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## Tularosa and the Dismantling of New Mexico Community Ditches

G. Emlen Hall

*University of New Mexico - School of Law*

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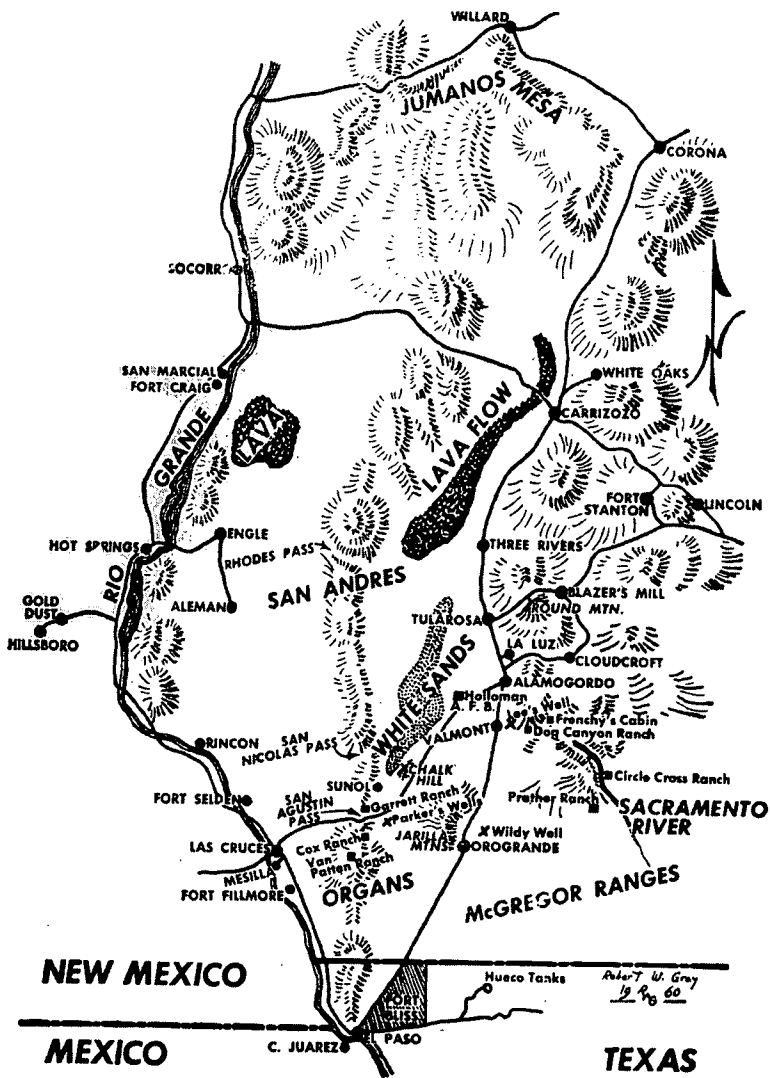
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**SMALL SCHOOL.  
BIG VALUE.**



Tularosa and Vicinity.  
From C. L. Sonnichsen, *Tularosa, Last of the Frontier West* (1960).

# Tularosa and the Dismantling of New Mexico Community Ditches

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G. EMLLEN HALL

In the last quarter of the nineteenth century and the first quarter of the twentieth, contested claims to the water of a small stream in south-central New Mexico produced a storm of legal activity. The maelstrom arose out of the tangled complications surrounding the development of non-Indian water rights to the Tularosa Creek. The creek was a small spring-fed stream that headed on the Mescalero Apache Indian homelands in the Sacramento Mountains. From its beginnings, the creek ran west, first through a narrow canyon and then out onto a broad plain before petering out in the porous White Sands. Between 1880 and 1919, this unpromising wilderness produced two full trials: one interim district court decree that became final, one final district court decree that was reversed, and no fewer than three New Mexico Supreme Court decisions.<sup>1</sup> In the eye of this legal hurricane, New Mexico transformed its basic water institutions.

Who would have guessed such a scenario from an exchange of letters in November 1912 between Otero County's Albert Bacon Fall and Santa Fe's Thomas Benton Catron?<sup>2</sup> Correspondence between the two about New Mexico water would have surprised no one. After all, the two lawyers had just capped careers as New Mexico's preeminent statesmen and politicians by securing twin appointments as the new state's first United States senators in Washington.<sup>3</sup> Fall and Catron had each served as influential delegates to the 1910 Constitutional Convention which, in response to Federal authorization, had pounded out the proposed new state's fundamental water law.<sup>4</sup> Prior to that, both men had enjoyed considerable success at the private practice of politics

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G. Emlen Hall is Professor of Law at the University of New Mexico.

and law, even then, a practice that centered on natural resources acquisition and exploitation.<sup>5</sup> Between them, the two men covered the vast expanses of the new state with their influence and expertise and now, as senators, with their formal offices.

But in November 1912, Fall and Catron were not corresponding about any lofty matters of state. Instead, they were worried about a specific state court district judge in Otero County and the bitter lawsuit there. On 11 November, Fall wrote Catron telling him that he had spoken privately with District Judge Edward L. Medler who would soon decide the case. Fall reported that even in the ethically dubious out-of-court conversation, he had not convinced the judge of his and Catron's point of view. Fall continued:

I do not think you realize, however, the importance to yourself of this case. You received about fifty water rights and have sold a large number of them for which you would undoubtedly be held responsible in event of failure of title. Then your deed to the corporation at Tularosa I am afraid would be construed as an abandonment of any rights which you held in the canyon, or at least Medler might so hold, and you would find yourself with quite a burden of responsibility. You'd better see Medler yourself. You might then succeed in convincing him that he had nothing to do with title to the water right owners further than to give the Tularosa town lots and citizens the amount of water necessary for their purposes.<sup>6</sup>

Catron replied six days later, complaining primarily that "Medler is prejudiced against me; I don't know why."<sup>7</sup> Otherwise, Catron did not respond to Fall's warnings of legal liability. But out of this personal Tularosa mess, Catron and Fall created a new world for New Mexico water.

As at Tularosa, New Mexico began in 1890 with undefined, local, amorphous, community-based water institutions, "the community irrigation ditches."<sup>8</sup> Those ditches controlled access to water. Their governing commissions decided who would be allowed to share the source of water on which all members of the community ditch depended. In the parlance of twentieth-century water law, the community ditches determined what water was "unappropriated" and thus available for new use. The community ditches also ranked uses among existing

users, assigning in times of inevitable shortage different preferences to different uses ("domestic," "subsistence," and "commercial"). Finally, the community ditches offered individual irrigators not so much private ownership of water delivered through the ditch as the right to participate politically in ditch governance and the concomitant duty to work on common ditch maintenance.

As at Tularosa, by 1920, essential New Mexico water law had displaced all of these basic community ditch powers. The power to decide who would have access to a common source of water was taken from the community ditches and sent up to a state bureaucrat, the New Mexico State Engineer.<sup>9</sup> At the same time, the power to rank uses was sent down to individual irrigators. So long as the use was "beneficial" (and almost all uses were), then the choice as to which beneficial uses were better was left to individual irrigators, not community ditch commissions.<sup>10</sup> Finally, water rights became property rights—the expression of individual ownership—and not the corporate political will of a community ditch association.<sup>11</sup>

In the process of that relatively quick transformation between 1890 and 1920, lawyers, lawmakers, and statesmen like Fall and Catron played critical roles. In the end, they succeeded in privatizing water so that individuals rather than political communities controlled this most fundamental of natural resources. Catron had played a similar but more controversial role in the transformation of the common lands of New Mexico's community land grants. Suddenly, in the second half of the nineteenth century and with Catron's push, these lands had become available for the first time for private acquisition as private property.<sup>12</sup> As Fall's letter to Catron in November 1912 indicated, Catron already had done the same thing with water in Tularosa Creek.<sup>13</sup> In 1912, he found himself desperately trying to get the courts to adopt a vision of water that would confirm the private sales of communal water that he already had made.

The Catron-instigated, thirty-year war over the nature and extent of rights to water in the Tularosa Creek encapsulated the four-hundred-year-old history of irrigation in northern New Mexico. The longer background in the north was blurred by time and a lack of consistent documentation, but the full recorded story of Tularosa's development was all there. While the Tularosa battle was fought exclusively under United States rule, it turned out that claims to its waters were based on the full range of Spanish and Mexican water law. So the short, clear Tularosa

controversy mirrored the longer, murkier evolution of water rights elsewhere in more entrenched New Mexico.

