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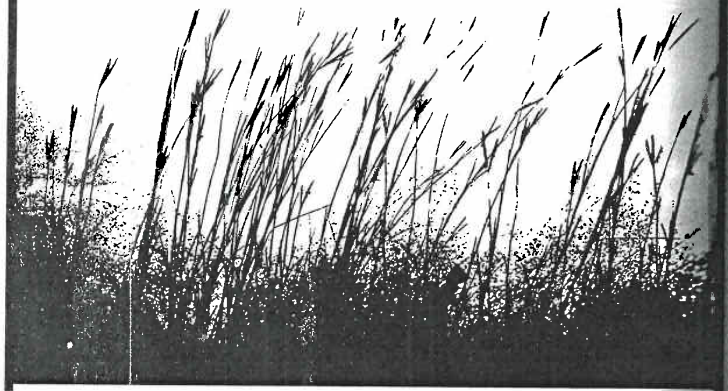

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COLONIAL LATIN AMERICAN HISTORICAL REVIEW

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THE OLD WORLD AND THE NEW

family's ranch south of Albuquerque in 1770. He grew to manhood, first among the Comanches, and later with the Taovayas of northeastern Texas to whom he was traded after the death of his Comanche mother. In July 1784 he escaped from the Red River village of the Taovayas and, at age twenty-two, presented himself at the presidio de San Antonio de Béxar dressed as an Indian with lacerated and tattooed eyelids. Articulate in Spanish and Indian languages, he then began a long career as an interpreter and intermediary of Spaniards with the Amerindians of the northern frontier.[57]

The Spanish policy and practice of rescuing and ransoming Spanish and Amerindian captives, while humane and sensitive on the one hand, introduced problems on the other, such as reincorporation into Spanish society after rescue and ransom, and whether or not it encouraged both Amerindians and Spaniards to raid one another for economic profit, thereby promoting hostilities. It should also be noted that while in captivity, Spanish captives evidently were not always killed but incorporated into Amerindian society, and those who returned to Spanish society undoubtedly faced emotional and psychological problems. Certainly the exchanges of captives in each other's control served to blur societal and cultural relations on the northern frontiers, thereby contributing to a growing multicultural society.

Rescue and ransom of Spanish captives may be considered the first two steps of restoration to Spanish society and relief for the anguished families and friends of the released captives. Widely practiced in Nueva Vizcaya and New Mexico, rescue and ransom of Spanish captives, although neglected or ignored by most historians, formed a basic policy on the northern frontier of New Spain that continued long after Spain's presence there ended.

[57] Elizabeth A. H. John, ed., Adán Benavides, trans., "Inside the Comanchería, 1785: The Diary of Pedro Vial and Francisco Xavier Cháves," *Southwestern Historical Quarterly* 98 (1994):27-28.

The Spanish Colonial Legacy and the Role of Hispanic Custom in Defining New Mexico Land and Water Rights

DANIEL TYLER

Customs have long played a role in determining the diversion, distribution, and utilization of water in northern New Mexico. They reflect the relative isolation of the Hispanic people from centers of law and learning, their dependence on each other in cooperative communities based on irrigated agriculture, their close relationship with the Pueblo Indians, and the realization of local officials that negotiated compromises in times of conflict were necessary in order to maintain rural harmony. Due to the power of local customs in resolving water disputes, Hispanic New Mexican governors tended to distance themselves from situations best understood and resolved by those closest to the land. Users of water from the many acequias tended to work out their own system of equitable apportionment, especially when shortages occurred late in the growing season or when a sustained drought plagued the community. They did not deny their long Spanish legal heritage which viewed the best water right as one deriving from a royal decree (*merced de agua*) or an administrative procedure known as a *repartimiento de agua* (an administrative procedure for allocating water, labor, etc. in Spanish and Mexican periods). But because their connection with officials who bestowed these decrees was so tenuous, and because their own survival depended to such a great extent on mutual cooperation, they developed customary procedures regarding water use and water sharing that were acknowledged by succeeding generations as having the force of law.[1]

[1] See Santiago Oñate's Memorandum on the Water Rights of the Pueblo of Taos, NM, August 1989, prepared for the United States on behalf of Taos Pueblo. After reviewing Spanish and Mexican commentators' views of sixteenth-, seventeenth-, and eighteenth-century law, he concludes that *repartimientos de agua* were generally

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These customs have exacerbated the challenge facing present-day New Mexican authorities adjudicating water rights priorities on all of the state's streams and acequias. The state would like to assign a priority date to each acequia system so that in the event of a demand for water from Texas and Mexico (downstream call) on the Pecos or Rio Grande Rivers, it would be clear which junior appropriators would have to cease diverting in order to satisfy out-of-state treaty obligations. Acequia associations have resisted the state's attempt to force a priority system on ditches, arguing that an adjudication process based entirely on this principle would destroy the customary practice of sharing water. A locally managed system of equitable apportionment, they point out, has long proved fair and flexible, capable of adjusting to changing needs and conditions. If the state were to succeed in its attempt to date every ditch, the socioeconomic viability of northern New Mexico would be irreparably damaged. Acequias with early dates would sell their water to the highest bidder. Land would dry up; people would leave.[2]

