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Upper Rio Grande Waters: Strategies

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Research Report #004 Fall 1987

UPPER RIO GRANDE WATERS: STRATEGIES

(Proceedings: A Conference on Traditional Water Use)

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UPPER RIO GRANDE WATERS: STRATEGIES

A CONFERENCE ON TRADITIONAL WATER USE

OCTOBER 5TH and 6TH, 1987

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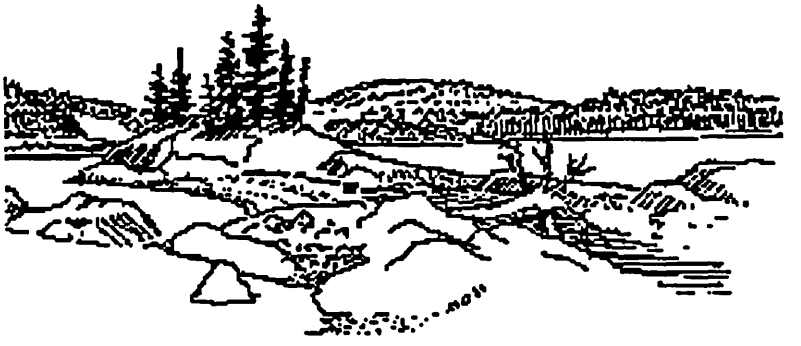

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PREFACE

These are times of change for water policies and institutions in the West, broadly, and New Mexico, in particular. As new rules for managing water evolve, it is essential that the values and interests of the oldest water users in the state be included in this reformulation. To that end, a *Conference on the Upper Rio Grande* was held at St. Johns College in Santa Fe on October 5th and 6th, 1987. The Conference focused on the concerns of the region's traditional water users -- the Pueblo and the Hispanic. The planning committee for the Conference consisted of the Upper Rio Grande Working Group which is composed of those Pueblo and Hispanic leaders in the region whose names and biographical sketches appear in Appendix I. The Working Group, in turn, was sponsored jointly by the Native American Studies Program, the Southwest Hispanic Research Institute, and the Natural Resources Center at the University of New Mexico and was funded by the Ford Foundation. The following Proceedings consist of papers prepared for the *Conference on the Upper Rio Grande.*

This report is the second prepared by the Working Group. The first, entitled *The Course of Upper Rio Grande Waters: A Declaration of Concerns*, set forth the values and perspectives of traditional water-users in the Upper Rio Grande relating to a variety of water issues facing the people of this historic region. The report was the culmination of a year long effort in which a draft was prepared by the Working Group. The issues contained in this draft formed the agenda for a Symposium which was held at Ghost Ranch in the Fall of 1985. This Symposium was attended by numerous community leaders, water-users, officials and educators from the region. The final report reflected additional perspectives that emerged at the Symposium.

The process leading to this second report was somewhat different. Building on the first report, the Working Group focused upon eight priority topics. These were to be investigated further with the aim of identifying implementation strategies and actions for each. The eight topics selected are represented by the eight papers appearing in this volume. Each of the papers is the product of a team consisting of the Working Group members and others from the traditional communities, together with water professionals with pertinent expertise. The papers were the basis for extended discussion and debate at the workshop sessions at the Conference.

Through the Working Group, the Symposium, the Conference, and the two reports, the sponsors have attempted to provide a platform for the articulation of perspectives which have much to offer for the larger society. We extend our deepest appreciation to the Upper Rio Grande Working Group and others for sharing their thoughts and feelings with us and with those who read the two reports.

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Albuquerque, New Mexico

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DAY 1 WORKSHOPS

CULTURAL PHILOSOPHY *(Working Team -- Andres Martinez, Gerald Nailor, Francis Vigil, and Tomás Atencio)*

The Hispanics and the Pueblo Indians have shared the Upper Rio Grande region, in conflict and in peace, for many years. Each culture has retained its unique views about religion, nature and society. Their shared experiences under the same sun, on the same land, and nourished by the same water have brought vital elements of the two cultures together. This session will examine the origin of their ideologies, the relevance of cultural values to water, and the role of a bonding philosophy in the maintainance of their unique region.

WATER RIGHTS PROTECTION *(Working Team -- Ben Tafoya, Lisa Chavez, and Emlen Hall)*

The need to assure individual water rights has forced many landowners to secure and quantify their water needs. Such titles have become clouded because of changing ownership. Whereas water was managed strictly by the acequias, individuals in the pursuit of lucrative commodity markets have begun to transfer their water titles out of this system by selling to outsiders. This workshop will consider the protection of community water rights. Legal strategies and techniques for documenting priority dates and for challenging individual water transfers will be included.

WATER EDUCATION *(Working Team -- Fabiola Teter, Gene Ortega, and Anne Taylor)*

Water is the unifying fiber which binds the traditional waters users of the Upper Rio Grande -- culturally, economically, socially, and spiriturally. The tradition of the acequia which has emerged from these communities and which is being practiced today is little understood outside of the region. This session will focus on the communication of these traditions through the general education system. It will examine the strategies needed to get such curricula adopted within the schools and provide an example of a curriculum based on traditional water usage concepts.

POWERS OF ACEQUIAS *(Working Team -- Fred Vigil, Victor Sandoval, and Fred Waltz)*

The powers of the local governments who manage community water systems, known as "acequias," have evolved over the long continuim of community development. Their local governments have had to adjust to changing regimes, the most recent coming with the advent of New Mexico Statehood. The focus of this session is to investigate the extent of acequia management authority which has been retained under State law. The possibilities of expanding their roles through planning, zoning, economic development, and water storage will be discussed.

DAY 2 WORKSHOPS

ALTERNATIVES TO LITIGATION *(Working Team -- Jose Lucero, John Gonzales, Luis Torres, and John Folk-Williams)*

Increased water demand by the various sectors of modern society have engendered artificial divisions and fierce competition. Traditionally, Hispanic and Pueblo communities once cooperated in the identification, sharing, resolution and enforcement of water matters. With the advent of regional water suits and interstate water compacts, the role of communities has largely been usurped by the courts. This workshop will discuss alternative ways to resolve water disputes through the revitalization of the community and its role in water management.

AGRICULTURAL LANDS PRESERVATION *(Working Team -- Patricio Garcia, Frank Tenorio, and Anita Miller)*

Rapidly changing population and land tenure patterns in the Upper Rio Grande have begun to impact substantially on the region. No where has this been more evident than in the preservation of agricultural lands which, in turn, is directly linked to the maintenance of the communities and the acequia systems. This session will focus on the presentation and discussion of techniques for the preservation of agricultural lands.

AGRICULTURAL MARKETING CAPACITY *(Working Team-- Arturo Jaramillo, Wilfredo Gutierrez, and Tom Clevenger)*

Modernization and economic development have brought new pressures to traditional agricultural activities. Once self-reliant and localized, the impetus of new development has been toward regional economic integration and the specialization of markets. This session will explore the various ways of strengthening the local agricultural marketing capacity of the Upper Rio Grande region.

WATER TRUSTS *(Working Team -- David Lujan, Ben Tafoya, and Ann Rodgers)*

Absentee landlords, the subdividing of agricultural lands, and shifts in land use have made significant inroads within traditional based communities. Under such circumstances, water rights often go unused or are simply forfeited outright. The loss of individual water rights has major implications on community development. The "water trust" concept is based on the pooling or banking of water rights. It's application at the community level is the topic of this session. The discussions will include examining both its advantages and disadvantages within the acequia system.

CULTURAL PHILOSOPHY:

A COMMON SENSE PERSPECTIVE

Prepared for the

UPPER RIO GRANDE WORKING GROUP

by

Tomas Atencio

Cultural Philosophy Team Members:

Andres Martinez
Gerald Nailor
Frances Vigil
Tomas Atencio

CULTURAL PHILOSOPHY: A COMMON SENSE PERSPECTIVE

Prepared by

Tomas Atencio

Introduction

"Greek philosophy," W. T. Jones writes, "was born out of the struggle to understand nature, for understanding nature proved to be less simple and straightforward than the earliest Greek scientists had confidently assumed." (1) The complexity of nature, the changes that it undergoes through time or as a result of other forces gave rise to questions about the nature of reality, change and the methods of inquiry. These are all philosophical concerns; thus scientists became philosophers as well. And since science could not teach humans how to value nature, philosophy also introduced the human response to nature. In other words, philosophy also dealt with the meaning of the relationship of humans to nature. Thinkers in Greek society also raised issues of human conduct. Gradually, a body of knowledge about nature and society began to grow as subsequent philosophers throughout the Western world addressed the same questions with more sophisticated methods of investigation. In summary, such has been the course of Western philosophy.

Men and women who commit themselves to such questions about nature, human conduct and society reflect in their writing the problems of their time and the social environment

in which they live. Their philosophies, at a highly conceptualized level, reflect the thoughts and feelings that inspire literary artists, statesmen and ordinary men and women of the time. (2) The ordinary men and women of the upper Rio Grande Region may not have struggled to understand nature and the social world in the same way as the Greeks. To Indian people there is no "separation of science, art, religion, philosophy." Nature is "understood" and "valued" simultaneously. (3) But they, too, experienced everyday life in their environment and have beliefs about nature and the social world which can be explained as a cultural philosophy.

This paper encompasses those views about nature and society of the Indian and Indo-Hispano of this region. We trace the origins of these beliefs and discuss their adaptations in a changing world, as well as their possible applications to everyday life experiences and problems that arise from social change and modernization. Because these views are rooted in tradition and endure in the midst of a modern society, the core values of these particular cultures in relation to the modern one, and implications of these diversities for the future of this region and the world will be addressed. Accordingly, while presented as a cultural philosophy, this discussion will also address the environmental ethics debate taking place in American society today.

Beliefs and World Views of the Indian and Indo-Hispano

American Indians and Indo-Hispanos have shared New Mexico land, in conflict and in peace, for many years. Each culture,

however, has preserved unique views about life, nature and society, as manifested in the contemporary religious observances, rites and ritual and in social organization of both cultures. Their shared experiences under the same sun, on the same land that is nourished by the same water have brought aspects of the two cultural views together, leaving a unique legacy to New Mexico, as well as to the rest of the country.

Our ancestors were close to nature; the land on which they toiled and that produced their food was warmed and fed by the sun and nurtured by the water. They learned that when the warmth and light of the sun, the moisture of the water and the nutrients of the soil were in harmony, there was food: there was life. Experience taught them that everything in nature was interconnected, and that as one thing changed, all other parts of nature were affected. Thus the ideal goal of human behavior, writes Santa Clara scholar Gregory Cajete was and is among traditional Indian people the "maintenance and perpetuation of harmonious interrelationship with all elements in the natural environment..." (4)

Water is one of those fundamental elements. Gerald Nailor, Picuris Pueblo leader, states that "water is the Life Source, a gift of the Great Spirit." Like everything else in nature, "water is imbued with the 'Great Mystery'." (5) It makes up the seas, evaporates into clouds, returns to earth as rain; water is seen as running through all of life. Water from rivers, clouds, springs, lakes makes up a greater part of the human body. Water is celebrated and venerated in ceremony; it

is sacred.

Ceremony celebrates human relationships to the cosmos--to all of nature-- and seeks rebirth and renewal of life in the harmonious relationship of people and their natural environment. (6) Plants and animals are honored as an intricate part of nature. In their songs and costumes, Indian people reflect these aspects of nature symbolized by rain, clouds, lightning and the rainbow.

The feast of San Juan, celebrated in San Juan Pueblo, honors a Christian Saint; but the 24th of June ritual fundamentally is a ceremony honoring the power of the sun, since it coincides with the summer solstice. To Hispanos, San Juan feast day marks the first day of the year when one can again go into the waters of the river. On that day water is thought to be sanctified and in turn blesses and purifies humans at the onset of the summer season.

Taos water rights advocate and community leader Andres A. Martinez reflects the influence of Judeo-Christian tradition on Hispano's view of water. Water is part of God's creation, and like the rest of His creation is there to be cared for by humans and used for His glory. Humans are the mayordomos, the stewards of nature in a world in which humankind was created a little lower than the angels but over the rest of creation. While in this view humans are part of nature, they are masters over nature and thus the belief varies from Indian beliefs where human and non-human nature are one in the whole of nature. But the genizarization of Indians in the eighteenth

and nineteenth centuries--the process by which Indians detribalized and accepted Spanish cultural modes--left imprints of the Indian world-view on Hispano beliefs. One such manifestation is in the acceptance of the sacredness of earth found in the Santuario del Potrero in Chimayo, an Indo-Hispano shrine.

We also find other beliefs among Indo-Hispanos that are a mixture of American Indian, Ancient (Ionian) Greek and Christian world-views. Antonio Medina offers a riddle in Spanish which conveys some of these beliefs. "Four children God created, from nothing he made them equal; two being mortal enemies of the other two, one baptized Christ, the other feeds the world, the other is in hell, and the other we have never seen." The four are the elements of water, earth, fire and wind. Water anoints; it baptized Christ. Earth nurtures and feeds the world. Fire is in hell and wind is invisible. Fire and air are the opposites (enemies) of water and earth, introducing the concept of duality, which is universal in indigenous thought, and the idea that there is diversity in nature. In the Judaic story of the Great Flood, Christians find that waters is a form of purification, of rebirth. After the destruction of life, God ordered the winds to cause the waters to recede. In the story of Noah, water destroyed life but wind overcame water and was able to overpower it on God's command.

The actors in this riddle are the natural elements of life, the key components of God's creation in Judeo-Christian

beliefs as interpreted by Indo-Hispano people, and fundamental in Ancient Greek explanations of the natural world; in Greek thinking, humans are apart from nature, however. In the Indo-Hispano view, the elements make up the human body, with water accounting for the largest part. This makes humans part of nature. Humans derive from earth, are sustained on earth by all the elements and at the end are returned to earth. This belief is reflected in an alabado, a song of passion sung in bidding farewell to a deceased brother.

La sepultura es mi cama
la tierra mi propio ser
se me atemorisa el alma
de considerarme en el.
De la nada fui formado
la tierra me ha producido
la tierra me ha sustentado
a la tierra estoy rendido.
The grave is my bed.
The earth is my very being.
Soul trembles to be led
Unavoidably to earth returning
I was formed whole from no substance.
Earth gave my life its ground.
Earth gave my life its sustenance
And to earth I am forever bound. (7)

Another integration of Native American world-views with Hispano beliefs are the nurturing and life sustaining

attributes of earth--- embodied in the term, Mother Earth. She has been venerated not only in prayers, verse and song but in practical ways through man's work in deriving from Her a livelihood. In their quest for survival men kneel before her, caressing her as they terrace the landscape to protect it from erosion to preserve the nutrients that feed the budding plants.

Changes in the seasons, which define the style of life in an agrarian society, have been remembered by Pueblo ceremonies, marking the division between summer and winter, hot and cold, or the agricultural and non agricultural cycle. (8) Indo-Hispanos, too, celebrate the changes with reverent veneration of symbols and observances that come from their tradition. Lent is a time of somber reflection and spiritual growth. Holy Week is celebrated with rituals of repentance, all in preparation for rebirth and renewal. Easter welcomes Spring, May fifteenth marks the day of San Isidro, patron saint of agriculture. Christmas and New Year celebrations usher in the winter months. The principal difference between the Native American and traditional Hispanos is that among the Indian community ceremony relates to cosmic forces; while at one time this was also common among Hispano villagers, community ceremonies of these kind no longer exist in most communities.

This view of the world grows from a life in which very little comes between humans and nature; human and non human nature are part of the same creation. Value is given to nature not because of what it does for humans, but because it has

intrinsic value. Nature, of which humans are a part, is composed of the primary elements in creation. And when it is necessary to alter the given tendencies of nature it has been done with a vision of harmony and balance. In Navajo, where irrigation is not used, and livestock raising rather than farming is the primary agricultural enterprise, diking is done and natural earthen dams are found to conserve water for use in small gardens.

Where rivers are part of the landscape, human adaptation to water in farming is somewhat different. Indians and Indo-Hispanos believe that rivers have been ordered to flow and their direction must not be thwarted. Therefore, in diverting and moving water from streams to the fields, the acequias are the best examples of alterations of the natural tendencies of nature while maintaining the principle of harmony. Water finds its own level, flowing gradually, pulled by the earth's own gravity. In its path, the water and the soil produce grass and shrubbery and give life to trees, creating in addition to a sturdy, well rooted ditch-bank to hold the water, the source of Life--oxygen.

Because of the spiritual significance of the acequia as the conveyor of water, Pueblo spiritual leaders pray as the work of ditch cleaning begins in the early Spring. While this tradition no longer exists among Hispanos, as late as the 1940s, Frances Vigil reports, the whole valley in the San Cristobal area would parade the image of San Isidro along the ditch banks after it had been cleaned. The ceremony would

conclude with an evening rosary and a velorio, an all night vigil.

Cultural Philosophy and the Social World

Water and the Sense of Community--Water, its management and distribution, and the organization of community are interrelated. The beliefs about water and land, the reverence and attributes of sacredness influence the ways our community has distributed water among its members. In both cultures, water is to be shared by all without regards for its ownership. If it is the Life Source imbued with the "Great Mystery" and a gift to be used to glorify God, it could neither be owned nor sold. If water is part of divine creation, it cannot be withheld from other members of the animal kingdom, human or non-human. Those beliefs result in communities that value solidarity, that practice sharing and free exchange of resources to sustain life and value nature for its own being. Communities that have a strong relationship with nature also create a strong sense of place and homeland for its inhabitants. People who are pulled away from their native homeland live for the day they can return. They have left behind in their village boarded houses and fallow fields, and often unused water claims.

The social order of a traditional Hispano village is to a great extent a mirror of the patterns of distribution and use of water. Village unity and social cohesion endure to the extent that water is used in farming or gardening. For centuries the acequias have helped hold together the various

communities. They are at the heart of our culture. When water is truly used as the life-blood of the community and physically sustain its inhabitants, a strong social order exists where labor for ditch maintenance is readily available. But when water is no longer in use for survival, community social cohesion begins to falter.

Respect for water and land, as discussed in the first part of this presentation, is transmitted from generation to generation and has become a cultural characteristic of Indians and Indo-Hispano people. These cultural legacies are at stake if other aspects of the cultures are not sustained. It is important that one of the significant vehicles for transmitting cultural values be supported: the native languages. Bilingual education that teaches not only the language but cultural practice to students should be supported as a means of cultural education. Through this, ceremonial practices which have died, as is the case among the Indo-Hispanos, may be revived, and it will assure the endurance of those observances still alive.

Population pressures and demands for more water have torn at the fabric of community solidarity. Water disputes have always occurred, but litigation was seldom necessary. A story is told about the villages of Trampas and San Miguel del Valle constantly quarreling over water they both used from the same creek. On one occasion commission members from both communities traveled to Santa Fe where the District Attorney mediated their dispute. Upon their return, both communities went to their chapels and held a vigil for their respective

patron saints. Dialogue cleared up their differences, and their problem was resolved. A religious ceremony sealed the peace. Dialogue and discussion is now the exception; litigation is the rule and the spiritual dimension is gradually losing its significance in modern society.

Rules for Water Distribution--Competing demands for water by the different water users require certain standards and rules for allocating water. Such rules differ from community to community. The Pueblo communities, however, remain closer to spiritual beliefs where the moral commitment to all of nature is affirmed and water is not denied those who need it.

The influence of modernization on the Hispano acequias, on the other hand, is seen in the following rules instituted 50 years ago in San Cristobal.

1) The ditches shall be cleaned by all owners on a date set by the mayordomo.

2) Land owners will be assessed a minimum fee per acre, any payment after July 1, will be delinquent and the land owner will not be allowed to irrigate until paid in full.

3) Water will be used at four hours per acre.

4) Water is to be used as follows in time of scarcity: gardens first, then newly seeded fields, orchards last.

5) It shall be unlawful for the mayordomo to irrigate the lands of another, for pay or otherwise. He can irrigate his own and/or his wife's land. Breaking of this rule shall subject the landowner to a penalty of not less than $25.00 for each day or a fraction of a day, and the mayordomo will forfeit his annual

pay.

6) The mayordomo shall turn the water into the creek as early in the Fall as possible, or as soon as all irrigation is finished.

7) Commissioners shall impose a fine on anyone impeding the work of the mayordomo and the full use of the water.

Change and Adaptations

Beliefs, embodied in legends, rites of worship, ceremony and practical ways of surviving and distributing water have been passed on from generation to generation. But at certain stages in history each generation has had to confront the painful challenge of change. And each time the response to these challenges have caused some adjustments and adaptations in beliefs in order to assure survival. One of these is the change from the belief that water is a communal resource to one that it is a right and its ownership must be declared through a process of adjudication. Although some Hispano water users have found locks on their watergates following adjudication, they have not fully accepted the concept of the right to ownership of water. From the ideological perspective which accepts the fundamental assumptions about creation and nature, adjudication must be rejected. From a practical perspective, Indians and Indo-Hispanos must be prepared to confront adjudication, enter litigation and commit resources to fight for their rights.

In the practical sphere, changes in ways of ditch maintenance, such as concrete lining, have created torrential little streams. Such improvements in the name of efficiency

deny the ditch-banks their moisture and alter the natural tendencies to the detriment of a balanced ecology. In addition, they create hazardous conditions for children who in years past have grown up safely around the traditional acequia.

Changes in society have also affected the practical ways of sustaining life. Perhaps the most important change has been in humankind's direct relationship to the land in making a living. In traditional society, the family produced the food for the entire group, with individuals sharing tasks and roles in this enterprise. Members of the family maintained the acequias, farmed the land and from the yield the whole group survived. Food went from the fields to the store-cellar and then to the kitchen. Since the railroad's coming to New Mexico in the 1880's, traditional ways of work have gradually changed. Today a wage earner works for someone else, uses his earnings to go to the store to buy produce from someone else's labor far away.

No longer is the family responsible for production to meet the basic human needs, since the breadwinner now is a wage earner. If an individual wage earner who owns a small plot of land wishes to continue participating in the acequia system, he must hire help for its maintenance, or withdraw his contribution and be party to the acequia's decline. In some villages acequia commission invite women to help with maintenance, for the community would rather have "womenpower" than money, if manpower is not available. Frances Vigil tells that in San Cristobal women showed up, uninvited, to clean the

ditch after noticing the lack of interest. These changes also affect the working of the land, leaving much of it lay fallow, jeopardizing the water rights for lack of use. Others might sell their rights, thinking they will never use them since they have other ways of making a living. If the acequia and water are no longer in use, the spiritual commitments to water must also be affected, for in a modern society river water cannot be claimed by a village only for ceremonial purposes, when others of the human community need it to survive.

The changes have left even deeper scars. Gerald Nailor from Picuris Pueblo and Antonio Duran formerly from Penasco recall the runs by Picuris residents from the Pueblo to the mountains from which the water came. There were rituals celebrated along the river's path around shrines made from the natural habitat. Then change came. Fences were strung up, and people claimed a small portion of the earth as theirs, making the pilgrims trespassers and subject to prosecution or personal attack. Vestiges of the shrines remain, and Pueblo people have found alternate routes to reach the source of their water and continue with their celebrations. A world-view based on individual property rights has overtaken the moral commitments of responsibility of one's well being for the other. It changed the place where the ceremony was celebrated, a significant adjustment, since the place where it is held is as important as the ritual itself.

The fundamental spiritual meaning has not been lost or forgotten by the more traditional Indians and Indo-Hispanos in

the face of change. Pueblo Indians ceremony continue with vitality and gratitude, celebrating and enhancing cosmic harmony. The view of water as Life Source to be managed by good stewardship is not shared by the dominant culture; water is a an investment, a commodity to be bought and sold in the marketplace. What was sacred in traditional society has become secular and profane in the modern world.

But the water continues to flow, first through natural creeks, then to acequias carved out by men and women, then to ditches, and eventually to the fields where seeds are nourished, growing into plants and then food. The acequias have sustained human life in the Pueblos and Hispano villages for centuries. Life in the villages has depended on and revolved around the acequia, for they have been the veins stretching from the heart outward across the landscape in mountainous canyons and expansive river valleys, carrying the life-blood of the community---water.

Survival and the Right to Protest

Communities that base their decisions about allocation of natural resources on moral commitments rather than on private ownership and individual rights find it necessary to protest when their beliefs and their ways of allocating water are challenged and threatened. This is evident in the unbridled development of resort communities and the gutting of the landscape for new roads to carry the added population attracted by the new trends, all at the expense of the environment and the native community. Dialogue is still a desirable avenue for

resolution of disputes, but in a culture dominated by individual interests over community concerns, where water is no longer sacred but is a commodity to be exchanged in the marketplace, there is little room for talking.

But talking must continue, especially between Indo-Hispano and Pueblo litigants, if not between corporate interests and native communities. Often we are made to believe that the interests of Indo-Hispano and Native Americans are different, when they are the same. Talking must be initiated, encouraged and continued among the traditional water users of both ethnic groups.

More important, we must affirm our fundamental beliefs about the spirituality of water, that rivers are ordered to flow naturally and their direction must not be altered merely for profitable ventures. We must protest all tampering with nature which is destined to harm Creation. We must understand the spiritual meaning of water based on those beliefs that we share and must confront the changes which have occurred in relation to the dominant society; we must develop an ethnic and political consciousness, assess the obstacles, identify those who disregard our interests and organize to protest. This consciousness and knowledge is useful in political protest, but may also support the native peoples cause as bureaus conduct studies to assess the impact of changes on the communities. Moreover, such knowldege is likely to influence the courts in our behalf in the process of litigation.

Conclusions

While some communities continue full use of the acequia and most of the land is under irrigation, others have changed. Consequently, the acequia scene has taken a romantic aura as old acequias are assured survival by becoming historic monuments of our agrarian past. (9) This raises another philosophical question: Is an acequia an acequia if it is no longer used to carry water for irrigation? At this juncture we must go beyond the origins or our beliefs, their changes and adaptations through time and derive from our past a cultural philosophy that affirms the practical aspects of survival as a people and that may serve as a guide for making decisions about the future of our water; the future of our community. These are the kinds of deliberations that have taken place in other sections of this symposium.

Our knowledge of our cultural beliefs and our commitment to them should give us direction in the face of inevitable change. We must direct change if we are to survive. It makes sense that we must not pollute the rivers, not make water a commodity; it makes sense that we use our land for survival and sustenance; it makes sense that we should not alter the natural tendencies of nature; it makes sense that we dialogue among ourselves and struggle for our beliefs; it makes sense that we honor and respect nature, for our lives and all of nature are what we save.

ACKNOWLEDGEMENTS

This essay reflects the contributions of the Cultural Philosophy Working Team: Frances Vigil, Andres A. Martinez, Ted Jojola, and Gerald Nailor. In addition, The Reverend Johnny Cook from Tempe, Arizona contributed invaluable information on the Navajo world-view which helped explain some of the Hispanic perspectives that related to the Native American. The Reverend Antonio Medina provided the material and insights concerning the four basic elements of nature. Padre Luis Jaramillo interpreted some of the Judeo-Christian and Native American adaptations on views about the cosmos. Cleofes Vigil, besides granting permission for use of an Alabado, has given us great insights into the beliefs and practices of Hispanic culture

Interviews with the late Phil Lovato of Taos, Benjamin Talache, Ranchitos, and Antonio Duran, formerly from the Penasco-Dixon area and now from Albuquerque conducted for a project of the Southwest Hispanic Research Institute at the University of New Mexico--Acequias y Sangrias--funded by the New Mexico Endowment for the Humanities were also used in this paper.

Other sources are the oral history collection and publications of La Academia de la Nueva Raza, Dixon, New Mexico.

The interpretations of most of these materials are my own in conjunction with the Cultural Philosophy Working Team of the Upper Rio Grande Working Group. I assume responsibility for any misinterpretations.

ENDNOTES

1. W. T. Jones, A History of Western Philosophy: The Classical Mind, Second Edition (New York: Harcourt Brace Jovanovich, Publishers, 1970) p. xvii.

2. Ibid. , p. ix.

3. Gregory A. Cajete, "Science: A Native American Perspective, A Culturally Based Science Education Curriculum" (Dissertation, International College, Los Angeles, California, 1986), p. 133.

4. Ibid., p. 138.

5. Ibid.

6. Vine Deloria, Jr. "Indians and Other Americans: The Cultural Chasm, Church and Society January 1985, p. 11..

7. Entre Verde y Seco, editor, Estevan Arellano, with Introduction by Tomas Atencio (Dixon, NM: La Academia de La Nueva Raza, 1972) pp. 105-106. The Alabado quoted was contributed by Cleofes Vigil for use by Academia and was translated by E.A. Mares.

