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Who Controls New Mexico's Acequias - Acequia Government and Wilson v. Denver

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Who Controls New Mexico's *Acequias*? *Acequia* Government and *Wilson v. Denver*

ABSTRACT

On May 29, 1998, the New Mexico Supreme Court entered an interlocutory order on the issue of the accepted methods of voting for acequia officials under New Mexico Statute. The court's ruling was only one of several issues before the trial court in the case of Wilson v. Denver in Taos County; however, it was an important decision for all acequia associations in New Mexico. While the legally accepted methods of electing acequia officials is important, the underlying issue when elections are in dispute is clearly actual control over the ditch structure and flow of water in the acequia. Because of ambiguity in the law as written, and because of the historical practices of community acequias in New Mexico, the court ruled that New Mexico recognizes three different methods of electing acequia officials based on ownership interests in the ditch structure, a right to flow of water, or by an equal interest in the acequia of all users, as long as the method has historically been the chosen method of election of officials in the particular acequia. The court's ruling, although consistent with prior New Mexico law, fails to take into consideration the other methods historically used by acequia associations in New Mexico to elect officials. The court's opinion inadvertently shows, however, that a uniform system for the election of acequia officials would be most beneficial, especially a method that recognizes the majority ownership interests in an acequia. Prior New Mexico Supreme Court opinions have put acequia associations into the category of "quasi-corporations," meaning that individuals with majority ownership interests in an acequia should have the controlling interests in an acequia. Case law in other states allows for election of ditch officials in proportion to majority ownership interests. The court's ruling in Wilson v. Denver, although clarifying the New Mexico statute dealing with acequia elections, does not resolve the underlying control issues that must be addressed under New Mexico law. Ulitmately, the New Mexico legislature should adopt one method for electing acequia officials that is not only consistent with New Mexico case law and common practice, but that recognizes the interests of those individuals, or groups of individuals, with majority interests in the acequia.

INTRODUCTION

On May 29, 1998, the New Mexico Supreme Court ruled on a dispute between individuals elected as *acequia*[1] commissioners and a family that claimed rights to sit on the *acequia* commission based on ownership of water rights and right to flow of water.[2] The Supreme Court's opinion is important to New Mexico communities that utilize a commission to manage and operate the flow of water to domestic water users in their community.

Acequias, or irrigation ditches, are an important part of rural life in New Mexico. Since the first Spanish settlements in the 1500s, and pueblo communities before that, *acequias* have provided rural communities in New Mexico with water for all community needs.[3] The traditional managerial practices of the *acequia* administration provided water to all users for cultivation of land, traditional farming needs, and domestic uses.[4] Originally, water rights were permanently joined to individual parcels of land.[5] This system differs somewhat from the doctrine of prior appropriation, which New Mexico has followed since 1891.[6] Under the doctrine of prior appropriation water rights are based on prior or first use and are not automatically attached to land surrounding or attached to a river.[7] This view of water ownership can conflict with one of the original views of water rights in New Mexico, the belief that land is valueless without water rights.[8]

The form of management of *acequias* in New Mexico has not changed much since the early Spanish settlements,[9] and modern management of the *acequia* is codified under New Mexico statute.[10] The govern-

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1. Irrigation ditch.
2. *See* Wilson v. Denver, 961 P.2d 153 (N.M. 1998).
3. *See* JOSÉ A. RIVERA, ACEQUIA CULTURE: WATER, LAND, AND COMMUNITY IN THE SOUTHWEST 1-3 (1998).
4. *See id.* at 6-7.
5. *See id.* at 8-9; Snow v. Abalos, 140 P. 1044, 1049 (N.M. 1914) ("the right to divert water, or the water right, is appurtenant to specified lands, and inheres in the owner of the land"). *See also* Jose A. Rivera, *Irrigation Communities of the Upper Rio Grande Bioregion: Sustainable Resource Use in the Global Context*, 36 NAT. RESOURCES J. 731, 736 (1996).
6. *See* Trambley v. Luterman, 27 P. 312, 315-16 (N.M. 1891) (determining that New Mexico followed the doctrine of prior appropriation). *See also* United States v. Rio Grande Dam & Irrigation Co., 51 P. 674, 677-79 (N.M. 1898) *rev'd on other grounds*, 174 U.S. 690, 709 (1899) (New Mexico Supreme Court recognized that the doctrine of prior appropriation existed in Mexican New Mexico prior to annexation by the United States).
7. *See* RIVERA, *supra* note 3, at 166-69.
8. *See* RIVERA, *supra* note 3, at 52; Rivera, *supra* note 5, at 736.
9. *See* RIVERA, *supra* note 3, at 52-62.
10. *See* N.M. STATUTE ANNOTATED § 72-1-1 to § 72-19-103 (Michie Repl. Pamp. 1997).

mental and managerial structure of the *acequia* is based on the historic management of the *acequia*:

> In most villages, the *acequia* association, made up of three elected ditch commissioners, a *mayordomo* [superintendent or "ditch boss"], and the *parciantes* [irrigators] themselves, is the only form of local government at the subcounty level. The ditch rules that govern *acequia* affairs, and much of New Mexico *acequia* water law, for the most part simply codify the norms already imbedded in custom and tradition. When internal disputes arise, the *acequia* commission is the final arbiter. While ditch officials and members are aware of the superimposed (Anglo-American) version of prior appropriation and the related notion that water rights are moveable and severable from the land, historically *parciantes* have not been forced to choose between the two opposing systems in any legal sense. Until the 1960s, the water markets in New Mexico were not strong or active enough to pose any direct threat to local uses. The business of managing the *acequia* waters continued much as before: the local ditch rules based on custom and tradition carried the force of law.[11]

Because of the importance of access to water in rural communities, and the importance of proper administration of that access to water, laws affecting administration are important to rural communities.

The New Mexico Supreme Court's ruling in *Wilson v. Denver* clarifies ambiguity in the New Mexico statutes[12] dealing with the election of *acequia* board commissioners and *mayordomos*.[13] The ruling allows *acequia* associations to use any one of three prescribed methods based on ownership interests in the ditch structure, a right to flow of water, or by an equal interest in the *acequia* of all users, as long as the method has historically been the chosen method of election of officials in the particular *acequia*.[14] Although the ruling allows for some diversity in the election of officials in New Mexico *acequias*, it reverses the water policy of the New Mexico State Engineer first implemented in 1921, in which the state mandated voting for *acequia* officials in proportion to water rights.[15] The court's ruling protects

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11. Rivera, *supra* note 5, at 737. For a history of statutes affecting water law in New Mexico since 1846, see *id.* at 737-38.

12. *See* N.M. STATUTE ANNOTATED §73-3-3 (Michie 1978).

13. A *mayordomo* is the ditch superintendent, or "ditch boss." *See* RIVERA, *supra* note 3, at 55; Rivera, *supra* note 5, at 737.

14. *See* Wilson v. Denver, 961 P.2d 153, 166 (N.M. 1998).

15. *See id.*; Ian Hoffman, *Ruling Frees Acequia to Govern Selves*, ALBUQUERQUE J., June 3, 1998, at D3, D3. The New Mexico Interstate Stream Commission issues grants and loans in the amount of approximately $500,000.00 a year and requires proportionate voting as a condition for eligibility. *See* Hoffman, *supra*, at D3.

the rights of all individuals with interests in an *acequia* but deviates from the traditional administration of some *acequias* and of corporations. Although the Court's ruling clears up some of the ambiguity in the New Mexico statutes dealing with the election of *acequia* commissioners, it creates confusion by not prescribing any one preferred method for the election of officials and moves away from uniformity and standardization in the election of *acequia* officials. By suggesting that there are only three prescribed methods of electing *acequia* officials, the Supreme Court ignores the fact that there are several other methods used in New Mexico that are not addressed in the current state statutes or common law.

Ultimately, the New Mexico legislature should determine a single election method to elect *acequia* officials. This method would be uniform, and required for all *acequia* board elections in New Mexico. Once officials are elected, ultimate decision-making power should be left in the hands of a board of directors or commissioners that are responsible for the administration of the ditch, and ditch management should be consistent with the interests of all users of an *acequia*.