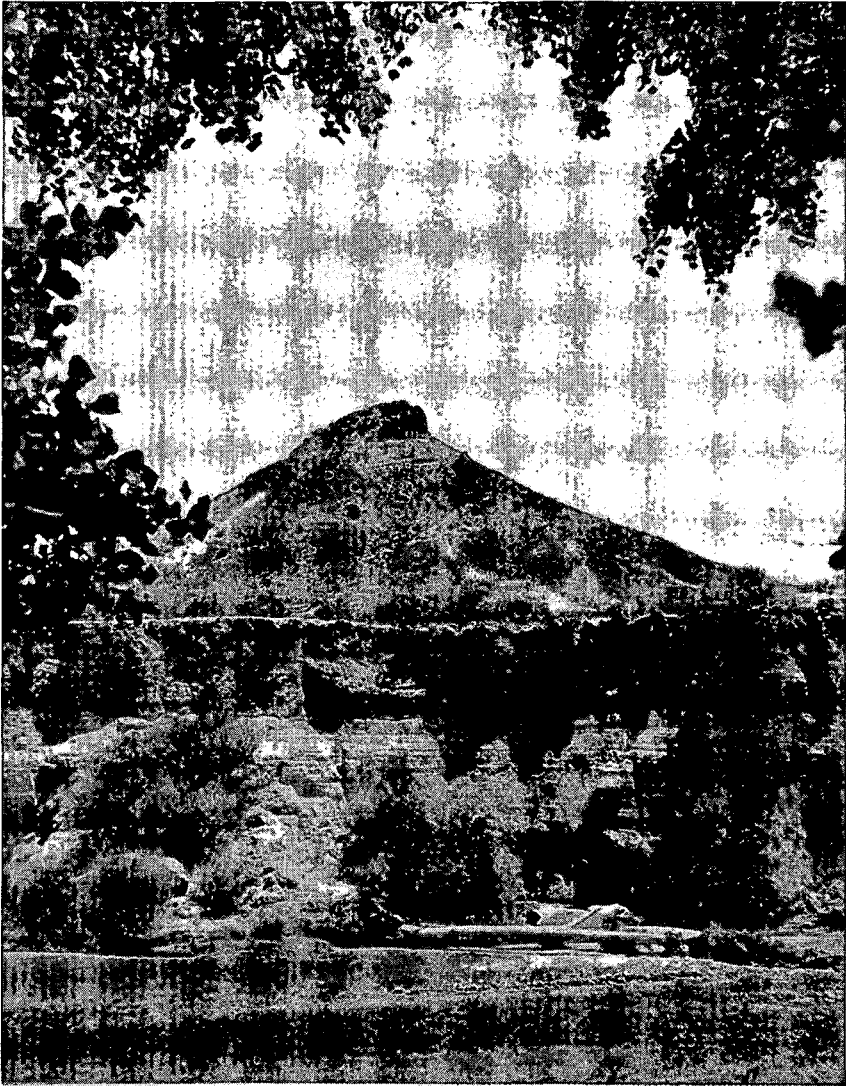
Testimony in that Tularosa litigation showed that the area was settled in the early 1860s by a band of New Mexico Hispanos and a few *Isleta del Sur Pueblo* Indians from the El Paso area. The lower Rio Grande on which they had depended changed course from year to year, and the volume of water wildly fluctuated from season to season. A particularly violent flood in 1863 had destroyed their irrigation ditches and made their fields impossible to plant. Rather than face the mighty river again, they moved.<sup>14</sup>

They chose for resettlement a flat area on the Tularosa Creek a short distance from where it left the narrow canyon that confined it to its source in the mountains. The place offered two distinct advantages. First, there was no other settlement in the immediate area, and there were no other users of the water of Tularosa Creek. The water seemed to be available.

Equally as important was the fact that the water could be controlled. At the El Paso/Mesilla site they had left, the Tularosa settlers had plenty of water—so much in fact that they could not rely on it. Settlers moved to Tularosa from their original homes not because of a lack of water, but because there was too much. Tularosa Creek offered less water than the Rio Grande. The El Paso settlers chose it because the scarcer water could be trusted and used with existing technology.

This choice by the Tularosa settlers mirrored the much earlier drive under Spanish and Mexican rule to harness for human use any available and controllable water source. The direct impetus to settlement was not so much land scarcity as water availability. Sometimes lack of water, particularly in the Santa Fe area, drove earlier eighteenth- and nineteenth-century New Mexican settlers out onto the frontiers of existing settlements.<sup>15</sup> Equally as often, too much water rather than too little provided the impetus as it later did at Tularosa. Indeed, a careful study of flooding on the main stem of the Rio Grande would show that this mighty source of water caused as many problems as it offered solutions to early New Mexicans, driving away as many settlers as it attracted.<sup>16</sup>

On their arrival on Tularosa Creek in 1863, having been rejected by the Rio Grande as so many earlier New Mexican settlers had been, the original settlers at what would become the Tularosa Townsite did what they had to do to establish a permanent settlement on the site. They



Round Mountain above Tularosa Canyon. Aultman Photo Studio.  
From C. L. Sonnichsen, *Tularosa, Last of the Frontier West* (1960).

went upstream on the Tularosa Creek as far above their proposed settlement as the land would allow and began to dig an irrigation ditch.

The tales of their efforts, with its prodigious work, its considerable danger, and its ingenuity, filled days of court testimony in the subsequent Tularosa legal battles.<sup>17</sup> By then, the original builders of the Tularosa ditch had lost control over the ditch and its water source. They claimed that only those who had worked on its construction could use the water delivered through it. Because the ditch had been built so recently at Tularosa, this claim was at least plausible. The original builders of the ditch were still alive and still claimed its water. They equated rights to water with actual work on the acequia system that delivered it.<sup>18</sup> Elsewhere in New Mexico, much older community ditches required annual contributions to ditch maintenance and refused water to those who failed to contribute, a customary practice sanctioned by Spanish and Mexican authorities<sup>19</sup> and confirmed in the earliest comprehensive legislation on community ditches.<sup>20</sup>

The Tularosa experience also demonstrated another common concern with earlier New Mexico water development: protection of the natural source from which the constructed ditch took its water. The original Tularosa settlers did not have to compete with others who already had developed the water of the Tularosa Creek. They were the first to claim by taking and using it. However, the original Tularosa settlers almost immediately tried to protect the natural source from subsequent depletion by other more recent arrivals. To do so, they used what means seemed available to them at the time. Rather than going to court, they went to the recently formed Territorial Legislature.

In 1866, only three years after the settlement of Tularosa, the New Mexico Territorial Legislature enacted a bill aimed specifically at protecting the work the settlers had done. The law forbade any new and different appropriation of Tularosa Creek water by other users upstream from the original Tularosa community ditch point of diversion.<sup>21</sup> In effect, the statute reserved all the water in the Tularosa Creek for the use of the Tularosa community ditch, putting it in exclusive control of water resources there.

Subsequent fundamental New Mexico water law made “unappropriated water” the property of the general public, not local community ditches, and put the State Engineer in charge of access to it.<sup>22</sup> But prior to 1905, as at Tularosa in 1866, New Mexico authorities sometimes granted exclusive water concessions and franchises to local communi-



ties and put them in charge of deciding to whom to grant new access to the common source.<sup>23</sup>

Of course at Tularosa, as elsewhere earlier in New Mexico, control of water meant something only together with land on which it could be applied. While separately acquired, land and water went hand in hand in desert New Mexico.<sup>24</sup> Because Tularosa was not founded until after the 1848 change in sovereignty from New Mexico's antecedent sovereigns, settlers there had to acquire rights to land under United States public land policy. The Tularosa settlers began, as many settlers on the public domain did, by squatting. Curiously enough, they found their opening to formal ownership in Federal townsite laws governing acquisition of title to 320 acres of Federal public lands.<sup>25</sup>

These townsite laws were designed to allow small, compact, urban commercial centers to service the quarter-section, 160-acre family farms that, in the United States' view of land settlement, would surround them. Of course, in desert New Mexico, that vision of land distribution never fit. The scarcity of water and the uneven distribution of what little there was guaranteed that the fundamental assumption of United States settlement law—that all quarter-sections were created equal—could not apply. Nevertheless, the inapplicable Federal public land model of an urban center surrounded by family farms ironically fit the fundamental Hispanic model of desert settlement in a different way. At Tularosa, the compact, non-agricultural "townsite" of United States land law became the irrigated heart of intensive Hispanic land settlement. The surrounding farms of Federal public land law, at least initially, became at Tularosa *tierras baldías*, idle lands available for general, common and non-intensive stock grazing.<sup>26</sup>

At Tularosa, the irrigation ditches overlay the urban lot boundaries required by the Federal townsite laws and indicated that the Tularosa Townsite was to serve a different function than the commercial, non-agricultural one contemplated by United States land law. The first irrigation ditch extended by the original Tularosa settlers entered the townsite on its east edge. There it divided into three branches. The central branch ran from east to west through the middle of the lots arrayed in tiers on either of its sides. The two other ditch branches ran parallel courses along the north and south edges of the townsite.<sup>27</sup> In other words, the supposedly commercial Tularosa townsite was surrounded by and centered on irrigation ditches.