The state, on the other hand, is wary about giving too much credence to the role of custom, even though the 1848 Treaty of Guadalupe Hidalgo promised to respect Mexican property "as if the same belonged to citizens of the United States" (Article 8) and to maintain and protect Mexicans who stayed in the United States "in the free enjoyment of their liberty and property...." (Article 9).[3] Historians David Griswold del Castillo and Donald C. Cutter argue that Mexican property, land in particular, has not been properly protected

considered to be "quasi-judicial decrees" which were never final and could be modified. Theoretically, Oñate concludes, either a *repartimiento* or a *merced de agua* was required in order for a private citizen to legally divert and apply water for irrigation. As will be seen, however, the theory did not work in practice in northern New Mexico.

[2] In his informative book, *Mayordomo* (Albuquerque: University of New Mexico Press, 1988), Stanley Crawford discusses the potential for socioeconomic dislocation in one northern New Mexico valley. Based on his own experience as "ditch boss," Crawford concludes that if the state continues to insist on adjudicating acequias according to the prior appropriation system, water will no longer be shared and the tightly knit community will break apart. Another excellent source is Frances Levine, "Dividing the Water: The Impact of Water Rights Adjudication on New Mexican Communities," *Journal of the Southwest* 32 (1990):268-77.

[3] Hunter Miller, ed., *Treaties and Other International Acts of the United States of America*, 10 vols. (Washington: U.S Government Printing Office, 1937), 5:217-2

by this treaty, but attorney-historian G. Emlen Hall points out that the treaty can only protect property rights which were perfected or vested at the time it was signed. If Mexican water rights had set priorities or fixed quantities not subject to control by the Mexican government, Hall argues, treaty provisions would apply.[4] "If resource allocations were anything, they were sovereign acts, apportioning and reapportioning public property among private licensees." What this means, Hall concludes, is that the transfer of sovereignty in the Treaty of Guadalupe Hidalgo required that the United States, through its own institutions, would determine the rules of resource allocation in the Southwest after 1848. Not everyone agrees with Hall, so the debate continues.

It should be noted that, aside from the treaty, the state is obligated to protect customary Mexican water usages by virtue of its own 1907 water code. Section 72-9-2 states that in cases "where local or community customs, rules and regulations have been adopted and are in force...such rules and regulations shall govern...and such customs, rules and regulations shall not be molested or changed, unless so desired by the persons interested and using said custom or customs...."[5] The nature of these customs remains ambiguous as does how they developed under Spanish and Mexican laws in New Mexico. Have they been static, have they changed with the passage of time, and are they useful in helping to determine when ditches first diverted water for beneficial use, an essential part of current New Mexico water law?

As defined in *Black's Law Dictionary*, custom under English common law is "a usage or practice of the people, which, by common adoption and acquiescence and by long and unvarying habit, has

[4] Letter, G. Emlen Hall to the author, 22 March 1995. In a 1991 essay, Hall described several theories articulated by legal historians to explain the nature of Spanish water rights prior to 1848. He concluded that: "Whatever ambiguity there is in the enforceability of strictly treaty guarantees may be cured by the acknowledgement of water rights in local law." See "Shell Games: The Continuing Legacy of Rights to Minerals and Water on Spanish and Mexican Land Grants in the Southwest," Proceedings of the Thirty-Sixth Annual Rocky Mountain Mineral Law Institute held in Santa Fe, NM, 19-21 July 1990, 35. For a defense of the Treaty of Guadalupe Hidalgo as protector of Mexican land and water rights, see David Griswold del Castillo, *The Treaty of Guadalupe Hidalgo: A Legacy of Conflict* (Norman: University of Oklahoma Press, 1990), 91, 107; and Donald C. Cutter, "The Legacy of the Treaty of Guadalupe Hidalgo," *New Mexico Historical Review* 53 (1978):305-15.

[5] Article 9, Application of Water Act of 1907, in Section 72-9-2, *New Mexico Statutes 1978, Annotated*, 63.

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become compulsory and has acquired the force of law with respect to the place or subject-matter to which it relates." It results from a long series of actions, constantly repeated, which have, "by such repetition and by uninterrupted acquiescence, acquired the force of a tacit and common consent." According to Black, custom is distinct from usage in that the latter is also a repetition of acts, but is not necessarily recognized as the law. "[W]hile there may be usage without customs, there cannot be a custom without a usage accompanying or preceding it."[6] Because Spanish and Mexican officials occasionally qualified grants of land with the phrase "*según los usos y costumbres*" (according to uses and customs), it is clear that they also distinguished between acts that were repeated from time to time and those that had developed the force of common consent. For officials with the power to make land grants, it was important to warn the grantee that local customs generally had to be respected.