8. Alfonso Ortiz, The Tewa World (Chicago: University of Chicago Press, 1969) p. 118.

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TECHNIQUES FOR THE PROTECTION OF COMMUNITY WATER RIGHTS IN NEW MEXICO

Prepared for the

UPPER RIO GRANDE WORKING GROUP

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REPORT ON WATER RIGHTS PROTECTION

This report discusses techniques that community organizations can employ to assert and defend their own definitions of the nature and extent of local water rights. The necessity to do so will arise in two situations: First, as New Mexico grows, pressure will increase to transfer water rights from existing and traditional uses to new non-traditional ones. State law provides some techniques and some doctrines that may offer promising ways for traditional water users to protect and defend their water base against diminishment by way of transfer to other newer and more renumerative uses.[1] Other reports in this series, particularly the ones dealing with the power of acequias and the development of a water trust for northern New Mexico, touch on those powers, techniques and doctrines.[2]

Rather than repeating those discussions, this report deals tangentially with the prospects that the power and trust analysis offers for the defense of traditional water uses and focusses instead on the formal definition of traditional water uses in

state or federally initiated water adjudication suits. The formal adjudication of water rights offered by the decrees in these suits provide the pre-requisite definition for the market transfers that threaten traditional water users today.

Traditional water using communities perceive these pervasive adjudications as foreign impositions ontheir water use. The recommended techniques offer methods to insure that these communties play a meaningful role in defining their own water rights. In addition, the techniques may reduce the destructive potential of fully privatized water rights in an essentially communal system.

These recommended techniques necessarily derive from state law. They necessarily will apply in formal stream system adjudications. In recommending these techniques we recognize the limitations of both the source of law from which they derive and and the lawsuits to which they apply.

The state law of prior appropriation has not touched and does not define the water perceptions of indigenous New Mexico communities. Indeed, the idea of hidebound priority, central to state law as the unique way of allocating water in times of shortage is not a part of the water culture of these communities. Introduction of that notion primarily has provided a tool for further dividing communities against each other and further pitting individual water users against the communities to which they belong.[3]

Stream system adjudications aggravate those pernicious tendencies. The suits are not well understood in local

communities. No one makes a particular effort to explain them except in very recent suits where the State Engineer has hired 4 local organizers to help explain the purpose of the suits. The suits raise issues---like priorities---that offer individuals legal tools against the community to which they belong and between communities. The final adjudication decrees do not offer much to the real concerns of local water using groups.

Perhaps worse, the final adjudication decrees do offer individual owners of water rights in a communal system a powerful tool in the modern private world of water. Specifically, the formalization of an individual and relatively senior priority creates an immediately valuable economic asset particularly attractive to the newest users of water.[5] By purchasing that decreed old water right, the new user acquires the priority as well. In this sense, the adjudication suits create the value that destroys the right it was meant to protect.

However, if adjudication suits must come, then we believe that community education and community organization are more essential to meaningful participation than any legal technique that we might recommend. But if stream system adjudications are inevitable, as they appear to be, and legally unavoidable, as they are, then the techniques which this report describes may help to improve the position of water using communities in stream system adjudications and to give those communtiies more control over the definition of their water rights.

Basically, this report recommends that local communities use the provisions of state law itself in order to place themselves in the most favorable position possible when adjudication comes.

Two distinct possibilities appear. First, a community can assert its right to define and control water rights under it. Second, communities can actually define water rights that they claim and in so defining them significantly alter the balance of power in the definition of their water rights.

The first approach involves a technical issue in current New Mexico water law: What power do community ditches have to define and defend water rights dependent on the community ditch? While other reports focus on this issue, this report places it in a slightly different perspective and recommends a method of analyzing it.

The second approach involves equipping local communities to meet the filing requirements of New Mexico's declaration law so those communtities can gain the self-definition advantages that state law offers. This report recommends ways of getting that information to local communities and suggests how they might use it.

Early New Mexico state court decisions, recently affirmed by a new Federal court ruling, hold that water rights served by a recognized community ditch belong to the individual irrigators who apply water to beneficial use on particular lands rather than the ditch which diverts the water in common for those tracts. In particular the courts hold that the priority of a water right attaches to each particular tract served by a community ditch rather than to the tracts' common point of diversion.[6]

These decisions are particularly important today because they mean that individual irrigators may sell the water rights

appurtenant to their particular tracts and convey with that sale perhaps the most valuable part of the water right, the very old priority, to which the most recent market purchasers will succeed.

The judicial decisions, then and now, subvert the original and historic understanding of the role of community ditches in the legal organization of traditional water using communities. Under Spanish and Mexican law and under traditional New Mexico practice, community ditches functioned as municipal corporate enterprises for the organization and distribution of water to local residents.[7] The water rights belonged to the community. Individual claims to the water came solely from residency and participation in that community, not from any individual rights to water. New Mexico water law upset that fundamental alignment when it placed individual ownership of water over community control of it.[8] That inversion of the original relationship of individual irrigator to the common ditch which serves his land has left traditional water communities in a much more precarious position with respect to claims of communal rights in New Mexico water.

Two parallel developments, however, offer some hope for resurrecting the community as an integral and indispensable party in the ownership and control of local water resources. First, a New Mexico district court recently has held that the "public interest" provisions of current New Mexico statutory water law require the State Engineer in administrative proceedings and the district court in de novo review of them to consider the impact of a proposed individual transfer of water rights away from the community ditch that created them on the remaining rights under

the community ditch. In particular, the reviewing district court held that a transfer of an individually owned community ditch right from agricultural to recreational use itself violated the "public interest" of the state statute and the community ditch.

That decision was immediately appealed to the New Mexico Court of Appeals where the case rests now. Pending a final decision, however, the case offers a promising route for the resurrection of community ditch status in the control of individual water rights.

In addition, a 1983 amendment to New Mexico statutes requires the water administrators and the courts to consider "conservation" and "public welfare" besides "public interest" in approving changes in the purpose and place of use from irrigation uses delivered through community acequias to private non-agricultural uses. While it remains for the courts to work out the specific meanings of these over-lapping and inter-related considerations, it is possible that they will create new avenues for community protection of old rights originating in water delivered through community ditches.[10]

At the same time, renewed interest in the standing of community ditches has spurred further research into the exact relationship between individual irrigators and the community ditch which serves them. Substantial evidence is emerging to suggest that community ditches constructed by the common enterprise of tract owners served by it, as most community ditches in New Mexico were, should enjoy a commonly held priority that cannot be severed from the community ownership of it. If

that argument succeeds, it would obviously enhance the position of community ditches in the control and allocation of water rights arising under them.[11]

That power could also be used to communally define the water rights delivered through them. Section 72-1-3 NMSA 1978 allows the owner of a water right which came into existence prior to March 16, 1907, the effective date of New Mexico's first water code, to declare the nature and extent of that right. Because almost all the water rights of New Mexico's traditional water using communities pre-date 1907, the declaration authorized by the statute will apply to them.

Many community ditches will discover that their predecessors already have filed declarations for them, sometimes as long as 80 years ago. These old declarations often will provide useful historical information to present community ditches. However, the contents of those old declarations will not prevent present commissioners from ammending those declarations now to reflect more current considerations. In particular, community ditches who join together and decide not to assert local priorities against each other can agree on a common priority and eliminate priority as a means of allocating shortages, at least locally where priority enforcement might make a real difference in the availability of wet water.

The declaration statute requires a claimant to define its water rights in terms of five criteria. They include the date that water was first put to beneficial use (the right's "priority"), the point from which public water is taken and diverted for private use (the "location of the source of said

water"), and a description of the land on which the water so diverted is used.[12]

The State Engineer provides a form on which a claimant must make the declaration. That form makes explicit the technical information required. This report addresses ways to meet those requirements. At the outset, however, it is most important to note the advantages that the declarations offer communities in the formal definition of water rights in adjudictation suits.

Unlike the suits themselves, declarations are self-initiated. Communities may file them at any time. They may also ammend them as new and different information becomes available. As suggested above, ammended declarations may also reflect new perceptions as to which elements of the doctrine of prior appropriation a community ditch may want to strictly assert in its claim.

In addition, declarations are self-defined. The claims made in them originate with the claimants and not the State Engineer Office. While in the past the State Engineer's office has held a monopoly on the kind of technical information that the declarations call for, state statute still confers on local communities the power to shape and mold that information in the first place.

Finally, declarations are given by statute a particular legal status in adjudication suits. Section 72-1-3 states that declarations "shall be prima facie evidence of the truth of their contents." This small piece of legal jargon significantly alters the power alignments in an adjudication suit. The matters

asserted in a community filed declaration become true unless the State Engineer can prove that they are false. The burden to do so falls on his Office. If he does not or cannot, then the court must adopt the community's own definition of its water rights as embodied in the declaration. Thus, the declaration statute both allows local water users to define their own rights and guarantees that definition a real weight in the adjudication process.

Obviously, that weight is not absolute. The State Engineer can still disprove the matters asserted in the declaration. His office is most likely to try to do so in those areas where it automatically has available information that might contradict the contents of the declaration. Essentially, the declaration contains information on the priority and quantity of claimed water rights. By virtue of other statutes, the State Engineer is much more likely to have accurate information on the quantity of water rights covered by a declaration than on the priority of those water rights.

As an adjunct to a stream system adjudication, the State Engineer must complete a hydrograhic survey of claims to water rights in that system. The findings of these surveys are supposed to take into account previously filed declarations. Generally the hydrographic surveys incorporate their contents unless the results of the hydrograhic surveys contradict the declarations.[13]

For a variety of reasons, the information produced by the hydrographic surveys is much more likely to contradict the contents of a declaration when it comes to the quantity of a water right than to its priority. For one, sections 72-4-13 NMSA

1978 et. seq. require the State Engineer to determine with specificity the land on which water has been applied to beneficial use. Once that determination is made, technically intricate computations allow the State Engineer to fix the amount of water needed to serve those acres. For another, aerial photography, photogrammetry, and field checks put the determination of the quantity of a community water right within the easy reach of the State Engineer's technical expertise. As a result, a community's determination of the quantity of its declared water rights, to the extent those rights are determined by the amount of water applied to beneficial use, needs to be done with the same precision that is available to the State Engineer to avoid the kinds of contradictions that will upset the prima facie effect of those declarations. With respect to these expensive and highly technical computations, there is an inherent imbalance between the expertise of the State Engineer's office and the resources presently available to local communities.

With respect to the other critical element of a water right under New Mexico state law---its priority---there is no such inherent imbalance. Until quite recently, the State Engineer was at a loss as to how to arrive at the priority dates of community water rights which originated prior to March 16, 1907, the date after which all new water rights required a state license which reflected its priority. Sometimes in adjudication suits the State Engineer accepted whatever priority dates existing declarations stated. At other times, the State Engineer Office assigned no priorities and proceeded to the adjudication of the quantity of

water rights while reserving a determination of their priority. Finally, at still other times, the State Engineer hired historians to date ditches from existing historical records as best could be done. In recent years, the State Engineer has invested many more resources in this later course in an effort to ground priorities in the existing historical documentation.[14]

From the point of view of local communities, these recent developments show the strengths and weaknesses of the "objective" determination of relative priorities in adjudication suits. In many instances documentation that is available to academic historians, even when fully developed, does not yield any explicit information on the dates of the establishment of specific ditches. Only from the most judicious extrapolation from existing documents can historians draw an implied priority date. Sometimes in the recent past, the extrapolation has not been that judicious: for lack of better evidence, the State Engineer has used the date of a land grant even though no evidence of either contemporaneous settlement or water use accompanied the grant documents. As this example indicates, oftentimes the State Engineer has little to go on when assigning priorities in stream system adjudications.[15]

The declaration statute strengthens the hand of local communities in defining their own priorities by giving their self-selected priority dates the effect of prima facie evidence. All things being equal, a community's definition of its own priority will prevail over the State's assignment. Furthermore, the statute requires no documentation in order to give such a self-declared priority this effect.

In addition, the declaration statute gives two added advantages to self-selected community priority dates. First, the statute itself specifically allows the community declarant to assert a priority date "on information and belief." In other words, very little in the way of formal documentation is required to give a declared priority its prima facie effect. Second, and perhaps more importantly, the statute leaves the community in a special position with respect to proving the asserted priority against the assertion by, for example, the State Engineer, that other evidence defeats the prima facie case the declaration has made.[16]

Community ditches asserting priorities under section 72-1-3 NMSA 1978 enjoy factual and legal advantages in proving their prima facie assertions. Factually, community ditches will have access to local documentation in the possession of residents that will not be available to outside investigators. For a variety of reasons, many historical documents that would help establish the existence or construction of ditches have never reached public repositories where academic historians might find them. These documents remain in the custody of local residents and only commmunity residents will be able to coax them into the light of priority adjudication.

In addition, local ditch declarants stand in a unique legal position with respect to their ability to establish priorities on the basis of custom in the community. As already noted, section 72-1-3 permits a declaration to be based "on information and belief." The community knowledge exception to the hearsay rule

may allow a community declarant to bolster the priority information it asserts "on information and belief" by adding the objective proof of community custom as to the date. Arguably, that custom can be based in whole or in part on oral tradition. Carefully constructed, in other words, a community water declaration based on the oral water traditions of local users can both provide the subjective "information and belief" necessary to create a prima facie case for a community's own priority and provide as well the kind of admissable objective evidence useful in overcoming the possibly contradictory implications of other "objective" historical documents.[17]

As this suggests, communities which choose to use the provisions of current state law to protect their water bases first by defining and then asserting their water rights will necessarily have to enter into a world of complex engineering and law. We believe that they must do so in order to retain control over a critical aspect of their existence, water. We believe that they can do so with a lot of community education and a minimum of technical help. We believe that they should do so in order to restore a critical balance between tradition and change, between community wisdom and technical expertise, and between water as the stuff of communal life and water as a free-market commodity.

ENDNOTES

1. See e.g. N.M. Stat. Ann. sec. 72-5-7, 72-5-23, 72-12-3.

2. See report on "Power of Acequias", prepared for the Upper Rio Grande Working Group by Fred Waltz, Fred Vigil and Victor Sandoval.

3. Because New Mexico's courts have held that water rights delivered through a community ditch belong to the individual appropriators, because the priority belongs to the individual, and because that priority is often the most valuable element in an old water right, the individual rights of community ditch appropriators are the most valuable and vulnerable in today's water markets.

4. See, e.g. ongoing Rio Pueblo de Taos and Rio Lucero adjudications.

5. See note 3, supra. The priority element gives the water right value but does not do much to guarantee wet water except under very local conditions.

6. Snow v. Abalos 18 N.M.681, 140 P. 1044 (1914); Memorandum Opinion and Order, February 26, 1987 in State of New Mexico ex.re. S.E. Reynolds, State Engineer v. R. Lee Aamodt et. al. No. 6639-M Civil USDCNM.

7. See, e.g. district court opinion of Judge Edward L. Medler in State ex.re. Community Ditches and Acequias of Tularosa Townsite v. Tularosa Community Ditch, 19 N.M. 352, ___P.____(1914)

8. Snow v. Abalos, supra.

9. In the Matter of Howard Sleeper et. al., Rio Arriba County Cause No. RA 84-53 C (April 16, 1985).

10. E.G. N.M. Stat. Ann. 72-5-5.

11. Edward Kelly, "Power of Acequias to Control Priority", August 1987 unpublished memorandum for the New Mexico State Engineer.

12. N.M. Stat. 72-1-3.

13. N.M. Stat. 72-4-13 et. seq.

14. E.g. Ditch Priority Dates, Canon Community Ditch, Jemez Stream System prepared by Frances Levine, Ph.D.; Frank Wozniak Ph.D.; and Hana Samek, Ph.D.

15. statement of Frances Levine at Water Rights protection workshop, October 5, 1987.

16. N.M. Stat. 72-1-3 and 4.

17. Prof. Lee Teitlebaum, "Oral History and Community Hearsay", paper presented to seminar on New Mexico Oral History, Albuquerque, N.M. November 1985.

WATER EDUCATION

Prepared for the

UPPER RIO GRANDE WORKING GROUP

By members of the

Water Education Team:

Ann Taylor
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PREAMBLE

TO

EDUCATION SUBCOMMITTEE

I. Water is the unifying fiber which binds the Traditional Water Users - culturally - economically - socially and religiously. Water, being the life-blood of traditional water users must be understood and preserved for future generations. New Mexicans need to have a good historical knowledge and preception of water issues as they impact on Traditional Water Users. This knowledge and concept must be incorporated as part of the mainstream of our educational -political -social, and economic systems.

II. Youth - Children

Our children and youth must be provided an opportunity to understand and to develop a sense of responsibility to the preservation of water and to the rights of Traditional Water Users.

Youth must develop an understanding and an attitude of concern towards Traditional Water Users and the importance of water in all disciplines which affect our being and our lives.

EDUCATION SUB COMMITTEE PANEL/WORKSHOP

I. PURPOSE

- To create an awareness among the participants of traditional water users.
- To create an awareness among the participants of the need to incorporate water issues into educational curriculum.
- To present an educational model and approach for incorporating water issues into the educational system and curriculum.
- To present participants with a brief history of the working group.
- To present participants an overview of the original report.*
- To present participants a specific overview of the educational concerns of the working group.
- To present participants an overview of educational recommendations presented/proposed in the original report.

NOTE: This presentation is in itself a model which can be used for other educational purposes.

* Original report refers to a document produced by the Upper Rio Grande Working Group entitled, The Course of Upper Rio Grande Waters: A Declaration of Concerns, December 1985.

II. OBJECTIVES

- To bring about an awareness of traditional water users.
- To bring about an awareness of the urgency of water issues.
- To demonstrate a model and approach for incorporating water issues into the curriculum.

III. METHODOLOGY

The basic methodology and approach(s) to be utilized during the presentation are:

a. Lecture/presentation

b. Question and answer(s)

c. Demonstration of model

d. Option - movie and/or slides

e. Panel discussion

The following methods can be utilized to make the presentation:

a. The MAJOR ISSUES as identified can be

1. Presented on an over-head projector; or
2. Laid out on easel pads; or
3. Copied and passed out to the participants

b. The recommendations can like wise be reviewed and presented as in a above.

A. History of URG WORKING GROUP

1. A brief presentation will be made which addresses

a. Purpose of URG working group - basic theme:

In the context of changing water policy in the arid West, the Natural Resources Center, the Native American Studies Center and the Southwest Hispanic Research Institute at the University of New Mexico organized an Upper Rio Grande Working Group to advance a comprehensive declaration of concerns about water issues from the perspective of traditional users in the region: Pueblo tribes, acequia or ditch associations, and mutual domestic water associations.

b. MAJOR ISSUES IDENTIFIED:

The declaration enumerates a variety of major issues judged by the Working Group as the most important local and regional problems within five substantive areas:

Development
Water Policy
Administrative
Infrastructure
Education

NOTE: Throughout this and other presentations, facilitator/group leader will allow for questions/answers and will elicite in-put from participants - panel/committee members.

B. Report Overview

1. Facilitator will highlight the following areas of the report:

- Development
- Water Policy
- Administration
- Infrastructure

NOTE: Education will be excluded as this will be dealt with in more detail. Facilitator/group leader will briefly reveiw the following areas of the report.

2. Development:

In the area of DEVELOPMENT, the declaration recognizes the need for continued economic growth in the region but calls for development of options which are consistent with the cultural values of Pueblo tribes and Hispanic rural settlements, including the need to retain water rights for traditional uses. Specific issues in the declaration of concerns include: (a) the lack of incentives for innovative uses of water, (b) the need for more targeted technical assistance, especially in the area of agricultural marketing, and, (c) the increasing pressure on traditional communities to sell their water rights in the open marketplace. By way of recommendations, the declaration advances a corresponding set of solutions and action agendas.

Option: Brief overview of recommendations
(refer to page i & ii of report)

3. Water Policy:

In the area of WATER POLICY, the declaration of concerns noted that New Mexico water policies do not provide sufficient protection for the rights and needs of traditional water users, and instead the policies consider water solely as a property right whose use can be sold to the highest bidder. Additionally, the forfeiture provisions discourage conservation and innovative uses by the traditional communities. One underlying issue is the absence of comprehensive water planning at the state level which could balance the competing water needs of development, environmental protection, and traditional water users. In the absence of such a plan, the Office of the State Engineer is able to exercise a great deal of discretion with respect to water policy issues, often to the detriment of the traditional water users.

Option: Brief overview of recommendations

(refer to page iii of report)

4. Administration:

Closely related to policy issues are a number of concerns about the ADMINISTRATION of water resources and programs. These concerns include lack of coordination between government agencies, overlapping jurisdictions, failure to serve clientele, and problems with local management systems within the traditional communities themselves.

Option: Brief overview of recommendations

(refer to page iv of report)

5. Infrastructure:

In the fourth substantive areas, INFRASTRUCTURE, the declaration of concerns describes numerous problems associated with the physical characteristics of water delivery systems: (a) maintenance requirements of irrigation ditches; (b) constant erosion, flooding, seepage, and sedimentation; (c) outdated domestic supply systems with inadequate rate structures to finance major repairs; and (d) limited government financial assistance.

Option: Brief overview of recommendations

(refer to page iv & v of report)

C. EDUCATION ISSUES/CONCERNS: The fifth and last substantive area, and one we wish to spend more time on is the area of education.

1. Facilitator will review educational issues/concerns and recommendations identified in the executive summary found on page ii of the report.

NOTE: As identified by the URG WORKING GROUP Education Activities are at three different levels: 1) Traditional Water Users, 2) General Public and 3) Public Officials. The following information from the report will be presented/addressed by the facilitator/group leader:

EDUCATION:

<u>Issues</u>

Improvements in education can help address many of the problems encountered by traditional water users.

Education of Traditional Water Users. Traditional water users need to learn more about existing water laws, policies, procedures, and institutions. For many, the crucial importance of adjudication procedures as well as current water litigation is neither fully understood nor appreciated. Traditional water users need a better understanding about the ways in which water rights can be protected.

Along the same lines, Indian tribes within the region can benefit from improvements in education. For example, a better understanding of the array of costs and benefits of the strategies for protecting and, in some cases, expanding the legal recognition of aboriginal water rights would be beneficial. Further research on alternatives to litigation such as negotiated settlements needs to be conducted and research results disseminated to the tribes.

A related educational problem concerns recognition of the rights and responsibilities of traditional water user organizations. In some cases, members of acequias or mututal domestics do not understand the association's powers and procedures. Misunderstanding may result in numerous management problems. To a great extent, educating water users is a responsibility of the state, but this responsibility certainly must be shared by local water user associations.

Education of the General Public and Public Officials. Beginning at the elementary school level, there is a need for

general education on water, water management, and water problems. This is especially true for the state's newest citizens who often do not appreciate the crucial role that water plays in traditional and indigenous cultures. For example, the historical importance of water in the development of the region's economy and political institutions is not stressed enough in current curricula.

Public officials, too, need to be educated about the rights and concerns of traditional water users. Familiarity with the region and its water issues must become a top priority for local, state, and federal water policymakers and their staffs. In sum, a holistic, comprehensive view of water needs to be taught to counter the prevalent notion that water is merely an economic commodity.

Recommendations

Educational solutions are implied or specifically mentioned in most of the other sections because education is an essential prerequisite to meaningful change. Generally speaking, educational efforts need to be directed toward four groups: traditional water users, public administrators who regulate water use, water policymakers, and the general public. Overall, a wealth of information is available and there is a growing interest in water issues. Lack of information or interest therefore is not as problematic as is access to information. Effective strategies for disseminating information need to be developed for all groups

concerned with water resources. We all share the responsibility for learning about water resources. We also must ensure that water information is widely disseminated.

Improving Access to Water Information.

A State clearinghouse presented as an administrative solution could also improve access to water information. Regional clearinghouse could also act as information centers. However, our intention is not to create an unnecessary bureaucratic structure. Perhaps it would be better to assign outreach and public relations functions to established field offices of state agencies such as the Environmental Improvement Division or the Office of the State Engineer.

The State's educational institutions should also play an increased role. Specifically, universities and colleges should continue to develop water-related seminars and exhibits. The New Mexico Water Resources Research Institute should hold water conferences throughout the state in lieu of the recent tendency to meet primarily in Las Cruces.

Legislation should be enacted to fund such activities and the universities should seek foundation support. Specific legislation should be drafted which requires incorporation of water resource curricula beginning at the elementary school level.

The following information related to the Educational issues will also be addressed:

EDUCATION

The symposium participants devoted a significant amount of time discussing educational issues. First, there was significant concern about the content of water education materials. Some noted that the spiritual, cultural, and traditional importance of water was not being taught in our schools. Students may be receiving a bias view when they only learn about water management through official accounts such as U.S. Forest Service films. Along another dimension, participants noted that information about water rights and related topics was too technical and therefore difficult for lay persons to understand. The content needs to be translated for general consumption.

The responsibility for the content and format of water education curricula also was discussed. Education for traditional water users does not appear to be a priority to either the State Legislature or state and federal water agencies. Therefore, there is a need for traditional water users to become more involved in water education. Traditional water users must secure resources to develop and implement their own educational programs. The symposium participants emphasized that information about the traditional importance of water needs to be disseminated to public schools, water users, the media, and governmental officials. Responsibility for education should be shared. Just as state

agencies need to educate traditional water users, users need to educate agencies about local customs and laws.

Education Recommendation

A number of specific recommendations were made for improving current educational practices. Public schools could teach the importance of traditional water use by bringing in mayordomos and other water users as guest speakers. Apprenticeship programs should be developed where students would receive credit for working with community ditch associations. Students should also be sent to hearings and other events where they can learn about water conflicts and local history. Teachers also could be provided in-service training by local water officials. In order to educate the general public, community meetings should be made more interesting. Some participants suggested integrating water education with community cultural events, while others suggested organizing rallies in response to crises which threaten the community. Along similar lines, some participants advocated a statutory directive to require state agencies such as the Office of the State Engineer to meet with acequias and other local water officials in well-publicized, open meetings held in the local community.

In addition to general education, traditional water users need to know how to find answers to specific questions. More generally, they need to keep abreast of changes in water law and managment. There was considerable discussion about establishing a

traditional water user organization that would incorporate the best features of Acequias del Norte, the Eight Northern Pueblos Council, and the New Mexico Rural Water User's Association. Unlike these organizations, such an organization would include Indian and non-Indian traditional water users and would serve as both a clearinghouse and a center for developing educational materials and services for traditional water users.

A number of participants contended that a clearinghouse would be of limited educational value because relatively few people would use it. Public hearings, if well advertised in local communities, would be more educational. Along the same lines, some participants proposed holding water conferences in specific hydrologic areas of the region. For example, in the area between Chama and the Rio Grande, approximately twenty-two acequias manage water. A conference specifically designed for individuals interested in water management could be extremely educational.

D. Educational Model

As a means of presenting a model for addressing water issues the following model developed by the subcommittee with the assistance of Ann Taylor and Ted Jojola is presented.

The model has been developed as an example of what can be done within the:

a. Existing curriculum

This example is one from within the number of possible discipline within the curriculum.

The presentation is turned over to Ann Taylor or some other member of the task force/committee:

a. Model is reviewed

b. Participants are asked to comment on the model:

Usefulness - particalness - problems, etc.

Facilitator/group leader can then present other topic areas/concepts which lend themselves to the use of the model:

-Indicate how this concept may be applied to:

Art --

Affective

Emotional

Assymmetry/Symmetry

Balance

Color

Form

Harmony

Line

Space

Texture

Rhythm

Health--

- Kinesiology
  - of body
  - force
  - matter
  - energy
- Mental

Language Arts & Reading--

- Symbiology
- Creative Writing
- Language
- Oral History
- Poem
- Technical Writing

Math--

- Number Systems
- Measurement
  - linear
  - cyclical (time)
  - volume
  - weight
- Algebra
- Geometry

Physical Science--

- Physics
  - matter

energy

motion

Biology

habitat

cycle

change

organic life

Social Science--

Culture

Economic

Sociology

Communityl

Political

Government

Race

IV. Closure

As a means of allowing participants the opportunity to react to the model the facilitator can elicite responses to the following questions:

a. What are your feelings about model?