A conversion of interests in *acequias* to shares, and a corporate-like system, would be more uniform, and would be more in line with modern law in other jurisdictions dealing with ditch officer/board elections. A share system, however, might not comport to the traditional "one member, one vote" system, and other methods of electing officials that have been the chosen methods of electing commissioners in many New Mexico *acequias*.[16] Such a method might also be contrary to the original intent of the first *acequia* management laws, which were intended to codify the common and historical practices of *acequias* in New Mexico.[17] Although the best method of electing *acequia* officials in New Mexico would be one that is uniform and standardized for all *acequias* in the state, this may be impossible to achieve. Because of the unique nature of water rights, as well as rights in the actual ditch structure recognized in New Mexico, and the notion of "one person, one vote" emphasized by the New Mexico Supreme Court in *Wilson v. Denver*, the Legislature may not be able to devise one system that is consistent with all interests involved.[18]

This article will examine the history and law in New Mexico dealing with *acequia* elections, give the background of the *Wilson* case up to the New Mexico Supreme Court's opinion, discuss and examine the New Mexico Supreme Court's opinion, and analyze the Opinion in the context of general *acequia* law in New Mexico and other states.

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16. *See* RIVERA, *supra* note 3, at 77-145 ch. 4.
17. *See id.* at 50.
18. *Wilson*, 961 P.2d at 163.

BACKGROUND

In 1852 the New Mexico Territorial Legislature passed the first codified laws of *acequia* administration.[19] The law stated, "[t]he regulations of ditches (acequias) which have been worked, shall remain as they were made and remain up to this day...."[20] The current laws dealing with the election of *acequia* officials have existed since 1895.[21] In 1895 the New Mexico Territorial Legislature enacted legislation dealing with the election of *acequia* officials, and amended the law in 1897.[22] The Legislature codified the 1897 legislation, which still reads,

> [t]he election for *acequia* or community ditch officers under this article shall be held by the outgoing commissioners under rules and regulations to be prescribed by them. Only those having water rights in the *acequia* or ditch and who are not delinquent in the payment of their assessments, and fail to [sic] proffer such delinquent assessment at the time they offer to vote, shall be allowed to vote; but votes may be cast by written proxy and shall be in proportion to the interest of the voter in the ditch or water, or in proportion to the number or amount of his water rights.[23]

In 1903 the legislature enacted legislation making some counties exempt from the 1897 election law including Taos County, in which the La Lama *acequia* is located.[24] In 1917 the legislature amended the statute, excluding San Miguel, Mora, Taos, and Valencia Counties.[25] Those counties became subject to what is currently New Mexico Statute Annotated Section 73-3-3 (Section 73-3-3) when electing *acequia* officials.[26]

Courts and administrative agencies in New Mexico have long interpreted the meaning of both *acequia* officer election statutes.[27] A

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19. *See also* RIVERA, *supra* note 3, at 50, 63.

20. *Id.* at 50 (translated, original statute in Spanish).

21. *See* N.M. STATUTE ANNOTATED § 73-2-14 (Michie 1978); RIVERA, *supra* note 3, at 59-60.

22. *See* § 73-2-14; RIVERA, *supra* note 3, at 67.

23. §73-2-14. The current election law is codified as N.M. STATUTE ANNOTATED § 73-3-3 (Michie 1978).

24. *See* N.M. STATUTE ANNOTATED § 73-3-11 (Michie 1978).

25. *See id.*

26. § 73-3-3. This is the current law that is the subject of *Wilson*. *See* Wilson v. Denver, 961 P.2d 153, 165-66 (N.M. 1998).

27. *See* RIVERA, *supra* note 3, 216, ch. 4 n.1.

> [Officers]; election; votes; canvass. The election for acequia or community ditch officers, under this article, shall, be held by the outgoing commissioners, under written rules and regulations to be prescribed by them. Only those having water rights in the acequia or ditch, and who are

1915–1916 New Mexico Attorney General Opinion found that when electing *acequia* commissioners, voting rights were determined by a voter's interest.[28] In a 1921 opinion the Attorney General wrote that water users should vote in proportion to the amount of water owned and used in the preceding year.[29] In 1914 the New Mexico Supreme Court wrote that domestic water users' interests may be too small to give them a right to vote under New Mexico statute.[30] In 1952 the New Mexico Supreme Court confirmed that Section 73-2-14 recognized two alternate methods of voting for *acequia* officials, through ownership interest in the water or ownership interest in the ditch.[31]

Since enactment of the statutes governing election of *acequia* officials in New Mexico, the *acequia* associations themselves have used different methods to elect officials. In New Mexico there are over 800 Community *acequia* associations and no single system of voting used in common.[32] In Taos County, where the El Rito de la Lama *Acequia* Association is located, only one of sixty community *acequias* that are members of

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not delinquent in the payment of their assessments shall be allowed to vote, but votes may be cast by written proxy. All votes shall be in proportion to the interest of the voter in the ditch or water, or in proportion to the number or amount of his water rights, which for election purposes, shall never exceed the lands under irrigation the outgoing year. They shall canvass the votes cast and shall record and publicly announce the result of the election within twenty-four hours after the close of the same. Contests, if any, shall be commenced and conducted as provided by law in the case of general elections for county officers, but the notice of contest shall be filed within fifteen days after the result of the election is announced as herein required.

§ 73-3-3.

Ditch elections; votes. The election for acequia or community ditch officers under this article shall be held by the outgoing commissioners under rules and regulations to be prescribed by them. Only those having water rights in the acequia or ditch and who are not delinquent in the payment of their assessments, and fail to [sic] proffer such delinquent assessment at the time they offer to vote, shall be allowed to vote; but votes may be cast by written proxy and shall be in proportion to the interest of the voter in the ditch or water, or in proportion to the number or amount of his water rights.

§ 73-2-14.

28. *See* 1915-16 N.M. Op. Att'y Gen. 323.

29. *See* 1921-22 N.M. Op. Att'y Gen. 105.

30. *See* State *ex rel.* Community Ditches v. Tularosa Community Ditch, 143 P. 207, 211, 213 (N.M. 1914).

31. *See* Holmberg v. Bradford, 244 P.2d 785, 788 (N.M. 1952). In the Supreme Court's decision in *Wilson*, the court noted that NMSA § 73-2-14 was similar to § 73-3-3. *See Wilson*, 961 P.2d at 165.

32. *See* Ian Hoffman, *Lawsuit to Test Acequia Voting*, ALBUQUERQUE J. (NORTH), Mar. 9, 1997, at A1, A6.

the Taos Valley *Acequia* Association uses a proportional voting method, i.e., equating voting in proportion to ownership of water rights for election of officers.[33] Eleven community *acequias* along the Gallinas River around Las Vegas, New Mexico, allow users to elect *acequia* officials with each voter having a common and equal interest in the *acequia*.[34] The reason there is no defined method for administering *acequias* is that customary usage, and not laws, statutes, or ordinances, have been the basis for regulation of individual *acequias*.[35] "Spanish and Mexican water laws pertinent to water management were implemented as guidelines and...were elaborated to fit prevailing norms, customs, traditions, and local circumstances."[36]

In 1995 the New Mexico legislature passed House Bill 270, which would have eliminated proportional voting rights in an *acequia* in the election of officials.[37] Governor Gary Johnson vetoed the bill on April 4, 1995.[38] Had the bill passed, New Mexico would not have allowed voting for election of officers in *acequia* associations in the manner asserted by the Wilsons.[39]

STATEMENT OF THE CASE

The El Rito de la Lama *Acequia* is located in Taos County in the community of Lama, and was built in approximately 1900.[40] The Association was formed in 1902, and the articles of incorporation were filed with the Territorial Engineer in 1908.[41] The original Association filed for seven cubic feet per second water rights to irrigate 640 acres of land bordering the *acequia*.[42] Lawsuits to adjudicate interests in water rights in the *acequia* took place in 1963 and 1980.[43]