The original Tularosa settlers designated two principal classes of land served by these ditches. The classes shared nothing with the Federal public land law under which title to the tract had been secured but instead came out of the much deeper Hispanic traditions the settlers brought with them from southern New Mexico and El Paso. First, 196 lots, laid out in forty-nine squares of four lots each, lay at the center of the townsite through which the main trunk of the irrigation ditch ran. These were designated as *solares* (house sites) or *huertas* (garden plots). These lots were designated as the places of residence of the settlers. Those residences required access to water from the central ditch both for domestic uses and, as the alternative “huerta” name indicates, for the small household gardens equally as necessary for every settler’s subsistence. Outside of this central tier of solares and huertas, the original Tularosa settlers arrayed a second tier of lots organized for a different purpose and bearing a different name, *hortalizas*. These larger, more removed tracts were designed for larger-scale growing of less essential crops, principally wheat and corn.<sup>28</sup>

The two tiers of Tularosa land gave the new town a compact, highly organized, gridlike look. From the air, the townsite looked exactly like what the United States had intended in its Federal townsite laws, but those laws had not anticipated the addition of the Tularosa irrigation ditches. That addition gave to Tularosa the look of much more ancient Hispanic urban designs. In fact, the non-agricultural Federal public land Tularosa townsite became, with the addition of the irrigation ditches, a model of what Hispanic agricultural settlement was supposed to have been.<sup>29</sup>

Particularly Spanish law, but even the less formal succeeding Mexican law, had laid down specifications for the settlement of new communities. Those laws called for the same highly organized lots that United States Federal public land law had given Tularosa. The compact Hispanic design was required to provide maximum exposure to scarce water resources. With its ditches, Tularosa looked like Hemosillo, Mexico, built to conform to the municipal specifications of the 1796 Plan of Pitic,<sup>30</sup> or like San Antonio, Texas, built to conform to the hydraulic expectations of the Canary Islanders who first settled the town.<sup>31</sup> Tularosa was a United States town that looked like a Spanish planner’s dream come true.

Tularosa thus embodied an abstract municipal design inherited from the laws of sovereigns that had lost control over the territory.

Tularosa settlers had poured their Hispanic conceptions into a United States land-use mold that incidentally fit only with the addition of water.<sup>32</sup> The Hispanic mold itself had never actually been adopted in New Mexico, except where the terrain or the circumstances had demanded it.<sup>33</sup> New Mexicans had resisted the compact living that Spanish and Mexican law seemed to require. Ironically, the Federal townsite of Tularosa looked more Hispanic than most ancient settlements in New Mexico founded in fact under Spanish or Mexican law.

In the actual distribution of water to lots in the townsite, Tularosa conformed more closely to the actual ancient New Mexico practices. As elsewhere in long-established New Mexico, community ditch water was used for many purposes—domestic, direct subsistence, and livestock supplement—that corresponded to the solar, huerta, and hortaliza lot designations. Ditch officials ranked the uses, generally preferring a constant supply of household water to water for the larger, less essential fields at the edge of town. Distribution practices varied across the New Mexico landscape. However, those different practices all shared the assumption reflected at Tularosa. Some water uses were more important than others, and, in times of shortage, public officials would distribute scarce supplies according to a publicly determined hierarchy of uses rather than a privately enforced, property-based individual priority date.

Tularosa also had a system for handling excess waters that had its historical analogue in the established system of what northern New Mexicans called *sobrantes*. These were waters not needed for consumption within the community ditch system and available for other uses outside the system, usually only so long as they were not needed within it.<sup>34</sup> Eventually, of course, sobrante uses sometimes themselves became incorporated into new community systems. When they were, apportionment of water shortages between the older and newer community systems became more complex than the absolute preference of community systems over those who might use the community's sobrantes. But, at least initially, late arrivals to lands outside the Tularosa Townsite, like late arrivals to established communities elsewhere in New Mexico, understood that their claim to water depended almost entirely on the community ditch's determination that its uses did not require all the water.<sup>35</sup> By 1916, the fundamental precepts underlying the New Mexico community ditch would be changed. Priority in time would replace hierarchy of use in determining what claims would

receive first use in the times of scarcity.<sup>36</sup> Individuals asserting individual water rights would control the assertion of rights, and not the community ditches as a whole.

The change from corporate, community control of water to private individual rights at Tularosa came slowly and at first from within the ditch itself. Abundance, not scarcity, started the community down the road to the privatization of its communal water resources. The Federal townsites scheme into which the original Tularosa settlers had squeezed their Hispanic settlement had created many more lots than were in fact initially needed.<sup>37</sup> Tularosans quite quickly began to think of their claims to water in terms other than the needs of the lands on which the water was applied. Time became the basis for individual claims to water delivered through the community ditch. A Tularosa water right amounted to a twelve-hour run of water every two weeks.<sup>38</sup>

Similar, although less visible claims of private rights to water had been sneaking at the same time into the operations of longer established, more hidebound northern New Mexico community ditches. In some places, as at Tularosa, these individual rights were expressed through the number of hours of exclusive use of a community ditch. Elsewhere, irrigated acreage defined the extent of the individual claim. In some places, the individual rights were called *piones*; in others, they were simply called *derechos*.<sup>39</sup> In the ancient European world on which New World ditches had based their models, the drive towards privatization of communal water resources had been creeping along for centuries.<sup>40</sup> But on whatever model they were based, by whatever name they were called, and by whatever measure they were determined, these assertions of private rights to water in community ditches represented a new factor in the calculus of New Mexico water.

The sudden development of interest in land in southeastern New Mexico in the 1870s and 1880s fueled and extended this drive to privatization of water at Tularosa.<sup>41</sup> The drive came at least in part from within the original Tularosa community ditch organization. Initially, individual members of the original Tularosa community ditch had traded only among themselves parts of the twelve-hour run of water that had come to define their individual entitlement, no matter how much water they used or how much land they irrigated. But the settlement of public domain land outside the area of the Tularosa Townsite created a new broader market for water rights, and the unused or unneeded portions of water rights within Tularosa suddenly became valuable outside



Thomas Benton Catron.

Olsen Collection, New Mexico State Records Center and Archives.

of it.<sup>42</sup> Elsewhere in New Mexico, the same pressures, both from within and without local communities, had cost ancient community land grants ownership of their *ejidos*.<sup>43</sup> Now, the pressure reached communal water as well as land.<sup>44</sup>

Beginning in the 1870s and contemporaneous with the settlement of public domain lands above and below the formal Tularosa Townsite, owners of lots within the townsite began to convey to new landowners outside the townsite the water rights the lot owners regarded as their private property. Developers like Catron, who owned land outside Tularosa as the Tularosa Land and Cattle Company, were trying

to sell it to recent arrivals. They did their best to sweeten the new land they offered by adding water to it.<sup>45</sup> Some did so by offering the water of the Tularosa Creek itself. More astute land speculators did so by moving recognized water rights. As his November 1912 letter to Fall indicated, Thomas Catron had followed the second, more perceptive course when he purchased fifty "water rights" from lands above the townsite and offered them to purchasers of land from his own Tularosa Land and Cattle Company below and outside the townsite.<sup>46</sup>

Sales like this posed two problems for the citizens of the Town of Tularosa. First, the actual demand on the surface water supplies of the Tularosa Creek became heavier.<sup>47</sup> At the same time, control over the diminishing water of the Tularosa Creek shifted from the townsite residents alone to the wider community that now held townsite water rights.<sup>48</sup> As a result of the kinds of sales that Catron had engineered, the available water had diminished and the community of water users had grown. The combination of changes guaranteed conflict.

At Tularosa, that conflict came quickly enough in the form of a legal battle that proceeded on many levels between 1885 and 1919. It started as a downstream townsite attack on new upstream development and quickly turned into a struggle for political control of the townsite ditches.<sup>49</sup> As pressure on the Tularosa Creek water increased, townsite residents claimed that they alone had the right to participate in the ditch organization that controlled the water. Purchasers of townsite rights and users whose rights had originated outside the town demanded an equal right to participate. By the 1890s, the faction that insisted on the broader-based participation had identified 107 "water rights" that it insisted were entitled to participation. Less than half of those identified rights were still attached to lands within the original Tularosa Townsite. Recognition of the changes that the sales had brought about meant that the Tularosa Townsite had lost control of its ditches.<sup>50</sup>

However, beneath the question of the control over the ditches lurked the more fundamental problem of control over water. In effect, the Tularosa Townsite champions were asserting the corporate community's exclusive rights to decide how the waters of the Tularosa Creek could be used. The wider group of 107 recognized rights were insisting that the decision rested with the much looser confederation of water rights claimants whose rights originated not in belonging to any political community but in the water rights of particular individuals both within and outside the Tularosa Townsite.

