Preserving and Protecting the Chicano's Water Heritage

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Preserving and Protecting the Chicano's Water Heritage

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In the welcome address, Professor Romero introduced the importance of discussing water law and justice in the contexts of equality, equity, and inclusion. He pointed out that often, in our efforts to discuss diverse communities, we think of them from a deficit standpoint. To adequately engage other communities, we must begin approaching them as asset-based communities and focus on building bridges and communication. The University of Denver Sturm College of Law wants to help its students build these bridges and continue working side by side with these diverse communities.

José Roberto (“Beto”) Juárez, Professor of Law at the University of Denver Sturm College of Law, moderated this panel discussion. Professor Juárez began with an introduction of the history of water irrigation in the American Southwest through the use of acequias. These acequias were part of the fundamental infrastructure for developing the Southwest and helped make the arid land livable and profitable.

José Martinez, a board member of the Land Rights Council, began the panel discussion by describing the Culebra Basin, ten miles north of the New Mexico border and just east of the Sangre de Cristo mountain range. The Culebra Basin is made up of nine canónes that bring water down the east side of the mountains and provide irrigation to the farm lands below. From north to south, the canónes come off the mountain as follows: El Poso, El Cañón de Chama, North Vallejo, South Vallejo, Vallejos, San Francisco Creek, El Tocito, Los Cuates, and Jaroso.

Mr. Martinez then painted a picture of how his forefathers set up acequias to utilize the water from the canónes. Acequias are simply diversions from the river that use an initial main water gate to bring water into a system of trenches. These trenches then divert the water to other acequias, which, in turn, distribute the water to every property in the area. Mr. Martinez gave a focused discussion on his community’s acequia system that diverts water from the San Francisco Creek. Two main diversions, Acequia Number One and Nana (mother) Ditch, serve seventy-six irrigators. Irrigation is a part of the way of life for Mr. Martinez and his neighbors. He often spends time meditating while irrigating; he marvels at the history of the acequia system and how the pioneers figured out how to serve every parcel of land so that the people of the towns could feed themselves and profit from the land.
Depending on the acequia system means always hoping for good moisture and snow through the winter. Last year, southern Colorado saw plenty of snow, and Mr. Martinez was able to grow nearly forty percent more hay than normal. However, this year's lack of precipitation is cause for much concern. The acequia form of irrigation has been prevalent in the San Luis area for over one hundred and fifty years, and Mr. Martinez recommended paying the San Luis area a visit to experience the history personally.

Juanita Martinez, who is Mr. Martinez's wife and also a board member for the Sangre de Cristo Acequia Association, spoke next and transitioned the discussion from the history of the acequias to the forward-looking politics of the San Francisco Creek Acequia community. She proudly announced that since her husband has served as president of their comisión—the acequia governing body that meets once a year—women have since held the treasurer and the secretary positions. Women traditionally have not served on the comisión in the past. At the annual meeting, every land owner with a water right to irrigate comes together and elects, or re-elects, the comisión for the coming year. This meeting was historically male dominated, but in the past five years women have begun to partake in the process. Voting rights are tied to the land—every parcel of land gets one vote. This is a different voting system than a mutual ditch, where the owner with more shares of the ditch gets more votes. Mrs. Martinez lauded the democratic and equitable nature of the acequia voting system. The acequia community looks at specific needs when making decisions during times of drought, and the community members try their best to work together and accommodate all of those needs. However, at times of shortage, tensions can run high. With such a democratic and community focused system, communication is vital for effective governance.

Mrs. Martinez lives in a small village with approximately ninety people. Her community has a strong religious foundation. The community operates under traditional cultural values, and everyone knows their role and adheres to the order and structure. Such traditional values may strike those from modernized cities as outdated and unrelatable, but those values help preserve the heritage and history of the acequias and their way of life.

David Benavides, the managing attorney in the Land and Water Project for the New Mexico Legal Aid organization, followed Mrs. Martinez with a discussion about his work in New Mexico on water transfers in relation to acequias. He began the discussion with a quote from Helen Ingram:

"Water . . . symbolizes such values as opportunity, security, and self-determination . . . Strong communities are able to hold on to their water and put it to work. Communities that lose control over water probably will fail in trying to control much else of importance."