Legal philosophers who have studied the role of custom in many societies have come up with definitions similar to those stated above. Burton M. Leiser emphasizes that custom and law need not be compatible, that custom can actually be a source of law, possibly assisting judges who are interested in discovering what the operative law actually is.[7] Others conclude that custom is obeyed because it is intertwined within a network of interrelationships, enforced as a form of social morality in the absence of political sanctions. The more primitive the society, the greater the possibility that property ownership, social status, and inheritance will be settled by customary law. The resort to legal process is so difficult to obtain in primitive societies and so costly to the impoverished inhabitants that custom obtains the force of law. To be enforced by the sovereign, however, these customs must be clear and certain, reasonable and immemorial, continuous and undisputed. If they meet these criteria, and do not contradict existing

[6] Henry Campbell Black, *Black's Law Dictionary*, 5th ed. (St. Paul: West Publishing Company, 1979), 347.

[7] Burton M. Leiser, *Custom, Law and Morality: Conflict and Continuity in Social Behavior* (Garden City: Anchor Books, Doubleday and Co., 1969), 4, 20, 40, 43, 46-48, 63-65, 97, 121-22, 136, 138-39, 159-62.

statutes, customs may be formally sanctioned as lawful, because in one sense, they are already the law.[8]

Spanish and Mexican lawmakers and jurists seem to have followed these general principles before, during, and after the occupation and settlement of New Mexico. The first major Spanish code, the *Fuero juzgo*, promulgated by the Visigoths in the seventh century, "gave formal sanction to the continuing power of customary law" and remained "Spain's principal code of laws until it was replaced in 1255 by *Las siete partidas*."[9] In partida 1, title 2, laws 4-6 of *Las siete partidas*, custom is defined as an "unwritten law established by usage during a long space of time...." As such, all inhabitants of a place, without distinction, were eligible to establish a custom whose force was seen as "very great" when custom was founded on reason. According to Law 6, custom could resolve disputes in the absence of law. It could also serve to explain the law and to repeal it under certain circumstances.[10]

In the 1681 *Recopilación de leyes de los reynos de las Indias*, many laws specifically required protection of the traditions and practices of Native Americans resident in New Spain. The need to preserve and respect Indian customs gave custom a role that was often more powerful than the law itself. Mexican writer Guillermo F. Margadant has recently observed that Indian irrigation practices, for example, were considered so commendable that Spanish officials urged

[8] See Paul Radin, *The World of Primitive Man* (New York: Schuman, 1953), 223, as cited in Donald Black and Maureen Mileski, *The Social Organization of Law* (New York: Seminar Press, Inc., 1973), 320; T. S. Rattray, *Ashanti Law and Constitution* (London: Oxford University Press, 1929), 286, also cited in Black and Mileski, *The Social Organization of Law*, 330; Gilbert T. Sadler, *The Relation of Custom to Law* (London: Sweet and Maxwell, 1919; reprint, Littleton: Fred B. Rothman Co., 1986), 27, 61, 85.

[9] Richard L. Kagan, *Lawsuits and Litigants in Castile: 1500-1700* (Chapel Hill: University of North Carolina Press, 1981), 23, as cited in Malcolm Ebright, *Land Grants and Lawsuits in Northern New Mexico*, ed. John R. Van Ness (Albuquerque: University of New Mexico Press, 1994), 12.

[10] Partida 1, title 2, laws 4-6, in *The Laws of las siete partidas, Which are Still in Force in the State of Louisiana*, trans. L. Moreau Lislet and Henry Carleton, 2 vols. (New Orleans: James McKaraher, 1820), 1:13-14. Malcolm Ebright called to this writer's attention that the section on custom in *Las siete partidas* follows directly after sections on God and the king.

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colonists to emulate them.[11] Historian Richard E. Greenleaf went so far as to conclude that Spanish customs actually "conditioned legal practice in remote areas of the empire, especially in northern New Mexico, rather than Hapsburg absolutist legal theories contained in the *Recopilación*."[12]

In the middle of the nineteenth century Mexican Mariano Galván y Rivera wrote that local behavior patterns could overpower statutory law. He concluded that when the use of water on a stream is greater than the potential flow, the fairest method of distribution is to totally disregard the respective dates of each *merced de agua* and apportion water to everyone in such a manner that all would share equally in the gain and loss.[13] During the same time period the Spaniard Joaquín Escriche published his *Diccionario razonado* in which he defined custom as a regular practice, acquiring the force of law or becoming an unwritten law by frequent use. In order for uses to become customs, however, they must be practiced constantly by a majority of the people during a period of "ten to twenty years." When this condition occurs, he argued, custom has the force of law and takes effect not only when there is no law in opposition, but when previous laws are opposed to the recognized custom. A custom ceased to exist when another custom replaced it or when a new law destroyed it.[14]

He might have added a final generality identified by an eminent Spanish historian, Raphael Altamira y Crevea, at the turn of the twentieth century. When people feel isolated, they tend to rely on their ancient customs. These customs become the law in respect to the family, in relating to the use of arable land, works carried out jointly by community members, and the "distribution, apportioning and sale

[11] Guillermo F. Margadant, "El regimen de aguas en el derecho indiano," in Francisco de Icaza Dufour, *Recopilación de leyes de los reynos de las Indias*, 4 vols. (Mexico: Miguel Angel Porrua, 1987), 4:510.