Finally, beneath the questions of ditch and water control resided an even more basic problem at Tularosa: what exactly would New Mexico recognize as the nature of a "water right" in the old Territory and new State? If New Mexico law recognized the right of community control of local water, then it would rule in favor of the Tularosa Townsite claimants. If, on the other hand, New Mexico law favored individual rights that could be bought and sold, then it would choose the position of that wider group of 107 individual rights that claimed control of the Tularosa community ditches.

The contest over ditch control began indirectly in 1904. Realizing that upstream development threatened downstream supplies, officers of the broadly constituted Tularosa Community Ditch ("Water Rights Commission"), whose membership included some townsite residents and many who were not residents, asked the Otero County Court to settle water rights to the Tularosa Creek. The defendants in the 1904 suit were even newer water speculators and developers. The list included the Mescalero Apaches as well, located at the creek's headwaters. The townsite did not participate in any way.<sup>51</sup>

The 1904 suit lingered in the district court of Otero County for almost five years while the water situation got worse. Then, between 1909 and 1910, the legal action picked up again, adding layers of complexity to the already confused legal situation. In April 1909, Judge Edward A. Mann entered a decree in the 1904 Tularosa Community Ditch case. The decree identified 107 existing rights to Tularosa Creek water, some for lands inside the Tularosa Townsite, many not. Some of those 107 rights outside the Tularosa Townsite were purchased from owners of land and water inside the townsite. Others were based on water rights initiated by appropriation outside the townsite. No matter. The so-called 1909 "Mann decree" forbade any other water claims to the Tularosa Creek. The decree recognized no special water rights in the Tularosa Townsite ("Townsite Commission"), which was not even a party.<sup>52</sup>

Even before the Mann decree was entered in April 1909, the townsite claimants had reacted to the idea confirmed in the decree that creek water rights belonged to the individual irrigators rather than to the corporate townsite community. In January 1909, the townsite residents formally claimed that their "Community Ditches or Acequias of the Tularosa Townsite" ("Townsite Commission"), not the rogue Tularosa Community Ditch ("Water Rights Commission"), was the only proper

organization for control of Tularosa Creek water. After the Mann decree, the challenging Townsite Commission took a further step to establish its claim as the only "real" organization when in November 1909 it held elections and chose a full slate of mayordomo and commissioners.<sup>53</sup> Now two organizations, the Townsite Commission and the Water Rights Commission, competed for control of the creek's limited waters. Initially, the competing groups were at loggerheads, but between 1909 and 1910, efforts at mutual recognition further clouded the choice between the two.<sup>54</sup> Even these concessions, however, did not resolve the tensions between the competing organizations or interests they represented.

For its part, the Water Rights Commission continued in its efforts to transfer water rights from inside the townsite outside. Thomas Catron continued to play his role in the process when he swapped land controlled by his Tularosa Land and Cattle Company for water controlled by the rump Water Rights Commission. He then offered that water to new owners of irrigable farmland just outside the Tularosa Townsite.<sup>55</sup> Catron then capped the insult when he applied to the new Territorial Engineer for permission to move the paper rights to new lands.<sup>56</sup>

All of these shenanigans finally proved too much for the recently resuscitated Townsite Commission. In April 1910, the organization itself elected to go to court. Using local Alamogordo attorney Edwin Mechem and an Omaha, Nebraska, associate, the Townsite Commission asked the court to declare that the Townsite Commission was the only proper entity for the control of Tularosa Creek water and, as a result, to enjoin the Water Rights Commission from attempting to distribute the creek water.

Arcane legal considerations greatly influenced the outcome of this second Tularosa Creek water suit.<sup>57</sup> The organizational struggle overlay the more fundamental question of who should control the creek's development and use. This dispute was fought out against the even more general background of New Mexico's first efforts between 1890 and 1920 to formally define and codify its basic water law.

One crucial issue in early New Mexico water law was the status of domestic claims to water: should domestic uses be superior to other uses of water? Such a preference would further the townsite's claim to a superior status. There was some indication of such a preference in Spanish, Mexican, and Territorial law.<sup>58</sup> The problem was that the 1910



drafters of the 1912 New Mexico Constitution had explicitly rejected such a superior status for domestic claims to water.<sup>59</sup>

In addition, the claim of the Townsite Ditch also seemed to contradict the other basic tenet of the emerging New Mexico version of prior appropriation law, that "beneficial use" alone would be, as Article XVI of the proposed State Constitution so eloquently phrased it, the "basis, measure, and limit" of a water right.<sup>60</sup> The principle emerged in Western water law in general, and in New Mexico water law in particular, from the great turn-of-the-century fear that speculators would monopolize and hoard scarce natural resources like water, thus preventing the development of water resources necessary to make the desert and the new state bloom.<sup>61</sup> Recognition of the townsite claim ran against this principle since it made municipal status, not actual use, the basis of its claim.

The 1910 suit by the Townsite Ditch against the Water Rights Ditch quickly ran into more mundane legal problems. Albert Fall, who had instigated the 1904 suit, claimed that the rights of the townsite already had been decided in the earlier 1904 suit. District Judge Frank Parker agreed. The Territorial Supreme Court reversed that ruling, holding that as a legal matter the Townsite Ditch at least was entitled to an opportunity to show that the 1904 decree had not legally bound them.

When the case got back from Santa Fe to the district court, Catron and the Water Rights Ditch switched gears and now presented a new and even more technical defense: the Townsite Ditch had proceeded in the suit under the wrong theory altogether.<sup>62</sup> A new district judge dismissed the townsite challenge again. This time the Territorial Supreme Court agreed. As of the 23 December 1911 Supreme Court decision, the Townsite Ditch and the claims it represented were finally out of court.<sup>63</sup>

In January 1912, after the 1910 suit had finally ended in defeat and in the same month that New Mexico became a state, the Tularosa Townsite Ditch returned to court. This time, it challenged the right of the Water Rights Ditch to control Tularosa Creek water, using a different legal format. The Townsite Ditch argued that the waters of the Tularosa Creek belonged exclusively to the townsite community. They asked the court to recognize the Townsite Ditch as the only authorized manager of the ditches and thus the water of the Tularosa Creek.<sup>64</sup>

Water rights on the Tularosa Creek occupied the courts for the eighth consecutive year since the Tularosa Community Ditch and the Tularosa Land and Cattle Company, under the direction of Fall and

Catron, had set out to capture the stream's waters and sell rights to use to newly arrived ranchers and farmers outside. During that time, outside pressure on the townsite ditches continued to grow.<sup>65</sup> By the time the Territorial Supreme Court finally dismissed the two townsite lawsuits in late 1911, the water situation in the Town of Tularosa was desperate. Now with the third suit, the situation was, if anything, worse.

Once again, Thomas Catron, now a United States senator, defended the new Water Rights Ditch organization before District Judge Edward L. Medler of Las Cruces. Catron responded to the townsite complaint with the usual technical legal objections and once again argued that the 1909 conclusion to the 1904 Tularosa lawsuit already had determined that the Water Rights Ditch, not the Townsite Ditch, was the proper organization for the distribution of Tularosa Creek water.<sup>66</sup> However, Judge Medler swept these technical objections aside. Through 1912, with Water Rights Ditch lawyers Catron and Fall now carrying on as United States senators for New Mexico in Washington, Judge Medler assembled the evidence on which he would base his decision.

Luckily, witnesses in the 1904 and 1910 suits already had told the byzantine tale of the establishment of the Tularosa water systems, the role of Catron's Tularosa Land and Cattle Company in transferring rights from the Townsite Ditch to the Water Rights Ditch, and the subsequent conflict between the two. Medler proposed simply to incorporate that earlier testimony into the current suit. The lawyers agreed.<sup>67</sup> Still, the 1912 irrigation season came to Tularosa without a district court decision, and opposing lawyers Catron and Mechem had to propose an interim division of water between the competing groups, which Medler approved.<sup>68</sup> Not until 11 January 1913 did the judge actually rule on the suit.