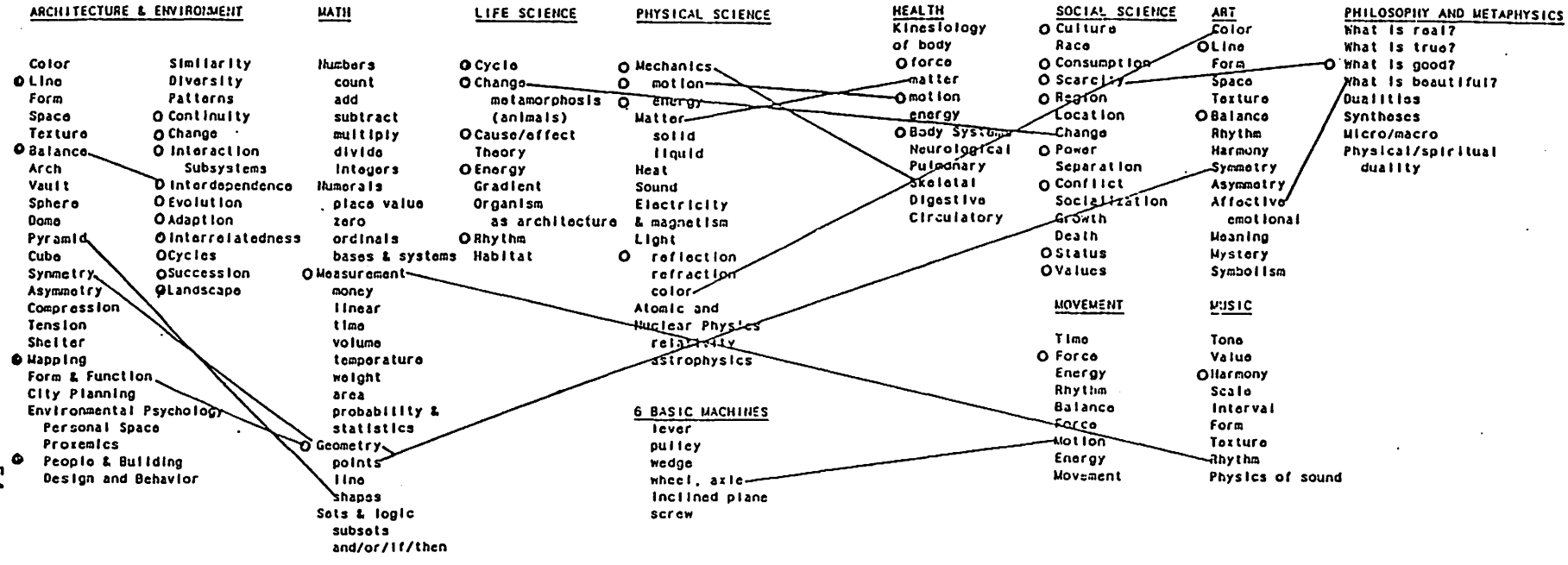
b. What can be done with/to the model to make it more adaptable to various age groups - general public - as a learning tool for politicians, etc.

c. What other adaptions could be done/added to the model to make it more meaningful, etc.?

d. How could you see yourself using this or a similar model?

A PRELIMINARY WATER CURRICULUM MODEL FOR INTEGRATIVE & INTERDISCIPLINARY LEARNING --
Prepared for the Working Committee on Education, Upper Rio Grande Working Group, 1987

THE CONCEPTS FROM SUBJECT MATTER DISCIPLINES



1. This is a preliminary model for interdisciplinary learning which teaches concepts across the subject matter disciplines and is the basis for teaching water study to children. It differs from current methods of teaching and acquisition of knowledge. Presently, subject matter disciplines are taught separately, vertically, and by themselves. Textbooks are even written that way. This model allows the student to learn in the manner in which the brain functions, that is, holistically. Each concept listed above represents the main essence of the discipline under which it falls. Water study is the concrete, real world example of principles, laws, and concepts being now taught through textbooks. The process of design and problem solving facilitates creative problem solving (creativity) and critical thinking skills (valuing). This curriculum content philosophy of seeing man/woman a part of not apart from the environment reflects our "being" in the world. There are, of course, sub-concepts under each main concept. Theoreticians on which this model is based are: Jerome Bruner, Jean Piaget, Schwab, Ashael Woodruff, Phillip Phenix, John Dewey, Anne Taylor.

O Demonstrates concepts which relate to the study of water

2. In the new information age when we can retrieve information by topic and concept across disciplines, we will be learning in a manner more compatible with the way the brain works and by student interest. In this way, the learner sees the relationship and interdependence of all things from concrete to abstract learning. This particular matrix relates other subject matter to the field of architecture and built environment education. We are, therefore, not adding a new discipline to the curriculum, but reinforcing what is already being taught. Anne Taylor has developed this model over a period of years while working in the area of Architecture for Children. She can be reached for further information at:

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POWERS OF ACEQUIAS

Prepared for the

UPPER RIO GRANDE WORKING GROUP

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POWERS OF ACEQUIAS

Historically in New Mexico acequias have been the primary institution for the collection and distribution of water supplies for most purposes including irrigation, stock watering, and domestic uses. Today acequias are still a vital social, economic, and political factor in the rural communities of northern New Mexico, and in particular the Upper Rio Grande region. Acequias have existed in this region for literally hundreds of years. They have been and remain so today an integral part of the establishment and existence of many communities in northern New Mexico.

The power and authority of acequias have evolved with the development of local communities and the various sovereign powers that came to control this region. The focus of this paper is to examine the current status of acequias' powers and authority. In order to do this, it is essential to understand the historical development of acequias.

Acequias are both a physical structure and a community organization. Physically, an acequia is an irrigation ditch, or a system of ditches, which divert water from a stream, river, or other water source. By simple gravity flow, acequias deliver water to fields and farmlands for irrigation purposes, as well as stock watering and domestic uses. An acequia is also an organization of land owners who have the right to use the irrigation ditch or canal.

These organizations have elected officials to manage the affairs of the acequia and regulate the common maintenance and repair of the ditch.

An acequia's powers are not really the powers of the actual ditch itself, but the powers of an association of the acequia's members. What are an acequia's powers? A simple but incomplete answer would be found by merely researching the laws of the State of New Mexico relating to acequias. An acequia's powers or ability to act are based upon much more than statutory authority; they also are based upon the function and purpose for which acequias have been established and upon the practice and customs of acequias.

I. Brief History of Acequias

Remains of ancient irrigation canals made by prehistoric people have been found in the Southwestern area of the United States.

> "The right to appropriate and use water for irrigation has been recognized longer than history, and since earlier than tradition. Evidences of it are to be found all over Arizona and New Mexico in the ancient canals of a prehistoric people, who once composed a dense and highly civilized population." [1]

Soldiers with Coronado's expedition wrote about the cultivation of crops by the Pueblo Indians of the Middle Rio Grande Valley, New Mexico. [2]

Espejo, during his expeditions of 1582-3, wrote of irrigation ditches which supplied water to pueblos near Socorro, and described Acoma Pueblo Indians as having "many partitions of the water" in a marsh two leagues from the pueblo. [3]

Although little is known about how the early Pueblo Indians in New Mexico managed and organized the use of irrigation works, they clearly existed.

> "Less is known, unfortunately, about the irrigation institutions of the early Indians than about their physical works. However, the pueblos were given to commutal undertakings, and their irrigation systems were built and managed as community affairs. The character and exegencies of their pueblo life lead inevitably to public regulation of irrigation matters; therefore, taking care of the ditches became one of the important traditional community tasks."[4]

With the arrival of Spanish colonists to New Mexico, the first "acequia" was constructed by them in 1598 at San Juan, New Mexico. They brought with them knowledge of irrigation techniques that had long been practiced in Spain. Spanish irrigation practices and institutions were originally encouraged and developed by the Moors, who originally came from Northern Africa to Spain. [5]

Pueblo Indian customs and methods of irrigation were not extinguished by the Spanish colonists, but instead there was a merging of the two systems of irrigation so that there developed a unique system of irrigation in New Mexico: the Community Acequia. [6]

Prior to the 16th century and the colonization of the New World, there had already developed a body of law in Spain dealing with community acequias. These laws were heavily influenced by local customs, which had the force of law. These laws of Spain dealing with irrigation practices and community acequias were applied to the colonies in New Mexico. The early laws found in the Partidas described the distinction between a private acequia and a community acequia. [7]

The Laws of the Indies further imposed Spanish laws upon irrigation practices in the New World. An important provision of the Laws of the Indies stated that all waters shall be common to all inhabitants and also that pre-existing Indian rules regarding irrigation practices were to be maintained. [8]

Other laws such as the Plan of Pitic encouraged and required the creation of community acequias. The plan of Pitic was a pronouncement of land and water law which was prepared for the founding of a new town on pueblo at Pitic, Sonora, Mexico. This plan was approved by the King of Spain in 1789 and was to be used whenever a new pueblo was established in certain areas including New Mexico. [9]

After gaining its independence from Spain, Mexico did not pass any new significant laws affecting the community acequias in New Mexico. In fact the Treaty of Cordova provided that Mexico would honor and adopt Spanish law. Therefore, even though colonization laws of the Mexican government were more liberal,

ancient customs and laws regarding irrigation practices and community acequias were retained and enforced by the Mexican administration.

II. Legal Rights and Powers of Acequias Under United States Administration

The Treaty of Guadalupe Hidalgo ended the war between the United States and Mexico in 1848. One of the most important provisions of that Treaty was that the property of every kind of the Mexicans who desire to remain in New Mexico were inviolably protected. Of course one of the most important property rights of these people was the right to retain ownership of their lands and the right to continue to irrigate them. This protection extended unquestionably at the time to the water rights of members of community acequias then existing.

The first laws enacted for the newly acquired Territory of New Mexico was the Kearny Code. This code of laws was enacted on September 22, 1846 to provide for the creation of a provisional government for New Mexico during the war with Mexico. The Kearny Code specifically provided that existing laws were to be continued to be enforced. [10]

The first New Mexico Territorial Legislature passed a number of laws which protected the existing water rights of acequia members. In fact, these old laws of 1851-52 still exist and are enforceable today. [11]

These original Territorial water laws were concerned primarily with acequias. They provided, among other things, that

the course of acequias established prior to 1851 could not be disturbed,[12] and that all natural water courses used as acequias were declared to be public ditches or acequias. [13]

The Territorial Legislature in 1874 passed a law that "all inhabitants of the State of New Mexico shall have the right to construct ... acequias." [14]

In 1895 the Legislature declared that all community ditches or acequias shall be considered corporations with the power to sue or be sued as such.[15] This was the first important change made by the Territorial legislation on the status of community acequias. The change was purely administrative, having no effect upon the water rights of the individual members,[16] but acequias now had the legal status to act on behalf of the common interests of members of the acequia. By this Law acequias became a form of a public corporation.[17]

Early New Mexico court decisions took a very restrictive view of what powers these early water laws conferred upon acequias. In 1905 the New Mexico Supreme Court said that acequias were involuntarily public quasi-corporations with no powers except those expressly conferred by statute or such that are impliedly necessary to the performance of those statutory powers. [18] Again in 1914 the New Mexico Supreme Court said that Acequias recognized as corporations have only those powers expressly or impliedly granted them by New Mexico's water laws.[19]

Acequias, then, really have at least three primary sources and areas of powers: (1) those powers that are expressly confirmed by the statutes, (2) those powers that are or can be

impliedly necessary to perform statutory powers, and (3) the power to deal with matters that are not dealt with by statute. The first two sources are relatively easy to understand. The statutory powers are found in the written laws and are discussed below. Implied powers necessary to the performance of statutory powers are also discussed more fully below.

The third area really includes all the other powers of acequias, which can be summed up as the power or ability to act on behalf of and for the benefit of the acequia's parciantes, or members, which are not related to statutory or implied powers, and which are not prohibited by law. Obviously this could be a very large area. In recent times it hasn't been. Apparently acequias have become content to limit their area of concern and consequently their powers.

Since acequias in general have existed long before the State of New Mexico their powers are based upon their historic and customary functions. Also, as discussed above, acequias powers are based upon pueblo Indian traditions and the laws of Spain and Mexico. Historic and customary powers were not eliminated by the territorial laws and the current laws of the State of New Mexico. Current water laws do not specifically enumerate the powers of acequias, therefore any historic or customary powers of acequias that are not inconsistent with New Mexico' water laws are still valid.

In fact, local customs and water rights which vested prior to New Mexico's laws are specifically protected by law.[20]

Actually, what we are dealing with here are acequias powers that pre-date and exist outside of and supplement New Mexico's written water laws. In general a distinction can be made between statutory and implied powers, and acequias powers concerning other matters. An acequia is certainly not prohibited from getting involved in or pursuing issues and concerns that are of common interest to the members. [21] Representing its members in court may cause certain legal problems, but this can easily be avoided by the members simply forming an unincorporated association or joining together in a case as individuals. In many small rural communities there is no other form of community body then the acequia. Most rural communities in New Mexico have no form of municipal government, nor do they apparently need or want it. That may be because most local matters are dealt with in a very personal manner and the community already gets together when dealing with the acequia. As a practical matter when neighbors get together for acequia meetings they will often discuss matters other than irrigation that are of common concern. An example of this would be acequia members discussing the impact of a large development upon their domestic wells. The acequia as a community body could then pursue discussions, negotiations, or even litigation over such matters.

A. Statutory Powers

There are specific laws that address the powers of acequias. These laws are found in the New Mexico Statutes of 1978 at

Chapter 73, Articles 2 and 3. They relate specifically to acequias, their organization and management.

Section 73-2-1, recognizes the right of the inhabitants of New Mexico to construct acequias. By this section acequias have the power, through their commissioners, to condemn, or take, land necessary for building a new ditch, or enlarging or extending an existing one. This statute also provides that just compensation must be made to the owner of land that is used for an acequia, unless, of course the owner of the land is a member of the acequia. [22]

By virtue of Section 73-2-4, acequias have the power to prevent the construction of any building or other object which would obstruct the flow of water. In one case the City of Albuquerque was prevented from building or widening a street which would have obstructed the flow of water in a community acequia. [23]

An important statute relating to the powers of acequias in Section 73-2-11, wherein acequias are declared to be corporations with the power to sue or be sued as corporations. This law gives a legal status to community acequias, "in order to facilitate the distribution of water and the maintenance of the ditches and laterals." [24] Without this law acequias would have no right or power to legally represent the common interests of the acequia's members. [25] The law is important because in its absence the powers of acequias could not be pursued and enforced in courts, only the rights of individuals.

The powers of commissioners of acequias are specified in Section 73-2-21 and Section 73-3-4. Of particular importance is their power to make contracts on behalf of the acequia. Any such contracts must of course be necessary and appropriate and for the benefit of the acequia or its members in general. The commissioners of acequias in some communities do not have this statutory authority to make contracts. [26] However, the acequias certainly can make contracts, in which case the members would vote upon the issue of whether to enter into a specific contract. The commissioners, or one of them, or a special agent could then sign a contract for the acequia.

The commissioners also have the power to assess the members and enforce payment of any legitimate expenses incurred in conducting and maintaining the acequia. The power to assess members is not limited to expenses of repairs, cleaning and payment of the mayordomo's salary; it extends to all legitimate expenses such as the costs of a lawsuit. [27]

Commissioners, and thereby acequias, also have the power to contract for irrigation water, if such contracts are ratified by a majority vote of the members. They may also enact bylaws, rules, and regulations that are not in conflict with New Mexico's laws.

It is important for acequias and their commissioners to know that they have the legal authority to seek out and contract for irrigation water since most acequias experience annual water shortages. Additional irrigation water may in fact be available

to some acequias. An example is San Juan/Chama water that may be purchased on an annual basis either directly from State of New Mexico or U.S. government, or from other "owners" of San Juan/Chama water, such as the City of Albuquerque.

Section 73-2-22 specifically authorizes acequias to borrow money and contract indebtedness. Even prior to the passage of this law in 1965, it was generally assumed that acequias impliedly had the power to borrow money for the purpose of the acequia. [28]

A law was passed by the 1987 New Mexico Legislature which specifically recognized the right of acequias to own water rights. Prior to passage of this law it was unclear whether acequias could actually own water rights. While New Mexico's water laws never addressed this issue, some court decisions have ruled that water rights are owned by the individual members of acequias and not by the acequias themselves. [29] This created some ambiguity as to whether acequias could acquire water rights. The new law clearly recognizes this ability of acequias.

(i) Political Subdivisions

One of the most important laws dealing with the power of acequias is Section 73-2-28 which officially makes them political subdivisions of the State. Although this law was relatively recently passed in 1965, acequias had long been considered political subdivisions. This law then removed any doubt as to the legal nature of an acequia.

> "it is no exaggeration to state that community acequias have been serving as "political subdivisions" in the area that now comprises the State of New Mexico since at least 1851. Statutes enacted by the New Mexico Territorial Legislature, and subsequently the State legislature, have merely confirmed this status. [30]

Acequias are political subdivisions much the same as are counties, school districts, conservancy districts, and water and sanitation districts. As political subdivisions of the state, acequias have certain attributies of sovereignty and local self-government which the state has vested in them. Political subdivisions are formed "for the more effectual or convenient exercise of political power within certain boundaries or localities, to whom the electors residing therein are, to some extent granted power to locally self-govern themselves." [31]

As a political subdivision, an acequia is a public body with certain precise and limited public duties. In order to carry out these public duties, acequias must have and do have certain specific powers and implied powers necessary to perform their duties. [32]

The extent of powers acequias have by virtue of being political subdivisions has not been determined by the courts. Of course there have been general rulings that acequias have only those powers conferred by statute or such as are impliedly necessary to perform statutory powers. [33] But there have been no recent court decisions interpreting the powers that acequias have by virtue of their being officially declared political subdivisions in 1965. By analogy with other political

subdivisions, acequias have the political power to self-govern themselves and use whatever express or implied powers are necessary to manage the distribution of water to irrigated lands within their territory.

It is accurate to say that acequias really haven't utilized the full range of authority and power they have by virtue of being political subdivisions. So long as acequias act on behalf of and for the mutual benefit of their members they have the political power to provide for the general welfare of the members, much as a county or municipality could.

B. IMPLIED POWERS

Acequias have implied powers which exist as a means of effectuating or performing their specific statutory powers and authority. There is no published list of what the implied powers are. In fact, there are not even any reported cases in New Mexico which deal with an implied power of an acequia. However there are cases which agree that there can be implied powers. [34] An implied power could be defined as a power which is not expressly mentioned by law, but which exists as a method of accomplishing a lawful purpose of an acequia.

Examples of implied powers include: the power or ability to purchase and own land for the acequia, affect local ground water uses, participate in or protest water transfers, protect water quality, protect water rights, lease or bank water rights, create water trusts, and build reservoirs or other methods of storage of

water for irrigation, stock watering, and domestic uses by acequia members. Acequias could also become actively involved in other activities such as agricultural preservation and zoning issues.

Basically they have the implied power to engage in any activity that is for the benefit of the members and is related to its statutory authority. As suggested earlier, acequias could even become involved in activities that were not directly related to specific statutory powers, so long as the activity was for the benefit of its members and not prohibited by law. Some of the above suggested implied powers might not be considered to be related to statutory powers of acequias, such as zoning issues. In which case it would not technically be an implied power. But unless there is a new law or court order prohibiting such actions, acequias should become involved in issues that promote and protect the water rights of its members.

The implied powers an acequia has are too numerous to mention. Each acequia will have different problems and concerns; and they have the implied power to deal with those individual matters. The implied powers mentioned above are more general in nature, but even that is not a complete list. Some of them are discussed in detail below.

(i) Protection of Water Rights

Acequias can and should become involved in the protection of water rights of its members. If the members lose their water rights the acequia becomes meaningless.

People can lose their water rights in many ways. New appropriations by the government, such as the forest service, can impair the water rights of downstream users. Water that is transferred out of the local community may interfere with the efficient operation of the acequia.

Water rights can be lost through non-use. They can also be lost through abandonment and forfeiture. For example, if corrals and a barn are built in a pasture, the New Mexico State Engineer and the courts will determine that a person abandoned the right to irrigate that portion of his pasture and will lose those water rights. If a specific part of irrigated land has not been irrigated for many years because of insufficient water supplies, and it has become overgrown with sagebrush, it may be determined that the right to irrigate that land was forfeited.

The water adjudication cases that are presently occurring throughout New Mexico are especially notorious for accomplishing the loss of people's water rights. Court orders are made specifying each person's water rights. In many cases people lost water rights because of the application of the legal theories of non-use, abandonment, or forfeiture. For example in the Red River Adjudication, over 800 acres of irrigated land in Cerro lost their water rights because of alleged forfeiture. These people who lost water rights could not irrigate their lands enough because of regular shortages of water. Without the adjudication case they probably wouldn't have lost the right to irrigate these lands.

People may also lose the right to irrigate their lands if a court order is entered that has a priority date that is incorrect and too recent in time. The priority date is the date water was first used on specific land. In times of shortage, the user with the earlier priority date gets the water first and exclusively.[35] People with recent priority dates or who are mistakenly determined to have relatively recent priority dates, may effectively lose the right to irrigate in times of shortage.

Acequias can help their members protect against losing their water rights. They can try to prevent non-use. Acequias can try to help their members fight the loss of water rights in the adjudication suits. Especially regarding priority dates, acequias should help their individual members prove the earliest time of use. It is beyond the resources of most people to participate in these complex legal cases. Organized as a group, as an acequia, people may be able to protect their water rights. Instead of each person hiring their own lawyers and experts, the acequia could do this much cheaper and effectively.

(ii) Water Rights Transfer

Generally the transfer of water rights has been bad for acequias. When water rights are transferred from irrigated land to other areas or for other purpose, the acequia that supplied water to that land will have less water. If the transfer is large enough or if there are other transfers involving the same acequia, its operation will become less efficient. With less

water in the acequia it will become harder to irrigate the remaining lands.

Of course an acequia or its members could protest a water transfer on the ground that it will it impair their rights to irrigate the remaining lands, but it is often difficult to prove this to the satisfaction of the State Engineer or the courts.

The acequia as a viable organization will also suffer if people sell their water rights and there are fewer members. The sale and transfer of water rights provides immediate financial gains, but it shortchanges future generations by denying them a means of self-sufficiency or income from agricultural activities. Fertile land is literally dried up. Owners of this land must rely upon other sources of income. Ultimately, the dried-up land will be sold to support the owners families.

There may be some circumstances where a water rights transfer is beneficial for an acequia. For example, each member of an acequia could transfer a small portion of his or her surface water rights to a well, which could then be pumped to supplement the acequia in times of shortage. Another example is the creation of a water trust or banking of water rights, where members who no longer desire to use their water rights transfer them to the acequia so that they may continue to be used for agricultural purposes by others.

(iii) Water Storage

Many acequias face water shortages almost every year. If they only had a system of water storage, they could supplement

the surface flows of water in times of shortage and then have sufficient water for all their needs. It is a fact that most acequias do not have any water storage system, but they could.

Certainly an acequia can build and maintain a reservoir. Presently the New Mexico State Engineer requires separate or additional water rights to maintain water in a reservoir. If the members of an acequia wanted to store water in a reservoir, then according to the State Engineer, they would have to either give up some of their water rights or acquire additional water rights from some other source. This is supposedly necessary to compensate for water that is lost by storage through seepage and evaporation.

Actually acequias should be able to use a reservoir without having to give up some of their water rights or purchase additional water rights. It should be allowed so long as the total amount of water that the acequia diverts for both immediate use and storage, including all losses, does not exceed the annual total of members water rights.

Acequias could also try to store their water underground in the water table. This has not been tried locally, but it might work depending upon certain local hydrologic variable.

(iv) Flood Waters

Since acequias have the power to acquire water rights, they should be able to establish a water right in the annual spring floods. New Mexico's water laws allow the impounding and use of flood waters by up stream users. Section 72-5-29 states in part

that "people living in the upper valleys" of the state's stream systems may "impound and utilize a reasonable share of the waters" in such valleys subject to the prior rights of others. Section 72-5-30 says in part that "the state engineer is authorized to approve" applications to "impound and utilize" flood waters.

Every year there are spring floods and tremendous amounts of water rush down streams past acequias. Taking extra water during this time would not harm any downstream water user and would actually help to "prevent erosion, waste, and damage caused by torrential floods." [37]

The water is there and the law authorizes the appropriation of flood waters, acequias just need to take advantage of these statutes.

III. CONCLUSION

The power of acequias to manage water resources for their members is strongly rooted in the historical development of acequias. In New Mexico the changes in sovereign governments affected the water rights of the users.

The power of the Pueblos to deal completely with their own water resources was of course affected by the imposition of Spanish authority and laws. Being an arid region, scarce water resources had to be shared.

Mexican independance brought another sovereign power to the area, which continued and encouraged additional settlements and development of irrigation practices.

With the transfer of sovereign power to the United States in 1848, the power of local acequias to manage their own water resources was weakened by the imposition of authority from a distant Washington, D.C. Even though the Treaty of Guadalupe Hidalgo guaranteed the property rights of the residents the territory of New Mexico, the federal government neither understood nor protected their water rights. This is even true today in the water adjudication occurring in the federal courts.

Acequias' powers were further weakened by the creation in 1912 of yet another layer of authority and jurisdiction over water rights, the State of New Mexico. While the Constitution of New Mexico guarantees that "the rights, privileges and immunities, civil, political and religious guaranteed to the people of New Mexico by the Treaty of Guadalupe Hidalgo shall be preserved inviolate," [38] it is questionable whether the powers of acequias and the rights of their members have been honored.

The doctrine of prior appropriation has been adopted by New Mexico as the basis of water rights. [39] This doctrine is inherently different from the legal basis of water rights under traditional Pueblo Indian, Spanish and Mexican laws and customs. Under those laws and customs water rights were of a communal nature. Like the air, no one could possess or own water for themselves. But under the doctrine of prior appropriation water rights became private property. Now they can be bought and sold.

New Mexico's water code does contain language that seems to recognize the water rights and customs established prior to the

first water laws of 1851, but in actual practice those water rights are treated essentially the same as water rights established after 1851.

According to some older court decisions, acequias have two types of authority or power; express statutory powers and powers that are impliedly necessary to carry out or effectuate statutory powers. To this can be added a third category, which is the ability or power of an acequia to engage in activities or deal with matters that don't deal with express statutory or implied powers but that are of common concern and for the common benefit of an acequia's members. An example of this would be an acequia lobbying for legislation that promotes the agricultural interests of the acequia's members. Such activity is neither restricted nor illegal and clearly is not a statutory nor implied statutory power.

The power that an acequia has is a function of the power that it exercises. If an acequia limits its activities it really has little power to affect anything, but if an acequia is active and becomes involved in many things to promote the interests and welfare of its members then it is powerful and can cause things to happen.

Subsistance uses of water by acequias have caused them to be on the defensive and slow to react to outside forces and interests harmful to acequias. If acequias only concern themselves with routine internal operations, they will constantly

fall prey to outside institutions and people. On the other hand if acequias are aggressive and creative they can influence and have some control over their water resources and the course of major legal suits such as the adjudications.

Acequias have all the power they need to deal with important issues concerning their members. So long as there is no illegal action and basic rules are followed, acequias can do whatever is necessary to protect and promote the common interests of their members.

FOOTNOTES

1. Clough v. Wing, 2 Ariz. 371, 17 P.453, 455-6 (1888)

2. Winship, George Parker, "Translation of the Relacion del Suceso," U.S. Bureau of Ethnology, Fourteenth Annual Report, Part 1, pp. 569-570, 575.

3. Bolton, Herbert E., "Spanish Exploration in the Southwest," pp. 178, 183.

4. Hutchins, "The Community Acequia: Its Origins and Development" 31 S.W. Historical Quarterly 262-3 (1927-8).

5. Hall, Wm. H., "Irrigation Development, France, Italy and Spain," pp. 363-366.

6. Hutchins, supra, p.263.

7. Hall, Frederic, "The Laws of Mexico." p. 414, quoting Escriche.

8. Recopilacion de Leyes de los Reynos de las Indias, see translations of portions contained in "The Laws of Mexico," Id.

9. Hall, Federic; supra

10. Kearny Code of Laws, Section 1 of Laws

11. See Sections 73-2-1 to 73-2-64, N.M.S.A. 1978.

12. Section 73-2-6, N.M.S.A. 1978

13. Section 73-2-9, N.M.S.A. 1978

14. Section 73-2-1, N.M.S.A. 1978

15. Section 73-2-11, N.M.S.A. 1978

16. Snow v. Abalos, 18, N.M. 681, 140 P.1044 (1914)

17. 1964 Op. Atty. Gen. No. 64-95

18. Candelaria v. Vallejos, 13 N.M. 146, 81 P.589 (1905)

19. Snow v. Abalos, 18 N.M. 681, 140 P.1044 (1914)

20. Sections 72-9-1 and 72-9-2, N.M.S.A. 1978

21. La Luz Community Ditch Co. v. Town of Alamogordo, 34 N.M. 127, 279 P.72 (1929)

22. Sections 73-2-1 and 73-2-3, N.M.S.A. 1978

23. City of Albuquerque v. Garcia, 27 N.M. 445, 130 P.118 (1913)

24. Snow v. Abalos, 18 N.M. 681, 699, 140 P.1044 (1914).

25. La Luz Community Ditch Co. v. Town of Alamogordo, 34 N.M. 127, 279 P.72 (1929)

26. Section 73-3-4, N.M.S.A.; which applies to the following counties: Bernalillo, Catron, Cibola, Curry, DeBaca, Harding, Hidalgo, Lea, Los Alamos, Mora, Sandoval, San Miguel, Sierra, Socorro, Taos, Torrance, and Valencia.