[12] Richard E. Greenleaf, "Land and Water in Mexico and New Mexico 1700-1821," *New Mexico Historical Review* 47 (1972):86.

[13] Mariano Galván y Rivera, *Ordenanzas de tierras y aguas...* (Mexico: Imprenta de Vicente G. Torres, 1842), 138.

[14] Joaquín Escriche, *Diccionario razonado de legislación y jurisprudencia* (Paris: Librería de Rosa, Bouret, 1852), 521-22. See also his *Manual del abogado americano* (Paris: Garnier hermanos, 1863), 8-9, and *Elementos del derecho español*, 3d ed. (Paris: D. Vicente Salva, 1840), 23-24.

of water for purposes of irrigation...."[15] Given New Mexico's history, geography, climate, and the continual threat from hostile Indians, a dependence on custom should now be seen as a logical extension of physical conditions.

In fact, New Mexicans had additional reasons to develop their own customs. In both land and water matters, there were no institutional mechanisms for private citizens to record conveyance of titles unless the property in question was disputed, or in the case of a will requiring litigation. Conveyances were frequently made verbally and without any exchange of documents.[16] Because it was abundantly evident that Mexico City was far removed from the problems of rural New Mexico, local *alcaldes* and *ayuntamientos* (municipal councils) became more powerful. Utilizing the techniques of conciliation[17] between disputing residents within their respective jurisdictions, local officials tried to guide parties in conflict toward some form of compromise resolution. Occasionally, one finds in the conciliation record books a reference to the *Recopilación* or the *Novissima recopilación*, the laws of the Spanish *cortes*, and the laws of the Mexican congress. But because so many laws were incomplete, out of

[15] Rafael Altamira y Crevea, *Historia del derecho español* (Madrid: V. Suarez, 1903), 99, as cited in E. N. Van Kleffens, *Hispanic Law Until the End of the Middle Ages* (Edinburgh: Edinburgh University Press, 1968), 122-23.

[16] Describing an 1845 land sale in the San Ildefonso area, a local justice of the peace noted that between buyer and seller, "*no le han celebrado documentos*" (no documents have been exchanged). See Teodor Gonzáles, Juez de Paz, San Ildefonso, 30 July 1845, Gilbert Papers, New Mexico State Records Center and Archives, Santa Fe (hereinafter cited as NMSRCA). These papers, along with the Spanish Archives of New Mexico (hereinafter cited as SANM), the Mexican Archives of New Mexico (hereinafter cited as MANM), and the Surveyor General and Court of Private Land Claims records (hereinafter cited as SG and CPLC) are among many collections located in the NMSRCA.

[17] Conciliation was required by a law of the Spanish *cortes* dated 18 March 1812 as a first step in conflict resolution prior to litigation. This requirement was repeated in the Mexican constitution of 4 October 1824 and in the Judicial Act of 23 May 1837. An example of conciliation at work in an 1841 acequia dispute can be found in the Mexican Archives of New Mexico, Santa Fe (hereinafter cited as MANM), roll 29, frame 115. Even after the Treaty of Guadalupe Hidalgo, conciliation continued, as evidenced in an 1856 "Agreement of Arbitration" between residents of Desmontes and users of the Rebalse Ditch who wanted to settle their dispute in a friendly manner in order to "avoid the immense cost of litigation." See Taos County Deed Records, vol. 19, 440.

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date, and inapplicable to their immediate situation, *alcaldes* and *jueces de paz* (justices of the peace) placed greater emphasis on what would work for their constituency. Their goal was to reestablish harmony and assure the integrity of rural communities threatened by marginal farming conditions, Indian depredations, and threats of invasion. Increased agricultural production was not only mandated by the government, it was the single most important key to success for most New Mexicans. Even the Supreme Court in Mexico City made clear that it preferred not to become involved in New Mexican disputes over property, hoping instead that these matters could be resolved by local officials.[18] In such an environment, a variety of customary practices thrived.

In contrast to the *vecinos* (residents, citizens) of New Mexico, appointed governors were more inclined to think and act in terms of laws they received from Mexico, but some evidence indicates that they, too, respected the power of local custom. Governor Tomás Vélez Cachupín, for example, was quite concerned about land purchases being made by San Felipe and Santa Ana Pueblos. Because he wanted the Indians to pay a fair price, and because there were so many opinions about what the land was worth, he appointed an appraiser in each case. The land was valued according to the amount of water and timber available. But what is curious is that the authorization document signed by the governor was qualified by the words, "*según el uso de la tierra*" (whatever the [customary] usage was in that region). Apparently, the governor did not wish to go against accepted practice in these matters.[19]

New Mexicans who placed so much weight on custom did not live in anarchy. To the contrary, they were for the most part extremely loyal to the viceregal government of New Spain and to the Republic of Mexico. They obeyed imperial, national, regional, and local mandates when they were known to them, clearly understood, and applicable to their situation. In the opinion of attorney-historian Malcolm Ebright, when the Mexican government finally enacted land laws in 1824 and

[18] Letter, José María Paredes, Secretary of the Segunda Sala de la Suprema Corte de Justicia, Mexico, 17 February 1830, to Don Ramón Abréu, Secretary of the Diputación of New Mexico, SANM, I, no. 1369.