As soon as he released his decision and opinion, everybody realized why it had taken him so long. Judge Medler wrote an unheard-of, exhaustive, forty-page district court decision in the Tularosa case.<sup>69</sup> The lawyers had not contributed much to it, as was customary. Instead, Medler himself had reviewed every New Mexico law on water in general and community ditches in particular. He had looked into the works of Kinney and Wiel, authoritative contemporaneous commentators on Western water law.<sup>70</sup> He had gathered together, mostly on his own initiative, cases from other Western states, particularly from California, that seemed to deal with analogous water cases.<sup>71</sup> Now in January 1913,

Judge Medler concluded that the Catron-backed Water Rights Ditch was, in the words of the Supreme Court:

[g]uilty of misusing the privileges of a public acequia or ditch corporation, and is guilty of malfeasance or nonfeasance in the management and control of the acequias or ditches, and the [officers of the community ditch] . . . are operating and controlling the said acequia or ditch to the exclusion of parties justly entitled to have and receive water therefrom.<sup>72</sup>

Medler's conclusion dealt a severe blow to the Water Rights Ditch's claims to Tularosa Creek water, but the analysis itself went to the nature of water rights in the new State of New Mexico.

In his January 1913 "opinion," Medler determined that New Mexico law made community ditches, like the original Townsite Ditch, the basic—indeed only—instrumentality for the distribution of the water whose diversion and use they controlled. From this basic premise, at least two tenets of water life followed. First, individual residents of Tularosa did not have and never did have any "water rights" that they might have transferred from inside the Tularosa Townsite to outside. Catron's Tularosa Land and Cattle Company scheme and the 107 "water rights" found in the 1909 decree assumed that individual transfer of rights from inside the original townsite to outside were effective. Now, Judge Medler said that the individual members of the community had nothing to transfer.<sup>73</sup>

That was so, continued Medler in the second part of his decision, not because there were no such things as "water rights," but because the only right to water belonged to the corporate community represented by the Townsite Ditch. That community ditch organization, according to Medler, "owned" whatever water the Tularosa Creek might yield. That ownership was not limited to the amount of water that the ditch might have used at any particular time but extended to all the water that the townsite might eventually need. In the language of the strict law of prior appropriation just then emerging in New Mexico,<sup>74</sup> both the appropriated and the unappropriated water of the Tularosa Creek belonged not to the new State of New Mexico and not to the individual users, but to the townsite ditches.

Judge Medler found the authority for his remarkable interpretation in a couple of sources. In the six months it took him to put his decision

together, he reviewed, in his own words, "every law ever passed by the Legislature of New Mexico affecting acequias or ditches."<sup>75</sup> No New Mexico court decision up to that time had defined the nature and extent of community ditch claims to water. No comprehensive legislative code had yet done so. But the Territorial Legislature had acted often in the past with respect to acequias. "Many of these laws," noted Medler, "are private in character and refer to particular ditches then in existence or about to be constructed."<sup>76</sup>

By assembling and analyzing these disparate laws, Medler divined that ditches like the Tularosa Townsite Ditch were "public in character." The water belonged to the public entity that the ditch represented. If individual members owned anything, they "owned" an "appurtenant" right to have the ditch cross and serve their land, nothing more. Obviously, such a right did not confer an abstract "right to water" so much as it granted the parcel owner the power to compel the ditch to deliver water to the tract it crossed and nowhere else. The water belonged to the public, and the public was the Townsite Ditch.<sup>77</sup>

For this second proposition, Judge Medler turned to Spanish and Mexican law as brought into New Mexico by local custom and interpreted by the courts. New Mexico had not had the opportunity to address the question, said Medler, but California had. In the nineteenth-century cases of *Lux v. Hagen*, *Hart v. Burnett*, and *Vernon Irrigation Company*, the California courts had determined that American cities, like Los Angeles and San Diego, that had begun as Mexican pueblos, had a prior and paramount right to whatever waters ran through the settlement to satisfy the needs of the community at whatever time (now or in the future) the community might need them.<sup>78</sup> The so-called, non-Indian "pueblo rights doctrine" had become embedded in California water law by the time Medler made his decision. He simply imported the controversial "pueblo rights" from California.

Now in January 1913, Judge Medler applied the California doctrine to a new institution, the New Mexico community ditch. In effect, Medler made the traditional New Mexico institution the legal equivalent of a Mexican city in California. The California city founded under Mexican rule and the New Mexico community ditch each had a total right to whatever water they might require, now or in the future, to satisfy the needs of their constituents. Other California residents outside the boundaries of the original "pueblo" and purchasers from Catron's Tularosa Land and Cattle Company had no rights to water. The

California city that could trace its rights to a pre-1848 grant owned all the water as trustee for its residents and so, too, according to Medler, did the New Mexico community ditches.<sup>79</sup>

The California version of the "pueblo rights doctrine" applied only to the cities of Los Angeles and San Diego. Nobody knew how many community ditches there may have been in New Mexico in 1913, but estimates ran as high as 480.<sup>80</sup> They distributed the water of almost every tributary of New Mexico's principal surface water basins, the Rio Grande, the Pecos, and the Canadian. The New Mexico community ditches controlled as well at least the base flows of the principal rivers. Almost all of them had begun operation before the change in sovereignty in 1848. If Medler's ruling survived, the New Mexico community ditches would have become the principal institutions controlling the development and use of water in the new State of New Mexico.<sup>81</sup>

The problem was that, in New Mexico at least, this version of water ownership went against the emerging version of prior appropriation in the state. Article XVI of the New Mexico State Constitution, which went into effect 6 January 1912, made the public, not the community ditches, the owners of water not yet applied by anyone to beneficial use.<sup>82</sup> The same basic provision made particular appropriators, not the community ditches, the owners of water that had been applied to beneficial use.<sup>83</sup> Both provisions went against the Medler view, which assigned the unappropriated water of the Tularosa Creek and the water already appropriated exclusively to the townsite community ditch. These combined provisions located the power over New Mexico water at new and more appropriate places in the "modern" view of political organization. The state replaced the community ditch as the stakeholder, which would dole out the unappropriated water of the state. The individual held the rights so created.

When the New Mexico Supreme Court reviewed Judge Medler's decision on appeal, Justice Clarence J. Roberts responded in two ways, one technical, the other more general.<sup>84</sup> Technically, said Roberts for the court, the townsite ditches could not prove that they were entitled to control the ditches. Because the lawsuit was predicated on the townsite ditches making that case, the suit had to fail.<sup>85</sup> However, that position did not require Roberts to rule that the competing community ditches themselves were entitled to that control. Indeed, Roberts suggested that neither the Townsite Ditch nor the Water Rights Ditch conformed to the basic requirements of the New Mexico water law.

According to Roberts, both the Townsite and Water Rights ditches had based their claims to control on impermissible factors in New Mexico water law. The Townsite Ditch's claim that it was entitled to the same kind of pueblo rights as were the Mexican "pueblos" in the State of California failed because, as the New Mexico Supreme Court tersely pointed out, Tularosa was not a Mexican pueblo. It had been founded after the change in sovereignty from Mexico to the United States and, therefore, could not claim that the treaty protected its rights as a Mexican pueblo, even if cities founded between 1821 and 1846 were entitled to prior and paramount rights to water.<sup>86</sup>

New Mexico Supreme Court Justice Roberts also rejected District Judge Medler's ruling that individuals using community ditch water owned no water rights because the ditch organization owned them all. The Medler view, suggested Roberts, violated the fundamental premise of "appurtenance" at the heart of the prior appropriation doctrine. Applying water to a particular beneficial use alone could perfect New Mexico water rights, ruled Roberts. In an agricultural setting such as Tularosa, the requirement of application to beneficial use meant that water rights attached to the particular tracts where the water was used and belonged to the owners of those tracts.<sup>87</sup> The ditch simply delivered water to the lands where the rights had been perfected by use. It followed, of course, that the ditch owned no water rights, but that the owner of the tract where the water was applied did.<sup>88</sup> For that reason, Judge Medler's ruling that the community ditch, not the tract owners, owned the Tularosa water was clearly wrong.

Justice Roberts did not have to say so to make his decision, but he went on to suggest that the basis for the claims of the Water Rights Ditch did not stand on a much firmer ground than the claims of the Townsite Ditch. At least some of the 107 water rights that Catron's Water Rights Ditch claimed to represent were themselves not based on water that had ever been applied to beneficial use. Some had been purchased, for example, from townsite residents who had sold the time-based right to water that local custom had allowed to arise there. These rights, suggested Justice Roberts, were not based on any beneficial use and provided no firmer ground for the Water Rights Ditch claim to exclusive control of the Tularosa Creek than did the townsite claim.<sup>89</sup> In effect, ruled Justice Roberts, both the Townsite Ditch and the Water Rights Ditch ruling were incorrect.

