve a full term beginning in August 2009.