The Association presently uses a share-per-hour system, with a total of 168 share/hours in the *acequia*.[44] One share is equal to use of the full flow of the ditch for one hour per week.[45] The Wilson family owns 61

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33. *See* Transcript of Proceedings at 5, Wilson v. Denver, 961 P.2d 153 (N.M. 1996) (No. 94-109-CV) (Sept. 1, 1995) [hereinafter Sept. Transcript].
34. *See id.*
35. *See* RIVERA, *supra* note 3, at 33.
36. *Id.*
37. H.B. 270, 42d Legis. Session § 1 (1995). The law would have amended N.M. STATUTE ANNOTATED § 73-3-3 (Michie 1978). *See id.*
38. *See* Hoffman, *supra* note 32, at A6; Sept. Transcript, *supra* note 33, at 16.
39. *See* H.B. 270, 42d Legis. Session § 1 (1995).
40. *See* Wilson v. Denver, 961 P.2d 153, 156 (N.M. 1998).
41. *See id.*
42. *See id.*
43. *See id.*
44. *See id.*
45. *See id.*

percent of the total share hours, or 102.5 shares, entitling them to full flow of the ditch for 102.5 hours per week.[46] In 1963, the share interests in the El Rito de la Lama *acequia* were litigated in *Vigil v. Meritian*.[47] The judge ruled that the litigants were the sole owners in common of the *acequia* system, that the water was originally divided among seven owners, and that all of the owners had vested water rights.[48] There were seven original owners of water rights in the *acequia* from 1907, and during litigation the Wilsons contended that they purchased all of the interests of four of the original seven tenants in common.[49]

The dispute between the Wilson family, headed by Dr. John N. Wilson, and several individuals that claimed a right to sit on the El Rito de la Lama *Acequia* Association began in 1989 over a question of possible contamination of the community *acequia*.[50] The Wilsons own a 750 acre ranch upstream from 20 households that use the *acequia* as a source of domestic water.[51] Manure from the Wilsons' Norwegian fjord horses was allegedly piled close to the *acequia*, allowing for possible contamination of the water in the *acequia*.[52] The manure's proximity to the *acequia* actually led to the misdemeanor criminal prosecution of Dr. Wilson for two counts of water pollution and two counts of public nuisance in 1994.[53]

Officers of the *acequia* Association offered to help build a new fence for the horses away from the *acequia*.[54] After refusal by the Wilsons, the Association attempted to pass rules and regulations regarding pollution of the *acequia* by the Wilsons' horses.[55] The Wilsons refused to move their horses and considered the Association's actions an attempt to restrict their

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46. *See id.*

47. Vigil v. Meritian, No. 6677, 1963, Taos County.

48. *See* Sept. Transcript, *supra* note 33, at 34.

49. *See id.* at 35.

50. *See* Hoffman, *supra* note 32, at A6.

51. *See id.*

52. *See id.*; Ian Hoffman, *Acequia Control in Court*, ALBUQUERQUE J. (NORTH), Mar. 11, 1997, at A1, A1.

53. *See* State v. Wilson, 962 P.2d 636, 637 (N.M. Ct. App. 1998). Dr. Wilson was convicted in Magistrate Court. *See id.* He appealed his conviction to District Court and the convictions were overturned. *See id.* The State appealed to the Court of Appeals, where the dismissal of the nuisance counts was upheld, and the dismissal of the pollution counts was reversed. *See id.* The case was then remanded to the District Court where Wilson filed a petition for writ of superintending control, request for stay, and an alternative petition for extension of time in the New Mexico Supreme Court, which was granted. *See id.* In March 1997 a trial in District Court was held and the charges against Wilson were once again dismissed due to procedural issues dealing with the time in which Wilson was prosecuted. *See id.* On appeal by the State to the Court of Appeals, Wilson's dismissals were once again reversed and remanded. *See id.* at 640.

54. *See* Hoffman, *supra* note 32, at A6.

55. *See id.*

property rights.[56] At the Association's annual election of officers and *mayordomo* in 1994, the Wilsons indicated their intent to vote for commissioners and *mayordomo* in proportion to their water rights in share/hours, which, by their assertion, would give them 61 percent of the vote.[57] The Association decided that voting would be in proportion to the equal interest of every member of the *acequia* association in the ditch.[58] A "one member, one vote" election was held in which all members of the *acequia* association were allowed to vote by a show of hands.[59]

At the annual meeting in 1995, the Wilsons again asserted a statutory right to vote in proportion to their 61 percent water rights, and voted John Wilson and Barbara Wilson into commissioner positions, and their son, Nat Wilson, into the position of *mayordomo*.[60] The Wilsons abstained from voting for the third commissioner's seat.[61] Despite the Wilsons' assertions, the *Acequia* Association again conducted the election using a "one person, one vote" method to elect its commissioners.[62]

The Trial Court

The Wilsons filed suit against Jeanne Denver, Margaret Nes, Polly Fox, Susie Goldberg, and Tony Trujillo, collectively, as the elected officers of the El Rito de la Lama *Acequia* Association, but did not file suit against the *Acequia* Association as a legal entity.[63] The Wilson's contested the 1994 and 1995 elections as "violative of their statutory voting rights and contrary to the laws of New Mexico."[64] The Wilsons argued that the Defendant members of the Association had violated Section 73-3-3, because the statute required voting "in proportion to the interest of the voter in the ditch or water, or in proportion to the number or amount of his water rights,"[65] and therefore gave them the greatest amount of votes in the election since they owned the most water rights.[66] Summary judgment was granted to the

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56. *See id.*
57. *See* Wilson v. Denver, 961 P.2d 153, 156 (N.M. 1998).
58. *See id.*
59. *See id.*
60. *See id.*
61. *See id.*
62. *See id.*
63. *See id.* at 153. *Acequia* Association, as used within the remainder of this paper, represents the Defendants, Jeanne Denver, Margaret Nes, Polly Fox, Susie Goldberg, and Tony Trujillo, that were elected to board positions within the Association, and to which the Wilsons protested. *See id.* at 156. Therefore, the term *Acequia* Association, or Association, means the Defendants in the case, the legitimacy of whom are not presumed.
64. *Id.*
65. N.M. STATUTE ANNOTATED § 73-3-3 (Michie 1978).
66. *See Wilson*, 961 P.2d at 158-59.

Wilsons regarding the contest of the 1994 election on the legal issue of whether the election violated New Mexico statutes.[67] The District Court certified the matter for interlocutory appeal to the New Mexico Court of Appeals, citing a "substantial ground for difference of opinion."[68] It asked "whether the New Mexico statutes require *acequia* associations to elect their commissioners and *mayordomos* in elections where votes are distributed to eligible voters proportionately according to shares of water rights owned by the members," and consolidated the 1994 and 1995 election contests for appeal.[69] The Court of Appeals denied an application to appeal filed by the officers of the Association on the grounds that it was untimely, and the District Court issued a second interlocutory order that was granted by the New Mexico Supreme Court.[70]

Both the Association and the Wilsons raised many issues in the trial court. During hearings before the New Mexico District Court prior to the Supreme Court's ruling, it became apparent that there were more issues involved than just voting rights in the *acequia*. In fact, voting interests may have been secondary to questions involving individual rights and the interests of each party in the *acequia* and flow of water. The underlying issues were actual control, and exercise of that control, over the *acequia*, and the attempt to further the individual goals of individuals with interest in the *acequia*. Ultimately, control of the Association was secondary to dominion and control of the water flow and of the ditch structure.

Beginning on November 7, 1994, several hearings were held in District Court before Judge Jay G. Harris.[71] The transcripts of those hearings show that issues involved in the election contest suit varied from removal by the Association of dam structures constructed by Dr. Wilson to ditch maintenance.[72] Judge Harris noted that any issues before the court regarding anything but the election contest may not have been proper because the original suit was an election contest only.[73] Judge Harris suggested that a new lawsuit should be filed at some time regarding removal of any dams or structures in the future, but that past dam removal

67. *See id.* at 156.

68. *Id.*

69. *Id.* at 156-57.

