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# Customary Practice and Community Governance in Implementing the Human Right to Water--The Case of the *Acequia* Communities of Colorado's Rio Culebra Watershed

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**CUSTOMARY PRACTICE AND COMMUNITY GOVERNANCE IN  
IMPLEMENTING THE HUMAN RIGHT TO WATER – THE CASE  
OF THE ACEQUIA COMMUNITIES OF COLORADO’S RIO  
CULEBRA WATERSHED**

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I. INTRODUCTION

An important aspect of the implementation of the human right to water in the West is recognition and protection of the right of peoples to define themselves and their cultures through their relationship to water and its management. The idea of water as a carrier of culture and as essential to identity may be especially important for communities of smallholder irrigators where water is both an essential economic resource and the basis for much of community life. These communities define themselves and their relation to place through their participation in the social and institutional arrangements on which irrigation management depends. Water management and watershed governance become

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sources of identity, manifestations of political competence, and foundations of effective civic life, which is especially meaningful for communities made up of the poor and historically marginalized. In these communities, water sustains basic life and is necessary for food security, but its management also defines the relationship of neighbor to neighbor and of people to place. Shared water governance serves as a primary structure for community life in landscapes created by shared labor and maintained by constant renewal of commitment to water management as a communal endeavor.

This paper offers commentary on the appropriateness of viewing, as a human right, the authority to manage water and to participate meaningfully in watershed governance, and it takes as an example the community of Hispano farmers of the Rio Culebra watershed of Southern Colorado in the headwaters of the Upper Rio Grande. In earlier work, the authors have written about the uneasy relationship between the formal system of appropriative water rights under Colorado law and the enduring set of local water norms practiced within *acequias*—the traditional water governance institutions and irrigation systems of the Culebra's Hispano farmers.<sup>3</sup> The present narrative will frame that work as part of the inquiry of Willamette University College of Law's Water Law Symposium into the nature of the human right to water in the American West. The history and present circumstances of the Culebra *acequia* farmers, as a case study, offer insight into the importance of recognizing group rights to exercise control over necessary water resources as a foundation for the protection of community rights to viable economic life, food security, and cultural survival. At issue in the *acequia* communities is the protection of communitarian power over water resources as a requirement for the survival of a very specific set of relations between people and the landscape in which they

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3. See Gregory A. Hicks & Devon G. Peña, *Community Acequias in Colorado's Rio Culebra Watershed: A Customary Commons in the Domain of Prior Appropriation*, 74 U. COLO. L. REV. 387 (2003) [hereinafter *Community Acequias*]. See also Gregory A. Hicks, *Acequias of the South-Western US in tension with state water laws*, in *OUT OF THE MAINSTREAM: WATER RIGHTS, POLITICS AND IDENTITY* 223 (Rutgerd Boelens, David Getches, Armando Guevara eds, 2010); Gregory Hicks & Devon Peña, *Conflicting norms in the struggle for communitary governance in the acequias of the Upper Rio Grande watershed*, presented at *Programme Justicia Hidrica: Acumulación de Agua, Conflictos, y Acción de la Sociedad Civil* 22-28 (Nov. 2009), available at [https://digital.lib.washington.edu/dspace/bitstream/handle/1773/16402/Conflicting\\_Norms\\_in\\_the\\_Struggle\\_for\\_Communitary\\_Governance\\_in\\_the\\_Acequias\\_of\\_the\\_Upper\\_Rio\\_Grande\\_Watershed.pdf?sequence=1](https://digital.lib.washington.edu/dspace/bitstream/handle/1773/16402/Conflicting_Norms_in_the_Struggle_for_Communitary_Governance_in_the_Acequias_of_the_Upper_Rio_Grande_Watershed.pdf?sequence=1).