27. State ex rel. Sanchez, v. Casados, 27 N.M. 555, 202 P.987 (1921)

28. 1964 Op. Athy. Gen. No. 64-95

29. Snow v. Abalos, 18 N.M. 681, 140 P. 1044 (1914)

30. 1963 Op. Atty Gen. No. 63-112

31. Gibbany v. Ford, 29 N.M. 621, 626, 225 P.557 (1924)

32. Candelaria v. Vallejos, 13 N.M. 146, 81 P.589, (1905)

33. Id.

34. Candelaria v. Vallejos, supra; Snow v. Abalos, supra.

35. Section 72-1-2, N.M.S.A. 1978

36. Section 72-9-3, N.M.S.A. 1978; Frank Bond and Son v. Reserve Mineral Corp., 65 N.M. 257, 333 P.2d 889 (1959)

37. Section 72-5-29, N.M.S.A. 1978

38. Constitution of New Mexico, Article II, Section 5

39. Section 72-1-2, N.M.S.A. 1978

ALTERNATIVES TO LITIGATION

Prepared for the

UPPER RIO GRANDE WORKING GROUP

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Both Indians and non-Indian communities in northern New Mexico have used methods of resolving water conflicts without entering the mainstream judicial system. Pueblos have developed systems which stem from cultural and religious beliefs and which resolve most disputes within the Pueblo itself. The acequia system has developed in much the same way, based on the social and cultural needs of the people. In both cases, water is woven tightly into the community values, and as a result, enforcement of water-related duties and resolution of water-related conflicts have traditionally been handled by the community within its boundaries.

Pressures from modern anglo society and inevitable changes have weakened some of these indigenous methods. State laws have contradicted acequia powers and challenged Pueblo authority in many instances. Adjudications of water rights have increased tensions and in some cases created dangerous hostilities between neighbors; lawsuits have resulted in some of these cases. Energy development has in some cases necessitated lawsuits over water issues. Recreational and suburban growth has threatened traditional lifestyles, and lawsuits are used in those cases as well to defend water rights and quality.

SUGGESTIONS FOR EASING CONFLICTS & LESSENING LITIGATION

In general, the feeling of the team was that a strong acequia association was less likely to find itself involved in litigation -- at least in litigation where smaller issues are involved. Many of the suggestions below aim toward a revived acequia system, with the authority of each ditch clarified and respected. The team wanted to emphasize that such strengthening of the acequia system would not mean any lessening of the Pueblo authority over their water management, but would be intended to enhance the cooperation possible between the two groups, and strengthen their mutual position with respect to defending their traditional use and management style of water resources.

Community education is crucial. The acequia and Pueblo members need to know more about their rights and powers, and the system that governs them -- whether it is federal, state, local or tribal. There is also a particular need for this information to be given to any newcomer to a ditch association to avoid violations which are committed out of ignorance. Education is also needed for non-members, including government officials about the powers and rights of the acequia and the Pueblo, and about the values the systems represent.

A Water liaison person, hired by the State Engineer, can be very useful in any area undergoing adjudication.

The State Engineer has just hired the first liaison person, for the Taos area, and there is much hope that this adjudication process will go more smoothly than usual. This person, a member of the community, will educate the water users, help gather documents and information concerning historical and current water use, and in general ease fear and tension surrounding the adjudication process. Many times the acequia or Pueblo is given plenty of information about the system and how it works, but are left helpless to insert themselves effectively into the system.

Increased cooperation could prevent many small disputes from ending up in court, and could contribute to innovative jointly-made solutions to the larger disputes. Several judges who regularly hear water disputes feel that a more concerted effort to cooperate and compromise would be enormously beneficial, both in terms of caseload, and in terms of a healthier, stronger community. Many of the disputes, they feel, are the result of personality clashes or old resentments.

Money is an enormous problem for acequias and Pueblos when it comes to defending water rights and protecting water quality. Legal Services can take only the cases with the most impact. Many smaller cases go undefended or unfiled. In the larger cases, the money for experts and depositions can be enormous, drying up legal services funds quickly. The team believes that mediation, arbitration, or face-to-face negotiation could solve some of these issues more cheaply and efficiently.

Reducing the role of the attorney would be a desirable step to take in the interest of reducing litigation. The team suggests that private attorneys often promote the protracted litigation for their own financial benefit. The Indian client is often unable to keep the lawyer in his place as a servant to the tribe; the Hispanic client is often unable to afford the lawyer in the first place.

Congressional and legislative involvement could resolve some of the larger water conflicts. It is believed by many that in both the Taos and the Pojoaque/Nambe basins there is plenty of water, especially if the surface water were supplemented with seasonal groundwater pumping, to satisfy all foreseeable needs. What is needed, they say, is a coordinated effort involving the state, Congress, and all water users to develop the water and provide delivery and storage systems. Although local and federal money would have to be spent on these projects, there could be millions of dollars saved in protracted litigation over the battle for the water rights. Efforts should be concentrated on delivering "wet" water to all who need it, and not on dividing communities over "paper" water rights.

The State Engineer, as an inevitable player in many of these conflicts, is urged by the team to adopt a flexible, sensitive and supportive policy with respect to traditional water users. The team feels that he is bound as a public official to take the "public interest and welfare" into consideration in making his decisions, and that his neutral position in this regard has been detrimental.

SUGGESTED ALTERNATIVES TO LITIGATION

The team considered several alternatives to litigation but wants to emphasize that these are suggestions, not recommendations, and that they hope there are some new models which may evolve to address the issue in the future.

Acequia Commissioners and Mayordomo: The Team believes that there is already in place a potential alternative to litigation for the more individual issues facing traditional water users. This is the acequia association. In the past, the mayordomo of an acequia served as arbitrator for many disputes that arose within his jurisdiction. The commissioners often served the same function, depending on the area. The team believes that a strengthening of the acequia system would be the most important step toward lessening litigation.

Arbitration Board: Taking the acequia model a step further, the team suggests the use of a possible arbitration board, made up of acequia commissioners from other areas, with no conflict of interest, as a body which could listen to a dispute between members, or between association and member, and decide. It is felt that if the commissioners are experienced and respected, their decision will be fair and adhered to. There are important considerations before attempting mediation or arbitration by acequia officials. First, the Pueblos' authority over their own water management and use must not be infringed on. Secondly, most traditional communities, Indian and non-Indian alike, are suspicious of "outside" intervention and do not trust the third party, or do not see the third party as an asset.

Agreements: Agreements have been used in the past as a means of resolving disputes between ditch associations, or between associations and Pueblos. The team hopes that such agreements can be considered in the future as a possible alternative to litigation. In the past these agreements have governed division and management of waters flowing through more than one acequia system or Pueblo. These agreements were made without attorneys and without court action, and served the parties with varying success, usually until an adjudication or other litigation brought the agreement into question.

In 1913, an agreement was signed by several non-Indian ditches and two pueblo governors governing the amount and timing of water in the Pojoaque River to be released by the upstream ditch to the downstream users. The agreement was apparently not adhered to by the upstream users, and eventually the non-Indian downstream users took the upstream users to court.

CONCLUSION

The Need for Strengthening Old Ways and Developing New Ways:

There are alternatives to litigation for both Indian and non-Indian traditional water user which are traditional and in place. For the Indian, this forum varies from Pueblo to Pueblo and is held secret. There is little doubt that it is effective and accepted by those subject to it. For the non-Indian, the acequia system survives and although weakened in some areas could probably be strengthened and revived to resolve many of the smaller disputes which now end up in court.

However, the applicability of one system to the other group is questionable. Several pueblos expressed concern that the acequia system, with its close ties to the Justice of the Peace, has always been biased in favor of the non-Indians, and that it is a system which has methodically worked to the detriment of the Pueblos. On the other hand, it is unlikely that Pueblos could tolerate including non-Indians in their highly cultural and religious system, and it is equally unlikely that the non-Indians would submit to it.

The challenge seems to be to develop some alternative model for these cases involving Indian and non-Indian disputants. Such a model would probably have to be developed by both groups, be based on common values, and be approved by the body of people represented by both groups. With the strong similarities in values and views of water, and with the strong history of sharing the water, this task could succeed in bringing together the two groups recently divided by litigation. It is the hope of the Task Team that the Upper Rio Grande Symposium, to be held October 5-6, will contribute significantly to this effort to develop new models for resolving water disputes in traditional northern New Mexico communities.

ALTERNATIVES TO LITIGATION

A Background Paper

I. ACEQUIAS IN LITIGATION

Introduction:

The acequia system was brought by Spanish settlers to northern New Mexico centuries ago. The settlers found pueblo irrigation systems already in place and the two methods existed side by side, and in some cases merged, over the years. The acequia is based on the principle that irrigators have the power and responsibility to manage their own system, and each individual member has a responsibility to the entire community. The ditch itself is owned by the members in common, but the water rights belong to the members individually.

Traditionally, many disputes over water -- the amount, the timing and manner of delivery, obstruction by another member -- were settled on the spot by the mayordomo or the commissioners of the association, who were its elected officers. Because of the great importance of water to these communities, these officials were considered very important as well. Their leadership and management of the water delivery was crucial to the strength of the community as a whole. Like the Pueblos, these acequia communities valued their water highly, and still do. And, like the Pueblos, there is fear that modern pressures and competing forces will weaken this acequia system, and as a result an important foundation of the community will be threatened. One of the most damaging competing forces may be litigation -- the modern alternative to resolving disputes.

The acequia system has been weakened by other changes -- conflicting state laws, introduction of the private property concept and the prior appropriation doctrine for water, and the decline in irrigated acreage. "Nothing creates more problems for an acequia than a piece of land not cultivated," said one acequia member. "First there are weeds, then gophers, and then condos."

Over half the cases brought in district and magistrate court involve one member suing another member, or the commission suing a member. Extremely rare are cases of one acequia suing another. Cases of acequias v. pueblos are more common, but also rare. There have been several significant cases involving acequias involved in litigation with the federal government and with private interests. Adjudication of water rights has led to some inter se suits, as well as disputes and tensions which do not reach court. There are also a large number of disputes within acequias which never get to court, not because they are resolved elsewhere, but because they are feuds which never end, or because of the expense.

One Member v. another Member:

This kind of suit, brought in magistrate court, is common, and is a symptom of the deteriorated state of the acequia system. Often the court decision in these member v. member suits does not truly resolve the dispute. Some communities are prone to this kind of litigation, and others are almost free from it entirely, most likely due to differing strengths of the individual acequia system.

Some disputes arise when certain people move into the acequia, or near it, and don't understand, or understand but don't respect, the acequia system. These people may be outsiders, or those who simply have no agricultural interest in the land. They may lock gates to their property, intentionally, or unintentionally, keeping out acequia people who need access through their land to ditches. In one case, the ditch officials were locked inside someone's property and couldn't get out. In other cases, the newcomer will change the course of the ditch, or divert the water for non-agricultural purposes, like making adobes, filling swimming pools, etc.

Another example is found in the heart of Santa Fe where a a new condominium development was built adjacent to a lateral of the Acequia Madre on Canyon Road. The residents, pleased with the "green belt" next to their condos, planted gardens and flowers in the lateral, and fenced pets in the area. The acequia association sued the condominium residents to enjoin this activity and for damages. The case was eventually settled before going to trial.

Acequia Association v. Individual Member:

Another point of conflict where litigation occurs is where enforcement of acequia rules is needed. There are frequent cases where the commissioners of an association take an individual member to court for payment of operation and maintenance fees to the association, or for obstruction of ditches, or opening of gates. Occasionally there are disputes between a ditch-rider and mayordomo concerning the actions of the ditch-rider, whether he shut off water at the right time and place, etc. This points to an inherent conflict in two systems which govern the delivery of water to the irrigator -- the ditch rider is paid by the Army Corps of Engineers and usually works for an irrigation company; the mayordomo is part of the state acequia system.

Some of the suits may stem from grudges, in the opinion of several judges. For instance, a member may refuse to pay dues in order to show the mayordomo who's boss. In these cases, the member ends up paying the dues, as well as the $20 filing fee, in the end.

Acequia v. Urban Pressures:

Acequias which are adjacent to cities, or suburbs, often have problems with encroaching urbanization. Culverts are placed in ditches restricting the flow, ditches are paved over, headgates are made inoperable. Another problem is quality degradation of acequia water. Particularly around Espanola, Pojoaque and Taos runoff from paved businesses can contribute a lot of oil and gasoline pollution to the acequias.

In Espanola, a ditch association backs on the Pueblo Plaza shopping center. The association claims that runoff has made it impossible to grow crops on certain acequia lands, and the paving of the parking area surrounding the gas station has made it impossible to clean the ditches. Ditch commissioners have failed to get satisfaction from the owners or the city officials. Acequias are not prepared to fight a corporation in court because of expense, and because of a basic inequality of power.

Acequia v. Developers:

These situations usually revolve around impairment of acequia water supplies by upstream developments -- recreational facilities or subdivisions. Many of these cases are around Taos, Red River, Questa, Ruidoso, and Chama. The damage -- whether to quantity or quality of the water --is difficult to prove until the cunulative effects are seen, and by then it is difficult to assign responsibility to one or many of the contributing parties. The impairment can be caused by either surface or groundwater appropriations, and the effect can be either the drawdown of acequia members wells, or reduction in the streamflow. (There is usually a strong connection between surface and groundwater in these areas.)

An example of this kind of litigation arose out of the Abeita adjudication north of Taos. In an inter se proceeding, an acequia challenged the right of a subdivision to buy up private agricultural water rights (not acequia) and transfer them to subdivision use. The subdivision had a certain number of domestic wells, but needed additional water and bought and transferred a certain amount of water from the stream feeding the acequia. The acequia argued that the water that was transferred was not a true water right, because traditionally the user was only allowed surplus water, and only during certain times of the year. The Federal Court judge ruled in favor of the acequia, saying that this "sobriante", customary right, had to be respected, and that the subdivision could not transfer that right as if it were a full and ordinary water right. He referred the case to the State Engineer for an adjustment of the water right. It is expected that the subdivision will not be able to use that water on such a conditional basis and will have to look for firmer rights, ie. full rights which can be bought, retired and transferred, with no net loss to the stream.

If the subdivision simply bought a firm water right and attempted to transfer its use, then it would be like the Sleeper case in Rio Arriba County. A planned ski resort/recreation area bought the water rights of an acequia member,conditioned on an approved transfer of the use by the State Engineer. In this case, the local acequia from which the water was to be transferred,with no net loss to the system, challenged the transfer on two grounds: 1) that the remaining irrigators would be impaired by having less water for carriage; and 2) that the public welfare of the community would be hurt by the shift of the water from agriculture to recreation. The acequia won in district court, but an appeal has been made.

In another case, a subdivision at Arroyo Seco was planned for 40 households, each with a 3 af domestic well. A hydrologist, hired by Legal Services, did a study and determined that the water table would be lowered by the wells, but not enough to be called impairment. This definition of impairment is very vague, and up to the State Engineer to decide.

Acequias v. Utilities/Railroads:

The Acequia Madre del Ojo del Gallo, in the Bluewater basin, is protesting in court the transfer of water rights bought by Plains Electric for its electric generating station west of Grants. The utility has bought both surface and groundwater rights and the acequia fears the transfer will cause impairment to the acequia's source, the spring feeding Ojo del Gallo stream. The spring disappeared during the uranium mining days, and now that the mining is gone the spring has come back. "The acequia is back in business," according to a spokesperson, "but we don't want that spring to dry up again. We are lining ditches and are getting ready to use that water again."

El Vadito de los Cerrillos WAter Users Association, rural water users in the Galisteo Basin, have been struggling for years in litigation to defend their water rights. In the 1880's the coal mining in Waldo and Madrid brought the railroad through Cerrillos, linking the three towns. The railroad bought land including a spring which it dammed up, and subsequently built a 14,000 foot pipeline from the dam to Cerrillos. The town made a deal with the railroad for the use of the water, but since the railroad went out of business, the dam and pipeline have changed hands many times. At this point two people are claiming to own the system -- one who wants to sell it all to Madrid, and the other who wants to start a big orchard.

There are really two issues here: 1) who owns pre-1907 water rights when one person diverted the water (rr) and someone else used it (town); and 2) how can a rural system get funding? The Cerrillos water users are trying to get state, federal and county grants to buy the system themselves. The association's money has already been depleted by legal fees, and their lawyer is at a loss what to do next. Parties to the suit have filed a

stipulation with the State Engineer to adjudicate inter se their water rights, but the State Engineer has refused, not wanting to adjudicate the Galisteo Basin, at least not yet.

Acequias v. federal government:

Conflicts with federal agencies have also arisen as a result of the adjudication process.

The extent of the water rights belonging to the Forest Service was severely limited in the adjudication of the Red River Basin. The Forest Service claimed reserved unquantified water rights for its land, all upstream of the acequias, based on the 1908 date when the Forest was created. This meant that the Forest Service could have expanded its water use indefinitely in the future to include future recreational needs not yet developed. The acequias challenged the rights, and the judge ruled against the Forest Service, limiting their rights to that amount of water needed for the domestic use of the ranger station and existing recreational facilities.

The acequia interests also conflict with most efforts at establishing an instream flow. The Forest Service and other agencies would like to appropriate water for instream flow but this could also be in conflict with acequia practices. The acequia, probably with priority dates in the 1800's, would not understand the necessity of leaving water in the stream and not irrigating in a water-short year to satisfy the instream flow right downstream.

Acequias and the Adjudication Process:

The adjudication process forces acequias into court when they might not otherwise have turned to that forum, because unfortunately litigation is the cornerstone of that process. Acequia spokespersons agree that the hydrographic surveys are needed to determine water use, but that these surveys should be subjected to something other than litigation for resolution of differences.

As seen above, the acequia may need to defend its priority date and amount of need against "newcomers" like the Forest Service. On the other hand, the acequias often end up competing with Pueblos for early priority dates. The adjudication process, with its setting of these dates, can create hostility, suspicion and enormous tension between members of an acequia, between acequias themselves, and between acequias and other communities, including Pueblos. The state engineer has so far had a policy of determining the priority date of the acequia through some kind of averaging of the member's individual dates. Current adjudications involving acequias are in Taos (5 separate ones) and at Santa Cruz and Chama.

Some Legal Dilemmas:

There is an inherent conflict within NM statutues which has not been tested. Prior Appropriation is the law on the one hand; but everyone has the right to a domestic well pumping 3 af. At what point does the prior right stop the drilling of that next domestic well, if ever? In some parts of the state, where the groundwater is over appropriated and mining of the groundwater is already taking place, any additional wells are definitely an impairment, but there is no recourse in the statutes for those with an early priority date, like acequias. When a transfer is necessary, then the issue of impairment does have to be considered by the State Engineer.

The traditional sharing of waters between Pueblo and Hispanic communities that has been the practice for hundreds of years in northern New Mexico is seen to be in conflict with the prior appropriation doctrine, according to the State Engineer's office. In water short years, the oldest right should be satisfied first, and the most junior might be left without any water that season. But traditionally in water-short years, the water was shared, and still is for the most part in those areas. During the adjudication process, this practice is ignored by the decision-makers. Legal services attorneys disagree with the State Engineer and feel this sharing practice is not necessarily in conflict with the prior appropriation doctrine.

PUEBLOS IN LITIGATION

Introduction:

It is clear that for the northern New Mexico pueblos water disputes among tribal members, or disputes between the pueblo government and individual members, are settled today much the way they have always been settled. This method varies from pueblo to pueblo. In some cases, it is dealt with by religious leaders, in some cases, by pueblo government officials, in some cases by tribal courts. Whatever these methods are, they are traditional and private. The same applies to whatever disputes there may be between pueblos themselves.

Another characteristic of the water disputes within the pueblo is that they rarely involve money. No pueblo charges a fee for irrigation water or for membership in a ditch organization. The duties of the water user involve maintenance of the ditch and banks, and are assigned by the pueblo leadership. Punishment for non-fulfillment of duties might involve some kind of public criticism, loss of privileges, etc., but never would include fines or fees.

The private, non-monetary handling of water issues within the pueblo reflects the pueblo view of water as a very basic element of all life. It is valued, not as a piece of property to be fought over, or bought and sold, but as a foundation of the religion, traditions and culture of the pueblo itself. Water, as well as the land and air, should be respected, and if one takes from these resources, one must also "give back" to the resource. One way of "giving back" to the water is to clean the ditches. In many pueblos, it is considered your responsibility to help with the cleaning of the ditches, even if you are going to take no water.

There is fear among pueblos that these values are being lost, as a result of the growing modernization of life around, and within, the pueblo. People won't do anything anymore unless they are paid for it, is a common complaint. There is the belief that for many, water has sunk to second place, behind money in importance. "When you switch the importance of these things you do something very bad," says one elder. "It means that pueblo culture is eroding. People think money is so important, but when you run out of water, or have ruined the water, money won't do you any good.....I tell the young people, they can't just take all the time from the land and water. It will be used up. They need to give something back. Right now all they are giving back is pollution."

This same person expressed the view that there was a commonality of value for the land, air and water among the older Hispanic and Indian water users, and among those who were continuing to try to work the land. Much of the younger

generation of both cultures were out of touch with these values.

The religious significance invested in the water puts pueblos in a difficult position to deal with water issues -- either questions of management or of rights. There is a reluctance -- even fear -- to discuss the future of the water. And yet, the pueblo leadership realizes that without talking about the problems and threats to their water, there will be no planning and protection of the resource. And without this, the water will surely be lost, either through legal means, inadequate management, or pollution.

Adjudication of Water Rights:

Outside the Pueblo itself, litigation does occur. All the pueblos except five Middle Rio Grande pueblos and Picuris are currently involved in adjudication of water rights lawsuits, brought by the State Engineer for the purpose of determining exactly how much water each user is entitled to. All water users in the basin being adjudicated are named defendants in the lawsuit. Unfortunately, these adjudications often lead to suspicion and hostility among neighbors who fear that the amount of water may not be enough to satisfy all the claims. Interestingly enough, it is usually the case that in the rural traditional areas there has always been enough "wet" water to go around, although the "paper" claims to water may exceed the amount available.

Litigation Involving Pueblos and Non-Indian Communities:

There are also lawsuits involving pueblos and non-Indian neighbors over management of shared water resources. Examples cited here are Taos, Santa Clara, Laguna and Acoma pueblos.

The headwaters of the Rio Lucero and its tributaries are located on the Pueblo of Taos; from there the water flows to serve several non-Indian acequia associations. Relations between Pueblo and the non-Indian water users have historically been strained. The intertwining of the Indian and non-Indian water use is more complicated than for some other pueblos because there is a significant number of lands within the pueblo boundaries which were deeded to non-Indians under the Pueblo Lands Act of 1924. These lands were also awarded water rights, if they were available, under state law. These water rights were not defined or quantified, but were given a priority date. The Act also may have permitted the non-Indian landowners to have access to ditches on pueblo land as needed for delivery of their water, although that is an unresolved issue. Other landowners, the Arroyo Seco Association, for instance, were given the right to a certain amount of water as available, after the other rights were satisfied.

These acequias which are located within pueblo boundaries are in a different position from acequias on non-Indian land. In terms of state law, they are considerably less powerful, being unable to assert the authority granted other acequias by the state, since state law does not apply on Indian land. This concept is often difficult for these associations to swallow, and it is easy for them to act like their state-sanctioned brothers and assert that authority anyway. This leads to understandable frustration and hostility on the part of the pueblo, who feel that these non-Indians are within the pueblo boundaries "by the grace of Congress."

There is evidence that it is easier to co-exist when the non-Indian users do not have pueblo land. An acequia association with no pueblo grant lands, the Fernando de Taos, was one of the first to be granted lands from Spain with appurtenant water rights from the Rio Pueblo de Taos, which originates on Pueblo land. From the beginning, the non-Indian neighbors looked to the Pueblo of Taos for protection and help, and the relationship has continued over the years to be a cooperative one.

Types of disputes include non-Indian irrigators changing the course of ditches so that downstream Indian users are cut off, and vice versa. There have also been differences over bills sent by the acequia association to the Pueblo for both labor and money for the maintenance of the ditch. The accounting system is apparently informal enough to cause confusion.

In an effort to define and regularize these often strained relationships with non-Indian water users, the Pueblo of Taos has recently passed a water code which requires non-members of the pueblo to apply for a permit to have access to ditches on pueblo land. The Pueblo, which actually began issuing these permits last year, hopes that this will be a means of achieving better understanding of duties and responsibilities of both Indian and non-Indian water users, and that disputes will be lessened.

Santa Clara Pueblo has a long history of disputes with its upstream neighbor Espanola. The pueblo feels that the town shows no respect for the pueblo values or rights. "They think we are some alien sitting in their midst," says one pueblo spokesperson. Many of the disputes have centered on water quality issues. The city's wastewater treatment plant discharges into the Rio Grande and mingles with water which is traditionally used by the pueblo for cultural and religious purposes. Although the discharge meets state and federal discharge standards, and is considered to be "healthy", it does not meet pueblo cultural standards, and the pueblo is forced to abandon the cultural and religious uses of the water. The pueblo has considered litigation over this issue, but at this point cannot afford the legal fees.

Another city, upstream from two pueblos, was sued for polluting the water with inadequately treated wastewater. Laguna and Acoma filed suit against the city of Grants, claiming the

quality of the water in the Rio San Jose was degraded by the effluent from the Grants treatment facility. Jurisdictional questions delayed resolution of the dispute for many months, and eventually settlement was reached.

Litigation Involving Pueblos and Governmental Agencies:

Santa Clara and Cochiti offer examples of lawsuits brought by pueblos against governmental agencies. Santa Clara and Cochiti both sued the Army Corps of Engineers; Isleta sued the Middle Rio Grande Conservancy District.

Several years ago the Army Corps of Engineers developed a plan to protect the city of Espanola from Rio Grande flood damage. The plan involved dredging and strengthening the banks, and some of the work needed to be done on pueblo land. The corps asked permission to enter pueblo land and in return the pueblo asked for some flood protection work for the pueblo, as well as the town. The corps replied that there was only money available for the town and not the pueblo. The pueblo sued the corps and enjoined them from entering pueblo land, until a compromise was reached calling for some flood control work for pueblo land as well.

Cochiti pueblo filed suit four years ago against the Army Corps for damages caused by seepage of the corps-built Cochiti dam on the Rio Grande. Seepage from the dam had caused most of the pueblo's agricultural land to be underwater and unuseable. This suit, asking for correction of the seepage problem as well as damages, is still pending, although efforts are underway for a negotiated settlement. Interestingly, the neighboring town of Pena Blanca has suffered the same damage and talks have begun between the two communities about joining forces, at least for political impact.

TECHNIQUES FOR AGRICULTURAL LANDS PRESERVATION IN THE UPPER RIO GRANDE REGION

Prepared for the

UPPER RIO GRANDE WORKING GROUP

By members of the Agricultural Lands Preservation Team:

Anita P. Miller
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I. SCOPE OF STUDY

The scope of work of the Agricultural Land Preservation Team, composed of Consultant Anita Miller and Task Force member Patricio Garcia, was to study techniques which might be applied to preservation of agriculture in the study area; to identify those techniques most appropriate to the study area; and to suggest state and local legislative changes which might be necessary in order to apply these techniques.

II. EXISTING AND PROPOSED AUTHORITY FOR LAND-USE REGULATION FOR THE PRESERVATION OF AGRICULTURAL LANDS

There is existing authority for local land-use regulation in State law. This authority is in the form of platting and planning jurisdiction, subdivision regulation, and zoning regulation.

A. Platting and Planning:

Pursuant to Section 3-19-1 et seq. NMSA 1978, a municipality has planning and platting jurisdiction, giving it the authority to carry out a "general municipal or master plan which may be referred to as "the general or master plan.'"

Section 4-57-1 et seq. NMSA 1978 provides for county planning commissions to carry out and promote county planning.

Section 4-58-1 et seq. NMSA 1978 provides for planning districts. District 2 consists of Rio Arriba, Santa Fe, Taos, Los Alamos, Colfax, Mora, and San Miguel Counties. These districts were for the purpose of regional planning and development, and were utilized during the 1970s for planning funded with federal grants. Although a plan was written under this statute for District 2, there has been little in the way of implementation.

B. **Subdivision Regulation:**

Both municipalities and counties, pursuant to their platting and planning jurisdiction, may enact subdivision regulations. The Municipal Subdivision Act can be found at Section 3-20-1 et seq. NMSA 1978. Section 30-20-5 of that Act discusses concurrent county and municipal jurisdiction over subdivisions, and states that both the county and municipality have subdivision jurisdiction over land which is within five miles of a municipality having 25,000 or more persons, and within 3 miles of a municipality having 25,000 or less persons. The governing bodies of both a municipality and a county must review and approve subdivisions in those areas immediately outside of municipal borders. The New Mexico Subdivision Act refers to counties and is at Section 47-6-1 et seq. NMSA 1978.