70. *See id.* at 157. The Supreme Court found that contests of ditch officer elections under N.M. STATUTE ANNOTATED § 73-3-3 (Michie 1978) would be based on the same procedure used in contests of elections for county officers. *See id.* The court also cited N.M. STATUTE ANNOTATED § 1-14-5 (Michie Repl. Pamp. 1995), which allows direct appeal to the New Mexico Supreme Court in contests of general elections. *See id.*

71. *See* Transcript of Proceedings at 3, Wilson v. Denver, 961 P.2d 153 (N.M. 1996) (No. 94-109-CV) (Nov. 7, 1994).

72. *See generally id.*

73. *See id.* at 9.

and agreement of the Association not to remove any further structures without notice to Dr. Wilson could be addressed to avoid additional expense.[74] The Wilsons were also concerned that the Association wanted to make further improvements to the *acequia* without their permission.[75] Judge Harris stated that he would not enter an order that would preclude the Association from altering the ditch, but would require notification prior to any action by the Association that would alter the ditch.[76] Judge Harris stated, "I can see there's a little bit of [a] connection because I think [the Wilsons feel]...new people...were elected...that's why these things are being done...I still don't think we're going to litigate the actual ditch maintenance and everything in an election contest suit."[77] Judge Harris further asserted that a separate suit would have to be filed to address concerns other than the election contest.[78]

In a September 1, 1995, hearing, the parties focused on the voting practices of the Association.[79] The Association argued that votes should be apportioned according to the Association members' common and equal interests in the *acequia* structure.[80] The Association stated that only one out of sixty community *acequias* that are members of the Taos Valley *Acequia* Association use the voting method that the Wilsons maintain is required by statute.[81] The Association pointed out that in the Las Vegas, New Mexico, area all eleven of the community *acequias* conduct elections apportioning votes in proportion to the members' common and equal interest in the ditch structure.[82] The Association asserted that a ruling in favor of the Wilsons would affect all *acequia* and ditch associations in New Mexico.[83] The Association continued its argument by stating that it had chosen one method of electing officials and used it historically.[84] The Association also argued that although the Wilsons received 61 percent of the water conveyed by the *acequia*, they only contributed 25 percent of the annual dues, and their share of the labor contribution and of special assessments was no greater than any other *parciante*[85] on the ditch.[86]

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74. *See id.* at 10.
75. *See id.*
76. *See id.* at 12.
77. *Id.* at 15-16.
78. *See id.* at 16.
79. *See* Sept. Transcript, *supra* note 33, at 2-4.
80. *See id.* at 4-5.
81. *See id.*
82. *See id.*
83. *See id.* at 6-7.
84. *See id.* at 7.
85. Irrigator. *See* Rivera, *supra* note 5, at 737.
86. *See* Sept. Transcript, *supra* note 33, at 22.

The Wilsons responded by arguing that the Association had exceeded its authority by creating its own interpretation of Section 73-3-3, and thereby restricted the use of the Wilsons' property.[87] The Wilsons chose to address the issues of water quality, and the 1983 Association bylaws, which they say expressly provide for apportionability according to shares.[88] The Wilsons argued that Section 73-3-3 requires voting in proportion to shares, and also that the Association had no consistent custom or tradition of voting for officers.[89] The Wilsons further asserted that New Mexico law required the allocation of costs related to maintenance of an *acequia* in proportion to the irrigable property of each owner, and the La Lama *Acequia* followed that practice prior to 1990.[90] The Wilsons pointed out that

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87. *See id.* at 28.
88. *See id.* at 29-30
89. *See id.* at 30-31.
90. *See id.* at 41-42.

> Whenever 10 (ten) or more of the landowners of any main ditch or lateral, deem it necessary to open a drainage, tajo or outlet, near the main dam or away from said dam of any public ditch or lateral, with the object of drawing off the excess of water, or to regulate the water of said ditches, with the object of protecting the dams from any floods, or the damage of lands from excess waters, the water commissioners of said ditch or lateral are authorized to determine the place where such drainage, tajo or outlet shall be opened, under the supervision of the mayordomo by the owners of the irrigable land of such ditch and the work shall be taxed in proportion of the irrigable property of each owner, and any person or persons belonging to said ditch or lateral, who shall fail or refuse to perform work, or pay the amount assessed against him in lieu of said work shall not be allowed to take or use any water from the same or any contra acequia or lateral thereof, whilst default in such payment or failure to do such work, continues.

N.M. STATUTE ANNOTATED § 73-2-52 (Michie 1978).

> The commissioners of any community ditch may alter, change the location of, enlarge, extend, or reconstruct such ditch for the purpose of providing greater efficiency in irrigation to the water users of said ditch, or when any part thereof shall have been destroyed by rain or in any other manner or for the purpose of increasing the cultivable (cultivatable) area, provided that such alteration, change of location, enlargement, extension or reconstruction shall be affected (effected) only upon the consent in writing of a majority of the water users of said community ditch, filed with such commissioners, such majority to be determined by the same rule as applies to the election of commissioners of the acequia, and provided that such alteration, change of location, enlargement or extension shall in no wise impair the rights of prior water users from said community ditch, and provided further that the expense incurred in any such alteration, change of location, enlargement or extension shall be borne pro rata by those beneficially interested in same.

N.M. STATUTE ANNOTATED § 73-2-56 (Michie 1978).

"proportional obligations and liabilities are customary in 19 western states in respect to ditches."[91]

Judge Harris found that the Wilsons' argument, along with the position of the State Engineer, was convincing and issued and allowed summary judgment on the issue of proportional voting.[92] Citing many unresolved issues of material fact, he refused to rule on all matters, and issued an order for an interlocutory appeal on the issue of the election contest.[93] Control of the Association and matters affecting the ditch and flow of water were left unresolved.

In another hearing before Judge Harris on April 15, 1996, the Association introduced a January 23, 1996, letter from the State Engineer's office stating that the Association's position might be correct, and then introduced a recent New Mexico appellate court decision that stated that deferring to an administrative agency may be incorrect under certain circumstances.[94] The Association argued that because the issue dealt with voting rights, and not water rights, the State Engineer did not have the authority to interpret Section 73-3-3.[95] Although the primary concern of all parties was control of the *acequia*, actual control based on differing interests in the *acequia* remained at issue.

The New Mexico Supreme Court

Justices Baca, Serna, and Alarid (of the New Mexico Court of Appeals sitting by designation), along with Justice Minzner, who authored the opinion, ruled that New Mexico recognizes three separate methods of determining interests in an *acequia* for purposes of election of officials.[96] There were no dissenting opinions.

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91. Sept. Transcript, *supra* note 33, at 42.

92. *See id.* at 51.

93. *See id.* at 52.

94. *See* Transcript of Proceedings at 7, Wilson v. Denver, 961 P.2d 153 (N.M. 1996) (No. 94-109-CV) (Apr. 15, 1995) (citing State *ex rel.* Reynolds v. Lewis, 394 P.2d 593 (1964)).

95. *See id.* at 8.

96. *See* Wilson v. Denver, 961 P.2d 153, 163 (N.M. 1998).

> In our analysis of the parties' arguments under Section 73-3-3, we have determined that the Legislature intended to provide for voting based on a proportional interest in water and that the interest in water is defined as the number or amount of water rights. In addition, we have determined that the Legislature intended to provide for voting based on a proportional interest in the ditch. We have also determined that, although the Equal Protection Clause does not require majority voting, the importance of the right to vote necessitates that we strictly construe statutes tending to limit the right to equal voting.

Id.