live.<sup>4</sup>

At this writing, the Colorado *acequias* stand at an important crossroads. In April 2009, the State of Colorado adopted the Acequia Recognition Act (hereinafter ARA) to allow historically functioning *acequias* to achieve formal legal status as political and operating entities.<sup>5</sup> The ARA extends to Colorado *acequias* qualified protection for some of their most distinctive and necessary features of water governance and water allocation. The ARA reflects a new commitment by the state to view *acequias* not as outliers or oddities, but as effective institutions, true to place and expressive of a valid culture of water, placing *acequias* within a shared narrative of citizenship and civility. Nevertheless, the earlier hegemony of the law of prior appropriation, and its force as the still prevailing law, continue to matter for the prospects of reviving *acequia* institutions. The ARA exists within a context of laws and institutions that support the prior appropriation system and its values, which privilege private ownership of water, allow for the severance of water rights from the landscape in which the water flows, and imposes a regime of priority calls based only on seniority. These norms conflict with and press up constantly against the communal, place-centered norms of the *acequia*, which consider water a communal asset in the place, prohibit the separation of water from the land, and adhere to principles of equity and fairness as well as priority in the apportioning of water rights. Further, the first phases of consolidation of the law of prior appropriation in Colorado in the final decades of the nineteenth century resulted in a significant reduction in *acequia* water rights that affects them deeply to this day. This is all to say that the recognition of *acequias* has come late, as an exception to a strongly established structure of rights and values. It is clear that, if the *acequias* are to take advantage of the opportunity created by the ARA or community capacity building and retrieve some measure of their former authority over their waters, many disabilities created by modern Colorado water law must be overcome.

This paper will present a condensed account of the relevant

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4. See, e.g., GUSTAVO ESTEVA & MAHDU SURI PRAKASH, GRASSROOTS POST-MODERNISM: REMAKING THE SOIL OF CULTURE (Zed Books 1999) (presenting the thesis that human rights discourse must engage the protection of rights to culture and to society, which may at times be at odds with a vision of human rights centered on a conception of human identity and integrity that emphasizes individual autonomy as the foundation of rights).

5. Colo. Rev. Stat. § 7.42.101 (2009); 2009 Colo. Sess. Laws 1233.

history and present circumstances of the Culebra *acequias* necessary to understanding possible human rights arguments that support protection of *acequia* institutions and promote full engagement by *acequia* farmers in governance of the watersheds on which their irrigation communities depend. The paper will speak to the value of achieving true pluralism in water law and institutions to protect the social and natural resource capital of marginalized communities and to advance the human rights of economic and cultural life.

## II. CHARACTER OF THE CULEBRA WATERSHED

The Culebra River watershed is located in what is today Costilla County in the San Luis Valley of southern Colorado. Its headwaters constitute the western slope drainage of Culebra Peak in the Sangre De Cristo Range of the Colorado Rocky Mountains. Most production occurs on smaller family farms, and production on the watershed's 23,000 cultivated acres concentrate on livestock forage (alfalfa and grass hays), livestock production (cattle and sheep), and niche market specialty crops like the renowned chicos del horno (adobe oven-roasted heirloom corn), which are listed on the Slow Food USA "Ark of Taste" list of endangered and disappearing traditional foods and food ways. In earlier periods, row crops used for subsistence and local and regional markets formed a more important part of the total mix of crops, with farmers having developed and cultivated landraces of crops such as potatoes, pod beans, and maize adapted to the watershed's severe winter climate, short growing season, and high altitude (8000 feet above sea level).<sup>6</sup>

The total annual flow of the tributaries that make up the Culebra has ranged historically from 22,000 to 67,000 acre-feet during the season of irrigation, with an annual mean flow of 44,000 acre-feet.<sup>7</sup> With the exception of a large downstream reservoir (the Sanchez Reservoir), built in the early twentieth century to serve irrigated lands outside the immediate basin and the natural storage capacity of the sierra itself, where water is held as snow, there are no reservoirs in the Culebra watershed. As a result, the allocation of

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6. Devon G. Peña, *Cultural Landscapes and Biodiversity: The Ethnoecology of an Upper Rio Grande Watershed Commons*, in *Ethnoecology: Situated Knowledge/Located Lives* 107 (Virginia D. Nazarea ed., 1999) [hereinafter *Cultural Landscapes*]. See also Miguel A. Altieri, *Agroecology: The Science of Sustainable Agriculture* (2d ed. 1995).

7. Colo. Div. of Water Resources, *Rio Grande River Annual Calendar Year Flows 1890-2000* (2001).

water each year depends on the immediate availability of water in that year, and the viability of irrigation depends heavily on the health of the upper watershed—in particular, on the management of lands and forests to produce measured and steady snow melt throughout the irrigation season. There also are approximately 10,000 acres of wetlands and riparian corridors that are produced by the flood-irrigation practices of *acequia* farmers, and these are considered world-class examples of ecosystem services.<sup>8</sup>

The *acequia* landscape has genuine assets of enduring value: in the landscape itself, in the production methods of the *acequia* farms, in the preservation of traditional crops, and in the knowledge of both cultivated and wild plant stocks.<sup>9</sup> The ecological services provided by the landscape mosaic in Costilla County include a production landscape almost completely free of agrochemical inputs, which produces substantial annual savings in the form of soil conservation and soil formation. The culturally-based systems of water use and water governance are important elements of the ecological structures that create and sustain environmental wealth in the Culebra watershed. It is not only resources such as landrace fruits, vegetables, and grains that have a socio-cultural dimension, but also the watershed and endangered species services provided by *acequia* land use patterns and water practices. These culturally dependent natural resources have been generated by, and require the continuing preservation of, the specific patterns of habitation, land use, and social interaction of the *acequias*.