[19] SANM, I, nos. 1348 and 1349. This information was furnished by Malcolm Ebright.

1828, these laws generally validated customary procedures that New Mexicans had practiced during the preceding 230 years.[20]

Laws relating to water administration, however, were essentially local ordinances which addressed various community nuisances. Fines were imposed against those who contributed to water pollution, wastage, flooding, or unhealthy conditions.[21] Arrests were made for tampering with water flows, extending headgates too far into the streams, or irrigating at unassigned times.[22] Except for the law requiring appointment of a *comisionado* or *repartidor de aguas* (official charged with dividing water amongst users)—sometimes the *alcalde* himself—to supervise distribution of water so that it would cover the maximum amount of farm land,[23] the diversion, division, and administration of water depended more on local authorities' interpretation of customs than on statutory specifications.

Specific examples make this point quite clear. Even though some of the cases cited may suggest that customs by themselves were tenuous or unstable in the face of persistent conflict, it must be understood that as conditions changed on any stream system, water users sometimes resisted modification of what they considered their customary rights. Bringing their problems to a local magistrate did not undermine the force of customary law. On the contrary, a review of what plaintiffs actually said, as reported by municipal authorities, allows an understanding of the extent to which settlers and elected officials appreciated the importance of customs in the Rio Grande valley.

In their communications to officials, New Mexicans wrote frequently about their debt to custom. They spoke of water problems being resolved according to the *costumbre antigua* (ancient custom), while the governor's office on at least one occasion recognized the importance of *costumbre sistemada en estos pueblos* (systemized custom in these towns). They noted how the laws and the *costumbre bien*

[20] Ebright, *Land Grants and Lawsuits*, 23.

[21] Bando de Policía y buen Gobierno..., 2 January 1833, MANM, roll 16, frames 584-593; Bando de buen Gobierno..., 26 January 1845, MANM, roll 38, frames 1063-64; and MANM, roll 9, frame 1216.

[22] Ibid., roll 7, frames 289-93; roll 18, frame 49; roll 19, frame 993.

[23] Daniel Tyler, *The Mythical Pueblo Rights Doctrine: Water Administration in Hispanic New Mexico* (El Paso: Texas Western Press, 1990), 15.

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recibida (well-accepted custom) worked together in land and water disputes and how the force of custom dictated certain practices in regard to the placement of acequias and their headgates.[24]

In their land grants these New Mexicans refined a system of communal holdings so that settlers were granted wood, water, pasture, rights of way, and enough unsettled terrain for expansion as new colonists joined their ranks—all of these measures taken *según las costumbres comunmente tenido en toda la población* (according to the customs commonly held among the people).[25] They occasionally used a metes-and-bounds system to measure land grants, developed the custom of giving neighboring landowners a first right of refusal prior to land sales, insisted on cooperative responsibility in the building of community plazas and cleaning acequias, recognized the customary rights of Mexicans and Indians to certain lands and waters, and specifically noted that some customs had assumed the "force of law" in Mexican New Mexico.[26]

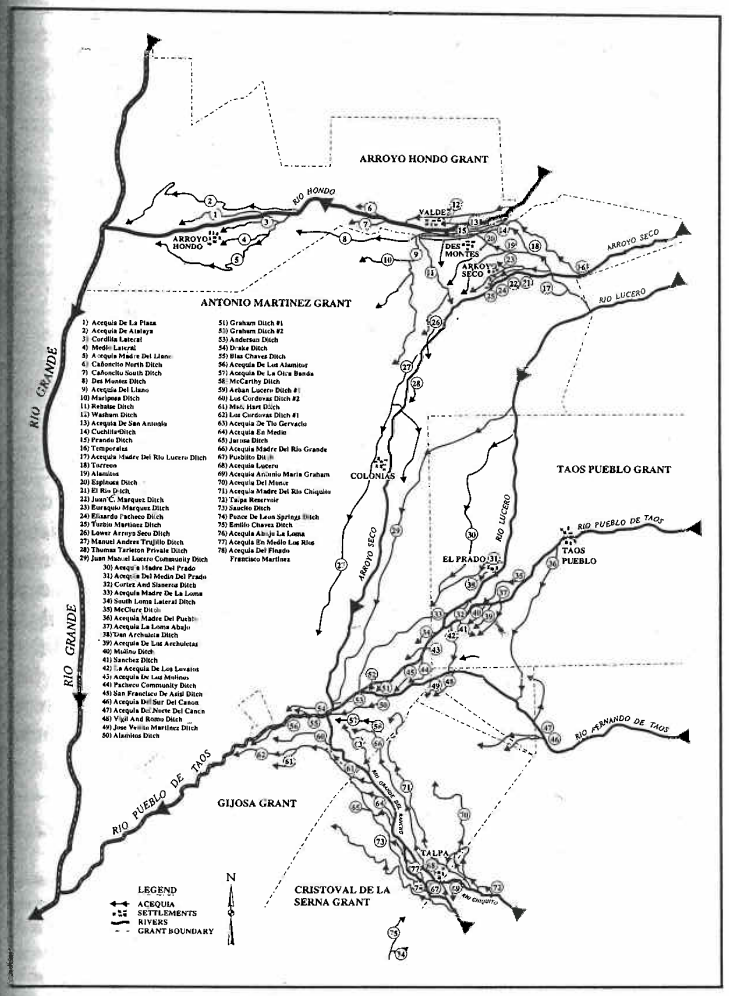
In matters more specifically related to water adjudications, New Mexicans paid strict attention to local arrangements. Gradually, and over a long period of time, they developed criteria for resolving water