Under the Municipal Subdivision Act, a subdivision plat must be approved by the city's planning authority if the subdivider proposes to divide the land into two or more tracts of less than 5 acres in any one county for certain enumerated purposes, including sale for building purposes.[1] Under the New Mexico Subdivision Act, a person proposing to subdivide land must get the approval of the county commission if he proposes to divide the land into five or more tracts within 3 years for the purpose of sale or lease.[2] The New Mexico Subdivision Act allows the board of county commissioners of each county to create its own regulations which set forth the county's requirements for the following:

> "(1) enough water for subdivision use;
>
> "(2) water of an acceptable quality for subdivision use;
>
> "(3) liquid waste disposal;
>
> "(4) solid waste disposal;
>
> "(5) sufficient and adequate roads;
>
> "(6) terrain management;
>
> "(7) phase development;
>
> "(8) specific information to be contained in a subdivider's disclosure statement in addition to that required in Section 47-6-17 NMSA 1978;
>
> "(9) reasonable fees approximating the cost to the county of determining compliance with the New Mexico Subdivision Act and county regulations while passing upon subdivision plats;
>
> "(10) summary procedure as provided in Sections 47-6-12 and 47-6-13 NMSA 1978;

> "(11) any other matter relating to subdivisions which the board of county commissioners feels is necessary to insure that development is well planned, giving consideration to population density in the area."

Paragraph (11) of Section 47-6-9 is particularly relevant, in that it has been interpreted by the Attorney General to allow counties to have more stringent regulations than the State Subdivision Act, if the commissioners feel that such regulation is necessary to ensure that development is "well planned," giving consideration to the population density in the area.

Rio Arriba County, in May of 1987, adopted new Subdivision Regulations, because the County Commissioners were alarmed about increasing subdivision activity which threatened to divert water from agricultural uses into residential development, which they considered to be against the public interest of the County as a whole. The Commissioners were also concerned about evidence of increasing ground water contamination in certain areas of the County, and wished to address this problem, with the assistance of the Environmental Improvement Division, through more stringent regulation of individual septic systems in subdivisions. The revised regulations set forth the County's public interest as being in agricultural preservation, and specifically refer to

preservation of water in acequia-based irrigation. These regulations are currently under challenge in the First Judicial District by the Coalition for the Preservation of Private Property Rights, a group composed mainly of realtors in the Espanola area.

In revising the subdivision regulations, Rio Arriba County relied heavily on the ruling of Judge Art Encinias of the First Judicial District, in the case Ensenada Land and Water Association et al v. Howard M. Sleeper and Hayden and Elaine Gainor and Steve Reynolds, New Mexico State Engineer, No. RA-84-53, which case is currently before the New Mexico Court of Appeals. That case stated that the State Engineer, in determining whether or not to approve a transfer of water rights, must consider the public interest of the community in which the transfer is to be made. The outcome of the challenge to the Rio Arriba County Regulations, and of the appeal in the Ensenada case will have a major influence on the extent to which subdivision regulations can be used for the preservation of agriculture in the area of study.

C. Zoning:

New Mexico's Zoning Enabling Act can be found at Section 3-21-1 et seq. NMSA 1978. It grants authority to a county or municipality to regulate and restrict, within its jurisdiction, the following:

"(1) height, number of stories and size of buildings and other structures;

"(2) percentage of a lot that may be occupied;

"(3) size of yards, courts and other open space;

"(4) density population; and

"(5) location and use of buildings, structures and land for trade, industry, residence or other purposes."

The Statute also enables the county or municipal zoning authority to:

"(1) divide the territory under its jurisdiction into districts of such number, shape, area and form as is necessary to carry out the purposes of Sections 3-21-1 through 3-21-14 NMSA 1978; and

"(2) regulate or restrict the erection, construction, reconstruction, alteration, repair or use of buildings, structures or land in each district. All such regulations shall be uniform for each class or kinds of buildings within each district but regulation in one district may differ from regulation in another district."

Section 3-21-5 NMSA 1978 says that all zoning must be in accordance with a comprehensive plan, thus tying zoning to overall planning in a municipality or county.

There had been provision for "special zoning districts" at Sections 3-21-3 to 3-21-6 NMSA 1978. These districts would have allowed the organization of "special zoning districts" outside the boundary limits of incorporated municipalities, with the authority to establish and enforce zoning regulations. This statute was declared unconstitutional in the case of Deer Mesa

Corp. v. Los Tres Valle Special Zo... ...mission, 103 N.M. 675 (Ct. App. 1985). The Deer Mesa ca... ...ed a special zoning district in Taos County. The Coun... ...t have zoning, and so local residents, under the provis... ...f the Special Zoning District Act, formed a zoning distric... ...gulate land within the district. When they denied a sub... ...application in the district because it was not in ac... ...e with their zoning restrictions, the subdivider appe... ...t was successful in nullifying the Special Zoning Distri...

III. OTHER POSSIBLE SOURCES OF LAN... ...EGULATION IN THE STUDY AREA

A. The Rio Arriba County Pol... ...an Draft. In a study entitled "Land Use In Rio Arr... ...unty, Problems and Opportunities," the law firm of Potte... ...y, which was retained by Rio Arriba County in late 1985 ...y existing land-use controls in the County and propose... ...es, with particular attention to revision of the Subdivis... ...lations, specifically stated that land-use regulation in ...unty should be made in the context of comprehensive plannin... ... in recognition that revised subdivision regulations ... only apply to the subdivision of land, and not to other ... development. After the Subdivision Regulations were a... ... volunteer Policy Planning Task Force was created b... ...ounty Commission to develop a Policies Plan which would a... ...nd use in particular,

but also address other, related issues, such as economic development. The Task Force met regularly between June, 1986 and February, 1987, discussing a single important County issue in depth at each meeting. It reached conclusions concerning suggested County Policies, and then suggested Implementation Strategies. In April, 1987, the Policies and Implementation Strategies which had been agreed upon by Task Force members were compiled and presented to the County Commission. As of September 1st, members of the Task Force have requested that the County Commission adopt at least some of these Policies. If these Policies are adopted by the Commission, they will provide official County policy upon which to base additional land-use regulation. The Policies Plan is available from the Upper Rio Grande Working Group. Of particular interest to this Task Force are Policies II and III.

Policy II, Agricultural Preservation, states as follows:

> "The County should assume the responsibility of preserving identified agricultural areas on the County. These areas include the following:
>
> "(1) Tierra Amarilla/Chama: cattle and sheep ranching and cultivation of hay to serve the ranches;
>
> "(2) Medanales: truck farming of fruits and vegetables;
>
> "(3) Velarde/Dixon: truck farming, with emphasis on orchards;

"(4) Chimayo: truck farming and orchards."

Policy III, The Eastern corridor, states as follows:

> "Policy: The County is committed to analyzing problems which exist along the Velarde corridor, north of Espanola, and the Santa Cruz and Chimayo valley south of Espanola, with particular concern for displacement of agriculture by uncontrolled residential development, haphazard placement of mobile homes, and the resulting contamination of ground water. The County shall explore land-use regulation to address problems in this area."

Under both policies, there are several implementation strategies which could be adopted by the County to address these policies. As stated above, the County will have to adopt a plan if it wishes to implement some form of zoning to address these problems, since zoning must be in accordance with a comprehensive plan.

The planning process which occurred in Rio Arriba County could also be applied in other counties and municipalities in the Upper Rio Grande study area. The process gives an opportunity for citizen input concerning what a county or municipality would like to become in the future, with particular emphasis given to preserving assets, such as water and agriculture.

B. Water Planning Efforts. The New Mexico Water Resources and Research Institute and the University of New Mexico Law School received legislative funding in 1985 to study state appropriation of unappropriated ground water, as a result of the decision of the

United States District Court and the 10th Circuit in the City of El Paso v. Reynolds cases, 563 F. Supp. 379 (D. N.M. 1983) and 597 F. Supp. 694 (D. N.M. 1984). Those cases had stated that ground water flows in interstate commerce, and cannot be kept from out-of-state use. Those cases did provide, however, that the public interest should be used as the criteria to allocate water to applicants both within the state and out-of-state. The water study suggested that regional planning be instituted in New Mexico, which would then guide the Interstate Stream Commission in determining the public interest in appropriating unappropriated ground water in New Mexico.

During the 1987 session, the legislature appropriated funds for the purpose of regional water planning. The criteria for regional planning involve "the identification of the region requesting planning funds and why it is a hydrologically and politically appropriate applicant", among other criteria. (Emphasis added.) The legislation also states that:

> "D. A water planning region eligible for funding under this section is an area within the state that contains sufficient hydrological and political interests in common to make water planning feasible. The state as a whole shall not be considered a water planning region for the purposes of this section.
>
> "E. No entity shall be made a part of a proposal for planning funds under this section without its consent.
>
> "F. No funds shall be granted under this act to any party or parties that are not within a water planning region. Whether a proposal for funding

falls within a water planning region shall be determined on a case by case basis by the Interstate Stream Commission after consultation with the state engineer and consideration of the following:

> "(1) whether the source of water and the potential place of use of the water are located within the same hydrologic basin; and
>
> "(2) if there is more than one party and the parties are requesting funds on a joint basis, whether the parties have demonstrated political and economic interest in common by entering into a binding intergovernmental agreement for carrying out the planning process."[3]

The first report of the Task Force of the New Mexico Water Resources Research Institute and the University of New Mexico Law School Task Force studying unappropriated ground water made it clear that the Upper Rio Grande Basin would certainly have interests different from other parts of the State, and that preservation of the acequia-irrigated agriculture and the culture of the region could be a legitimate basis for state appropriation of unappropriated ground water, if the region, at the grass-roots level, planned appropriately for these ends.[4]

The 1987 Statute does not empower the Water Planning Districts to do more than engage in planning for regional water needs. Planning for water needs, however, necessitates consideration of current and future land uses, and water, of course, is a major determinant of land use. Thus, this

legislation could well form the basis for a land-use planning process in self-defined regions, which, as stated above, do not have to be contiguous with existing county or municipal lines.

If, in the water planning process, securing enough water for agricultural preservation is included in water plans, then the plans could also be a basis for establishment of an agricultural preservation policy. It must be stressed, however, that at the present time, only counties and municipalities have specific authority to enact the subdivision and zoning regulations which could implement any agricultural preservation policies enunciated in regional water plans.

IV. ANALYSIS OF OTHER LAND-USE TECHNIQUES IDENTIFIED

A. In 1973, the New Mexico State Legislature enacted Section 7-36-20 NMSA 1978, popularly known as a "greenbelt" law, which established a special method of evaluation for land used primarily for agricultural purposes, determined on the basis of the land's capacity to produce agricultural products. This law was clearly an exception to the general mode of property evaluation for tax purposes established by the Property Tax Code and the New Mexico Constitution, which is the land's market value.

Under the New Mexico Statute, the property owner must file an annual affidavit confirming the agricultural use of his property. Residents of the Village of Corrales, New Mexico, in particular, take advantage of the benefits of this statute.

This preferential taxation, however, provides no penalty to be paid by the property owner if he should convert his land from agricultural to other uses. He merely gets the tax benefit while the land remains in agriculture.

In other states, tax benefits to farmers have features which make it more desirable to retain the land in agricultural uses. Under the system of "deferred taxation," the property owner is taxed at a preferential rate as long as the land is kept in agriculture, and at the time of conversion to another use, gains received from the preference are paid back. Under a "circuit breaker" system, in place in Michigan and Wisconsin, the taxpayer gets a tax rebate, which is repayable when the land is converted to other use.

Under a "use tax penalty" system, a conveyance or use tax penalty is imposed in tandem with preferential assessment. If a change in use is simultaneous with sale of the property, the tax is computed on a percentage of the purchase price. It usually is assessed on land's market value in the new use.

In Vermont, the capital gain enjoyed by the land owner who converts the property into another use and sells it for profit is the basis for the penalty. Over 60% of long-term capital gains on land sales is taxed away. The penalty varies with the amount of gain as a percentage of the original cost to the seller. It is geared toward discouraging short-term speculation. After keeping the land in agriculture for 10 years, there is no penalty.

California has a "restrictive agreement" under the terms of which owners agree to restrict their land to agricultural use for 10 years in return for preferential assessment under a contract. At the end of each year, they may renew the contract or announce an intent to break it. The amount of benefit is then taxed back during the remainder of the 10 years.

A preferential tax without a penalty serves only to benefit land owners as a holding action until market conditions are favorable for sale. Even under a penalty system, a farmer may still sell his land regardless of the penalty if the price of land is high enough. A conveyance tax imposed at the time of sale, equal to the difference between the market value for its highest and best use and the capitalization income-producing value of the land if kept in agriculture--the unearned increment--could be imposed, which would tax away all profits of sale.

B. Agricultural Districting. Agricultural districting requires state enabling legislation. Formation of agricultural districts is usually initiated by farmers, and a land owner cannot be included in a district without his permission. Agricultural districting, where in effect, is usually utilized as the basis for right-to-farm legislation, which prevents neighboring property owners who have different uses for their land from restricting farm activities. In many states, preferential taxation can be imposed only in agricultural districts which have been set up by petitioning farmers. In other states, particular zoning regulations geared toward agricultural preservation can only be imposed in agricultural districts. Agricultural districts are usually formed by county governments after petition by land owners who wish to take advantage of their benefits.

C. Agricultural Zoning. Agricultural zoning can be imposed under the New Mexico Zoning Enabling Act, cited above, since that statute allows the formation of different districts and also regulates density. There are already "agricultural zones" in some counties. It might be desirable to add a specific provision to the Zoning Enabling Act which gives, as one of the authorized purposes of zoning, the preservation of agriculture.

As stated above, zoning must be in accordance with a comprehensive plan, which could be a minimal policies plan, such as the proposed Rio Arriba Policies Plan. Once agricultural areas

are specifically identified, however, they should be mapped, so as to enable further land-use regulations. The planning process should involve the farm community, and the Soil Conservation Service, County Extension Agent, Tax Assessors, and farm organizations.

A workable plan should identify lands not needed for agricultural protection as well as those that are, and map them, so that nonfarm development can be channeled to these areas.

Assistance in identification of suitable agricultural land can be obtained through the Soil Conservation Service, which can utilize the Land Evaluation and Site Assessment (LESA) procedure in identifying land which is more or less suitable for continued agricultural pursuits. LESA was developed by the United States Department of Agriculture Soil Conservation Service in the 1970s, under the Federal Farmland Protections Policy Act, and was designed to determine the quality of land for agricultural uses and to assess sites or land areas for their agricultural economic viability. It was hoped that the system would be used to facilitate decision-making by state and local planners, land holders, developers, and governing officials concerning appropriate land-use regulations for preservation of land in agriculture.

LESA involves a two-step process. The first step, land evaluation, is performed by the Soil Conservation Service, and consists of analysis of soils in the area and evaluation of these soils; with the best group assigned a value of 100, and all other groups assigned lower values. The land evaluation is based on data from the National Cooperative Soil Survey.

The second step, site assessment, is performed by a local task force, usually in cooperation with county or municipal officials. The task force and county officials identify the criteria which they would like to see applied to property in the plan area. These criteria could range from proximity to a city, to inclusion of property in an acequia, to agriculturally-based cultural characteristics. The task force-selected criteria do not have to be based on any scientific criteria, such as "prime agricultural soils."

All property in the area of the plan is then rated by both the Soil Conservation Service and the planning task force, to determine whether or not the land should be identified as suitable for agricultural preservation. County or municipal planning boards should use the Land Evaluation and Site Assessment as a guide to decision-making as to future land use. They could enact some form of agricultural zoning, as will be discussed below, in areas which have high agricultural value, according to both the Soil Conservation Service's Soils Evaluation and the criteria

established by the local task force, and enact higher density regulations in areas found to be of less significant agricultural value. The criteria developed during the LESA process could also be incorporated into subdivision regulations when large tracts, currently in agricultural production, are proposed for subdivision.

C. Agricultural Zoning:

The passage of zoning ordinances which have the specific purpose of preserving agriculture has occurred in many parts of the country. There are two types of agricultural zoning:

Nonexclusive agricultural zoning allows other uses of the land and is usually characterized by (a) large minimum lot size, (b) fixed area based on allocation combined with a small building lot, e.g., one house per quarter section, (c) a sliding-scale-area-based allocation: the number of dwellings decrease as the area increases, or (d) conditional use, allowing nonfarm dwellings based on meeting certain criteria.

Exclusive agricultural zoning allows only those uses which meet the criteria of a "farm." It may allow nonfarm uses as a conditional use.

Zoning has slowed down speculation in agricultural areas, and geared development to those areas deemed desirable.

V. DEVELOPMENT RIGHTS

A. **Purchase of Development Rights.** A state or county, or private land trust, or other nonprofit entity may pay the farmer the difference between the agricultural value of his land, and its value for other purposes, and thus enable him to withstand pressure for development. The State of Massachusetts purchases farmer's development rights, and has been reasonably successful in slowing down conversion of agricultural land. Boulder County, Colorado, also has implemented a purchase of development rights program in agricultural zones after imposing agricultural zoning on areas currently in agricultural production. The farmer can purchase back his development rights if the area in which the farm is located changes, if this change is recognized by the county by changing the zoning in the restricted area.

Given the financial crunch of New Mexico and its counties, it seems unlikely that public entities would be willing to buy up development rights from farmers, particularly in the Upper Rio Grande area, where the pure agricultural value of the land is marginal and its value is based on both its agricultural productivity and its unique cultural characteristics.

B. Transfer of Development Rights. Development "rights" are assigned to owners in an agricultural preservation district in a systematic manner. Thus, formation of some form of agricultural districts should precede utilization of this technique. The district could be an area in which preferential taxation is applied, as distinct from other areas where property owners cannot get the benefit of this taxation, as in New York State; or it could be some other district. Usually, agricultural districts form the basis for preferential taxation, agricultural zoning, transfer of development rights, and ordinances which protect agriculture from neighboring uses, and guarantee that those in nonagricultural areas will not declare agricultural activities to be nuisances. Under a transfer of development rights system, the owners of the land are not able to develop if for any use other than agriculture, but may, instead, sell their development rights to those who may use these newly acquired development rights to develop at higher densities than normally allowed by the zoning in areas deemed suitable for development. The problems with this program are the valuing of development rights, the administration of the program, and finding areas which are receptive to being "receiving" areas for increased density development. The success of this program relies on private market transactions, where there are willing sellers of the development rights, and willing buyers.

The Village of Mesilla is developing a plan for transfer of development rights. The Village is trying to obtain surplus BLM land as a receiving area for farmers' development rights. The BLM would be paid for this property through a transfer tax imposed upon sale of the property. The BLM has land in Rio Arriba County which would be suitable for this type of program. The BLM, however, does not give its property away, and some form of compensation would have to be found. The Village of Mesilla still has not convinced appropriate federal officials that a transfer tax will appropriately compensate the BLM for the release of its property to the Village for use as a receiving area.

C. **Analysis of These Techniques.** In all states in which agricultural districts are in force, there is state legislation providing for a procedure for their establishment. There has been no commitment by the State of New Mexico to either the forming of these districts, or any comprehensive planning at the State level which specifically recognizes the value of agricultural land and earmarks particular areas for agricultural preservation. If support for enabling legislation for the formation of agricultural districts could be gathered statewide, through a joining of forces with areas such as Dona Ana County, as well as the northern counties, then these districts could be the basis for additional

tax incentives as well as for zoning ordinances. New legislation should impose a tax penalty for conversion of agricultural uses to nonagricultural uses, with the conveyance tax, as discussed above, being the most effective.

Perhaps the acequias along a single watershed could form a natural base for the agricultural districts of a county. The districts could choose between nonexclusive or exclusive zoning, in encouraging the county to enact agricultural regulations. The acequias do not have zoning authority, and, as stated above, neither do the regional planning districts contemplated by recent legislation. If agricultural zoning were to be enacted by counties and municipalities in the Upper Rio Grande area, large-lot zoning would be the easiest to administer. These large-lot zones are often contributors to conversion to nonagricultural use, however, since they encourage the division of land into "ranchettes," rather than continuation of agricultural use.

The Rio Arriba County Commission showed an interest in the planning process, but it does not appear, at this time, to be ready to adopt zoning of any kind because of misconceptions of what zoning entails. The same attitudes are prevalent in other counties in rural New Mexico. Most northern New Mexico residents perceive zoning as involving strict "use districts," such as residential, commercial, and industrial. They are not familiar

with a system in which everything is zoned agricultural or agricultural/residential, with any other use requiring specific site-plan review of the use to be made of the property. They are also not familiar with performance standards, which involve establishing criteria, such as availability of water, water quality, liquid waste disposal, drainage, landscaping, etc., which must be met before any use other than agricultural or agricultural/residential will be allowed. County commissions will have to perceive a consensus in favor of some form of agricultural zoning, which consensus, to date, has not been present in northern New Mexico.

VI. **CONCLUSIONS.** Rio Arriba County may adopt some form of comprehensive plan. It also appears that Taos County is considering engaging in the planning process. There is certainly no political consensus at the present time to adopt zoning on a countywide basis anywhere in this study area. The authors of this study, however, arrived at two specific conclusions which they thought might work in creating a beginning for mechanisms to preserve agriculture in the area.

A. **Formation of Water Planning Districts.** Utilization of Chapter 182, Laws of 1987 (H.B. 337), involving the formation of a water planning region eligible for funding under the Act, should be encouraged. The Team suggested that a district which is hydrologically appropriate could range from the Soil and Water

Conservation District; to an irrigation district; to an association of acequias in a watershed, such as the Rio Chama Water Users' Association; to a single acequia. The Rio Chama Water Users' Association has a stable organization, and appears to have a consensus that it wishes to implement not only measures to preserve its acequias, but also to preserve agricultural use of the property. It could thus apply for regional planning funds.

B. **Utilization of the Rio Chama Water Users' Association,** a federation of acequias from south of El Vado Dam to the confluence of the Rio Chama and the Rio Grande, as a vehicle to encourage land-use regulations by the counties, could present a united front to the Rio Arriba County Commission, and urge its adoption of the policies related to agricultural preservation Policies Plan. Other acequia associations in this study area could also form a regional planning district, and, in the course of planning, deal with agricultural preservation issues, and then create a political consensus to influenced the counties to adopt desired land-use regulation, which could be labeled something other than "zoning."

Water planning districts could probably utilize LESA without County participation. Participation in the LESA program could well be the basis for the type of planning which could involve identification of future water needs. Since there is no other authority for zoning except in municipalities and counties, however, it does not appear, under current legislation, that

either regional water planning districts or other identified areas or groups, such as water users' associations, would have any land-use authority apart from the county, without legislative change.

The study area should form an alliance with other agricultural areas of the State in order to influence the passage of a State Agricultural Preservation Policy, which could include agricultural districts, better preferential taxation for agricultural lands, and a specific zoning statute for utilization and preservation of agriculture.

FOOTNOTES

1. 3-20-1 NMSA 1978

2. 47-6-2 I. NMSA 1978

3. H.B. 337, Chapter 182, Laws of 1987

4. State Appropriation of Unappropriated Groundwater: A Strategy for Insuring New Mexico a Water Future, New Mexico Water Resources Research Institute and University of New Mexico Law School, Chapter 9, pp. 26-27.

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INCREASING THE AGRICULTURAL MARKETING CAPACITY FOR THE UPPER RIO GRANDE

Prepared for the

UPPER RIO GRANDE WORKING GROUP

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INCREASING THE AGRICULTURAL MARKETING CAPACITY FOR THE UPPER RIO GRANDE

PURPOSE

The purpose of this report is to present practical opportunities for increasing the agricultural marketing capacity in the Upper Rio Grande, New Mexico, region. Opportunities for improving the marketing of the region's agricultural goods were identified by the team. Opportunities that were judged to be achievable were examined in greater depth and are reported here. An effort is made to present sufficient information about each opportunity so that it may be understood and that possible approaches for implementing the opportunities are identified.

Three categories of opportunity for increasing agricultural marketing capacity in the Upper Rio Grande are presented. Although not the only categories of opportunity, the three discussed in this report are:

1. Development of Physical Market Facilities;
2. Development of Market Outlets; and
3. Improved Market Information.

Within each category, specific opportunities are identified and examined. It is anticipated that presentation of these opportunities will contribute toward developing and improving the region's marketing of agricultural products. It is also expected that upon seeing these opportunities identified, others will be prompted to identify possibly even more productive opportunities.

DEVELOPMENT OF PHYSICAL MARKET FACILITIES

Three opportunities are examined under the category "Development of Physical Market Facilities":

1. The development of additional retail farmers markets;
2. The development of retail-wholesale farmers markets with permanent facilities; and
3. The establishment of an agricultural marketing company.

The idea behind encouraging development of physical market facilities is that it provides a market place. People wanting to sell what they produce do not have to spend their time locating a market. When physical market facilities are available, they just deliver their production. Depending upon the type of market being established, producers may set up and sell products there themselves, sell to buyers there, or arrange with brokers or commission agents to sell products for them.

Development of Additional Retail Farmers Markets

In general, a retail farmer's market consists of local agricultural producers united for the purpose of selling their products at a particular place and time to the local community. The benefits to producers of using this market outlet are twofold: First, it affords producers an excellent way to compete with local retailers by providing an outlet where overhead costs are low. Most farmers markets in New Mexico are held outdoors and require only a small investment on the vendors part. Second, by producers uniting together to sell their production, they attract more buyers than they might by operating individually.

During harvest time, consumers can find a wide variety of excellent quality fruits and vegetables at many farmers markets and roadside stands throughout the Land of Enchantment. These seasonal businesses provide consumers with fresh, locally grown produce. In addition, farmers markets may provide many producers with an excellent income earning potential.

In most cases, farmers markets in New Mexico are located in towns and cities, on empty lots, parking lots, town squares, or on local fairgrounds. The produce sold includes fruits, vegetables, flowers, herbs, and spices. At some markets homemade food and handicraft items are also sold.

There are 12 retail farmers markets operating in New Mexico as shown in Table 1. There are two basic forms of ownership or business structure by which these farmers markets are organized. One is a non-profit corporation. The other is an informal association of growers.

The first type of organizational structure, the non-profit corporation, involves a legal arrangement among growers. There are three non-profit corporation retail farmers market organizations in the state. They are located in Albuquerque, Grants, and Santa Fe.

In Albuquerque, the Growers Market is located in the city on the parking lot of a country and western club, Caravan East. According to this year's director, Ed Schaffer, the Grower's Market leases the parking lot from the club for two days a week (Tuesdays and Saturdays) for July through November. The corporation does not charge fees to join, however, members are required to serve on the board of directors for one year. Booth rentals are $35 per pickup and $25 per car for the season. Daily vendors pay $2 per car and $5 per pickup. Most vendors selling at the Albuquerque market are local growers. However, some producers from northern New Mexico also go to Albuquerque to sell their products.

The farmers markets in Grants and Santa Fe are also non-profit corporations. However, they are operated differently from the market in Albuquerque. In Santa Fe, the corporation operates in two locations, one in the downtown area and another at the county fairgrounds. The downtown location is open summer and fall on Tuesdays and Saturdays at 7 a.m. The

Table 1. Identified Farmers Markets In New Mexico, 1987.

Location	Ownership	Years Open	County[1] Population	Months Open	County Per Capita[2] Income
Bernalillo County Albuquerque Caravan East Club	Non-Profit Corporation	15	464,300	summer fall	12,305
South Valley South of Albuquerque	Vendor's Association	1	464,300	summer fall	12,305
Dona Ana County Las Cruces Downtown Mall	Vendor's Association	10-15	118,300	all year	8,176
Grants	Non-Profit Corporation	10	25,300	summer	9,129
Lovington	Vendor's Association	1	65,500	summer fall	11,843
Los Alamos	Vendor's Association	18	18,400	summer	20,082
Rio Arriba Espanola Lucero Center	Becoming a non-profit corporation	1	32,400	spring summer fall	6,576
San Juan County Aztec Empty lot in town	Vendor's Association	4	91,100	summer	8,920
San Miguel County Las Vegas	Vendor's Association	10	24,800	summer fall	6,340
Santa Fe County Santa Fe Downtown and at Fairgrounds	Non-Profit Corporation	16	84,600	summer fall	11,646
Sierra County T or C	Vendor's Association	5	9,500	summer fall	9,272
Taos County Taos Held on court- house grounds	Vendor's Association	10	21,900	summer fall	8,389

[1]United States Department of Commerce, United States Bureau of the Census, Provisional Estimates of the Population of Counties, July 1, 1985.

[2]United States Department of Commerce, United States Bureau of the Census, Local Population Estimates, 1982-84 Per Capita Income Estimates, Per County, April 1986.

fairgrounds location is open summer and fall on Saturdays only. Both locations use an on-site manager who is responsible for collecting the $5 per day or $50 per season fee charged vendors who use the facilities. The fees are used to cover liability insurance, advertising in the local media, and maintenance of restroom facilities at each location. In addition to the fees charged vendors, the corporation has an annual fund raising dinner to help cover costs. The Santa Fe farmers market corporation has a management agreement with the city of Santa Fe to use city property free of charge for the market locations.