The ruling in the final Tularosa ditch dispute reflected the preoccupation of developing Western states when it came to handling water. The scarce resource was so critical to economic progress that the legal regime that governed it could neither allow the hoarding of it by speculators nor permit a monopoly over its control by private or local subdivisions of the new state.<sup>90</sup> From that perspective, the claims of both the Townsite Ditch and the Water Rights Ditch looked equally suspect. The townsite's underlying claim that it alone controlled access to the water of the Tularosa Creek looked as if this local government was claiming two interests, one over unappropriated water, the other over how to distribute claimed water among existing rights, which the new constitution had just assigned to the state. As for the Water Rights Ditch's claim that the 107 water rights listed in the 1909 decree finally determined all valid water rights to the Tularosa Creek, that claim was based at least in part on water rights that no one had ever perfected under the doctrine of prior appropriation by having put the water to some beneficial use. In other words, in the New Mexico Supreme Court's view, the competing claims in the Tularosa Creek case offered two equally unacceptable choices, local political control over unappropriated water or speculative water rights. In the final Tularosa Creek decree, Justice Roberts, in the process of reversing Judge Medler's decision, rejected them both.

The decision cost communities like the Tularosa Townsite any control over how to rank established claims to water among its residents. As far as the state was concerned, domestic uses and agricultural uses stood on the same footing, and no choice could be made between them in apportioning shortages among existing rights. As for adding new rights of any kind to the system, the new state alone, not some local community ditch, would determine whether there was sufficient unappropriated water to allow the new right to join the existing pool of joint claimants to the common supply—in this case, the Tularosa Creek. Finally, as for the sale and transfer of existing rights to water, only the state would regulate the market and then only to guarantee that the private transfer was based on legitimate rights and would not harm other existing rights. The new doctrine of prior appropriation allowed water to flow uphill to money. In Tularosa at the turn of the century, the New Mexico Supreme Court's final decision in *The Community Ditch or Acequias of Tularosa v. the Tularosa Community Ditch* allowed water

rights to flow up the Tularosa Creek, from the Tularosa Townsite to the ranches above and the farms outside.

The decision solved part of Thomas Catron's immediate problem as he and Fall had discussed in November 1912. Had the court upheld the townsite's and Judge Medler's position, the water rights that Catron had brokered through the Tularosa Land and Cattle Company to land outside the townsite automatically would have failed. As Catron's partner Albert Fall correctly saw, such a decision would have left Catron holding an empty bag. At least Justice Robert's final resolution of the matter had not opened Catron to the charge of selling water rights that did not exist.

The decision allowed Catron to do to New Mexico water what he already had done to New Mexico land. As a lawyer, politician, and heavy speculator himself, Catron specialized in breaking down into their component parts resources that local Hispanic communities regarded as communal and indivisible. His efforts had yielded to him and other speculators large parts of the common lands of the Tierra Amarilla and Mora Grants.<sup>91</sup> As the battle over Tularosa water showed, he had done the same thing with even more valuable water. The primary effect was to privatize in the name of modern times and new state law what theretofore had been regarded as a public, community resource.

The endless Tularosa ditch cases between 1904 and 1914 did not end the Tularosa Townsite's water problems. It was not until the mid-1960s that the Village of Tularosa finally straightened out its claim to the waters of the Tularosa Creek.<sup>92</sup> Today, the issue of private rights to water delivered through New Mexico community ditches continues to plague New Mexico water rights hearings and the courts,<sup>93</sup> as do problems of the proper formal governance of New Mexico community irrigation ditches.<sup>94</sup> But those problems, still with New Mexico at the turn of the twenty-first century, originated in the Tularosa ditch disputes at the turn of the twentieth.

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## NOTES

1. John Baxter, *Dividing New Mexico's Waters: 1700–1912* (Albuquerque: University of New Mexico Press, 1997), 97–104; *The Tularosa Community Ditch v. The Tularosa Land and Cattle Company et al.* No. 293, Otero County District Court, Final Decree, 29 April 1909, State Engineer Office (SEO), Santa Fe, New Mexico; *The Community Ditch or Acequias of Tularosa Townsite v. The Tularosa Community Ditch*, 16 N.M. 200, 114 P. 285 (March 1911); 16 N.M. 750, 120 P. 301 (December 1911); *State ex rel. Community Ditches v. Tularosa Community Ditch*, 19 N.M. 352, 143 P. 207 (1914).

2. Albert B. Fall to Thomas B. Catron, 11 November 1912, and reply, Catron to Fall, 17 November 1912, in Box 3, Folder 1, Catron Papers 201, Special Collections Department, University of New Mexico General Library, Albuquerque.

3. Robert W. Larson, *New Mexico's Quest for Statehood: 1846–1912* (Albuquerque: University of New Mexico Press, 1968), 299–300; Victor Westphall, *Thomas Benton Catron and his Era* (Tucson: The University of Arizona Press, 1973), 348–83.

4. Dorothy I. Cline, *New Mexico's 1910 Constitution: A Nineteenth-Century Product* (Santa Fe: The Lightning Tree Press, 1986), 33–36.

5. Westphall, *Thomas Benton Catron*; Malcolm Ebright, *The Tierra Amarilla Grant: A History of Chicanery* (Santa Fe: The Center for Land Grant Studies, 1980).

6. Fall to Catron, 11 November 1912.

7. Catron to Fall, 17 November 1912.

8. Wells A. Hutchins, "The Community Acequia: Its Origin and Development," *Southwestern Historical Quarterly* 31 (July 1927–April 1928), 261–84; Jose Rivera, *Acequia Culture: Water, Land, and Community in the Southwest* (Albuquerque: University of New Mexico Press, 1998).

9. 1905 Laws of New Mexico, Chapter 102, "An Act Creating the Office of Territorial Engineer, etc.;" 1907 Laws of New Mexico, Chapter 49, "An Act to Conserve and Regulate the Use and Distribution of the Waters of New Mexico, etc.;" Hall, *A Brief History of New Mexico Water Rights Administration since 1907* (Denver: CLE International, 1997).

10. *New Mexico ex rel. Red River Valley Co. v. 4th Judicial District*, 39 N.M. 523, 51 P2d. 239 (1935).

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

12. Hall, "San Miguel del Bado and the Loss of the Common Lands of New Mexico Community Land Grants," *New Mexico Historical Review* 66 (October 1991), 414n2; Malcolm Ebright, *Land Grants & Lawsuits in Northern New Mexico* (Albuquerque: University of New Mexico Press, 1994), 105–23, 268–70.

13. Testimony of G. W. Maxwell in *State ex rel. Community Ditches*, 19 N.M. 352, in Transcript of the Record, Supreme Court of New Mexico No. 1662, microfiche frame 223 in Microfiche Records of the New Mexico Supreme Court, Law Library, University of New Mexico. See also Transcript of the Record, Box 903, Catron Papers, 181, for a blue-line copy of the transcript: Q: "Are you the owner, Mr. Maxwell, of any water rights in that ditch?" A: "Yes, sir, I am the owner of water rights." Q: "How did you get them?" A: "Paid the money same as buying a horse and have been paying taxes on them since 1895 as personal property." Q: "Buy land or water rights alone?" A: "The water rights alone."

14. Testimony of Manuel Ortega, NMSCt. No. 1662, Frame 332, Transcript 290; Helen Shields, *Las Acequias de Tularosa: The Ditches of Tularosa* (Privately printed, 1987), 2-4; C. L. Sonnichsen, *Tularosa: Last of the Frontier West* (1960; Albuquerque: University of New Mexico Press, 1980), 9-16.

15. William deBuys, *Enchantment and Exploitation: The Life and Hard Times of a New Mexico Mountain Range* (Albuquerque: University of New Mexico Press, 1985), 176.

16. See Joseph Fillippi, "History of Flooding on the Rio Grande" (1940), Misc. Files, Middle Rio Grande Conservancy District, Albuquerque; "The Town of Manzano Grant" in J. J. Bowden, "Private Land Claims in the Southwest" (Master of Law Thesis in Oil and Gas, Southern Methodist University, Dallas, Texas, 1969), 242 (Rare Book Room, University of New Mexico Law Library), describing the founding of Manzano as a result of the 1829 flood at Tomé on the Rio Grande main stem.

17. Testimony of Rosalío López, NMSCt. No. 1662, Frame 235, Transcript 193; testimony of Victoriano Durán, Frame 121, Transcript 83.

18. Medler opinion, 11 January 1913, Frame 324 ff.

19. Salvador Montoya to Alcalde de Santa Ana García Montoya, 1 August 1838, Seligman Collection, University of New Mexico General Library, directing users to work on a common Pueblo and Hispanic ditch or forfeit their rights to water. Michael C. Meyer, *Water in the Hispanic Southwest: A Social and Legal History, 1550-1850* (Tucson: University of Arizona Press, 1984), 160.