[24] MANM, roll 29, frame 115; roll 21, frames 775-76; roll 28, frame 80; and roll 15, frame 194. SANM, I, roll 6, frames 702-3, in which the governor of New Mexico referred to what he called "long-standing custom."

[25] SANM, I, no. 29, roll 6, frame 37. This is a July 1832 report of a special commission appointed to check out the feasibility of a land grant in the Tierra Amarilla area. The report approved settlement but required that the fields, watering places, and roads remain common property ("*según las costumbres comunmente tenido en toda la población*"). See also Daniel Tyler, "Ejido Lands in New Mexico," in Malcolm Ebright, ed., *Spanish and Mexican Land Grants and the Law* (Manhattan: Sunflower University Press, 1989), 24-35.

[26] See Sender Documents, No. 275, NMSRCA. This item is an 1843 complaint in which the old custom of first right of refusal between adjoining landowners was upheld by a local magistrate. Additional examples may be found in Charles L. Briggs and John R. Van Ness, eds., *Land, Water, and Culture: New Perspectives on Hispanic Land Grants* (Albuquerque: University of New Mexico Press, 1987), 275. Both Spanish and Mexican customs are further detailed in documents constituting the Bartolomé Fernandez Grant, 1767, Land Grant-Surveyor General Records, Santa Fe (hereinafter cited as LG-SG), roll 21, frame 7, and the Felipe Tafoya Grant, LG-SG, roll 22, frames 4-6. MANM, roll 18, frame 22 contains an 1832 statement from the citizens of Abiquiú, protesting a decree of the local junta and the policies of the central government, stating that "the general will and passage of time have given [custom] the force of law in this territory."

Taos Valley Acequias



Map courtesy of Daniel Tyler.

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related disputes. While the importance of *prioridad* (priority) was recognized, New Mexicans incorporated other equally important principles into their system of *repartimiento* (division) of water: *antiguëdad* (age or length of time) and *primacía* (precedence)—essentially the concept of first-in-time-first-in-right—were mentioned frequently; *necesidad* (need), *igualdad* (equity), *bien común* (common good), and *perjuicio del tercero* (injury to a third party) were other factors entering into the resolution of disputes.[27]

New Mexicans were driven by a need to preserve their fragile communities. This meant sharing the water they had, especially in times of shortage, so that everyone would be able to irrigate at least part of their lands. After many generations of experience with land and water conflicts, Mexican New Mexicans had learned how to strike a balance between laws and customs.[28]

An 1823 conflict between the Taos Pueblo and non-Indian settlers at Arroyo Seco reveals how the local custom of water sharing in times of need was endorsed by local authorities in order to preserve peace and support agricultural production. Arroyo Seco pressed a claim for water from the Rio Lucero. The Indians argued that the Mexicans had no right to this water and had not made use of the farm land until recently. Employing the principle of *antiguëdad*, the Taos *ayuntamiento* responded to the conflict by saying that the Indians were the *dueños [d]espóticos* (literally, the absolute owners) of waters of the Rio Lucero by virtue of their long-standing use of this stream. After "detailed" conferences with both sides, however, the *ayuntamiento* decided that the pueblo did, indeed, have a legal right to the Rio Lucero, but because of the needs of the inhabitants of the new settlement at Arroyo Seco, the officials directed the pueblo to provide a *surco* of water to the

[27] See Michael C. Meyer, *Water in the Hispanic Southwest: A Social and Legal History, 1550-1850* (Tucson: University of Arizona Press, 1984), 145-67.

[28] The concept of shared water use is discussed in William B. Taylor, *Colonial Land and Water Rights of New Mexico Indian Pueblos with Special Reference to the Tewa Region*, 1983, 31. This report was prepared for the United States in *State of New Mexico* v. *Aamodt*. See also the disposition of José María Vizcarra, who ordered some form of water sharing amongst water users of the Río Hondo during times of scarcity even though the community of Arroyo Hondo claimed a "complete and absolute right" to the water. LG—Court of Private Land Claims, roll 33, frames 3-18. For an example of how Mexican New Mexicans balanced laws and customs, see MANM, roll 14, frames 1056-64.