In Grants, the retail farmers market corporation is less structured than in either Albuquerque or Santa Fe. At the start of each season, the Grants farmers market corporation petitions the Grants city council to use city property in downtown Grants for their location. The market is open summer and fall on Saturdays at 7 a.m. Home gardeners and small volume producers make up the bulk of the vendors at the Grants market.

Another retail farmers market that is very structured, although not a non-profit corporation, is in Los Alamos. The producers selling at that market cooperate with the Santa Fe market to determine operating policy for both markets. Vendors at Los Alamos sit on the board of directors for the Santa Fe market and both markets coordinate their days of operation so they do not overlap.

The Los Alamos retail farmers market benefits greatly from the volunteer help provided by the League of Women Voters and the City of Los Alamos. The League helps to manage the market, while the city donates the use of the land for the market location and helps with other costs.

The retail farmers markets operating as vendors associations use their organizations mainly as a tool to coordinate activities among vendors.

There are no membership fees to be a part of most of these associations. In Las Cruces a vendor must get a business license from the City of Las Cruces in order to sell at the market. Other retail farmers markets than Las Cruces and Los Alamos that use a vendor's association include: Albuquerque South Valley, Aztec, Espanola, Las Vegas, Lovington, Taos, and Truth or Consequences.

Although both the non-profit corporation and the vendors association structures are used for retail farmers markets in New Mexico, the non-profit corporation approach appears to be more successful. They tend to draw more vendors and to be well established in their respective communities. This is not true in every case. The market in Las Cruces has been successful for many years using the less formal approach. Therefore, it seems that three-key structural criteria are necessary for the success of a retail farmer's market in New Mexico. First, a market must have a good organizational structure that is equipped to handle the management, the vendor logistics, and the public relations of a market. Secondly, a healthy relationship with the local and county governments is the key to lowering costs and finding a successful location. Third, the amount of volunteer assistance available for running the market is critical since most markets do not have a cash flow to hire workers.

Community population is another important determinant of the success of farmers markets in New Mexico. The smallest town supporting a retail farmer's market in New Mexico is Taos, population 3,444, Albuquerque is the largest with a population of nearly half a million. At a minimum, an ability to draw from a population of 15 to 20 thousand appears to be necessary for a market to be successful. This is because farmers markets attract to their location only a percentage of the people in the area as

buyers. In addition, fewer buyers will result in less producers willing to be involved in a market.

For example, the farmer's market in Truth or Consequences struggles with only 2-7 vendors on site at one time. This leads to a problem of market reliability for consumers. Since different crops mature at different times, farmers may not always be there when the public expects. In contrast, Taos city, population 3,444, is the smallest population area where a farmer's market is very successful. However, the county population is 21,000. A large number of local gardeners contribute to the fresh produce available at the Taos market. In addition, tourism lends considerably to the Taos market's success.

There is evidence that other retail farmers markets could be successful in New Mexico. Considering that it takes a population of at least 15,000 to support a viable retail farmers market, it is conceivable that several cities in New Mexico that do not currently have a market could have one.

Table 2 points to six cities in New Mexico with populations over 20,000 that do not have retail farmers markets. For four of the six, Roswell, Hobbs, Carlsbad, and Clovis, the closest farmer's market is located in Lovington or Lubbock, Texas. The new farmers market in Lovington is the only one in southeastern New Mexico. Four other cities also have the potential to each support a retail farmers market. These cities are Alamogordo, Belen, Deming, and Gallup. The populations of Belen and Deming would not appear to be able to support retail farmers markets themselves. However, the county population should be more than adequate for Belen and possibly adequate for Deming.

Table 2. Possible Farmers Markets In New Mexico, 1987

County	County Population[1]	County Per Capita Income[2]	City	City Population[3]	Nearest Farmers Market
Chaves	56,500	$ 9,519	Roswell	45,702	Lovington
Eddy	52,500	10,017	Carlsbad	28,433	Lovington
Lea	65,500	11,843	Hobbs	35,029	Lovington
Luna	17,500	8,416	Deming	10,609	Las Cruces
McKinley	63,300	5,790	Gallup	20,959	Shiprock
Otero	49,500	8,772	Alamogordo	27,845	Las Cruces
Curry	42,600	9,323	Clovis	33,424	Lovington
Valencia	35,900	8,998	Belen	6,794	Albuquerque

[1]United States Department of Commerce, Bureau of the Census, Provisional Estimates of the Population of Counties, July 1, 1985.

[2]The Official New Mexico Blue Book, New Mexico Secretary of States Office, April 1986, Page I-28.

[3]The Official New Mexico Blue Book, New Mexico Secretary of States Office, April 1986, Pages I-23, 24.

The potential for more retail farmers markets in New Mexico is great. This market outlet provides small volume producers an excellent opportunity to earn valuable income while only farming a small land area with vegetables, fruits, or other specialty cash crops.

Development of Permanent Retail-Wholesale Farmers Markets

In other parts of the United States, farmers markets flourish as well. For years, farmers have used this marketing tool to increase their profits by selling in the local marketplace. Many cities encourage this and established permanent physical facilities to provide improved marketing opportunities for farmers that want to sell both retail and wholesale. Technological improvements for produce at these sites such as centralized handling systems for the produce, post harvest cooling equipment on the premises, and centralized easy access for transportation have increased the opportunity for retail and wholesale sales. Discussed here for these permanent facilities are the initial financing, who the vendors are, how these markets are managed, and how they are structured for retail and wholesale business.

Most of these permanent retail-wholesale farmers markets have been built either by the state or local municipality. An example is the Georgia Department of Agriculture's 17 markets throughout the state. These 17 markets were all financed by the state of Georgia. They are overseen by the Georgia Department of Agriculture. These markets encompass a range of marketing alternatives and facilities for retail and wholesale produce sales. One is an auction market. The state of Georgia considers the markets a service to growers, consumers, and wholesale companies that operate out of the different markets.

There are some privately financed produce markets, but they typically function for wholesalers using the facilities as terminal points. Generally, little retail business directly between farmers and local consumers happens at independent markets. Some were originally built by a municipality and now are run as cooperatives by the wholesalers.

A terminal market that has wholesale companies, farmers selling retail, and some farmers selling wholesale to restaurants and small 'mom and pop' grocery stores is in Atlanta. The Atlanta market covers the whole gammit of alternatives. In one year, $2 million worth of produce may go through this market. Ninety percent of that business is wholesale. The Atlanta market is unique in that 80 percent of the produce sold at wholesale comes from outside Georgia. This is just the opposite of Florida markets where mostly Florida grown produce is sold.

Most markets have sections where farmers can come and rent a space for a day. The Pipe Place Market in Seattle, a major terminal market for wholesalers in the northwest, has 96 'farmer's tables' that can be rented for an average of $9 a day. The Atlanta market charges local growers $4 a day to sell at one of the 1,028, 10' by 10' booths set aside strictly for retail sales. The Dallas market, which is city owned, charges local growers $18 a day. Retail sales generally do not generate enough revenue for a permanent market facility to support itself.

State sponsored markets have a management structure that includes a market manager, inspectors, security officers, maintenance, and clerical staff. The manager's salary seems to lie between $15,000 and $40,000 depending on the size of the market. The state markets are usually overseen by the marketing division of the Department of Agriculture.

Most markets are only equipped to store and refrigerate produce that arrives for wholesale sales. The markets are not set up to give retail sellers booths that have cold storage capacity.

Albuquerque may have the potential to accommodate a retail-wholesale farmers market in a permanent facility. However, it is doubtful if current produce wholesalers could be attracted to such a facility due to their investments in other locations. It is possible that a permanent market facility may serve to attract customers to itself as well as other surrounding businesses. This may provide some justification for establishing a permanent facility.

Establishment of an Agricultural Marketing Company

In several areas of the agricultural sector in this country, government-backed programs have been used to start or develop an activity when private industry has not been willing to accept the initial cost and risk of investment. Examples include government backing for the farm credit system and the rural telephone and electrification administration. The concept suggested here is for a similar initial public investment in providing agricultural marketing services in the Upper Rio Grande Region of New Mexico.

The Upper Rio Grande Region is confronted with a "chicken or egg" problem. That is, farmers can and want to produce more, but a marketing infrastructure does not exist in the area to facilitate larger volume sales. On the other hand, the marketing infrastructure does not exist because the present production volume is inadequate to support the activity. At present, no one individual has sufficient potential volume or investment capital to undertake the development. Government assistance in

establishing a marketing organization in the region is proposed as an alternative.

It is proposed that an Agricultural Marketing Company be established in the Upper Rio Grande Region of New Mexico to broker, buy, process, and sell New Mexico produced agricultural products. The purpose of this company would be to foster economic development through marketing of agricultural products. The premise on which the company would be established is that an adequate marketing system does not exist in the region for many agricultural products.

The Agricultural Marketing Company would be initially a public venture. After a stated period, it could become a solely private venture with the public sector being bought out. The objective of the Agricultural Marketing Company would be to make profits and, in so doing, provide a major market outlet for New Mexico agricultural products.

The Agricultural Marketing Company would undertake the following:

a. Locate markets for specific products;

b. Contract or arrange with producers to grow crops or livestock;

c. Arrange to sell products for a fee;

d. Buy products to resell or process and resell; and

e. Arrange for or process products.

The core staff consisting of a manager-fieldman and administrative secretary/bookkeeper would be hired immediately. A broker would be placed on retainer to begin looking at and developing markets for products that can be commercially grown in specified areas of New Mexico. The brokers involvement in the operation would be increased each year to insure that adequate marketing activities are conducted. As the growth of the company merited, a packing shed manager would be added to oversee that part of the

operation. Job descriptions plus a minimal 3-year budget for the staff follow.

Agricultural Marketing Company Position Descriptions

Broker: This individual will be on retainer for the first few years to concentrate on identifying alternative markets for products that can be grown in the area. The responsibility is for marketing products produced by the farmers. The responsibility indicates determining how much of each product will be needed and have contracts available for those quantities of products. The person will be looking for new markets at all times to develop more alternatives for area farmers. The amount of involvement of this individual will be increased as the project growth merits.

Manager Fieldman: This will be an individual with vast experience in the growing of specialty crops. The person will work directly with farmers to assist them with the entire planning, planting, and growing operation. The individual will be able to take the marketing plan and determine what quantities, of what products, should be planted when, to produce the amounts needed by the broker. The person will work with farmers in all areas of growing the crop and knowing when to harvest.

Adm. Secretary Bookkeeper: This individual will be responsible for running the office and carrying out the necessary accounting records to insure that all farmers get paid the proper amounts based on their products.

Position Description: Year II & III

Packing Shed Manager: The responsibility is to take the products grown by farmers and get them into the needed packaging for marketing. The individual will be responsible for grading, packaging, and delivery of products to the market. The individual will have to work with the fieldman to insure that sufficient quantities of products are delivered on a timely basis to operate the plant efficiently.

MARKETING COMPANY PROJECT
1ST YEAR BUDGET

Salaries		
Broker Retainer	$20,000	
Adm. Secretary Bookkeeper	16,000	
Manager-Fieldman	30,000	
Fringe Benefits @ 20%	9,200	
		$ 75,200
Travel		
Broker	$ 2,000	
Manager-Fieldman	4,000	
Subtotal		$ 6,000
Office Costs		
Rent	$ 6,000	
Phone	6,000	
Misc.	2,000	
Subtotal		$ 14,000
Misc. Costs		
Printing	$ 2,000	
Meetings	1,000	
Materials	1,800	
Subtotal		$ 4,800
Total Cost		$100,000

MARKETING COMPANY PROJECT
2ND YEAR BUDGET

Salaries		
Broker Retainer	$30,000	
Adm. Secretary Bookkeeper	18,000	
Fieldman	35,000	
Packing Shed Manager	25,000	
Fringe Benefits @ 20%	15,600	
		$123,600
Travel		
Broker	$ 3,000	
Manager Fieldman	5,000	
Packing Shed Manager	3,000	
Subtotal		$ 11,000
Office Costs		
Rent	$12,000	
Phone	12,000	
Misc.	6,000	
Subtotal		$ 30,000
Misc. Costs		
Printing	$ 3,000	
Meetings	2,000	
Materials	5,400	
Subtotal		$ 10,400
Development Costs		
Packing Shed and Misc. Activities Development	$50,000	
Subtotal		$ 50,000
Total Cost		$225,000

MARKETING COMPANY PROJECT
3RD YEAR BUDGET

Salaries		
Broker	$40,000	
Adm. Secretary Bookkeeper	20,000	
Fieldman	40,000	
Packing Shed Manager	30,000	
Fringe Benefits @ 20%	18,000	
		$148,000
Travel		
Broker	$ 3,000	
Manager Fieldman	5,000	
Packing Shed Manager	3,000	
Subtotal		$ 11,000
Office Costs		
Rent	$12,500	
Phone	12,500	
Misc.	6,000	
Subtotal		$ 31,000
Misc. Costs		
Printing	$ 3,000	
Meetings	2,000	
Materials	5,000	
Subtotal		$ 10,000
Total Cost		$200,000

DEVELOPMENT OF MARKET OUTLETS

Development of market outlets as a means for increasing the marketing capacity of the Upper Rio Grande Region is the second major category of opportunities. Four opportunities are discussed in this section that would serve to develop expanded or additional market outlets for New Mexico's agricultural producers. These four opportunities are:

1. Facilitated State Procurement;
2. Increased sales to agricultural processors;
3. Increased assistance to key agriculturalists; and
4. A pilot project in conjunction with the acequia improvement program.

Facilitated State Procurement

Many agricultural businesses in New Mexico are missing out on a potentially valuable source of income. The state of New Mexico spends millions of dollars each year to buy a wide variety of commodities and professional services. Agricultural products such as fresh fruits, fresh vegetables, and processed fruits and vegetables are included in the state bid lists. However, according to Jim Montoya, Deputy State purchasing agent for the state of New Mexico, most in-state agricultural manufacturers and producers are not taking advantage of the opportunities available. Most of the bids are being let to larger volume producers because smaller operations are either not aware of state procuring methods or they cannot deliver the products.

The procurement process for goods and services works basically the same for both commodities and professional services. Initially, a business must fill out a registration form with the State of New Mexico Purchasing

Department. This form seeks information on the tenure of a business in the state, the organization of the business, and the type of commodity or services that the business is able to supply. In addition to this information, a $75 fee is charged to cover costs of bid mailing. The fee entitles the business to receive notification, for a 12-month period, of any upcoming bid solicitation that involves the commodity or services for which the firm has applied on its registration form. Registration with the state purchasing office is not mandatory for a firm to participate in the bidding process; however, the convenience of receiving the bid notification in sufficient time to act upon it is forfeited, and the firm must look in the local news media to find information about upcoming bids. Bid solicitations are sent to firms that see the advertisements in the local news media and request them. After receiving a bid, a firm has until 5 p.m. the night before the bid is let to enter a bid with the state. Late bids are not accepted.

Not being on the bidder list can be a problem, especially for small volume producers, because the state of New Mexico uses three different formats to advertise bids depending on the projected bid amount.

If a bid is less than $250, the user agency requesting the product may issue a direct purchase order for the product. These solicitations are generally made through past business dealings with a specific agency.

For a bid projected to be above $250 but not greater than $5,000, an informal bid may be taken from three businesses. Contact for this amount of expenditure is made any of four ways. The state procurement office may check businesses listed on the state bid list, take verbal quotes over the telephone, get quotes in writing, or a user agency may suggest three

businesses that could make bids. Generally, for bids less than $5,000, the state purchasing office already has a purchasing order for the specific product, and the bid is filled within 24 hours.

A formal bid proposal is sought by the purchasing office for any purchase over $5,000. Bids are sent to vendors who have registered with the state. These bids are usually filled within 30 days from the time the purchasing office receives the request. In addition to mailing the bid to vendors on the bidders list, the purchasing agency must also advertise in three newspapers.

New Mexico state statute 13-1-21 outlines the guidelines by which in-state producers and manufacturers may be given bids over out-of-state competition. The statute defines a 'resident business' as one who is authorized to and is doing business under the laws of the state of New Mexico, maintains its principal place of business in New Mexico, or has five or more employees who are state residents. A resident manufacturer is defined as a person who offers materials grown, produced, processed, or manufactured wholly in the state.

The statute gives in-state producers and manufacturers a 5 percent advantage over out-of-state competition. For example, if bids are received only from resident and nonresident businesses, and the nonresident's bid is lowest, the state will award the bid to the lowest resident bidder if that bid, when multiplied by .95, makes the bid lower than the nonresident bid. This also holds true when bids are only received from nonresident business and resident manufacturers. However, if bids are only received from resident manufacturers and resident businesses, then the low resident manufacturer receives the bid if it beats the low resident business when its bid is multiplied by .95. The low resident manufacturer will also

receive the bid when competing with nonresident businesses and resident businesses if the bid is less than all others when multiplied by .95.

Many agricultural products purchased by the state are purchased on one-year contracts. The state purchases in this fashion to insure a uniform price during that year. However, some agricultural products are purchased on a user need basis. Most of these bids are informal bids that are purchased via the telephone or bidders list.

The purchasing office in the state of New Mexico procures many different kinds of agricultural products. Opportunities exist for local businesses to get involved in this process. But, despite the opportunity, many producers in New Mexico are not registered with the State or are not taking part in the bidding process. The purchasing office offers instruction to local businesses who are interested in doing business with the State of New Mexico. For more information contact:

Jim Montoya
Deputy Purchasing Agent
Office of State Purchasing
Santa Fe, NM 87503
(505) 827-0472

Access by New Mexico producers for selling products to the state might be facilitated if some bids were let more frequently than once per year. This would permit improved access for New Mexico producers during their harvest or market periods.

The availability of information would be helpful to assist potential sellers in identifying opportunities. The information should include what agricultural products were purchased last year, product form, the quantity, the quality, the time of year, and by what user agency. Increased procurement of products produced in New Mexico could serve as a form of market development for these agricultural products.

Increased Assistance to Key Agriculturalists

If agricultural production, processing, and marketing opportunities are to be increased in the Upper Rio Grande Region, they can be defined and implemented in conjunction with key agriculturalists in the region desirous and able to implement such opportunities. The first step in this process would be the identification of key agriculturalists in each area of the Upper Rio Grande Region.

Key agriculturalists would be those having an interest in and able to increase, initiate, or expand into higher value agricultural production and marketing activities. Identification of these key agricultural people may be accomplished with the assistance of the County Extension Agents. The Northern Rio Grande Resource Conservation and Development Organization could also assist in this identification effort.

Once identified these key people would be the target of an intensive, coordinated program to assist them in achieving defined opportunities. The program would involve the New Mexico State University Cooperative Extension Service and Agricultural Experiment Station, the New Mexico Department of Agriculture, the Soil Conservation Service and other agency personnel as relevant. This is not a call for new funds, but a coordinated, directed focusing of existing effort. The idea would be that the targeted key agriculturalists would become the early adopters of the defined agricultural opportunities. New developments resulting from these efforts would then provide the impetus for the diffusion of successful opportunities to others. Many of the developments would also be expected to open up market opportunities for other agricultural producers in the region.

Increased Sales to Agricultural Processors

Many agricultural producers in New Mexico are not aware of the agricultural processors in the state and in nearby states. The provision of information about these processors to agricultural producers may permit them to make business contacts with the processors. This may assist in the development of additional market outlets for the producers of New Mexico's raw agricultural products.

Agricultural processors in the state and in nearby states may be contacted to determine their potential interest in expanding operations or what they view as limitations to expanded operations. These contacts could be made by the Cooperative Extension Service, New Mexico State University, or by the New Mexico State Department of Agriculture. If the processors needed additional information or studies, these could be identified and assistance could be provided in cooperation with the Cooperative Extension Service and the New Mexico Department of Agriculture.

A Pilot Project in Conjunction with the Acequia Improvement Program

It is suggested here that a pilot project be initiated in conjunction with the acequia renovation that is being conducted in New Mexico. The acequia renovation is supported with combined state and federal funding. The pilot project would focus on improving the agricultural production and marketing activities following renovation of selected acequias. This activity would be endorsed by the state Acequia Commission and the members of an acequia who wanted to participate in such a pilot project.

The New Mexico State University Cooperative Extension Service and Agricultural Experiment Station could appoint a pilot project facilitator to identify desired production and marketing alternatives with acequia

members. The facilitator would assist by providing the information necessary for acequia members to achieve their desired objectives. This would involve the provision of both production and marketing information.

The concept of the pilot project would be its role to demonstrate the potential for the acequias. It would be anticipated that successful activities demonstrated through the pilot project would be adopted and or modified for adoption by other acequias and individuals in the region.

IMPROVED MARKET INFORMATION

Improvement in the agricultural marketing information available in the Upper Rio Grande Region is the third category of opportunities for increasing the Region's market capacity. This assumes that by providing more marketing information, it will be used to increase the region's marketing capacity. The five opportunities identified under this category are:

1. Improved access to agricultural information;
2. Initiation of an agribusiness development center;
3. Improved availability of entrepreneurship information;
4. Conference on fruit and vegetable production and marketing potential; and
5. More information about legislation impacting upon agriculture.

Improved Access to Agricultural Information

Alternative arrangements can be defined and implemented to improve the access to relevant agricultural information in the Upper Rio Grande Region. The region needs more information about crop and livestock production and marketing alternatives. Much of this information is available through the Cooperative Extension Service and Agricultural Experiment Station,

New Mexico State University. However, what is needed, is a coordinated and directed effort to identify the possibilities for increasing agricultural income and employment in the Upper Rio Grande Region. Then the information must be delivered, particularly to the key agriculturalists in the Region.

Some of the improved access to agricultural information can occur directly through the auspices of New Mexico State University. Other information dissemination may occur through the utilization of farm, ranch, and agribusiness organizations formed for the purpose of their members sharing information about new technology and marketing alternatives or opportunities. This later type of activity is lacking in the Region.

Initiation of an Agribusiness Development Center

In the Upper Rio Grande Region of New Mexico and elsewhere throughout the state, one of the major opportunities to increase agricultural income and employment is through development of appropriate agribusinesses. This would provide value added income and employment opportunities to agriculture. An Agribusiness Development Center for the state would be a major step to facilitate the identification, feasibility analyses and information for initiation of expanded or new agribusiness.

It is suggested that the Agribusiness Development Center be operated through New Mexico State University. Additional funds would be necessary for such a center. The center would conduct feasibility studies, provide desired management and marketing training activities, and identify sources of investment capital. Success for the center would be measured by the increase in income and employment resulting from agribusiness developments serving New Mexico.

Improved Availability of Entrepreneurship Information

This opportunity is one that may be enhanced separately or may be facilitated through one of the other alternatives suggested in this report. There is a need in the Upper Rio Grande Region for the improved availability of entrepreneurship information. This includes the need for a wide variety of "How To" information including how to do a feasibility study, how to conduct a marketing study, and how to start a business.

The increased information and services may be provided through the Small Business Administration, retired executives through SCORE, Chambers of Commerce, the Cooperative Extension Service, and others. The idea is that improved entrepreneurship ability will lead to an increased marketing capacity for the region.

Conference On Fruit and Vegetable Production and Marketing

This opportunity was suggested to New Mexico State University personnel and a conference is being held November 19, 1987, in Las Cruces. The conference will focus primarily on vegetable production and marketing opportunities.

It is suggested that a similar conference be held next year in the Upper Rio Grande Region of New Mexico. The conference could focus specifically upon opportunities for the Upper Rio Grande area. This activity may serve as a springboard or impetus to creativity in regard to improving the region's agricultural production and marketing capacity.

More Information About Legislation Impacting Upon Agriculture

There is a need for the improved availability of information about legislation having an impact upon agriculture in the Upper Rio Grande Region. The legislation may be from any level of government.

In other communities, farm, ranch, and Chamber of Commerce organizations often perform the function of disseminating information about legislation and fostering discussions of its possible impacts upon agriculture. This function could be encouraged in the region.

Legislation and court actions concerning water both have a substantial impact upon agricultural development and the region's marketing capacity. Many other issues besides water occur each year that have potential impacts upon the regions marketing capacity.

The suggested role for improved information dissemination in the region could also be conducted in association with other opportunities described in this report. It may be that implementation of a combination of the opportunities would best serve to increase the region's agricultural production and marketing capacity.

SUMMARY

Opportunities for increasing the agricultural marketing capacity for the Upper Rio Grande Region of New Mexico were identified as follows:

A. Development of Physical Market Facilities
    1. The development of additional retail farmers markets.
    2. The development of retail-wholesale farmers markets with permanent facilities.
    3. The establishment of an agricultural marketing company.

B. Development of Market Outlets
    1. Facilitated State procurement.
    2. Increased sales to agricultural processors.
    3. Increased assistance to key agriculturalists.

4. A pilot projection conjunction with the acequia improvement program.

C. Improved Market Information

1. Improved access to agricultural information.
2. Initiation of an agribusiness development center.
3. Improved availability of entrepreneurship information.
4. Conference on fruit and vegetable production and marketing potential.
5. More information about legislation impacting upon agriculture.

It is expected that presentation of these opportunities will prompt others to identify possibly even more productive opportunities.

DEVELOPMENT OF A COMMUNITY WATER TRUST FOR NORTHERN NEW MEXICO

Prepared for the

UPPER RIO GRANDE WORKING GROUP

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The loss of water rights from acequias in northern New Mexico is a significant aspect of many of the critical problems facing the region.[1] With the early priority dates that attach to most of these water rights, these rights are some of the most valuable water rights in the state. As water becomes increasingly scarce, there will be greater pressures on individuals to sell the rights now served by acequias or change how the water is used to more economically productive non-agricultural uses.[2]

Most people will acknowledge that at some point in the future it may become impossible to maintain these rights in agricultural uses, but it is clear that the people in these communities would like to have some control over when and what changes are made.[3] Water is probably the most valuable natural resource of the region, from both a social and economic perspective. How the individual uses their water right is important to everyone else that relies on the same source. Due to this interdependency, the effect of change is felt throughout the community. Legal and administrative processes exist to challenge changes in the place and type of use of a water right.[4] It is not always feasible for a community to use these processes because participation is expensive and time-consuming; it may be years before a final decision is reached. In the Report of the Upper Rio Grande Working Group it was suggested that a private alternative to enhance community control over changes in water use might be a water trust along the lines of more common community land trusts.[5] This working paper explores that alternative: what is a community water trust, how can it be implemented and is it needed in light of existing water management institutions.

I. DESCRIBING A COMMUNITY WATER TRUST

A community water trust, like a community land trust, is not a trust in the legal sense, but a non-profit corporation that holds and manages property for a community. Numerous articles and other publications are available that describe many existing community land trusts, but the concept has not been applied to water distinct from the land in recent history. An exception to this is the Pueblos of New Mexico that hold water as a community property right. In non-Indian communities, though, there is a long history of community involvement in individual water use based on traditions hundreds of years old. This community involvement is manifested in both traditional acequia associations and modern mutual domestic associations. The community water trust builds upon these existing institutions by allowing a community to acquire rights for a variety of uses consistent with the needs of the people in a community.

A brief description of how this institution might function is as follows. A community, or the existing water-use institutions, would form a non-profit corporation with the power to acquire water rights in the same manner as any individual. The trust could purchase rights, lease rights, or acquire them by gift. When it is feared that the community will be harmed by a transfer of rights, or that individuals might lose rights through forfeiture[6], the water trust could acquire the right and put it to use in the community. The technical documents needed to create a trust are not overly complex, but must be drafted with care because actually operating the trust is a different matter. Sections II and III discuss some potential problems and the documents to create a trust are discussed in the final section.

II. FORMING A COMMUNITY WATER TRUST

A. Membership

A corporation is an association created by individuals to accomplish some goal, such as providing health services to people or the operation

of a business. One of the first issues that must be addressed is what individuals or other entities would create the trust and who the trust would act for. The topic of membership also raises the issue of to what extent could a water trust act for users who are tribal members or who use tribal waters. There may be no one configuration that would work in all circumstances. The following discussion highlights potential pros and cons of a variety of group combinations.

1.Acequia Users

This could be all the individuals presently using the water of an acequia or it could be all those owning land on an acequia. At first glance these might seem to be the optimal groups to form a community water trust because they are the individuals that now hold the rights, or control them. Some of the drawbacks to this approach exist. First, in either group the membership will change over time. If the group is all water users, membership would change each time a right was transferred, including transfers into the trust. Once a user transferred the right to the trust, they would no longer be a member. This could result in a very small number of individuals having a great deal of power over water use and all related activities in the community. If landowners served by an acequia form the water trust membership, it would then include absentee owners with an ever decreasing interest in the community and might not include those actually putting the water to use.