San Luis, Colorado's oldest town, is the population and commercial center within the watershed.<sup>10</sup> There are 619 people living in San Luis.<sup>11</sup> Other populated places, none of them more than hamlets, include San Acacio, San Francisco, San Pedro, San Pablo, Chama, and Los Fuertes. The total population of the watershed is approximately 1500 persons.<sup>12</sup> Annual average rainfall is approximately eleven inches, and thus farming depends principally on irrigation from the networks of community *acequia* systems fed by snowmelt from the Culebra and its tributary streams.<sup>13</sup> The

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8. See generally Devon G. Peña, *The Watershed Commonwealth of the Upper Rio Grande*, in *Natural Assets: Democratizing Environmental Ownership* 169 (James K. Boyce & Barry Shelley eds., 2003) [hereinafter *Watershed Commonwealth*].

9. Peña, *Cultural Landscapes*, *supra* note 6.

10. See Hicks & Peña, *Community Acequias*, *supra* note 3.

11. *Id.*

12. *Id.*

13. *Id.*

significant variability of water flows from year to year and the prevalence of drought in the American Southwest mean that, during many years, available water does not meet total potential demand. There are sixty-four functioning *acequias* in the Culebra watershed, each with its own governance and each responsible for maintaining and operating a system of community irrigation ditches.<sup>14</sup>

### III. HISTORY OF THE CULEBRA *ACEQUIAS*

#### A. *Settlement and Organization*

The *acequia* irrigation communities of the American Southwest have their origins in patterns of settlement under Spanish, and later Mexican, colonial authority.<sup>15</sup> Those irrigation communities were the products of a pattern typical of Hispano settlement of the upper Rio Grande region in which the Spanish, and later the Mexican, government would make land grants to encourage settlement of frontier zones. Groups of settlers would organize and build irrigation systems, receiving individual lands for farmsteads and rights in common with their fellow settlers to use water from the rivers for irrigation, to take timber and fuel wood, to hunt, and to graze their livestock on the open lands surrounding their farms.<sup>16</sup>

Consistent with the historical pattern, the *acequia* communities of the Culebra watershed were established in the years immediately following the nineteenth century war between the United States and Mexico (1846-48) on lands granted by the Mexican government shortly before its loss of sovereignty over the upper Rio Grande region.<sup>17</sup> By 1852, the first *acequia*, the San Luis People's Ditch, was established, delivering water to settlers in the chief Culebra settlement of San Luis de la Culebra.<sup>18</sup> An additional twenty-two *acequias* were created in the subsequent years of the settlement phase.<sup>19</sup>

The original pattern of land apportionment was designed to assure that each landholding would have access to the *acequia*

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14. *Id.*

15. See Hicks & Peña, *Community Acequias*, *supra* note 3.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

system and be amenable to irrigation through gravity-fed systems.<sup>20</sup> Water rights allotted to individual cultivators were tied to ownership of farmland within the *acequias*.<sup>21</sup> Water could not be severed from the land, and transfer of individual irrigation rights was strictly prohibited.<sup>22</sup> Moreover, the rights that any user could secure remained subject to the universal rights of others to share in available water when scarcity required rationing.<sup>23</sup> Prior use might be a factor in determining equity of allocation, but under conditions of scarcity, the law required allocation on the basis of criteria whose ultimate concerns were fairness to all and responsiveness to need.<sup>24</sup> Water use rights also were conditioned by a variety of other rules including participation in the maintenance and operation of the *acequia*, respect for irrigation schedules, and conformance with rules against waste of water or damage to other farmers and the land.<sup>25</sup> Water flowed through the community of users, supplying individual rights holders while providing many general benefits, including irrigation of a community grazing commons and, through sub-irrigation by water seeping from irrigated fields, creating woodlots and meadowlands.<sup>26</sup>