Mexicans in times of abundance. In times of scarcity, the Indians would have to provide a proportional amount, the actual quantity to be determined by the *ayuntamiento*.[29] In this case, as in others, the custom of sharing water modified the legal principles of *antiguëdad*, *primacía*, and *prioridad*.

Some form of water sharing occurred on almost every ditch and stream system. In Santa Fe, the *ayuntamiento* urged the *alcalde* to deliver water to everyone equally. The Indian pueblos of Santa Ana and Acoma were told to share water with their non-Indian neighbors. And the Tesuque Indians were instructed to provide water to the creek for the benefit of downstream users.[30] As many times as the *Recopilación* stated the need to protect Indian rights to land and water, in practice the custom of sharing with one's neighbors was what local officials required of all water users.

Because local government officials were the only ones completely aware of how customs operated on individual ditch systems, they were charged with finding equitable solutions for conflicts as they arose. The power of this custom and the general acceptance of its importance can be seen in this final example involving a dispute that took place in Abiquiú in 1832.

Manuel Martínez wanted to build a new headgate and acequia on the land of his neighbor Ramón Martínez, but Ramón forcibly opposed him. The *ayuntamiento* and *alcalde* of Abiquiú corresponded at great length with New Mexico Governor Santiago Abréu, who soon found himself embroiled in a local feud, the origins of which he did not fully comprehend. Abréu did understand, however, that the force of local custom could not be ignored. After some posturing, he told the *ayuntamiento* to decide the case according to what those officials believed to be just and consistent with the "*usos y costumbres que en*

[29] SANM, I, no. 1292. A *surco* of water was the amount which could pass through twenty-seven square inches, an opening measuring 1/48 of a square vara (yard), providing a flow of approximately fifty-one gallons per minute. Galván y Rivera, *Ordenanzas de tierras y aguas*, 136-38.

[30] These incidents are further described in the following sources: Santa Fe: see *Journal of the Ayuntamiento of Santa Fe*, Santa Fe, NM Records, 1822-1834, collection 76, Center for Southwest Research, Zimmerman Library, University of New Mexico; Acoma and Laguna: see LG-SG, Laguna Pueblo Tracts, roll 16, frames 57-58; Santa Ana: see MANM roll 18, frame 591; Tesuque: see Santa Fe County Deed Book 1, 130-32.

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tales casos se han observado en esa jurisdicción" (the uses and customs that have been observed in such cases in that jurisdiction). Following a Spanish custom of appointing three *peritos* (advisors) to review the situation and make recommendations, the *ayuntamiento* decided the dispute in favor of Manuel Martínez. In doing so, it recognized the custom of easements for acequias, which, according to local practice, enabled individuals to bring their ditches through private lands.[31]

Abréu's decision to allow the *ayuntamiento* of Abiquiú to determine the fate of the disputing water users was a reflection of the power of customary law in New Mexico: the intertwining of a vague civil law with the customary practices of the local people. On many occasions governors ordered *alcaldes* and *ayuntamientos* to resolve conflicts *según las leyes* (according to the laws) without mentioning any applicable statutes, edicts, or resolutions. This suggests that disputes had to be resolved by the people themselves according to custom. When governors were appealed to for assistance, they generally ordered *alcaldes* and *ayuntamientos* to do what was just, or to seek perfect justice, stating in their own way that local customs needed to be respected if the integrity of New Mexican society was to endure.[32] They knew the inherent danger of imposing solutions from the top without fully understanding local exigencies that had been in effect for generations.

Thus, New Mexico's customary law tended to be in conformity with the general principles of Hispanic law dating back to the *Fuero juzgo* and continuing forward to the Treaty of Guadalupe Hidalgo. As of 1848, therefore, the United States was obliged to protect what had been legitimate Mexican property when the war broke out in 1846. Generally speaking, a water right is considered a property right, but

[31] MANM, roll 15, frames 185-86, 193-94; see also Malcolm Ebright, "Manuel Martínez's Ditch Dispute: A Study in Mexican Period Customs and Justice," *New Mexico Historical Review* 54 (1979):21-34. According to historian Tom Glick, the custom of appointing three *peritos* goes back to fifteenth-century Spain. See his *Irrigation and Society in Medieval Valencia* (Cambridge: Belknap Press of Harvard University Press, 1970), 40. In a 22 March 1995 letter to the author, G. Emlen Hall argues that the Martínez case reveals more of the Mexican commitment to principles of prior appropriation, especially "the right of private eminent domain, than any extraordinary recognition of local custom."

[32] SANM, I, nos. 1245 and 1317. This subject is further explored in Ebright, *Land Grants and Lawsuits*, 57-72.

because it has been argued that the Mexican government was legally in control of only those water rights granted with specific *mercedes*, questions have been raised in the past few years about the obligation of modern courts to recognize the vast majority of Spanish and Mexican water rights that were not specifically granted or adjudicated by *mercedes* but which came with Mexican citizens as property when they became United States citizens.