Before addressing "whether the New Mexico statutes require *acequia* associations to elect their commissioners and *mayordomos* in elections where votes are distributed to eligible voters proportionately according to shares of water rights owned by the members," the court questioned whether the district court had subject matter jurisdiction over the *acequia* officers election, *sua sponte*.[97] Citing Section 73-3-3, which requires notice of the contest of an *acequia* officer election within fifteen days after the result of the election is announced,[98] the court held that statute of limitations defenses are usually waived if not raised in the pleadings, and the fifteen day time limit within which to contest an election is a condition precedent to maintaining an action for contest of the election of *acequia* officials.[99] The court wrote, "[t]he right to contest an election is entirely statutory; such a proceeding was unknown at common law. The statutory provisions for an election contest must be strictly followed. One has the right to contest an election only in the manner and to the extent prescribed by statute."[100] The court concluded that the Wilsons' contest of the 1994 election was barred by Section 73-3-3, because the *Acequia* Association's election was held by a show of hands on April 24, 1994, and the Wilsons did not file an election contest in district court until May 23, 1994, 29 days following the announcement of the election results.[101] The holding regarding this issue was that the district court had no jurisdiction because of the untimely filing of the Wilsons' contest and remanded for dismissal of the 1994 election contest.[102] It was held, however, that the Wilsons' 1995 election contest was filed in a timely manner, but the court noted that a procedural ambiguity was created by dismissal of the 1994 contest.[103]

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97. *Id.* at 156-57.
98. N.M. STATUTE ANNOTATED § 73-3-3 (Michie 1978).
99. *See Wilson*, 961 P.2d at 157.
100. *Id.* (citing Dinwiddie v. Board of County Comm'rs, 708 P.2d 1043, 1046 (1985)).
101. *See id.* at 158.
102. *See id.*
103. *See id.*

We note that the dismissal of the 1994 election creates a procedural ambiguity. The Wilsons moved for summary judgment only in relation to the 1994 election. Further, the order granting summary judgment was entered in the 1994 election contest prior to its consolidation with the 1995 election contest. Nevertheless, the two election contests raise identical issues. In addition, the Wilsons filed an unopposed motion to consolidate prior to the entry of summary judgment. In the order granting summary judgment, both the 1994 and 1995 election contests appear in the caption. Finally, both matters were certified for interlocutory appeal on the sole issue of the interpretation of the applicable statute. Therefore, we conclude that the district court intended to apply the grant of summary judgment to both the 1994 and 1995 election contest, and we will review the grant

The district court's grant of summary judgment to the Wilsons was next examined de novo.[104] The court set out to determine the meaning of Section 73-3-3, which states,

> [t]he election for acequia or community ditch officers, under this article, shall, be held by the outgoing commissioners, under written rules and regulations to be prescribed by them. Only those having water rights in the acequia or ditch, and who are not delinquent in the payment of their assessments shall be allowed to vote....*All votes shall be in proportion to the interest of the voter in the ditch or water, or in proportion to the number or amount of his water rights, which for election purposes, shall never exceed the lands under irrigation the outgoing year.* (emphasis added)[105]

The Wilsons' argument that the legislature prescribed a single method of voting for *Acequia* Association officers, giving them a 61 percent vote in the *acequia* election, and the *Acequia* Association's officers' contention that the word "ditch" in the text above created a second method of voting for *acequia* officials based on ditch ownership was examined.[106] The officers of the Association asserted that the ditch, or *acequia*, is owned by all water users as tenants in common, and, therefore, equal ownership allows voting in proportion to "one person, one vote."[107] Both the Wilsons' and the Association officer's assertions were based on the text of Section 73-3-3.[108]

The court first decided that the plain language of Section 73-3-3 provides for alternative methods of voting, and held that the ordinary meaning of the word "or" in the statute should be given its "ordinary disjunctive meaning," and the lack of a comma between the words "ditch" and "water" showed the legislative intent of the independent significance of both words.[109] The court further found that the phrase "or in proportion to the number or amount of his water rights" explains the meaning of the interest in "water" and that the Legislature did not intend to use the phrase as a definition of the interest in the "ditch."[110] On this issue the court finally held that Section 73-3-3 recognized alternative methods of voting for ditch officials and provided that voting could either be in proportion to the

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of summary judgment as it applies to the 1995 election contest.

Id. at n.1.

104. *See id.*

105. N.M. STATUTE ANNOTATED § 73-3-3 (Michie 1978).

106. *See Wilson*, 961 P.2d at 159.

107. *See id.*

108. *See id.*

109. *Id.*

110. *Id.*

interest in the ditch, or in proportion to the interest in the water flowing through the ditch, which is defined by the ownership of water rights.[111]

Second, the court addressed the Amicus Curiae brief of the New Mexico State Engineer that proposed that Section 73-3-3 was ambiguous, and that each reference to the interest in the ditch, water, and the amount of water rights was an enumeration of a single required method of voting in proportion to the ownership of water rights.[112] The court held that there was no indication in Article 2 or 3 of Chapter 73 of the New Mexico statutes that the words "ditch" and "water" are used synonymously, but that there were actually contrary indications that the legislature had used the two words separately and distinctly.[113] The State Engineer's argument was dismissed, beginning with the statement "[t]he ownership of water rights in this State is entirely dependent on the amount of water put to beneficial use."[114] The court distinguished ditch ownership from the ownership of water rights by stating that ditch ownership is based on contribution to the construction of the ditch.[115] The court used the difference between New Mexico Statute Annotated Section 72-1-2 (1907) and Section 73-2-7 (1882) to show the difference between ditch ownership and water rights in New Mexico.[116] The court emphasized the difference by pointing out that the Legislature recognized the difference by limiting individuals able to serve

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111. *See id.*

112. *See id.*

113. *See id.* at 159-60.

> The Legislature first enacted Section 73-3-3 as an amendment, limited in application to certain counties, 1903 NM Laws ch. 32, § 12, to the general ditch election procedure originally enacted by 1895 NM Laws, ch. 1, § 3. See 1903 NM Laws ch. 32, § 2. The original 1895 election law remains in force, in its amended form, for those counties not subject to Section 73-3-3. See NMSA 1978 § 73-2-14 (1895, as amended 1921). Taos County is subject to Section 73-3-3. See 1917 NM Laws ch. 68, § 1 (removing Taos County from the list of counties exempt from the application of the 1903 amendments). Based on the context of its enactment, we believe Section 73-3-3, though now codified in an article separate from many of the general provisions affecting ditch associations, is part of an overall scheme in the regulation of ditch associations. We, therefore, interpret Section 73-3-3 in combination with the provisions of Article 2 of Chapter 73.

Id. at 160 n.2.

114. *Id.* at 160 (citing NMSA § 72-1-2 (1907) ("'Beneficial use shall be the basis, the measure and the limit of the right to the use of water.'")).

115. *See id.* (quoting NMSA § 73-2-7 (1882) ("'All acequias, public or private, when completed, shall be the property of the persons who may have completed such acequias or ditches'")).

116. *See id.*

as *mayordomo* or commissioner of an *acequia* association to individuals owning "an interest in said ditch or the water therein."[117]

The third issue addressed was the Wilsons' argument, which the court compared to the State Engineer's argument.[118] The court disagreed with the Wilsons' argument that prior cases in New Mexico equated an interest in the ditch with an interest in water under Section 73-3-3.[119] The Wilsons' assertion was primarily based on a statement by the court in *State ex rel. Community Ditches v. Tularosa Community Ditch.*[120] In *Tularosa* the court wrote, "interest in the ditch depends upon the amount of land for which [a person] has acquired a water right, and this right, so acquired...is only to the use of a sufficient amount of water to properly irrigate [the] land and for domestic purposes."[121] The court disagreed with the Wilsons that this statement mandates a single election procedure based on water rights under Section 73-3-3.[122]

The court agreed with the Association's assertion that ditch rights and water rights are not the same and are governed separately and distinctly under New Mexico law.[123] *Snow v. Abalos*[124] and *Olson v. H & B Properties, Inc.*[125] were used to show a distinction between the ownership of rights to a ditch and water rights.[126] *Tularosa* and *Snow* were then differentiated because the facts in *Tularosa*, the court wrote, were specific to that case, and water rights and ditch interests in that case were the same.[127]

Fourth, the court addressed the interpretation of Section 73-3-3 in *Holmberg v. Bradford*, in which the court held that ditch ownership and

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117. *See id.* (quoting NMSA § 73-3-1 (1903, as amended 1987)).