20. Sections 12 and 45, Chapter I, Title I-Acequias, Compiled Laws of the Territory of New Mexico of 1897.

21. "An Act Especially for the Precinct Number 11 of Dona Ana County" adopted 31 January 1866, *Statute Laws of New Mexico 1865-1866*, 138-43.

22. N.M. Const. Art. XVI, Sec. 2; 1907 Laws of New Mexico, Chapter 49.

23. See Laws of New Mexico, 17 January 1862, 21 January 1868, 30 January 1868, dealing with the water supply of the Town of Socorro; decision of Juan José Lobato, 30 October 1823, Spanish Archives of New Mexico, State Records Center and Archives, Santa Fe (SANM), Series I, no. 1292, describing

the Taos Pueblo as the "total owners" (*duenos despoticos*) of the entire (*desde su fuente*) Río Lucero. See also Daniel Tyler, *The Mythical Pueblo Rights Doctrine: Water Administration in Hispanic New Mexico* (El Paso: Texas Western Press, 1990.)

24. *California-Oregon Co. v. Beaver Portland Cement*, 295 U.S. 142 (1936).

25. Jerry Ritter, "Federal Townsite Laws and Townsite Settlement in New Mexico," paper submitted to author in a course titled "New Mexico Land and Water Legal History," University of New Mexico Law School, Spring 1986 (in author's possession); Michael Rock, "Silver City's Townsite," undated, Center for Land Grant Studies, Guadalupita, New Mexico; Act of 1867, 14 *Statutes at Large* 541, *Globe* 37th Cong., 3d sess., 1863, 1108-10.

26. Compare Ebright, *Land Grants and Lawsuits*, 9-54, and David E. Vassberg, *Land and Society in Golden Age Castile* (Cambridge: University Press, Cambridge, 1984), 5-15.

27. "Map of the Tularosa Townsite Belonging to the Inhabitants of the Tularosa, Doña Ana County," filed in the Doña Ana County Probate Court, 10 August 1885, and reproduced in 1979 by Human Systems Research, Inc., Tularosa, New Mexico.

28. Shields, *Las Acequias de Tularosa*, 3; Testimony of Rosalío López and Victoriano Durán in NMScT. No. 1662. The solares contained less than a quarter-acre, the hortalizas almost two acres.

29. Dora P. Crouch, Daniel J. Garr, and Axel I. Mundigo, *Spanish City Planning in North America* (Cambridge, Mass.: MIT Press, 1982.)

30. Meyer, *Water in the Southwest*, 34-40.

31. Thomas F. Glick, "The Old World Background of the Irrigation System of San Antonio, Texas," *Southwestern Studies Monograph* 25 (El Paso: Texas Western Press, 1972).

32. Compare Hall, "San Miguel del Vado and the Loss of the Common Lands," 413-32.

33. Marc Simmons, "Settlement Patterns and Village Plans in Colonial New Mexico," *Journal of the West* 8 (January 1969), 7-21.

34. Meyer, *Water in the Hispanic Southwest*, 137-40.

35. Students of the prior appropriation system that Catron and Fall had just established in New Mexico when the Tularosa water battle was reaching fever pitch will notice in the *primacia* rights of community ditches and the *sobran* rights of others a rough equivalent to the "senior" and "junior" rights that would drive the Colorado doctrine system that became the fundamental law of the new State of New Mexico. However, the fit is elusive at best and deceptive at worst. The *primacia* rights recognized by custom in various communities in New Mexico and by 1866 Territorial Statutes at Tularosa were not so much assignments of priority dates as grants of fundamental legal power to control water from a designated source such as the Tularosa Creek.

Conversely, the assignment of sobrante status to other rights did not so much make those rights junior in time as it made them subservient in power.

In at least two other ways, the system of water distribution initially established at Tularosa and long established elsewhere in New Mexico differed fundamentally from the system that statehood brought to New Mexico. In the first place, at Tularosa, priority of appropriation did not give the better right to water in times of shortage. Instead, the community ditch, through its elected officers and its mayordomo, determined which uses were more important and allocated water accordingly. Obviously at Tularosa, domestic water at the center of town enjoyed a preference in times of water shortage that had nothing to do with the relative date when the right was established.

In the second place, again at least initially, individual lot owners had no private claim to water delivered through the community ditch system. Individuals expressed their interest in the allocation of water through their political participation in the ditch institution as a whole. Individual water rights had not yet fractured the corporate community ditch and forced the institution to yield to minority or even individual preference.

36. N.M. Const. Art. XVI, Sec. 4; *Snow v. Abalos*, 18 N.M. 681.

37. Testimony of Victoriano Durán, NMSCt. No. 1662, Frame 121, Transcript 93. Durán testified that when he arrived at Tularosa in 1863, settlers occupied eleven of 196 solares and 45 of 107 hortalizas.

38. See *Tularosa Ditch Case*, 19 N.M. 352 at 357.

39. Rivera, *Acequia Culture*, 230; *Wilson v. Denver* 125 N.M. 308, 961 P.2d 153 (1998).

40. Thomas F. Glick, *Irrigation and Society in Medieval Valencia* (Cambridge: Harvard University Press, 1970); Vassberg, *Land and Society in Golden Age Castile*.

41. Baxter, *Dividing New Mexico's Waters*, 99; Philip J. Rasch, "The Tularosa Ditch War," *New Mexico Historical Review* 63 (July 1968) 229-35.

42. Testimony of Victoriano Durán, NMSCt. No. 1662, Frame 123.

43. Hall, "San Miguel del Bado and the Loss of the Common Lands."

44. Adjudication by the United States of land titles guaranteed by the 1848 Treaty of Guadalupe Hidalgo formally opened the issue of land titles inherited from the Spanish and Mexican antecedent sovereigns. Sharp-dealing Hispanic ricos and innocent residents had responded by asserting individual interests in what traditionally had been regarded as community lands. Anglo speculators created a demand for such "private" interests and engaged in a lively trade buying and selling them. At Tularosa, the drive to privatization pushed against communal water, not land; the splintering of indigenous communities was the same.

45. Westphall, *Thomas Benton Catron*, 68-70; Baxter, *Dividing New Mexico's Waters*, 100.

46. Baxter, *Dividing New Mexico's Waters*, 100; testimony of Victoriano Durán, NMSCt. No. 1662; testimony of Eli Knight, NMSCt. No. 1662, Frames 260-64, Transcript 277-78, 288-89; Westphall, *Thomas Benton Catron*, 68-70.

47. Testimony of Eli Knight, Frame 256, Transcript 281-82; testimony of Otero County Clerk Charles E. Thomas, Frame 119-21, Transcript 131-34; Frame 291, Transcript 249; testimony of Renee B. Fields, Frame 265, Transcript 223.

48. *Tularosa Ditch Case*, 19 N.M. 352, 358, and 361.

49. Baxter, *Dividing New Mexico's Waters*, 100; *Tularosa Ditch Case*, 19 N.M. 352 at 358.

50. *Tularosa Ditch Case*, 19 N.M. 352, 358, and 361.

51. Baxter, *Dividing New Mexico's Waters*, 101.

52. Final Decree, 29 April 1909, *The Tularosa Community Ditch v. The Tularosa Land and Cattle Company et. al.*, No. 293, District Court, Otero County (SEO).

53. *Tularosa Ditch Case*, 19 N.M. 352 at 359.

54. The Tularosa Community Ditch made the first move towards mutual recognition when in its 1909 elections it allowed the owners of lots within the Tularosa Townsite to participate in its ditch elections, albeit allowing each lot owner only one-quarter of a vote and not the full vote allotted to each of the 107 water rights owners identified in the Mann decree. Then in March 1910, a new Otero County district judge took a little more of the harsh edge off of the 1909 exclusive list when he ordered that the Tularosa Community Ditch had to allow sufficient water to reach the townsite, at least for domestic purposes, even though the Mann decree had not listed the townsite among its 107 water rights. Testimony of J. C. Cravens, Transcript 178, and testimony of Thomas M. Shields, Transcript 115 and 123

55. Fall to Catron, 11 November 1912.

56. Petition to State Engineer from the Tularosa Community Ditch; Eli Knight to Charles Catron, 17 April 1912; and protest of Homer W. Scofield, 28 March 1912, *In Re Application of Tularosa Community Ditch to Change Place of Use of Tularosa River*, Catron Papers 201, Box 3, Folder 1.