How the state of New Mexico should adjudicate these customary water rights was an issue raised in United States District Court for the District of New Mexico in *State of New Mexico, ex. rel., S. E. Reynolds, State Engineer, et al.*, (Plaintiffs) v. *Eduardo Abeyta, et al.*, (Defendants).[33] Consolidated with a similar case on the Rio Hondo, the trial judge reviewed customary and traditional methods of sharing water out of the Rio Grande del Rancho, the Rio Pueblo de Taos, the Rio Lucero, the Rio Fernando de Taos, and the Rio Chiquito. It represented the attempt of forty-one community acequias to have their customary water rights adjudicated by a legal system interested in prioritizing each acequia's seniority in an ascending order of priority. The state did not rule out the validity of customs per se, but the representatives of acequias had to prove that the same customs were accepted by everyone on their particular stream system and that they had been in effect over a long period of time.

Affidavits submitted by the acequia representatives emphasized how water in the past had been shared, how sequential uses of water (return flows) had always been in place, how one acequia provided an *auxilio* (help) for another in times of shortage, how, since "time immemorial" water had been shared according to local custom to maximize the benefit to all users as part of the *repartimiento* system, and how agreements were reached by acequia representatives at the headgates during drought so that nobody would be completely deprived of water. Some affidavits noted that their acequia associations in the future would never make calls or demands between or among themselves based on prior appropriation dates. Others stated that they would

[33] This case was consolidated with a similar case, *State of New Mexico, ex rel., S. E. Reynolds, State Engineer, et al.* (Plaintiffs) v. *Celso Arellano, et al.* (Defendants), Rio Hondo Consolidated, nos. Civ. 7896-SC and Civ. 7939-SC. The Pueblo of Taos was intervenor.

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continue to act as if all users on their stream had equal priority dates.[34] In sum, the court was being told that water users on these six streams wanted to preserve a status quo based on the observance of local rules and customs since time immemorial, but the weakness of their argument stemmed from an inability to unify and agree on the customs presented.

On 23 July 1993, Special Master Frank B. Zinn reflected this lack of unity in his final report. He noted that Section 72-9-2 of *New Mexico Statutes 1978, Annotated* required "recognition of local rules and customs if they do not impair the authority of the State Engineer or the water master to regulate distribution of water." However, he said, matters of "permission or option on the part of the acequia commissioners are not deemed customs." The only customs that should be recognized in the final decree, therefore, "are those that affect rights other than elements of individual rights to be adjudicated in this case.[35] In other words, unvested agreements between acequia associations would not be recognized as lawful and binding by the state.

This finding was a devastating blow to the non-Indian acequia associations, but continued discussions with the state led to a stipulation signed on 22 November 1993 between the state of New Mexico and thirty-nine of the defendant acequias representing five of the six stream systems. Rio Hondo representatives did not participate. The purpose of the stipulation was to inform the court that agreement had been reached on some customs and that both sides wished to avoid further litigation "between them or among them as to customs and to possibly lessen further need to litigate priorities between them and among them."[36] The accord recognized most of the customs discussed in this essay:

[34] Affidavits submitted to the United States District Court for the district of New Mexico, signed by acequia commissioners of the Río Lucero, Río Chiquito, Río Fernando de Taos, Río Pueblo de Taos, and Río Grande del Rancho. Attached as exhibits to *State of New Mexico* v. *Abeyta* and *State of New Mexico* v. *Arellano*, nos. Civ. 7898-SC and Civ. 7939-SC.

[35] Report of the Special Master, Frank B. Zinn, in *State of New Mexico, ex rel.*, v. *Eduardo Abeyta* and *State of New Mexico, ex rel.*, v. *Celso Arellano et al.*, nos. Civ. 7896-SC and Civ. 7939-SC consolidated, 23 July 1993, 81.

[36] "Stipulation Between New Mexico and Certain Community Acequias Regarding Declarations of Customary Allocations of Water Between and Among Acequias," 22 November 1993, in the United States District Court for the District of New Mexico, nos. Civ. 7896-SC and Civ. 7939-SC consolidated.

equitable apportionment, division of surplus water, disposition of return flows, proportional distribution in times of drought, extra help when needed, etc. Taos Pueblo was mentioned but was not a party to the agreement. On 3 December 1993, Judge Santiago Campos entered an order adopting the stipulation as part of the trial record.[37] Compromise had prevailed and a historical precedent was established.

It is too early to tell how this will play out. Rio Hondo's acequias are divided on their future course and Taos Pueblo has filed an objection to the stipulation. Nevertheless, two things are clear: so long as the prior appropriation doctrine is not attacked, the state of New Mexico appears willing to recognize the legitimacy of customs in water litigation; final adjudication of water rights in New Mexico will take a long time and cost a lot of money, but the Abeyta and Arellano cases seem to suggest that, in the eyes of the court, prior appropriation and customary law are not mutually exclusive principles.

[37] "Order Adopting Stipulation Between New Mexico and Certain Community Acequias Regarding Declarations of Customary Allocations of Water between and among Acequias" in the United States District Court for the district of New Mexico, nos. Civ. 7896-SC and Civ. 7939-SC consolidated.

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