A second problem is related to the tax-status of the water trust. If a water trust can qualify as a tax-exempt nonprofit corporation, it may be able to attract the capital necessary to acquire rights or to plan for the use of rights once acquired. This may be of vital importance in northern New Mexico where many communities have subsistence

economies. When the trust is only composed of those with a pecuniary or personal financial interest in the waters of an acequia, it is hard to characterize it as a community-based trust rather than merely a vehicle to protect the financial interests of its members. Enhancing the value of private financial interests of a corporation's individual members is not the kind of activity that will be given tax-exempt status.[7]

A third problem arises under the laws of New Mexico. There are general laws governing the powers of corporations and there are specific laws that govern acequia user associations. These are known as the acequia laws, and in many respects these laws are a codification of the practices of acequia associations prior to U.S.sovereignty.[8] It is a rule of law that where a general law and a specific law are both applicable to an activity, the more specific rule will control because it is considered to be an exception to the general rule. Thus, with these groupings, the water trust would be governed by the acequia laws. Over the years the acequia laws have been construed so as to prohibit two associations to exist with authority over the same acequia. In State ex rel Community Ditches v. Tularosa Community Ditch, 19 NM 352 (1914), the New Mexico Supreme Court was asked to determine which of two acequia corporations controlled water on a community acequia. The two organizations were composed of competing factions within the community, each attempting to oust the other from control. The Court held that there could be but one acequia association for each acequia, and that it would have to be organized and operated under the state's acequia laws. These laws now provide for these associations to acquire and hold water rights.[9] Therefore if membership is to be limited to acequia users, there is no need for the water trust; indeed, it might be considered an illegal second acequia association.

2. Community Residents

When the membership of a community water trust is all the people in the community, many of the problems discussed in the previous section disappear. Membership would still be changing as the population of the community changes, but no one would lose their membership as a result of transferring their water right to the trust or because they used water without owning the land where the water was used. An open, community-wide membership would also be beneficial in applying and maintaining the tax-exempt status of a community water trust because it would be indicative of broader purposes than merely the protection of private property interests. Furthermore, with a community-wide membership, it could not be said that the water trust was merely a second acequia association.

The greatest potential drawback to this type of membership is that it does change with the community. If the purpose of the trust is to protect acequia or agricultural uses of water in a community,it might become undesirable if the character of the community changed in a rapid fashion, for example, the building of a year-round resort with condominium owners that preferred uses other than agriculture.

3. Existing Water Management Institutions.

In most rural communities in northern New Mexico there are two types of existing water management institutions. The first would be the existing acequia associations that manage surface water rights used in irrigated agriculture. The second would be the mutual domestic association than manages the provision of water for domestic use. In some instances there will be more than one of each of these associations in a rural community, and when these are all combined almost the entire

community is represented. This would not necessarily include, though, domestic users with their own wells and water rights held by and used in other than agricultural operations, such as a mine. The greatest benefit of these institutions organizing the water trust is that the membership technically does not change, but the institutions that form the membership must respond to the changes in the community. From the individual person's perspective, this would allow them to participate in the water trust through existing the existing associations. The same patterns that applied to influence decisionmaking in the past would still work. There would not be any new institution that would require a new set of processes or challenge the authority of existing institutions.

The question of whether these existing entities could combine to organize and operate a water trust depends on whether they already have the authority to do the activities contemplated; can they acquire water rights, can they hold water rights, can they lease water rights? Under existing law, both mutual domestics and acequia associations have the power to do these acts.[10] Therefore, it would be possible for a water trust to be organized by these types of existing institutions.

4. Regional Membership Groupings

In some instances a number of communities might wish to form a water trust at the regional level. Just because an organization is regional would not obviate the problems discussed in relation to specific groupings. One additional drawback is that it would move control of the water trust outside the community to the regional level. When membership in the trust is on an individual basis rather than by existing institutions, a regional water trust could become a vehicle with little relationship to the communities, especially if the population of the region was so great as to make individual participation meaningless.

One advantage to a regional scope would be that the water trust could

become more involved in planning the future of a region through the state program for regional water planning.[11] Briefly stated, this program allows the regions of the state to develop water-use plans, and where these plans show that water will be needed to meet the requirements of future users, the state may appropriate presently unappropriated water or purchase existing rights to meet those needs. Even if the state ultimately did not secure the rights as reflected in the regional plan, this would help the water trust identify the water rights it might want to acquire to meet regional or community needs in the future. The regional water planning program is run by the Interstate Streams Commission, and information concerning it can be obtained through that agency.

5. Other Membership Concerns

If membership is to be at the individual level, either of acequia users or community members, it can be broken down into classes with different levels of control over the activities of the corporation. For instance, Class A membership could be limited to solely domestic users, Class B could be irrigators using acequias, and Class C could be all other users. Where it was just acequia users, Class A could be landowners and Class B could be those that lease land and water rights.

Because numerous non-indian communities are located near or adjoining indian communities, the question arises as to how these water users would fit into the water trust concept. Tribal water rights, are not held by individuals, but by the tribe, and such rights are not subject to forfeiture. In some instances tribal users may not wish to be involved in the water trust for these reasons. On the other hand, tribal users are part of the community and the region. Particularly at the regional level, it would be necessary to include tribes in any water use planning efforts.

A water plan that ignores the interrelationship of a community's uses with those of a neighboring indian community because of reservation boundaries even though the communities are dependent on the same water source will not be realistic. No planning might be better than bad planning that only consists of incompatible wish lists. Complementary planning could be a way to define and promote mutually beneficial water uses, and perhaps, temporary exchanges. Where existing water use institutions make up the members of a trust, it would be logical to include a neighboring tribe as one of the institutions. This might be extremely beneficial where ditches are used by both tribal members and non-indian community members.

B. The Purposes of a Water Trust

The water trust can be created solely to acquire and put water rights to use for specific purposes, or it can be designed for more general purposes that address broader community problems. It can foster community education concerning water uses and the planning of present and future water needs. The purposes of the trust should normally be very broad because if it is too specific it might fail to provide for problems that can arise in the future. Generality promotes flexibility. The essential factor is that any statement of purposes should reflect the desires of its organizers.

If the organizers of a water trust want to seek tax-exempt status, the statement of purposes must be in the Articles of Incorporation and the Bylaws. It must include the statement that the trust is organized and operated exclusively for charitable, educational or scientific purposes.[12] Preservation of historic cultural values and providing water for non-profit community needs would meet this criteria. Additional permitted purposes would include the acquisition of water rights to protect and conserve farmlands and public recreational uses such as minimum flows for fish and wildlife as long as these uses will be perpetual.[13] Some examples of statements of purposes taken from land trusts are found in Section IV of this paper.

As noted earlier, tax-exempt status might be advantageous by facilitating the acquisition of water rights by the trust. The reason is that the tax advantages are not limited to just the trust; under some circumstances the transfer of the right to the trust would give the donee tax advantages. On the other hand, though, tax-exempt status does limit the activities of the water trust. Tax-exempt organizations cannot distribute "net" earnings to the membership.[14] Nor can they attempt to " influence legislation", a fancy label for lobbying, or participate in political campaigns AS AN ORGANIZATION on behalf of a particular candidate.[15] Certain rules concerning the distribution of trust property might preclude a redistribution of water rights to trust members or former owners if the trust was dissolved.[16] All of the benefits and drawbacks to tax-exempt status are beyond the scope of this paper. A tax specialist should be consulted if a community is interested in pursuing tax-exempt status.[17] At the present time the City of Roswell has created a tax-exempt corporation to acquire and hold water rights for future uses in the city. It might be helpful to contact the city to determine how useful this might be for a particular trust.

C. The Legal Process

1. The Articles of Incorporation

Once the purposes and membership of the water trust have been determined, certain steps must be taken to formally charter the organization with the state, and if desirable, with the Internal Revenue Service. At least two documents must be drawn up: the Articles of Incorporation and the Bylaws. Although there is no law requiring that an attorney draft these documents, it would be advisable as they are usually aware of the potential problems that may be encountered.

The Articles of Incorporation must include the following information under state law:

a. the name of the corporation,
b. the period of duration (usually perpetual),
c. the statement of purposes,
d. the address of its initial office,
e. the name of the initial registered agent (the person authorized to act for the corporation in its dealings with the State Corporation Commission.
f. the number of directors constituting the initial board of directors, and the names and addresses of those who will serve as directors.
g. the name and address of each incorporator. In the case of membership consisting of other associations, the officers of those associations could act as representative incorporators, or it could be the organizations.[18]

If a corporation will be seeking tax-exempt status, certain language concerning the handling of assets upon dissolution is also required by the IRS.[19]

2. The Bylaws

A corporation's bylaws are the internal rules that govern how the organization operates. Its sections are referred to as Articles. Article I usually sets forth the names of the corporation, the registered agent and where the office of the registered agent is located. Article II describes the membership, how it is determined, the rights and responsibilities that attach to membershp and how membership can be terminated, if necessary. The next article addresses the responsibilities of the Board of Directors, how many directors will serve and any special qualifications. The same information concerning the incorporators is set forth in a separate article. The next subject is the officers of the trust and their duties. Other articles can address topics such as the creation of committees to handle specific activities of the trust such as an acquisitions committee, a

leasing committee and long-range planning. In some instances the committees may be given special authority to act for the water trust. In other instances the committees may only be given an advisory role to the officers and directors. The holding of membership meetings, or community meetings, meetings of the Board of Directors and Officers, as well as who is responsible for maintaining the books of the corporation are also set forth. A very important part of the Bylaws is the process that is designed for the amendment of the Bylaws. In many trusts amendments must be adopted by the membership or the entire community by a majority or some other percentage of those present. Normally such meetings have a minimum number required. This is known as a quorum.

3. Filings

In addition to these formative documents, an initial annual corporate report must be filed with the State Corporation Commission. An Employer Identification Number should also be obtained from the IRS. This number serves to identify the water trust in any subsequent dealings with that agency. Additional forms should be filed at this time if tax-exempt status is desired. The forms can be obtained from the IRS, but a tax specialist should be consulted before these forms are filed with the agency.

III. Operating a Water Trust.

The water trust's primary function is to acquire and hold water rights, putting them to beneficial uses that enhance the community in some way. Presumably its actions would be consistent with a regional or basin wide plan for future water use. In accordance with its needs, the trust would acquire rights in the same manner as an individual, gift or purchase,

and then insure that the rights are put to beneficial use, either through the leasing of the right to an individual or to the community for community purposes. First the focus of the discussion will be on acquisition issues and then it will move to management issues.

A. Acquisition of Water Rights

1. who acquires the water rights.

Under a traditional corporate structure, the entity acts through officers, thus purchases would be made by and donations accepted by usually the president and the secretary. Officers do not act of their own volition, but only at the behest of the board of directors. For example, at a meeting of the Board of Directors, it is determined that certain water rights should be purchased by the trust. In the minutes of the meeting the officers are authorized to negotiate the purchase. Once the negotiations are complete, the officers report to the board and the board determines whether to authorize the purchase. If they do, the officers complete the transaction.

This process can be altered, and in the case of community land trusts it has been to allow greater participation by the community in the activities of the trust. Usually committees are formed from the membership and the committees make recommendations to the Board of Directors. In some instances the committees work directly with the officers once the Board has established a general policy concerning acquisitions.In much the same manner, donations to the trust are either accepted or rejected by the board of directors. Again, this can be done by committee if that approach is more desirable.

2. what is being acquired?

It must be understood that once a water right is acquired by the trust, it is no longer the property of any one person, but belongs to the trust. The right is being severed from the land completely, even though it may still be used on the land through a leaseback arrangement or perhaps where someone else leases the land from the owner and the water from the trust. In return for giving up their water right, the former owner is compensated with money - the purchase price of the right. Transferring the right to the trust DOES have an effect on the value of their property because it no longer can be sold with the water rights as is usually the case.

Up to now we have assumed that the trust would acquire the complete interest of an owner when a right is transferred to the trust. Another option would be to allow the trust to purchase a type of modified development right.[20] Many community land trusts use this approach when the objective is to limit changes in the land so that it is developed only in a manner consistent with the purposes of the trust.

With water rights it is not likely that a pure development right could be purchased where the right is held by a private person under the laws of New Mexico. Unlike land, the law does not recognize an individual, or private property interest in water that does not depend upon development of the resource by applying it to beneficial use. Thus, when a person agreed not to develop water resources, they would be agreeing not to put the water to use. This could result in forfeiture.

What might be feasible is a modified development right. For example owners of water rights might be compensated by the trust for agreeing not to use the water for uses inconsistent with the purposes of the trust, or not to change the place of use in a manner that would impair the purposes

of the trust.

The principle drawback to some sort of modified development right is in the enforcement of the agreement describing and transfering the right. If it is violated, the only means of enforcement is through the courts, an expensive and time -consuming process. Courts can refuse to enforce an otherwise valid contract if it is found to be contrary to public policy.[21] Courts can also decide that it would be inequitable to require a party to perform under the agreement and award monetary damages as an alternative remedy.[22] Further complications arise if the land and remaining interest in the water right are sold to a third party. It is not certain that a modified development right could be enforced against the new owner. One solution to this problem would be to expressly state that the agreement was a covenant running with the land. In otherwords, the agreement is not intended merely to limit the activities of the individual granting the development right, but is a transfer of his property interest to some extent. Thus the third party who purchases the owner's interest is only buying what the original owner did not grant away.[23]

Based upon the forgoing discussion, it would seem less problematic for a water trust to acquire an entire water right rather than some kind of lesser interest. Without an efficient enforcement mechanism, as traditional uses are subject to greater stress from market forces, there would be a greater incentive for transferees to turn to the courts to avoid restrictions on use in the agreements creating the modified development right.

An exception might be where a tribal water right is involved. If, for some reason, a community needs water and a tribe has water that it cannot put to use at the present time, the trust might wish to purchase a development right from a tribe. This would not constitute the alienation of real property, and therefore no federal approval would be required. Essentially

the tribe would agree not to put its water to use for a specific period of time so that others could use it. This is much more feasible because the tribe's right is not subject to state laws, especially those concerning the forfeiture of water rights. For the tribe, this type of arrangement can bring in funds that can be used for more pressing needs, and it keeps the water supply within the region. If this water is applied to mutually beneficial uses, the tribe or its members will also receive some benefit.

A major task for the water trust will be to determine what rights it needs to acquire. Criteria to govern the acquisitions needs to be developed to address what rights are most susceptible to market pressure and of greatest importance for the community to protect. A committee approach can be used to establish the criteria for acquisitions and to monitor trust activities to ensure that the criteria are followed. This could also be done by the Board of Directors, but the use of committees provides for greater community involvement and oversight.

B. Management of Rights Once Acquired by the Trust

Once the water trust owns water rights, there rights must be maintained by applying the water to beneficial uses.[24] Merely leasing the right, if it is not used by the lessee, does not avoid forfeiture. The trust cannot become a holding company to hoard water rights that cannot be put to use. If, however, the trust has specific plans for the use of water and diligently works toward putting the water to the planned uses, it can hold water right to meet those uses without risking forfeiture.

A second, and much more complex management issue is the appurtenancy requirement of state law. A water right is considered to be appurtenant to the specific land that it is used on. That the right is appurtenant means that it is attached to the property. State law governing the transfer of a water right assumes that if a right is transferred it will become appurtenant to a new tract of land. To sever a water right

from the land it is appurtenant to requires the consent of the landowner.

At first glance it might seem that this could be avoided by making a water right appurtenant to the community at large, but this approach is not consistent with state water law as construed by the courts of the state. In early cases the appurtenancy requirement was the basis for holding that water rights were the property of individual users, or the owners of the land where it was put to use, rather than rights held in common by all users of an acequia as a collective right.[25] In a recent decision, State ex rel Reynolds v. Holguin,[26] it was held that an administerable water right cannot exist where the right is not appurtenant to specific acreage. Even though the entire 120 acre tract was owned by an individual, the court remanded the case to the district court for a determination as to what portion of the tract was a water right sufficient for ninety acres appurtenant to.

With a water trust acquisition it is quite possible that the water will remain appurtenant to the same acreage. Severance might take place at a later date when it would serve the purposes of the trust to transfer the water right. The trust would, in all likelihood, need to obtain the consent of the landowner even though it had acquired the right beforehand. This approach is consistent with many decisions concerning the interests of landowners in water rights where the legal title is held by another, for example, by conservancy or irrigation districts.[27] Even though the landowners no longer hold legal title to the water rights, they may have an equitable interest in the right, Consent of the landowner to the transfer would terminate any equitable interest created by water use on their land by the trust.

Assuming that the appurtenancy requirement is interpreted in the manner described above, the remaining area of concern is the leasing process.

This is another area where it may be useful to allow a committee of members to set criteria and/or negotiate any leases. Given the diverse situations leading to the acquisition of rights, it may not be in the best interests of the trust to use a uniform lease agreement. For example, the length of the lease might differ depending on the type of use, and the circumstances by which the trust acquired the right. A donated conservation right for fish and wildlife purposes may need to be perpetual under the tax laws. On the other hand, if the lessee is an individual it might be more efficient to limit the term of the lease to a shorter period. A shorter lease period would also give the trust greater flexibility to meet future planned uses.

Any lease arrangements have to comply with the New Mexico Water-Use Leasing Act.[28] The substantive provisions are as follows:

> Any owner may lease to any person all or any part of the water-use due him under his water right, and the owner's water right shall not be affected by the lease of such use. The use to which the owner is entitled under his right shall, during the term of the lease, be reduced by the amount of water so leased. Upon termination of such lease, the water-use and location of use subject to the lease shall revert to the owner's original use and location of use.
>
> The lease may be effective for immediate use of water or may be effective for future use of the water covered by the lease, however, the lease shall not be effective to cumulate water from year to year, or to substantially enlarge the use of water in such manner that it would injure other users. The lease shall not toll any forfeiture of water for nonuse, and the owner shall not, by reason of the lease, escape the forfeiture for nonuse prescribed by law; provided, however, that the state engineer shall notify both the owner and the lessee of declaration of nonuser as provided in §§72-5-28 and 72-12-8 NMSA 1978. The initial or any renewal term of a lease of water-use shall not exceed ten years.

State engineer approval of the lease is required, but administrative discretion to deny approval is limited.

> The engineer shall approve the application if the applicant has shown that his proposed use and location of use is a beneficial use and will not impair any existing right

to a greater degree than such right is, or would be impaired, by the continued use and location of use.[29]

The principle concerns of a water trust would seem to be automatic reversion upon termination of the lease , the limit of the length of a lease, and State Engineer approval of the lease to guard against impairment of existing rights. Reversion upon termination raises some of the same issues as the appurtenancy requirement. If the water trust does not own any "place of use" where would the right revert to once the lease ended? This would not be a problem if the water was still in its original place of use under some sort of lease-back arrangement, but if there has been a change in the place of use, the water trust must have a planned use for the water right. If the trust were also leasing water for some community use, such as recreation, and had plans to increase this use, it could transfer the rights to that place of use.

The Act limits the term of a lease to ten years , allowing a renewal for another ten years. This would be the maximum limit allowable on a lease arrangement. During the period of the lease, the trust is still responsible for ensuring that the water is put to use. Rather than risking loss through the non-use of a lessee, it might be in the best interests of the trust to limit individual leases to a four-year period. On the other hand, if the trust is the creation of existing organizations that manage water use, monitoring would not pose that great a burden on the trust.

The State Engineer must approve any leasing arrangement but, as mentioned above, his discretion is more limited than in the case of a transfer of the water right. Under the statute the lease can only be denied if the proposed use is not a beneficial use, or if existing

right would be impaired. There is caselaw suggesting that the State Engineer has the discretion to deny a lease if he found that it was contrary to the public welfare.[30] It would be very unusual for this to cause the denial of a lease-back arrangement, thus, it is unlikely that this type of arrangement could be denied under the statute If there is a change in the place or type of use, though, the State Engineer could limit the amount to be leased to less than the full right, and conditions as to the manner of use in the new location could be placed on the right.

C. Legal Processes Involved in the Management of Water Use

When a water right is acquired, the document that signifies the transfer, usually a purchase agreement, should be filed with the Office of the State Engineer.[31] If the trust is going to lease the water right for use on the same land, then only the lease would have to be approved by the State Engineer, as discussed above. However, when a change in the type or place of use is contemplated, the transfer must be approved by the State Engineer, and under the statutes he has much greater discretion to deny the transfer.[32] If any protests to the transfer are filed with the Office, an administrative hearing would be necessary before the transfer could be approved.

There is caselaw suggesting that the State Engineer does not have jurisdiction over water rights with a priority date before 1907 if there has not been a stream-wide adjudication.[33] This exception to jurisdiction has been very narrowly interpreted by the courts. By statute it only refers to changes in the point of diversion, and caselaw limits this to the point of diversion for the acequia from the river, not individual points of diversion along the acequia.[34] The state supreme court has suggested that

the purpose of this exception is to allow acequia officials to create a new diversion for an acequia in an emergency situation. This is not an unreasonable interpretation in light of the rash of flooded headgates that occurs almost every spring in northern New Mexico.

The future vitality of any exception from State Engineer jurisdiction based upon a pre-1907 priority date in very questionable because once a stream system is adjudicated, the state engineer has jurisdiction to enforce the decree. Most stream systems in the region are in the process of being adjudicated at the present time. Once these proceedings are completed, the exception to State Engineer jurisdiction will have no force.

IV. DOCUMENTS TO CREATE A COMMUNITY TRUST

Each trust may wish to operate in a different manner and have different goals. The community, or organizations wishing to create a trust should work with an attorney to create organizational documents that reflect their needs and goals. No uniform model exists that will withstand all court challenges, or ensure that the community water trust will function in a equitable and efficient manner. As with any other community organization, the success of a water trust depends on the active involvement and support given to it by the community.

A. The Articles of Incorporation

In this section certain portions of the Articles of Incorporation will be discussed because the nature of a community water turst requires specific language, or certain provisions are necessary if tax-exempt status is sought. An integral part of the Articles of Incorporation is the statement of purposes for the organization. The following examples are taken from the statement of purposes for some community land grants.

1. Purposes - Examples

a. The purpose of this Corporation is to serve as a non-profit, charitable and benevolent organization to preserve the regional water supply for the people of the region and to resist and undermine the inflationary and impoverishing forces of wataer rights speculation and absentee control of resources by acquiring and holding water rights within the region, to hold in stewardship for all present and future generations, forever safe from the pressures of the speculative market;

To lease said water rights for secure use on terms that are consistent with this Corporation's avowed commitment to policies and practices that preserve community control over water resources and which are ecologically sound and economically non-speculative, on terms that assure the just rights of users and the natural rights of the land and water itself, and that reflect an aspiration to harmonious, cooperative living and working relationships;

To collect all lease income from leased water rights, pay all expenses incident to the operation of the Corporation, and to convey any net income in excess of these expenses to other like-motivated charitable organizations of similar purpose exempt under Section 501(c)(3) of the IRS Code.

b. This corporation is organized to acquire and hold title to water rights within the region in stewardship for future generations by removing said water rights from the pressures of the marketplace and leasiing said water rights on terms and conditions which are consistent with sound environmental and ecological principles and the historic cultural values of the region.

c. This corporation is organized to promote the social welfare of the residents of the region by acquiring and holding water rights

to promote the self-sufficiency of disadvantaged residents who derive their economic livelihood from water-based activities, to facilitate access and create recreational water uses for residents of the region and others, and to promote the use of water resources in an ecologically sound manner. to prevent the depletion of the water resources, so that it will be available for future generation; to facilitate these mutual and complementary objectives and encourage the cooperative and non-speculative use of the region's water supply.

However a purposes statement is framed, if tax-exempt status is sought, this section should state that the corporation is organized for charitable and educational and public purposes, and any other purpose authorized by the New Mexico Nonprofit Corporation Act consistent with Section 501(c)(3) of the Internal Revenue Code of 1954, as amended.

2. Earnings:(this may be treated as a separate article. It is necessary if tax exempt status is sought). No part of the net earnings of the corporation shall inure to the benefit of, or be distributed to its members, directors, officers, or other private persons, except that the corporation shall be authorized and empowered to pay reasonable compensation for services rendered and to make payments and distributions in furtherance of the purposes set out in Article ____ hereof. No substantial part of the activities of the corporation shall be the carrying on of propaganda, or otherwise attempting to influence legislation, and the corporation shall not participate in, or otherwise intervene in (including the publishing and distributing of statements) any political campaign on behalf of a candidate for public office. Notwithstanding any other provisions of these articles, the corporation shall not carry on any other activities not permitted to be carried on (a) by a corporation exempt from

Federal income tax under §501(c)(3) of the Internal Revenue Code of 1954, as amended, or (b) by a corporation, contributions to which are deductible under §170(c)(2) of the Internal Revenue Code of 1954, as amended.

3. Dissolution: (this article is required for tax-exempt status) Upon the dissolution of the corporation the Board of Directors shall, after paying or making provision for the payment of all of the liabilities of the corporation, dispose of all of the assets of the corporation exclusively for the purposes of the corporation in such manner, or to such organization or organizations organized and operated exclusively for charitable, educational or scientific purposes as shall at the time qualify as an exempt organization or organizations under §501(c)(3) of the Internal Revenue Code of 1954, as amended, as the Board of Directors shall determine. Any such assets not so disposed shall be disposed of by the State District Court of the District in which the principal office of the corporation is then located, exclusively for the purposes or to such organization or organizations as said Court shall determine, which are organized and operated exclusively for such purposes.

B. By-laws

The by-laws of a corporation are much more involved that the Articles of Incorporation because the purpose of them is to set out how the corporation will function. Rather than provide model articles, certain articles are described, others have options, or examples of language from land trusts that might be applied to a water trust. A model non-profit corporation act has been drafted by the American Bar Association and can be obtained by writing to the American Law Institute, ABA Committee on Continuing Professional Education.

ARTICLE I. OFFICES

This would include the location of the office of the corporation, the registered agent of the corporation and its office. Under state law it should also state if these are identical.

ARTICLE II. MEMBERS

This article sets out whether the corporation will have members, their voting rights, if any, how membership can be terminated by the trust, how members can resign and be reinstated, and if desired, whether membership in the water trust is transferable to another party. Presented below are a variety of options representing the various types of membership discussed earlier.

SECTION 1: Membership

Option 1.The corporation shall have no members.

Option 2.[Community] The members of the corporation are the residents of _____.

Option 3. [existing organizations] The members of the corporation are the following organizations:

Option 4.[members of existing organizations] The members of the corporation are those individuals who are members of the following organizations:

Option 5. [membership broken into classes] The corporation shall have _____classes of members. The designation of such Classes and the qualifications and rights of members of such classes shall be as follows:

Class A shall consist of _____.

Class B shall consist of _____.

SECTION 2: Voting Rights

Option 1.[This could correspond with Options 2,3, & 4 of Section 1] Each member shall be entitled to one vote on each matter submitted to a vote of the members.

Option 2.[This could correspond to Option 5 of Section 1] All members in Class A shall have one vote on each matter submitted to a vote

of the members. All members of Class B shall have no vote.

SECTION 3. Termination of membership.

In this section the trust would set out how membership could be automatically terminated in the event that someone left the community, if membership is determined by residency. It also can provide a process to suspend members by the Board of Diectors.

SECTION 4. Resignation.

This section would set out how a member could resign from the trust. If the trust is the creation of existing organizations, it might be appropriate to require the consent of the existing organization's members.

SECTION 5. Reinstatement.

This section would set out the process to be followed if a former member wishes to be reinstated. As with Section 4, if the members of the trust are existing organizations, the approval of the members of the organization could be required.

SECTION 6. Transfer of membership.

Given the nature of the water trust, it might be unnecessary to allow for the transfer of membership. If all residents are members, terminating residency would terminate membership. Two options are set out below.

Option 1. Membership in this corporation is not transferable or assignable.

Option 2. Any membership in this corporation may be transferred and assigned by a member to any person who has the requisite qualifications and whose membership is approved by the Board of Directors.

ARTICLE III. MEETINGS OF MEMBERS

If the water trust is to have members, it must provide for annual and special meetings of the members. Numerous models are available.

SECTION 1: Annual Meeting. The date, time and place of annual meetings must be set forth. The by-laws should also provide an alternative date should the date of the annual meeting ever fall on a legal holiday in the state of New Mexico. This can be accomplished with language providing that the meeting will be held on the next succeeding business day. Since the Directors of the corporation, if selected by the members, are elected at the annual meeting, this section should also provide for an alternative should the election not take place. The following language could be used: If the election of Directors shall not be held on the day designated herein for any annual meeting, or at any adjournment thereof, the Board of Directors shall cause the election to be held at a special meeting of the members as soon thereafter as conveniently may be.