That history of land grant settlement and organization is evident today in the Culebra watershed and is most visible in the network of the community irrigation ditches, the layout of farmsteads, and the created landscape of wooded riparian corridors, meadows, and fields that transformed the valley floor. It is also evident in the egalitarian governance structure of the modern *acequias* inherited directly from the period of first settlement. Led by their *mayordomos*, who regulate ditch operations and oversee water use and ditch maintenance, and their *comisionados*, who represent the interests of all irrigators, *acequias* are directed by policies set at periodic meetings among all users who share in an *acequia's* waters.<sup>27</sup> Officers are elected by the vote of the water users, most often on the basis of one-landholder-one-vote and irrespective of the size of landholding or the amount of water

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20. See Hicks & Peña, *Community Acequias*, *supra* note 3.

21. *Id.*

22. *Id.*

23. *Id.*

24. See Hicks & Peña, *Community Acequias*, *supra* note 3.

25. *Id.*

26. *Id.*

27. *Id.*



entitled to be diverted.<sup>28</sup>

### *B. Impact of Prior Appropriation*

After the organization of the Colorado Territory in 1861, the older Mexican water rules were for a time accommodated by territorial law, and later by Colorado state law.<sup>29</sup> The period of accommodation ended, however, after the pivotal 1876 court decision, *Coffin v. Left Hand Ditch Co.*, in which Colorado affirmed its commitment to the law of prior appropriation as the foundation of water rights.<sup>30</sup> That change in the law was an expression of vigorous public policies insistent that water rights should be clearly proprietary and that rights holders should have the ability to transfer water as they saw fit, allowing the resource to be moved to take advantage of market opportunities.

With the coming of prior appropriation, *acequia* governance of water usage was formally supplanted by the state-administered system of water rights. Internal governance of each *acequia* was left with its ditch association, but the determination of the existence of water rights and the volumetric measure of those rights and of relative priorities to divert water became creatures of state law. The *acequias* ceased to be a formal source of rights and instead became part of the statewide system of water rights and water administration.

The decisive moment for the Culebra watershed *acequias* was a set of court proceedings beginning in 1889, which were intended to establish the relative priorities of the *acequias* and the scope of their rights to divert water. Priority dates from 1851 to 1860 were assigned to the longest established of the Culebra *acequias*. A quantification of rights resulted in cancellation of ninety-one of the original 197 cubic feet per second of continuous flow originally decreed to *acequia* rights holders. Each *acequia's* loss was proportional to the total loss.

The contraction of *acequia* rights was based on the doctrine of beneficial use, specifically on the argument that the *acequias* were claiming and using volumes of water far exceeding the amounts

28. *Id.*

29. See generally Hicks and Peña, *Community Acequias*, *supra* note 3 (documenting the history of the encounter between traditional *acequia* irrigation communities and the establishment of the system of appropriative rights and state water administration in Colorado).

30. See *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443 (1882).

required for effective irrigation. However, by diverting more water than the amount strictly necessary in years of abundant flow, *acequia* farmers had been able to recharge the basin's shallow aquifer, improving general soil moisture and saving water to irrigate from shallow wells in drought years. This was an adaptive practice that responded to the irregularity of water flows from the Sierra's snows from year to year and to the prevalence of drought in the basin. The "excess" diversions allowed water to be banked without the construction of artificial reservoirs beyond the technological and economic reach of the *acequia* communities.

The scarcities created by the general contraction of *acequia* water rights meant that there was no longer enough water to irrigate as before. Although an ethos of equitable sharing persisted as an informal understanding, scarcity of water and unpredictability of flows caused farmers to reduce acres under cultivation and to reduce investment in higher value food crops. The original twenty-three Culebra *acequias* were not on an equal footing in the distribution of available water under the prior appropriation system, and the impacts were most severe for *acequias* with more junior water rights. Lands lay fallow, and the watershed lost population, undermining these communities that were dependent on mutual aid and shared labor and producing a steady shift away from vegetables and grains and towards the production of hay, which requires less labor and less attentive irrigation. To this day, the *acequias* with the most robust governance structures and healthiest farmsteads are those with relatively more senior water rights.