118. *See id.*

119. *See id.*

120. State *ex rel.* Community Ditches v. Tularosa Community Ditch, 143 P. 207, 213 (N.M. 1914).

121. *Id.*

122. *See Wilson*, 961 P.2d at 160.

123. *See id.* (citing Olson v. H & B Properties, Inc., 882 P.2d 536, 539 (N.M. 1994)).

124. Snow v. Abalos, 140 P. 1044, 1048 (N.M. 1914).

125. Olson v. H & B Properties, Inc., 882 P.2d 536, 539 (N.M. 1994).

126. *See Wilson*, 961 P.2d at 160. The court included the following wording from *Snow* to illustrate its point, "[t]he ditch, or carrier system, having been constructed by the joint labors of all the water users, is owned by them as tenants in common; each having a common interest in the same." *Id.* (citing *Snow*, 140 P. at 1048). And "[T]he fact that...water was diverted into a ditch, owned in common with other water users, did not give such other users any interest in, or control over, the right to take water, or water right...." *Id.* (citing *Snow*, 140 P. at 1049). The court also included the following wording from *Olson* as further illustration: "[w]ater rights are derived from appropriation for beneficial use while ditch rights are derived from ownership of the ditch and an easement therein." *Id.* at 160-61 (citing *Olson*, 882 P.2d at 539).

127. *See id.* at 161.

water rights are separate and distinct interests.[128] The court pointed out that in *Holmberg* a ditch election statute similar to Section 73-3-3 provided for two separate methods of voting and did not support the Wilsons' argument that prior case law required voting in proportion to the ownership of water rights.[129]

Next addressed was the Association's assertion that allowing election of *acequia* officers based proportionately on ownership of water rights would violate the Equal Protection Clause of the United States Constitution, fourteenth amendment, and "one person, one vote."[130] The court pointed out that if the Equal Protection Clause required "one person, one vote" in elections of *acequia* officials, then allowing alternative methods of voting for election of officials would be unconstitutional.[131] The court concluded, however, that the Equal Protection Clause does not apply to *acequia* associations in New Mexico because *acequia* government is limited in purpose and exercises narrow functions.[132] It held that "while the Equal Protection Clause does not require equal voting for limited-purpose entities if a rational basis exists for departure from the constitutional norm, we will strictly construe statutes tending to limit the right to vote in favor of equal voting."[133] The court also recognized that although "one person, one vote" did not necessarily apply to governmental entities created for limited purposes, Section 73-3-3 lacked clear legislative intent contrary to "one person, one vote."[134] The opinion states,

> the Legislature intended to provide for voting based on a proportional interest in water and that the interest in water is defined as the number or amount of water rights. In addition...the Legislature intended to provide for voting based on a proportional interest in the ditch....[and] although the Equal Protection Clause does not require majority voting, the importance of the right to vote necessitates that we strictly construe statutes tending to limit the right to equal voting.[135]

Addressing the language in New Mexico Statute Annotated Section 73-2-56 (1919), the court recognized that the statute identified the interest of a water user as a separate interest from the easement and ownership

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128. Holmberg v. Bradford, 244 P.2d 785, 786-87 (N.M. 1952) (under prior codification as NMSA 1941 § 77-1407).

129. *See Wilson*, 961 P.2d at 161.

130. *See id.* (citing Reynolds v. Sims, 377 U.S. 533, 577-81 (1964)).

131. *See id.*

132. *See id.* at 162.

133. *Id.* at 163.

134. *Id.*

135. *Id.*

interests in a ditch.[136] This interest is held equally by all with water rights in the ditch.[137]

Wording within Section 73-3-3, which allows voting in proportion to the interest of the voter in the ditch, was found to be ambiguous because the Legislature failed to specify exactly which one of the three possible interests in a ditch a voter in *acequia* association elections is required to possess.[138]

The court pointed out that the Legislature has distinguished five separate forms of management in an *acequia* statutorily, and that in every instance, except for one in which a blind person was allowed free use of water, the Legislature referred to an ownership interest in the ditch.[139] The court held that because the legislature had distinguished the separate interests in an *acequia* system in previous legislation, the legislature intended to "recognize each ditch interest, in addition to the interest in water, and, as a result, to provide for multiple alternatives in determining the appropriate voting scheme."[140]

Other New Mexico statutes that address voting in *acequias*, including one that specifically requires consent of a majority of water users to change the physical structure of the ditch, were examined.[141] Based on the language of those other statutes, the court found that the legislature intended Section 73-3-3 to include majority voting.[142] It held that the

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136. *See id.* at 164.

137. *See id.*

138. *See id.* Because there are three possible ways the statute can be read it is ambiguous. The court used *State v. Elmquist* to make this determination. State v. Elmquist, 844 P.2d 131, 132 (N.M. Ct. App. 1992) ("[a] statute is ambiguous when it can be understood by reasonably well-informed persons in two or more different senses").

139. *See Wilson*, 961 P.2d at 164. These interests include those

> (1) based on the majority of those possessing water rights, Section 73-3-1 (appointing successor commissioners in the event of the joint vacancy of two or more commissioner offices); (2) based on the majority of ditch owners, Section 73-3-2 (establishing, in conjunction with the commissioners and the mayordomo, the rate of compensation for the ditch officers); (3) based on a majority of water users, Section 73-2-56 (consenting to the alteration, change of location, enlargement, extension, or reconstruction of the ditch); (4) based on a majority of the owners of irrigated land, NMSA 1978, § 73-2-18 (1851-52) (determining the compensation for mayordomos); and (5) based in proportion to irrigable land or the lands under cultivation, NMSA 1978, § 73-2-34 (1851-52, as amended 1977) (responsibility for labor on the ditch); NMSA 1978, § 73-2-52 (1921) (taxing labor for the opening of a drainage, tajo or outlet); § 73-3-5 (responsibility for labor on the ditch).

Id.

140. *Id.*

141. *See id.* at 165.

142. *See id.* at 164.

Legislature felt the entire ditch community should have an interest in voting and concluded that majority voting was permissible.[143] The court pointed out that New Mexico Statute Annotated Section 73-3-1 allowed for "'a majority of the owners of the water rights' in a ditch [to] appoint successor commissioners in the event of a joint vacancy," and used this as a rationale for finding the Legislature did not intend to preclude majority voting in *acequia* elections.[144] It further recognized that allowing variations in elections was the Legislature's intent because *acequia* associations are political subdivisions of the State, and are also considered corporations,[145] and held that because of this, *acequia* associations can choose the most appropriate system of voting for their association given their needs.[146]

The court held that even though Section 73-3-3 includes the phrase "'only those having water rights in the acequia or ditch...shall be allowed to vote...,'" this statement creates, "a common interest in the flow of water...[allowing for] [v]oting in ditch elections [to be conducted] based proportionately on water rights, based proportionately on ditch ownership, or based on a majority of those using the ditch for the distribution of water."[147]

The court concluded that the voting method required for each association would be based on the history of voting in the *acequia*, or the bylaws.[148] It also concluded that the language in Section 73-3-3 "allows alternative methods of voting to be selected by each individual ditch association so long as the voting class is comprised of those possessing water rights in the acequia."[149]

ANALYSIS

Prior to *Wilson* there were only two recognized methods of voting for *acequia* officers under New Mexico case law based upon individual interests in either the ditch structure or in water rights.[150] The recognized

143. *See id.* at 165.

144. *Id.*

145. *See id.* (citing NMSA 1978, § 73-2-28 (1965) (political subdivisions); NMSA 1978, § 73-2-11 (1903) (corporations)).

146. *See id.* at 165-66.

147. *Id.* at 166.