Mr. Benavides felt that this quote accurately portrays how water is viewed in the West. He discussed the inherent tension in the law between water as a freely moveable personal commodity and water as part of a community's security. Water transfers are permitted by law, but only through a highly regulated process. Mr. Benavides questioned whether such a process incorporates the protection of a community's self-determination, and whether the law recognizes the value of water in the way described by Helen Ingram.
Mr. Benavides went on to explain New Mexico’s water transfer requirement that a transfer not be detrimental to the community from which the transfer is made. This subjective standard allows the law to promote the community values described above. Acequias are community oriented. Many living with the acequias system believe that because the water belongs to the community, water transfers out of the community should not be permitted. Mr. Benavides commented on the first case dealing with the public welfare language of New Mexico’s statute, *Application of Sleeper*, 760 P.2d 787 (N.M. Ct. App. 1988). The *Sleeper* case lost on appeal because the water transfer was proposed before the public welfare language was adopted into statute. After *Sleeper*, the state engineer purposefully tried to avoid evaluating the public welfare element when making water transfer determinations. In response, Mr. Benavides worked with the state legislature to give acequia communities the ability to make their own decisions on water transfers. Now, if an acequia puts into their bylaws that their comisión has the decision power for water transfers, all proposed water transfers from that community must be approved by the acequia comisión before ever going to the state engineer. Today, the acequia communities are writing the decisions that articulate the public welfare criteria in New Mexico.

Devon G. Peña, Founder and President of The Acequia Institute, and a Professor of American Ethnic Studies and Anthropology at the University of Washington, spoke last. Mr. Peña titled his presentation “Decolonizing Water Law,” and he focused on acequia legal ethics topics. First, he contended that acequia law is “true to place” and that acequias are “prior to prior;” even though the court in *Collin v. Left Hand Ditch* held that prior appropriation was the only water law “true to place” in Colorado. He also asserted that the Hallot Decree effectively acted as a theft of the acequias’ winter storage rights. Finally, he argued that the impact the acequias made on the San Luis Valley—from landscaping a beautiful environment for tourism to making the area farmable—entitles those using acequias to prior appropriation rights. In his view, it is amazing that the acequias survived with the “one owner one vote” model despite the law not acknowledging their mode of governance. Although some norms of the acequias, like cooperative community labor, have been under threat, many of the communities have begun to re-value traditional practices. He commented that acequia ecosystems bring great value to the environment through the creation of wetland habitats. Without water, there is no life. People speak of climate change, but Mr. Peña prefers to describe it as climate chaos. The increasing loss of snow pack each year has been extremely detrimental for the acequias.

Mr. Peña then focused in on a comparison between acequia water law and the prior appropriation doctrine. His comparison highlighted the community value of the acequia. Whether through “one farmer one vote” or shared scarcity in times of drought, the acequias rely on cooperation to govern and survive. In his view, the neighborliness of the acequias is what really sets them apart from the prior appropriation system.

After the conclusion of the panelist presentations, Professor Juárez facilitated a question and answer session with the audience. One audience member asked about adopting new modes of irrigation. Mr. Peña responded that the acequias are not resistant to change as long as the change preserves the natural wet lands. He also contended that questions on efficiency of the acequia irriga-
tion system detract from the injustice of the Hallot Decree. Mr. Peña also discussed the changes adopted during Lyndon B. Johnson’s presidential term. During that period of drought, the San Luis Ditch Company moved the ditch and lined it with cement to help with getting water to the end of the ditch. However, that cement is now cracking and imposing enormous repair costs. The acequia is contemplating going to a hybrid system that minimizes maintenance costs, but still capitalizes on some of the efficiencies gained from cement lining ditches.

Another audience member asked Mr. Peña to elaborate on the 14th Amendment issue he brought up in relation to the Hallot Decree. He explained that at the time, most of the acequia members neither spoke nor read English. Because of this, he asserted that the Hallot decision did not comply with the due process requirements of the 14th Amendment and is therefore unconstitutional. Thus, in his view, the acequias have been deprived of their winter storage rights without due process. In Mr. Peña’s opinion, to adequately preserve the acequia way of life, Colorado needs to allocate a line item in the annual budget to the acequias and permanently restore their winter storage rights.

Mrs. Martinez then answered a question on the “one farmer one vote” system. She explained that it does not matter if a farmer has one hundred acres or five, they still have only one vote. Despite this set up, the fee for use of the acequia is still a per acre fee. However, Mr. Peña and Mr. Benavides pointed out that some of the larger acequias have adopted a hybrid system, where certain issues are subject to the same “one farmer one vote” rule, but others are decided by proportional voting.

Mr. Benavides then answered a question on the difference between “public trust doctrine” and “detrimental to the public welfare.” He explained that the “public trust doctrine” is a court developed doctrine only affecting some water transfers. The “detrimental to public welfare” standard is statutory language that has been written into many states’ water transfer statutes.

Finally, an audience member asked what is being done in the local communities to ensure that younger members have the same kind of connections to the land as the older generations despite the ever-increasing mobility of the world around them. Mr. Peña answered first and stressed that they must protect what they have—the water. If they preserve their water now, it will be there for the younger generations. He also discussed the importance of teaching the younger generations the acequia way of life. He suggested that scholarships and grants for graduate student research could help further that endeavor. Mrs. Martinez followed with a forward-looking answer. Although she commented that teaching the young people in the community the way of life through events like the “limpiesa”—the cleaning out of the ditches—is important, she also stressed the necessity of adapting to the more mobile world. Her community has already taken steps to be more open and interconnected with the rest of the world.

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