#### IV. CONTEMPORARY WATER AND WATERSHED CONFLICTS AND THE *ACEQUIAS*

The tension between the rules and rights of the Anglo-American water allocation system and the norms and practices of the Hispano system remains an important factor in shaping perspectives within the Culebra community about just allocation of water. Each structure of ideas—commentary equity, on the one hand, and proprietary rights, on the other—plays a role in defining the sense of right and justice with respect to water, and at times, the structures combine themselves strangely. For example, it is a measure of the acceptance of the system of prior appropriation that few water users would view the superior water rights of older *acequias*, based on their relative seniority, as wrong, even though prior appropriation has produced clear winners and losers within

the watershed. However, the *acequia* norms limit the sense of wrong and invidiousness that might otherwise arise. A neighbor might well have land and a water right on a more senior ditch, but that neighbor can also be counted on to contribute labor at harvest time, to lend equipment and to help with repairs, to be a participant in a web of mutual assistance, and even to share water for irrigation.

For example, in 2002, the drought was so severe that only the three most senior of the Culebra *acequias* had water sufficient for irrigation.<sup>31</sup> The extant legal regime of prior appropriation did not allow those without water to insist on the sharing of water scarcity as would have been the case under earlier law, but some farmers cooperated by growing food together on the limited land that could be irrigated from the senior ditches. Of course, this adaptive approach to reallocation, providing water to those who would have had none, did not eliminate the economic hardship of a scarce water year, nor could it be insisted upon.<sup>32</sup> However, in the eyes of many irrigators, the older Hispano communitarian system continued to supply normative and functional justifications for insisting that water rights decreed to individuals remain burdened by collective duties.<sup>33</sup> The *acequia* ethos of equitable sharing and of common cause served to mitigate the inequalities of distribution under prior appropriation.

The persistence of *acequia* norms has depended in modern times on informal commitments among irrigators to maintain the usually unwritten rules for the apportionment of water rights on community ditches. Face-to-face normative coercion may have worked in the past when most irrigators were members of multigenerational farming families, but changes in ditch membership, inadequate water, and loss of population have made those connections more tenuous and less reliable.<sup>34</sup> Defection by newcomers to the community, who insist on a more individualized understanding of their water rights, and the very thinness of the community itself, means that there are fewer people who can be counted on to participate in networks of shared labor or in the

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31. See Devon Peña's field observation notes on effects of 2002 drought on irrigation practices (May 17, 2002) (on file with author); see also Interview with Adelmo Kaber, Owner, Adelmo Karber Farms, and Joseph C. Gallegos, Owner, Rancho Dos Acequias Farms, in San Luis, Colo. (May 17, 2002) (on file with author).

32. See Interview with Adelmo Kaber and Joseph C. Gallegos, *supra* note 31.

33. *Id.*

34. *Id.*

internal governance of the *acequias*. The will to participate is eroded further by a sense of loss of control over the landscape caused by subdivision for vacation properties that has intruded on the farming landscape and by industrial logging in the upper watershed that has disrupted water flows, making seasonal snowmelt less reliable and useful.<sup>35</sup>

Some conflicts between the *acequias* and Colorado law are rooted in the differences between customary irrigation practices and requirements of the doctrine of prior appropriation. The right of thirst—a commitment to the idea that all living things thirst and have a corresponding right to water—underlies the decision by most *acequias* to maintain their ditches in a more natural state with earthen-work banks that support habitat for wild plants and animals, many of which are important sources of food or medicine.<sup>36</sup> Thus, many *acequias* resist lining the ditches with concrete to reduce leakage along the riparian corridors. The Colorado State Engineer's Office and water courts tend to view this as a wasteful and inefficient practice. There is increasing pressure placed on the *acequias* to “modernize” and line the ditches to reduce the loss of water to phreatophytes (riparian vegetation). In fact, under Colorado water law, the loss of water to vegetation, including the creation of wetlands through sub-irrigation, can be considered “non-beneficial evapo-transpiration.” This corresponds with the idea that the state can compel irrigators to become more efficient in their use of water to meet with the doctrine of maximum utilization. The logical extension of this doctrine, in technological terms, means that irrigators should abandon the gravity-driven system of flood irrigation and use perforated pipes or drip irrigation to deliver water to crops, that the leaky earth banks of *acequias* should be lined with cement to reduce losses to riparian vegetation, and that the *acequias* should adopt other tools and practices to apply water more precisely to crop lands.