148. *See id.* The court found that on remand the issue of the Wilsons' claim that the bylaws of the Association require voting in proportion to shares of interest in water, and voting has historically been conducted in that manner, and the Association's counterclaims claims that voting has been conducted by "one person, one vote" and a showing of hands historically, could be evaluated. *See id.*

149. *Id.*

150. See Olson v. H & B Properties, Inc., 882 P.2d 536, 539 (N.M. 1994) (explaining the two distinct ownership interests in an *acequia*).

methods were based proportionally on easement interests, or on ditch ownership.[151] Actual voting for *acequia* officials takes many forms in *acequias* and many are not recognized under New Mexico state law.[152]

In *Snow v. Abalos*, the court wrote,

> [t]he community irrigating ditch or *acequia* is an institution peculiar to the native people living in that portion of the southwest which was acquired by the United States from Mexico. It was a part of their system of agriculture and community life long before the American occupation...[T]he Legislature...provided for the government of community *acequias*, and doubtless incorporated into the written law of the territory the customs...governing such communities."[153]

The court chose to recognize a "one person, one vote" method in *Wilson* as an additional voting option in election of *acequia* officials, citing an equal interest of all water users in the ditch.[154] The court's interpretation of Section 73-3-3 is correct based on existing case law in New Mexico dealing with the ownership interests in an *acequia*.[155] The court's grammatical interpretation of the statute was consistent with prior New Mexico case law, and it is apparent that the legislature in enacting Section 73-3-3 intended to recognize separate interests in an *acequia* based on the historically recognized interests in an *acequia* under New Mexico law.[156] In fact, the "one person, one vote" interest may have already been recognized prior to *Wilson*. In *Snow*, the court wrote, "elections were...called and held...at which all the owners or tenants of lands to be irrigated therefrom

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151. *See id.*

152. *See* RIVERA, *supra* note 3, at 40; Hoffman, *supra* note 15, at D3. Rivera writes that the basis of *acequia* administration came from tradition and custom instead of from formal written rules. *See* RIVERA, *supra* note 3, at 33. Hoffman recognizes that there are over 800 *acequia* associations in New Mexico, and no single system of voting in common. *See* Hoffman, *supra* note 15, at D3. *Acequia* associations are choosing methods that best suit their individual needs regardless of state law. *See id.*

153. Snow v. Abalos , 140 P. 1044, 1047 (N.M. 1914).

154. *See Wilson*, 961 P.2d at 164.

155. *See* Trambley v. Luterman, 27 P. 312, 315-16 (N.M. 1891) (the New Mexico Supreme Court determined that New Mexico followed the doctrine of prior appropriation for interest in water); N.M. STATUTE ANNOTATED § 72-1-2 (Michie Repl. Pamp. 1997) (first enacted in 1907 which states, "[b]eneficial use shall be the basis, the measure, and the limit of the right to the use of water"). *See also* N.M. STATUTE ANNOTATED § 73-2-7 (Michie 1978) (originally enacted in 1882 recognizing "[a]ll acequias, public or private when completed, shall be the property of the persons who may have completed such acequias or ditches"); *Snow*, 140 P. at 1048 ("[t]he ditch, or carrier system, having been constructed by the joint labors of all of the water users, is owned by them as tenants in common; each having a common interest in the same").

156. *See Wilson*, 961 P.2d at 161.

were permitted to vote for overseers of such ditches."[157] The *Snow* case indicates that the "one person one vote" method was historically used in New Mexico, and that the Legislature enacted legislation in accordance with the common practices of the people of New Mexico.[158]

The court, in its opinion in *Wilson*, made an important and interesting statement when it wrote, "the Legislature chose to treat ditch associations as corporations for the specific purpose of electing officers," which was used as a rationale for allowing voting in proportion to shares in the election of *acequia* officers.[159] The court in *Snow* addressed this issue by stating, "[a]ll community ditches or *acequias*, now constructed or hereafter to be constructed in this territory, shall for the purposes of this act be considered as corporations or bodies corporate..."[160] The court in *Snow* also wrote that, "[w]hen a landholder under a community *acequia* conveyed his real estate, his right to the use of water as a member of the community passed with the real estate."[161] *Snow* was also one of the first cases in New Mexico dealing with the doctrines of prior appropriation and beneficial use, and the individual interests of individuals in water, and the ditch that they constructed.

Another recent case addressing the different interests in an *acequia* prior to *Wilson* was *Olson v. H & B Properties, Inc.*[162] In *Olson* a declaratory action was filed seeking reallocation of rights in the *acequia*.[163] Both parties owned water rights pertinent to their land, and the ditch ran through both properties and was constructed in 1884.[164] The court wrote, "New Mexico cases have long recognized that ditch rights and water rights are distinct, are derived from different sources, and are governed by different rules of law....Water rights are derived from appropriation for beneficial use while ditch rights are derived from ownership of the ditch and an easement therein."[165] The court further wrote that, "[t]he physical structure of the ditch itself is real property, owned by the community who built it as tenants in common [through] joint investment of capital and labor...Successors in title acquire their interest in the ditch structure with

157. *See Snow*, 140 P. at 1047.

158. *See id.*

159. *Wilson*, 961 P.2d at 165 ("see NMSA 1978, § 53-11-33(A) (1983) (providing for voting in corporations based proportionally on shares 'except as otherwise provided in the articles of incorporation'")).

160. *Snow*, 140 P. at 1047.

161. *Id.* at 1048.

162. Olson v. H & B Properties, Inc., 882 P.2d 536 (N.M. 1994).

163. *See id.* at 537.

164. *See id.*

165. *Id.* at 539 (citing *Snow*, 140 P. 1044, 1048-49 (N.M. 1914)).

title to their land."[166] As is obvious from *Snow* and *Olson*, New Mexico case law has long recognized the separate interests enumerated in *Wilson*.

Other states address the administration of ditch associations in different ways, as evidenced through case law. Colorado recognizes the beneficial use doctrine in recognizing water rights, just as New Mexico does.[167] Mutual ditch corporations in Colorado use a pro rata system based on share ownership to determine water rights in the ditch corporation.[168] In Colorado, the owner of stock in a mutual ditch company possesses specific interests in water rights and also specific interests in ditches and all other works by which such water rights are conveyed.[169] This is different from the separate interests in an *acequia* recognized under New Mexico law.[170] In Utah, a shareholder in a mutual water corporation does not have the right to change the point of diversion of a ditch without the consent of the corporation.[171] Utah also recognizes that the directors of the corporation control the corporation, and not the shareholders.[172] Idaho recognizes

> that a stockholder in a mutual irrigation corporation has a right peculiar to such corporations in that he may have distributed to him and use his proportionate share of the waters belonging to or distributed by such corporation. However, such a corporation has the usual rights pertaining to corporations with reference to the handling of its affairs and in dealing with its stockholders.[173]

In California, "a familiar plan in the organization of irrigation districts or water companies where distribution of water is measured by the quantity of land, whether or not stock is issued as evidence of the quantum of the right...ownership of land is the basis of the right to water for irrigation."[174] This indicates a single interest in water, unlike New Mexico. In Arizona, corporations established for the administration of water have issued stock joining water rights to irrigated land.[175]

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166. *Id.*

167. *See* Williams v. Midway Ranches Property Owners Ass'n, Inc., 938 P.2d 515, 521 (Colo. 1997).

168. *See id.* at 525 (citing Left Hand Ditch Co. v. Hill, 933 P.2d 1, 3 (Colo.1997)).

169. *See* Great Western Sugar Co. v. Jackson Lake Reservoir & Irrigation Co., 681 P.2d 484, 491 (Colo. 1984).

170. *See* Wilson v. Denver, 961 P.2d 153, 163-64 (N.M. 1998).

171. *See* East Jordan Irrigation Co. v. Morgan, 860 P.2d 310, 312 (Utah 1993).

172. *See id.* at 313-14.

173. Johnston v. Pleasant Valley Irrigation Co., 204 P.2d 434, 437 (Idaho 1949).

174. Locke v. Yorba Irrigation Co., 217 P.2d 425, 428 (Cal. 1950) (citing Franscioni v. Soledad Land & Water Co., 149 P. 161, 163 (Cal. 1915)).

175. *See* Adaman Mutual Water Co. v. United States, 278 F.2d 842, 843 (9th Cir. 1960).