57. See *Tularosa Ditch Case*, 16 N.M. 200.

58. Spanish and Mexican water practices seemed to have recognized such a categorical preference. Guillermo F. Margadant, "Memorandum on Water Rights of Indian Communities in New Mexico," 1 November 1989, 117, in *State of New Mexico ex rel. Reynolds v. Aamodt et al.*, No. 669 DC N.M. Early, random water statutes of the Territory of New Mexico may have confirmed it. The Territory's first comprehensive attempt to regulate acequias in 1897 gave to "the inhabitants of all unincorporated towns or villages . . . a prior right to the use of so much of the water of rivers, streams, and other running water as shall be necessary for domestic and sanitary purposes." Chapter 1, Section 7, 1897, *Compiled Laws of The Territory of New Mexico*. Tularosa certainly prac-

ticed it. Testimony of D. G. Harris, NMScT. 1662, Transcript 193: "Q: And as far as you know of your own knowledge, this water for domestic purposes has been used . . . and been allowed in preference to any other uses? A: Yes. sir."

59. Report of Committee on Irrigation and Water Rights, 24 October 1910, in *Proceedings of the Constitutional Convention of the Proposed State of New Mexico* (Albuquerque: Press of the Morning Journal, 1910), 146-47. Section 4 of the original draft included the provision that "(d)omestic use shall be the highest and first use and the use for agricultural purposes shall have priority over the use for mining and manufacturing purposes." The committee itself deleted all of sections 4 and 5.

60. N.M. Const. Art. XVI, Sec. 2.

61. James R. Kluger, *Turning on Water with a Shovel: The Career of Elwood Mead* (Albuquerque: University of New Mexico Press, 1992).

62. A special statute, argued the Water Rights Ditch, governed the kind of challenge to elected authority that the Townsite Ditch wanted to make. Since the townsite had not invoked the statute, it could not challenge the governing board of the Water Rights Ditch. *Tularosa Ditch Case*, 16 N.M. 200 (3 March 1911).

63. *Tularosa Ditch Case*, 16 N.M. 750 (23 December 1911).

64. *State ex rel. Community Ditches v. Tularosa Community Ditch*, 19 N.M. 352 (1914), Information filed 26 January 1912.

65. The secretary of the townsite ditches during the period estimated that in 1900 only four hundred acres were cultivated outside the formal townsite. By 1911, the amount had grown to fourteen hundred, with the greatest increase coming after 1906. The testimony at the 1911 trial indicated that the transfers of water rights from inside to outside the townsite had made the increase outside the townsite possible. The Otero County clerk testified that the county records included scores of deeds transferring "water rights" to the large ranches outside of the townsite. Testimony of Otero County Clerk Charles Thomas, Frame 119-21, Transcript 137-39.

66. *Tularosa Ditch Case*, 19 N.M. 352, 360-62; Motion to Quash Information, filed 15 February 1912, Frame 13-14.

67. Order admitting evidence from No. 293 in NMScT. No. 1662, 5 March 1912, Frame 42.

68. Order, 28 June 1912, directing that "during the pendency of this suit" the parties had to "cause to flow in the main ditch of the Town of Tularosa a sufficient quantity of water for domestic purposes for the people of said Town." NMScT. No. 1662, Frame 41.

69. Edward L. Medler opinion, 11 January 1913, NMScT. No. 1662 ("Medler Opinion"). See *Tularosa Ditch Case*, 19 N.M. 352 at 363: "The trial court filed a written opinion in the case, which evidences an exhaustive research of the authorities, and also great learning and ability."

70. See Samuel C. Wiel, *Water Rights in the Western United States* (San Francisco: Bancroft-Whitney Co., 1911), sections 68 and 115; C. S. Kinney, *A Treatise on the Law of Irrigation and Water Rights*, 2nd ed. (San Francisco: Bender-Moss, 1912).

71. Townsite Ditch lawyers W. J. Connell and Edwin Mechem had mentioned the California "Pueblo Rights Doctrine" cases in the second 1911 appeal to the Supreme Court of New Mexico. "Syllabus by the Court," *Tularosa Ditch Case*, 16 N.M. 750.

72. *State ex rel. Community Ditches v. Tularosa Community Ditch*, 19 N.M. 352, 363.

73. Medler Opinion, 11 January 1913, NMScT. No. 1662: "From the foregoing my conclusions are: That the 'water rights' as hereinabove described, claimed in the Tularosa Acequia or Ditch, have no foundation in law and are therefore void."

74. "An Act Creating the Office of the Territorial Irrigation Engineer, to Promote Irrigation Development and Conserve the Waters of New Mexico for the Irrigation of Lands and Other Purposes," 1905 Laws of New Mexico, Chapter 102; "An Act to Conserve and Regulate the Use and Distribution of the Waters of New Mexico; To Create the Office of Territorial Engineer; To Create a Board of Water Commissioners, and for Other Purposes," 1907 Laws of New Mexico, Chapter 4 ; N.M. Const. Art. XVI, effective 6 January 1912.

75. Medler Opinion

76. Medler opinion; see Baxter, *Dividing New Mexico's Waters*, 72-74.

77. Medler opinion.

78. Iris Engstrand, "Water Rights of Municipalities under the Governments of Spain and Mexico and the California Pueblo Rights Doctrine," 14 February 1986, exhibit in *State v. Lewis*, Chaves County nos. 20294 and 22600 Consolidated, Chaves County District Court, New Mexico; City of Las Vegas sub-files UP 8.39-8.45.

79. Medler opinion.

80. Hutchins, "The Community Acequia," 277-78, estimates 480 community ditches as of 1909, 64% of which were instituted in the nineteenth century.

81. A fundamental flaw in the California pueblo rights doctrine also affected Judge Medler's application of it to the townsite ditches of Tularosa. Both analyses confused a rule of property with the assignment of political jurisdiction. California's pueblo rights doctrine may not have created ownership of the water in California cities so much as assigned to them in the first instance the power to determine how public water should be used within their boundaries. New Mexico's community ditches had not so much title to water as the power to act to distribute the water among users of the common system. Both in California's and Medler's view, power and ownership were the same

big thing: Mexican cities in California and community ditches in New Mexico owned water.

82. N.M. Const. Art. XVI, Sec. 2: "The unappropriated water of every natural stream, perennial or torrential, within the State of New Mexico is hereby declared to belong to the public."

83. *Snow v. Abalos*, 18 N.M. 681.

84. *State ex rel. Community Ditches v. Tularosa Community Ditch*, 19 N.M. 352.

85. *State ex rel. Community Ditches*, 19 N.M. at 364.

86. *State ex rel. Community Ditches*, 19 N.M. at 352. For those cities in the Southwest founded prior to 1848, the so-called "Pueblo Rights" doctrine proved a fertile ground for endless legal conflict. Compare *City of Los Angeles v. City of San Fernando*, 14 Cal. 3d. 199, 123 Cal. Rptr. 1, 537 P.2d 1250 (1975) (California), with *In re Contest of the City of Laredo to the Adjudication of Water Rights in the Middle Rio Grande Basin and Contributing Tributaries*, 675 S.W.2d 257 (Tex. App. 1984)(Texas), and *Cartwright v. Public Service Co.*, 66 N.M. 64, 343 P.2d 654 (1958), and *State v. Las Vegas*, 118 N.M. 257, 880 P.2d 868 (1994) (New Mexico). G. Emlen Hall, "Shell Games: The Continuing Legacy of Rights to Minerals and Water on Spanish and Mexican Land Grants in the Southwest," *Rocky Mountain Mineral Law Institute* 36:1 (1991).

87. *State ex rel. Community Ditches*, 19 N.M. at 370.

88. See *Murphy v. Kerr*, 296 F. 536 (DCNM, 1923), 5 F.2d. 908 (8th Cir., 1925).

89. *State ex rel. Community Ditches*, 19 N.M. at 370-71.

90. See Kluger, *Turning on Water with a Shovel*, 10-26; Donald J. Pisani, *To Reclaim a Divided West: Water, Law and Public Policy 1848-1902* (Albuquerque: University of New Mexico Press, 1993), Chapter 2.

91. Ebright, *Land Grants and Lawsuits in Northern New Mexico*; Robert D. Shadow and Maria Rodriguez-Shadow, "From Reparticion to Partition: A History of the Mora Land Grant, 1835-1916," *New Mexico Historical Review* 70 (July 1995), 257-98.

92. Stipulated Decree, 9 February 1965, in *Village of Tularosa v. Tularosa Community Ditch*, No. 10450 Otero County, State of New Mexico, SEO M. B. Compton to D. E. Grey, "Review of Files relating to Mescalero Apache Indians and Tularosa Creek," 13 December 1969, Water Rights Division, SEO.

93. *Ensenada Land and Water Association v. Sleeper*, 107 N.M. 579, 686 P.2d 269 (1984); 107 N.M. 494, 760 P.2d 787 (1988); 107 N.M. 413, 759 P.2d 200 (1988). "In Re the Application of the Mora Fish Hatchery," Water Rights Division, SEO (1999).

94. *Wilson v. Denver*, 125 N.M. 308, 961 P.2d 153 (1998).