SECTION 2. Special Meetings. This section describes who can call a special meeting. The by-laws could provide for the membership to call for a special meeting by setting out a percentage of the members who must request it. The by-laws should also provide for the calling of special meetings by the Board of Directors and individual officers.

SECTION 3. Place of Meeting. The Board of Directors must be empowered to determine where a meeting will take place, and this section should state that if no specific place is mentioned, the meeting will take place at the registered office of the corporation.

SECTION 4. Notice of Meetings. This section sets out what kind of notice must be given to the members . It should provide for delivery to the members and set out the time, place and purpose of the meeting.

SECTION 5. Informal Action by Members. This section usually provides for actions to be taken in the absence of a meeting through the use of a written consent to the action that is signed by all of the members entitled to vote on the action taken.

SECTION 6. Quorum. At any meeting there may not be all members present. The quorum is the minimum number (or percentage) that must be present for a decision to be valid. In the absence of a quorum the bylaws should state that the meeting can be adjourned by a majority vote of those present.

SECTION 7. Manner of Acting. This sets out what is necessary for an action to be adopted by the members. Normally this is a majority of the votes entitled to be cast on the matter to be decided.

SECTION 8. Voting by mail. Where it is appropriate, it can be left to the Board of Directors to specify how voting can be done through the mail.

ARTICLE IV. BOARD OF DIRECTORS

The purpose of this article is to describe the powers, number and tenure of the Board, as well as how meetings of the Board will be conducted.

SECTION 1. General Powers. This should merely state that the Board shall manage the affairs of the corporation.

SECTION 2. Number, Qualifications and Tenure. If the trust's membership is community residents, or any other grouping of individuals, the number of directors must be stated. This section should also set out the qualifications for director. Thus, if existing organizations are the members of the trust, it could state that one director would be chosen from each of the organizations. If residency in the area is a qualification it must be stated in this article. The following is an example of how the board of a community land trust was defined:

[Section 2. Composition of the Board. At all times the board shall have at least one member who represents the following catagories: (1) a family farmer who both works and resides on the land; (2) a farm worker who, at the time of appointment or within five years prior to appointment, was actively employed in agriculture labor; (3) a representative of a major environmental defense organization; (4) a representative of an active consumer based organization.]

Based upon this model, a community water trust might want to ensure that all users were reflected in the make up of the board, either by locality or type of use.

Other sections would address annual and special meetings of the Board of Directors, how notice would be given, what constitues a quorum of the Board, the manner of acting, how vacancies will be filled until the expiration of the term. One section should state that the members of the Board will not be compensated for their time. This section can, however, allow the board, by resolution, to cover the expenses of attending the meeting. A final section can provide for the adoption of actions by unanimous consent of the directors in writing.

ARTICLE V. OFFICERS

This article sets out the offices of the water trust and the duties attached to those offices. In many instances the officers are the President, Vice President, Secretary and Treasurer. It should state whether the officers are to elected by the members or by the Board of Directors, or whether the officers are to be appointed by the Board of Directors. The one important legal requirement is that the same person not be both President and Secretary, as both must execute any documents for them to be valid. The secretary's signature serve the purpose of attesting to that of the president. In addition to the above, sections of the article should address

the following topics: Election and Term of Office, Removal, Vacancies, the specific duties of each officer, and whether assistant secretaries and treasurers are desirable. Numerous models for this language can be found in the references.

ARTICLE VI. COMMITTEES

In the general discussion above, it was noted that it might be desirable for a community water trust to have committees that would be responsible for certain trust activities. This can be done by providing for the Board of Directors to establish committees and delegate authority to them to act. Here are some suggestions for types of committees and their responsibilities:

1. The water rights acquisition committee: This committee is responsible for taking all steps necessary to acquire water rights for the trust. It shall establish criteria to determine which rights should be acquired, and which rights should be preferred for acquisition. It shall coordinate its activities with other committees and shall make a report to the Board of Directors and the membership on a bi-annual basis as to its activities.

2. The water rights leasing committee: This commitee is responsible for maintaining the use of trust water rights for a variety of purposes through the leasing of rights to users and the community at large for projects consistent with the purposes of the corporation . It shall coordinate its activities with other committees, especially the water-use planning committee. It shall make a report to the Board of Directors and the membership on a semi-annual basis.

3. The water-use planning committee: This committee is responsible for developing long range plans of community water needs. It shall consult with state and local governmental planning agencies to insure consistency with any state or local water-use plans. It shall cooperate with other committees of the trust and shall report to the Board of Directors and the membership on a timely basis.

ARTICLE VII. CONTRACTS, CHECKS, DEPOSITS & FUNDS

Usually the description of the duties of the officers sets out who can do what with the funds of a corporation. This Article can set out specific measures, such as who can sign checks and other banking documents. It also empowers the Board of Directors to accept, on behalf of the corporation, any contribution, gift, bequest or devise for the purposes of the corporation.

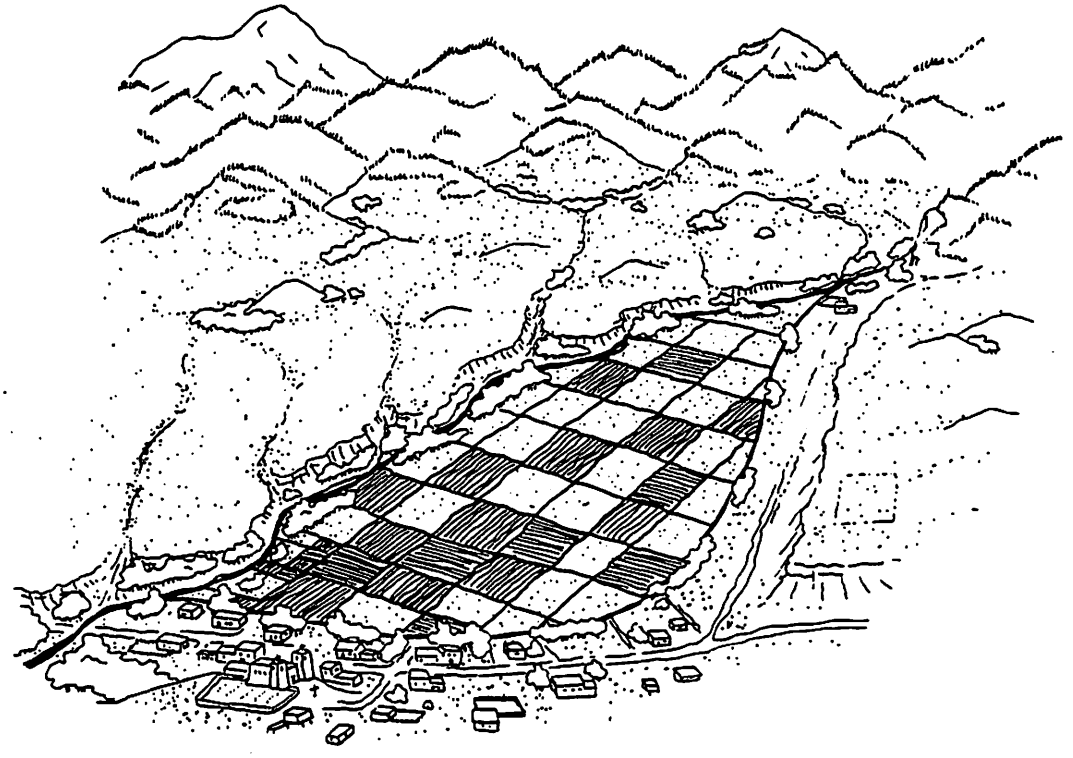
OTHER ARTICLES OF BY-LAWS

In addition to the Articles described above, the By-laws of a corporation should also include the following subjects.

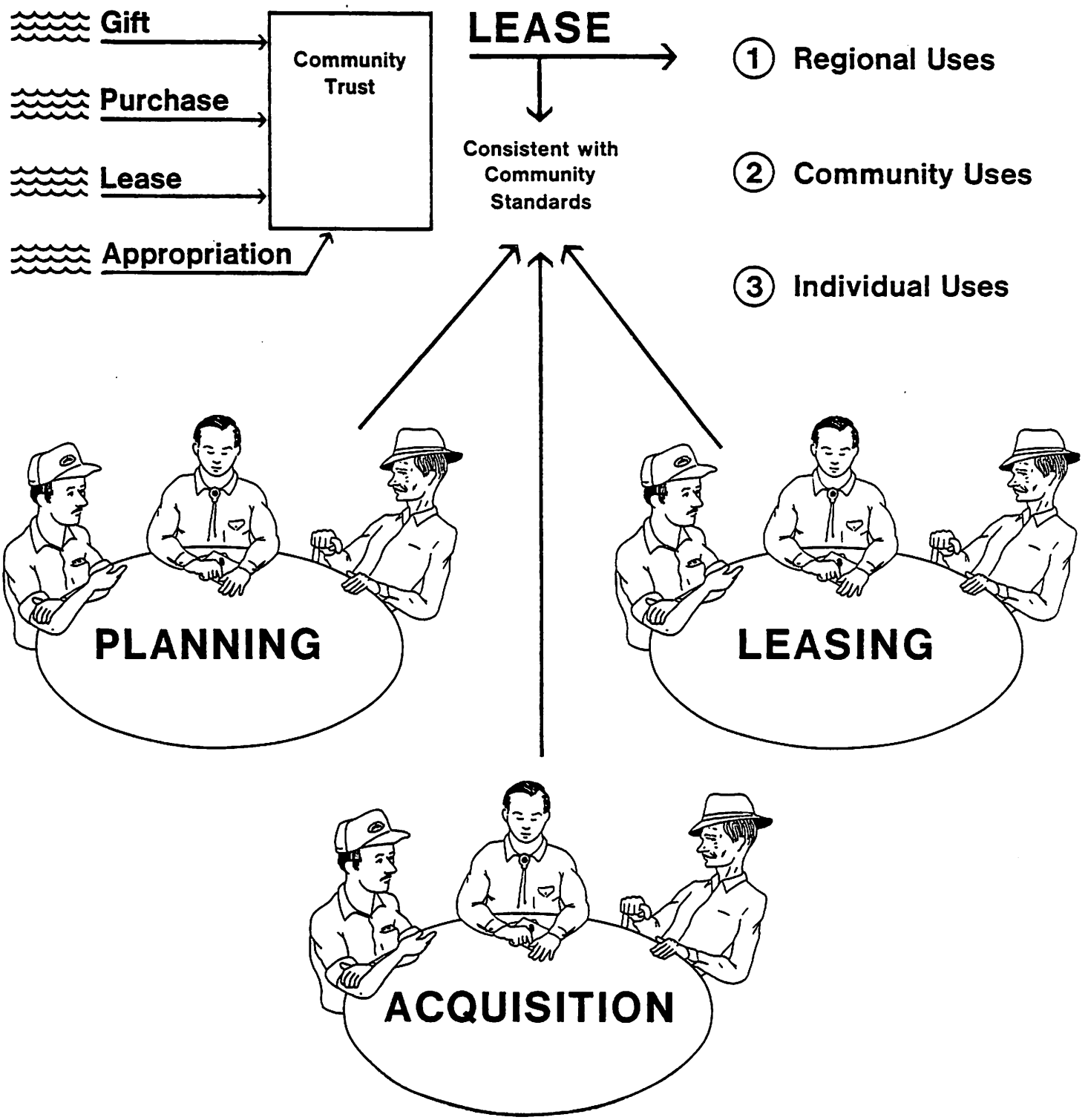
1) That the corporation shall keep complete books and records of account and shall keep minutes of the proceedings of any meetings, and that these books will be available for inspection;
2) The fiscal year of the corporation;
3) provisions for a corporate seal (the purpose of the seal is to authenticate the activities of the corporation;
4) One article should allow for waiver ofnotice in the event that not all those required to attend a meeting can do so;
5) the means of amending the by-laws. In corporations with few members this can be done by the Directors at a meeting called specifically for that purpose. However, it might be a very effective check if some certain percentage of the membership of a community water trust was necessary for the amendment of these very crucial articles. This can prevent overreaching action on the part of the Directors.

COMMUNITY PARTICIPATION IN WATER-USE DECISIONMAKING

- **Maintaining the Integrity of Land and Water Resources**
- **Protecting Water Use that Supports Cultural and Social Values of Communities**
- **Planning Present and Future Water Use that is Compatible with the Water Needs of Neighboring Communities**
- **Using the Water Market to Benefit the Community, not Victimize It**



HOW DOES IT WORK?



FOOTNOTES

1. THE COURSE OF THE UPPER RIO GRANDE WATERS: A DECLARATION OF CONCERNS, Report of the Upper Rio Grande working Group, Sponsored by the University of New Mexico, December 1985, pgs. 3-8. Other studies that have raised these problems include PEOPLE & WATER IN NEW MEXICO, published by Designwrights Collaborative, Inc., Santa Fe, NM January 1984, and STATE APPROPRIATION OF GROUNDWATER: A STRATEGY FOR INSURING NEW MEXICO A WATER FUTURE (FIRST AND SECOND REPORTS), New Mexico Water Resources Research Institute and the University of NewMexico School of Law, January 1985 & 1986.

2. STATE APPROPRIATION OF UNAPPROPRIATED GROUNDWATER, Supra at pp. 237-238.

3. This has been made clear by the action of at least one community in northern New Mexico in challenging transfers from acequias for recreational purposes through the administrative process and the courts. See Ensenada Land & Water Association v. Sleeper, No. RA-84-53-(C) (First Judicial District Court, County of Rio Arriba, Apr. 16, 1985) This case is presently before the Court of Appeals.

4. N.M. STAT. ANN §§ 72-5-23, 72-12-7 (Repl. Pamp. 1985).

5. THE COURSE OF THE UPPER RIO GRANDE WATERS, Supra, at pp. 28-33.

6. N.M. STAT. ANN. §§ 72-12-8, 72-12-8 (Repl. Pamp. 1985)

7. See "Becoming and Remaining a Tax-Exempt Organization", Marion R. Fremont-Smith & Roger E. Koontz, pp. 29-34 in LAND SAVING ACTION, Brenneman & Bates, eds. Island Press, Covelo, California (1984). The overriding issue is whether the organization has been formed for an allowable public purpose rather than to serve the private interests of particular individuals.

8. N.M. STAT. ANN §§73-2-1 et seq. & 73-3-1 et seq. (1978).

9. N.M. STAT. ANN. § 73-2-22.1 (Cum Supp. 1987).

10. Id., and N.M. STAT. ANN. §73-5-4(1978).

11. N.M. Laws, 1987, Ch. 182.

12. Supra, at n.7.

13. Brenneman, Russell L. "Note on Regulation Under I.R.C. Section 170(h)", in Brenneman & Bates, cited at n. 7, pp 178-193.

14. Internal Revenue Code §501 (c), Internal REvenue Code of 1954, as amended.

15. Id.

16. The specific language is set out in Section IV of this paper.

17. See numerous articles in Brenneman and Bates, cited at n.7, discussing the benefit and drawbacks of tax-exempt status from the perspective of the donor and the receiving organization.

18. N.M. STAT. ANN. §53-8-31 (Repl. Pamp. 1983).

19. The specific language is set out in Section IV of this paper.

20. Malone, Linda A., The Future of Transferable Development Rights in the Supreme Court, 73 Kentucky Law J. 759 (1985).

21. Shelley V. Kraemer, 334 US 1 (1948) In this landmark case the court refused to enforce a covenant prohibiting the purchase of property by a black person because it was a gross violation of public policy and would be using the court to deny a right guaranteed by the constitution.

22. Boomer v. Atlantic Cement Co., 26 N.Y.2d 219 (1970). For particular reference to restrictive covenants see Dobbs, D. REMEDIES, §5.7.

23. Supra, at n.20.

24. Supra, at n. 6.

25. Pueblo of Isleta v. Tondre & Pickard, 18 NM 388 (1913); Snow v. Abalos, 18 NM 681 (1914).

26. 95 NM 15 (1980).

27. Bryant v. Yellen, 447 US 352 (1980).

28. N.M. STAT. ANN. §§ 72-6-1, et seq. (Repl.Pamp 1986).

29. Id.

30. Supra, at n. 3.

31. A transfer where no assignment is filed with the State Engineer is not good as against third parties. N.M. STAT. ANN §72-5-22(1978).

32. Under statutes governing a change in the place of use, a transfer may be denied if found to be contrary to the public welfare of the people of New Mexico or conservation of water within the state. N.M. STAT. ANN. §§ 72-5-23, 72-12-7(Repl. Pamp. 1985).

33. Honey Boy Haven v. Roybal, 92 NM 603 (1978).

34. Id.

OTHER REFERENCE MATERIALS

Desiderio, Robt. J. & Taylor, S. Planning Tax-Exempt Organizations, Shepard's/McGraw-Hill, Colorado Springs, CO (1983)

The Community Land Trust Handbook, Institute for Community Economics, Greenfield, Mass. (1982).

The Community Land Trust: A Guide to a New Model for Land Tenure in America, International Independence Institute, Cente for Community Economic Development (1972).

Micek, John J. The California Farmland Trust: The Proposal to Balance Urban and Rural Land Use Needs of Californians, 18 USFL Rev. 171-220 (1984).

Appendix I: UPPER RIO GRANDE WORKING GROUP

PATRICIO GARCIA: Born in Rio Chama on a ranch that he still works, Patricio Garcia's concerns have been with irrigation water rights and domestic community water systems. He helped organize Las Acequias del Norte, and developed a simple bookkeeping system for M.D.W.S. He also has served as Mayordomo and Commissioner for his local ditch.

JOHN GONZALES: John Gonzales, Professional Planner and owner of Pueblo Enterprises, a consulting firm, served as Lieutenant Governor of San Ildefonso Pueblo the last two years and presently serves on the Tribal Council as Sheriff and the All-Indian Pueblo Council as Secretary-Treasurer. As Lt. Governor, Mr. Gonzales was involved in San Ildefonso's water rights litigation, State of New Mexico, ex. rel., S.E. Reynolds, State Engineer vs. R. Lee Aamodt, et. al., and United States of America, Pueblo de Nambe, Pueblo de Pojoaque, Pueblo de San Ildefonso, Pueblo de Tesuque, Plaintiff-In-Intervention. Mr. Gonzales has conducted research on regional development to define its impact on San Ildefonso's water resources. He served as an Economic Development Specialist with the Eight Northern Indian Pueblos Council, a Tribal Planner with San Ildefonso, and other positions involving him in Indian Affairs. Currently, Mr. Gonzales is assisting in developing water resource educational materials for use in a series of presentations to be held later this year in communities in Northern New Mexico. Mr. Gonzales graduated from Stanford University in 1980 with a Bachelor of Arts degree in Political Science and from the Massachusetts Institute of Technology in 1982 with a Masters in City Planning degree with a specialization in Regional Economic Development.

WILFRED GUTIERREZ: Mr. Gutierrez' 24 years of community involvement include serving in the following organizations: Member, Acequia de la Canova; Member and former Commissioner, Acequia del Medio; Member and current Commissioner, Acequia de los Garcia's; Member and current Commissioner, Acequias de los Chicos; Chairman, Las Nueve Acequias Steering Committee, a local organization comprising nine local non-Indian acequias in the Velarde area; Chairman, Las Acequias del Norte Association, a statewide organization of New Mexico acequias; Chairman, Communities United to Protect the Rio Grande, an organization formed in 1974 to protest the construction of El Llano Canal. Raised on a farm, since age 14 he has participated in the local acequia organizations. He still owns and maintains a farm in Velarde and is very interested in issues concerning land and water.

ARTURO JARAMILLO: Arturo Jaramillo is a farmer and businessman in Chimayo. He also is President of Manzana Center Inc., and Director of the United New Mexico Bank of Santa Fe, KSAF TV 2, the Santa Fe Opera, and Siete del Norte. Mr. Jaramillo is a member of the Santa Fe County Agricultural Stabilization and Conservation Committee.

JOSE H. LUCERO: Jose Lucero is the current New Mexico State Director of the Soil and Water Conservation Division, Natural Resources Department. The division serves 47 soil and water conservation districts statewide. His prior work experience includes the following: 1981-82 -- Director of Northern New Mexico Community College, Rural Development Foundation, El Rio, New Mexico. 1979-81 -- Director of Geothermal Research, Santa Clara Pueblo. 1977-79 -- Taos Pueblos' first tribal administrator. 1972-77 -- Instructor of Vocational Agriculture/Horticulture, Espanola Municipal Schools. Married to Faustina H. Lucero, with three daughters, Emilia, Felice, and Maria-Helena, the family lives in the Santa Clara Pueblo.

ANDRES ARAGON MARTINEZ: Since early childhood Andres Martinez has been interested in plants and their need for water. He used to watch his grandfather, Jose Lino Aragon, apply water to tiny plants, not flooding them, but adding water slowly, until the ground around the plants was saturated. As a student at Menaul School, Albuquerque, he learned from the farmer-teacher, Mr. Jones, how to irrigate alfalfa and garden crops. In 1927, he learned about the Middle Rio Grande Conservancy District, how small farmers were promised an abundance of irrigation water. Instead of the promised water, the small farmers lost their farms because they couldn't pay the Conservancy dues. During the period of the early 1960s he went twice to Washington with a delegation from New Mexico to fight for New Mexico's share (11.25%) of the San Juan River water. Throughout his life, he has been active in a number of water issues and organizations.

GERALD NAILOR: Gerald Nailor was born and raised at the Pueblo of Picuris. He attended the Santa Fe Indian School and graduated from the Peñasco School System in 1961. Mr. Nailor has been a three-term governor for Picuris Pueblo (1981, 1982, 1985), served as Lt. Governor in 1983 and is presently a counselor for the Eight Northern Indian Pueblos Council (E.N.I.P.C.), and Program and Committee Member for the Picuris Church Restoration League. He became interested in water issues during his term in office and is a firm believer in the cultural, traditional, and spiritual philosophy pertaining to water issues.

ERNEST E. ORTEGA: Gene Ortega is Executive Director of the Home Education Livelihood Program, Inc., in Albuquerque. He is responsible for overall administration and management of the statewide multipurpose development corporation which provides services in skills training, day care centers, real estate and housing for senior citizens and the handicapped. He is President of Management Consultants Unlimited, Inc. He has served on the Board for National Congress for Community Economic Development. Mr. Ortega has provided training to the Board of the San Juan Community Development Corporation (San Juan, Puerto Rico), and the Board of Dineh Cooperatives, Inc., (Chinle, Arizona). Mr. Ortega has been active in providing training and technical assistance to many Tribal Councils and agencies, including Standing Rock Tribal Council, Northern Cheyenne Tribal Council, Rosebud Sioux Tribal Council, Dakota Association of Native Americans, Montana Association of Native Americans, etc. Mr. Ortega is Vice-Chairman of the Albuquerque Development Commission and has participated in international rural development workshops in New Delhi, India, and in Israel.

VICTOR C. SANDOVAL: Victor Sandoval was born and raised in Chacon, New Mexico (Mora County). Mr. Sandoval is a self-employed rancher and farmer and has been active in the local acequias his entire life. He also has participated in a number of community development projects including rural economic development and rural health care.

BEN TAFOYA: Raised in Taos County, Ben Tafoya grew up in the community of Cañon de Fernandez. In the last fifteen years, he has been actively involved in grass roots issues ranging from water adjudication to zoning. He is Chairman of the Cañon Mutual Domestic Water Association and a member of the editorial committee of Lo Nuestro de Norte (a community journal dedicated to the education of rural communities in Taos County). As a participant of the Rural Development Leadership Network he has completed his masters thesis in Rural Development with extensive research into the history of water and land development in Northern New Mexico. Mr. Tafoya is presently working on the adjudication of water rights in Taos County as the liaison between the acequias and the State Engineer's Office. His primary goal is to develop the priority dates for individual acequias in the area.

FRANK TENORIO: Frank Tenorio of San Felipe Pueblo has experience in education, tribal politics, and service to the Indian communities of New Mexico. He was born in 1922 and attended Albuquerque Indian School. He served in the South Pacific from 1942 to 1945 and in the Korean War from 1949 to 1951. Mr. Tenorio has been involved in Pueblo water rights issues from the early 1950s, serving as an Irrigation Committee member for the Six Middle Rio Grande Pueblos from 1955 to 1972. He represented the concerns of three Southern Pueblo tribes in the Aamodt case. Mr. Tenorio chaired the All-Indian Pueblo Water Rights Committee from 1972 to 1982, during which time he headed a series of water rights seminars involving 42 Western Indian tribes. From 1953 to present, Mr. Tenorio has been involved with the San Felipe Pueblo Tribal Council as a spokesman and interpreter, as Head Fiscal, and as Governor for two terms.

FABIOLA TETER: Faby Teter was born and raised in Taos County and grew up in a small rural area known as Arroyo Hondo, New Mexico. Arroyo Hondo is eleven miles north of Taos and is still one of the loveliest little valleys in Northern New Mexico. Because she grew up with farming, she learned early on to recognize the importance of our two most precious resources, land and water. In the last five years, she has been actively involved in community issues related to water uses and is presently a Ditch Commissioner for one of the ditches in Arroyo Hondo. Recently, she was involved in the fight against the pollution of the Rio Hondo which is a high quality mountain stream that provides the only source of water for domestic use, irrigation of crop land, and livestock. She works for Northern New Mexico Legal Services in Taos as a paralegal primarily on land and water litigation.

FRANCES VIGIL: Housewife, mother, and grandmother, Frances Vigil lives in San Cristobal, New Mexico, about 18 miles north of the town of Taos, where her family owns 48 acres of land. The family raises livestock and grows their own vegetables, most of which are stored or canned for winter use. She has served as Secretary-Treasurer of The San Cristobal Mutual Domestic Water Consumers Association since 1976.

FRED VIGIL: Born and raised on a ranch in the Española Valley, Fred Vigil presently resides in Medanales, New Mexico. He is employed by American Friends Service Committee. Mr. Vigil is President of the Rio Chama Acequias Association, a member of the Rio Arriba County Policy Task Force, and Commissioner on the local acequia in Medanales. He is a member of the Acequia Commission by appointment of the Governor, and Vice-President of Health Centers of Northern New Mexico, a multi-site primary health care organization serving six counties in New Mexico.

Appendix II: CONFERENCE ATTENDEES

ATTENDEES
UPPER RIO GRANDE CONFERENCE
OCTOBER 5-6, 1987

Romolo Arellano
Tomas Atencio
Ruben L. Baca
Thomas Bahr
Jose S. Baros
John O. Baxter
F. Lee Brown
Gerald Chacon
Lisa Chavez
Carlos R. Cisneros
Chris Clay-Bauman
Tom Clevenger
Richard U. Conant
Deanna Concho
Dennis Cooper
Joe O. Cordova
Bobby J. Creel
Joel Cruz
Sylvia Ledesma Cruz
Walter Dasheno
Marie Dawson
Tim De Young
Anna Deardorff
Eugene Esplain
David Fernandez
Bill Fleming
John Folk-Williams
Lou Gallegos
Marcus J. Garcia
Patricio Garcia
Barbara Gastian
Jim Gilroy
Joe E. Gonzales
John Gonzales
Alice Grisham
Cleo H. Gutierrez
Wilfred Gutierrez
Wayne Gyulai
Leroy Hacker
G. Emlen Hall
Lucy Hilgendorf
Marcia Hollabaugh
Arturo Jaramillo
Robert Jenks
Ted Jojola
Rene Kimball
Stephanie Kruse
Bob Langsenkamp
Eduardo Lavadie
Irene Lee
Fran Levine
David Lucero
Jose H. Lucero
David Lujan
Barbara Mallery
Andres A. Martinez
Fernando E. Martinez
Palemon Martinez
Anita Miller
Ron Mitchell
Adam Montoya
Paul Montoya
Robin Morgan
Ben Moya
Gerald Nailor
Ernest E. Ortega
Sara Otto-Diniz
Aubrey Owen
Solveig Palanek
Carol Pecos
Edith Pierpont
Alex A. Puglisi
Richard L. Quintana
Rose Pecos-Sun Rhodes
Jose Rivera
Lisa Robert
Bruce H. Rolstad
Fabi Romero
Jose R. Roybal
Hilario Rubio
Blane M. Sanchez
Frank I. Sanchez
David Sanders
Andrew Sandoval
Victor S. Sandoval
Doug Schneider
Leta Schupack
Steven Siegman
Melvin W. Stout
Brie Stranahan
Mike Stranahan
Ben Tafoya
Fabiola Teter
Orlan Tewa
Sherry J. Tippett
Luis Torres
Alfredo Trujillo
Joe Fidel Trujillo
Joseph A. Trujillo
Carol Underhill
Lloyd Varela
Uvaldo Velasquez
Cleofes Vigil
Eliud Vigil
Frances Vigil
Fred Vigil
John Waconda
Fred Waltz
Gary Westerfield
Michael Wicker
Peter Thomas White
Ann Finley Wright
Esther Yazzie