In *Wilson*, the court wrote that the New Mexico Legislature chose to treat ditch associations as corporations for the specific purpose of electing officers, under New Mexico Statute Annotated Section 53-11-33(A), but did not intend this to be the only required method of voting.[176] In corporations, the election of officers is usually determined by the articles of incorporation, or by shareholders "by a plurality of the votes cast by the shares entitled to vote in the election at a meeting in which a quorum is present."[177] "Each outstanding share, regardless of class, is entitled to one vote on each matter voted on at a shareholders' meeting. Only shares are entitled to vote."[178]

New Mexico's *acequia* election statute, Section 73-3-3, reads,

> [t]he election for acequia or community ditch officers, under this article, shall, be held by the outgoing commissioners, under written rules and regulations to be prescribed by them. Only those having water rights in the acequia or ditch, and who are not delinquent in the payment of their assessments shall be allowed to vote....All votes shall be in proportion to the interest of the voter in the ditch or water, or in proportion to the number or amount of his water rights, which for election purposes, shall never exceed the lands under irrigation the outgoing year...."[179]

In *Wilson v. Denver*, the New Mexico Supreme Court interpreted the meaning of the statute, but did not clarify any ambiguity that the statute may create by its existence.[180] The fact that New Mexico also recognizes separate interests in an *acequia*, including water rights, and ditch ownership, makes ditch administration a complex issue.[181] If New Mexico utilized a system closer to that of a "quasi-corporation" system, and required allocation of shares based on ownership of rights to water, and to the ditch, the Wilsons' argument would probably have prevailed. This "quasi-corporation" system is one used by other states that recognize corporations for the administration of ditch associations. If this were the method enacted by the legislature in New Mexico, concerns that individuals with majority interests would abuse the ownership rights they owned in the ditch or water to harm the minority interests of others in the *acequia* would probably not be addressed.[182] If the Wilsons controlled the majority of

176. *See* Wilson v. Denver, 961 P.2d 153, 165 (N.M. 1998).
177. 1984 MODEL BUS. CORP. ACT § 7.28.
178. 1984 MODEL BUS. CORP. ACT § 7.21.
179. N.M. STATUTE ANNOTATED § 73-3-3 (Michie 1978).
180. *Wilson*, 961 P.2d at 166.
181. *See id.* at 163-64.
182. Dr. Wilson was prosecuted by the state of New Mexico for contaminating the *acequia*. *See* State v. Wilson, 962 P.2d 636, 637 (N.M. Ct. App. 1998).

shares in the Association, they might very well be able to enact bylaws allowing them to use the ditch and water therein in a way that would ultimately only be beneficial to them. They would not be able to violate state or federal laws dealing with water quality, but under certain circumstances they might be able to restrict the flow of water in certain years.

There are beneficial implications of the court's interpretation of Section 73-3-3, in that *acequia* associations in New Mexico can decide how to elect the officials that govern their *acequias* by the method that they choose. The administration of the *acequia* remains internalized, and each individual *acequia* is free to choose the method it deems best suited to its needs. Some *acequias* may choose equal voting because it may be what is necessary for proper administration given the activity in the *acequia* and the interests of each individual water user. Other associations may believe that their *acequia's* officers should be chosen by the individuals that own the most interest in the ditch structure. That may be because daily management of the *acequia* has a greater impact on those that own the ditch itself than on those that only have an interest in the flow of the water.

There are also negative implications in the court's ruling because there is no standard method required for the election of *acequia* officials in New Mexico. This makes standardized, statewide record keeping regarding *acequia* operations in New Mexico very difficult, or nearly impossible. The court in *Wilson* also pointed out that *acequias* are quasi-corporations, and should be run in that manner.[183] As noted above, in a corporation those individuals with the most ownership interest have a larger say in the decisions of the corporation. Also, the court in *Wilson* stated that a historical voting method should be the basis for determining if the election in *Wilson* was valid. However, this does not leave a large amount of discretion to *acequias* to change their voting methods. Therefore, even though there are three ways to choose *acequia* officials in New Mexico recognized under *Wilson*, the historically used method appears to be required for fear that any elections held in another manner would be declared invalid.

Wilson leaves unanswered the question of whether or not an association can change its voting method by changing its bylaws and articles of incorporation to get around the New Mexico Supreme Court's "chosen voting method" requirement.[184] What if an association decides to change its election methods by changing its bylaws and articles of incorporation, and the new method is challenged because it is not the "historically" chosen method? Can an association change its method after

183. *See Wilson*, 961 P.2d at 165.
184. *Wilson*, 961 P.2d at 166.

the ruling in *Wilson* without the change being challenged by an individual who is unhappy with the new voting method? Can officers of an *acequia* association change the voting method to best serve their self interests, thereby excluding the interests of others? If the historical method of voting has been "one person, one vote" can the officers of the association change the bylaws and articles of incorporation to exclude the interests of all individuals that do not have an ownership right in the ditch? Can individuals with interests in the *acequia* that could give them a controlling interest in the *acequia*, if another method of voting were used, create an "alternative association" in an attempt to exert their authority over the administration of the *acequia*? Would this "alternative association" have standing against the "official" association, or could it assert a priority interest based on the recognized interests in *Wilson*? In the case at hand, could Dr. Wilson create his own organization to run and maintain his individual interests in the *acequia* unless he implemented policy contrary to that of the actual association? Could the actual association implement policy contrary to the interests of the "alternative association?"

Another problem with the Supreme Court's ruling is that it ignores the "custom and tradition" aspect of *acequia* administration.[185] The ruling effectively prevents *acequias* from electing officials in any way that is contrary to the three prescribed methods in *Wilson*. If an *acequia* association uses a method that is not prescribed under New Mexico law, even if that method best comports with the needs of the association, then the method used is illegal. This notion is contrary to the historical development of *acequia* laws in New Mexico that developed from common usage and practices.[186] The Lama *acequia* is also a relatively new *acequia* in New Mexico, and its requirements and needs may differ from older and more established *acequias*. The *Wilson* ruling effectively makes law that is contrary to the practices of many *acequias* in New Mexico, and makes challenges to the common practices of established *acequia* associations by newer, less established, interests more likely to succeed.

The New Mexico Supreme Court could have prescribed one preferred method for the election of *acequia* officials in the state. A ruling of this nature would have created uniformity in the state, but would have been contrary to previous case law in New Mexico dealing with the ownership of interests in a ditch, and the ownership of actual water rights and flow of water. The court, in its ruling in *Wilson*, made over two hundred years of common practice in New Mexico common law, but ignored many of the other practices common in New Mexico *acequia* administration. It prescribed three allowed methods of voting, but ignored

185. *See* RIVERA, *supra* note 3, at 33.
186. *See id.*

common practice in many other instances. Essentially New Mexico must choose between standardization or history and common practice.

CONCLUSION

The New Mexico legislature should determine a method of voting for *acequia* officials that leaves ultimate decision making power in the hands of a board of directors or commissioners responsible for the administration of the ditch or *acequia* association that is consistent with the interests of all users of the *acequia*. The chosen method should also be uniformly required in the state of New Mexico, and should not unfairly discriminate against the interests of any individual in the *acequia*. A conversion of interests to shares, a corporate-like system, would be a more uniform system, but would not comport to the traditional, "one member, one vote" system that has been the chosen method of electing commissioners in many New Mexico *acequias*.

It may be that the New Mexico Legislature, or the courts, needs to make a greater distinction between the administration of *acequia* associations as corporations and all references to management of *acequia* associations as corporations. This would give individuals with a majority ownership interest in the *acequia* a greater amount of control.

Overall, the New Mexico Supreme Court's ruling in *Wilson* is consistent with the historical legislative action of New Mexico and previous case law, but inconsistent with the common practices of New Mexico *acequias*. New Mexico has historically recognized the three separate interests enumerated in *Wilson*, even though there are several other ways *acequia* associations elect officials that are not recognized by state law. Although the ruling is consistent with previous law, it does not completely end the ambiguity or address the issues of control that arise in the current law. Choosing a method of voting from among those enumerated in *Wilson* does not resolve all of the property ownership and control interests involved in the management of *acequias*.

CHRISTOPHER J. DELARA