The heart of the matter for survival of the Rio Culebra *acequias* is dependence on a continuing loyalty to a system of water allocation that requires common maintenance of a network of earthen ditches and on a common commitment to the principle that water is to be shared in times of scarcity. No amount of mutual accommodation among the farmers will ever succeed in assuring the

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35. *Id.*

36. *Id.*

long-term viability of *acequia* farming and the survival of *acequia* watershed landscapes unless contemporary water law and watershed management are adjusted. The adjustments must address a long-term process of atrophying of commitment to *acequia* institutions and landscapes by remedying water scarcity and encouraging investment in the re-building of the social and natural resource capital of a self-governing, working agricultural landscape. The Acequia Recognition Act is intended to be a part of that re-building of institutions and community.

#### V. THE ACEQUIA RECOGNITION ACT<sup>37</sup>

To summarize, the Acequia Recognition Act:

- Recognizes *acequias* as among the oldest institutions in the United States for local self-governance of natural resources and situates them as a vital part of Colorado's water history.
- Acknowledges the continuing relevance and effectiveness of *acequias* in the communities where they survive.
- Celebrates *acequias'* distinctive water allocation practice in times of scarcity, affording access to water based on principles of equitable sharing and necessity.
- Acknowledges inconsistencies between the operation of the law of prior appropriation and the informal practices to which many *acequia* irrigators adhere.
- Views as a public good the promotion and encouragement of *acequias*.
- Enables traditionally operating *acequias* in stated Colorado counties to organize themselves formally as "*acequia* ditch corporations" on the vote of their water users, with the right to adopt certain specific governance and water allocation rules, namely, the right to hold elections on a one-landowner-one-vote basis, to demand labor or assessments to maintain the ditch system, to allocate water within a given *acequia* on the basis of need and equity, and to enjoy a right of first purchase in the event of proposed private transfers of

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37. Colo. Rev. Stat. § 7-42-101; see Appendix.

water historically used to irrigate land served by the *acequia*.

What is perhaps most striking about the new law is the tension between the very generous and embracing descriptions of historical *acequia* norms and practices and the rather constrained set of substantive powers conferred on the newly authorized *acequia* ditch corporations. In the all-important matter of being able to assure that water historically used on *acequia* lands will remain tied to those lands, *acequias* organized under the new law have a right of first offer to purchase water proposed to be transferred, not a right to bar the transfer.<sup>38</sup> The *acequias* will have yet to assemble the necessary money when they wish to buy these rights. The right to purchase is not the same as recognition that *acequia* water is a community asset, created by and belonging to the *acequia*, with the irrigator having a usufructuary right to the water only during the time of his occupancy of the irrigated land. Such would have been the understanding under relevant Spanish and Mexican law. The right to purchase is thus a partial accommodation in which the freedom to transfer water is adjusted by giving *acequias* the first right of purchase. Similarly, the statute's concession to *acequias* of the power to choose to distribute water within their boundaries on bases such as need and equity rather than on the basis of legally decreed shares asks very little of the generally prevailing law of water allocation. All rights holders on a given *acequia* typically enjoy equal seniority of rights, so that any voluntary re-allocation among them would be within the structure of existing temporal priority and without impact on water priorities beyond the boundary of the *acequia*.

The ARA is also silent on the role that *acequias* might play in watershed management, including land use practices with an impact on water flows and ecosystem function. Such participation is essential to inform application of the county's land use code and comprehensive plan to address incompatibilities between threatened uses of lands and the landscape management needs of *acequias*. The Sangre de Cristo Acequia Association (hereinafter SCCA), the principal Colorado syndicate of *acequias*, has expressed particular concern about already approved and planned subdivisions in sensitive areas deemed essential to *acequia* functioning and the

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38. Colo. Rev. Stat. § 7-42-101.

maintenance of watershed quality and wildlife habitat values.

One possibility for increasing the effectiveness of *acequias* in watershed planning processes was proposed and rejected in the drafting stages of the Acequia Recognition Act: to allow organization of associations of *acequias* as Conservancy Districts or as special Acequia Conservancy Districts.<sup>39</sup> Conservancy Districts are important political subdivisions in rural life in the United States, with taxing power and rights of consultation. Had the final draft of the ARA included those provisions, *acequias* would have been given status as statutory referral agencies in land use decisions of relevance to *acequia* functioning and watershed management. The effort to achieve that status still is being pursued through discussions with the Costilla County planning office. The goal is to amend the county land use code to designate the Sangre de Cristo Association as an agency that can participate in the process of reviewing permits and also issue expert advice to the county land use office and commissioners on the impacts of proposals for land use changes and subdivision developments.

Taken as a whole, the Acequia Recognition Act's substantive provisions go so far only as to authorize local choice by individual *acequias* with respect to internal governance and water allocation matters within their boundaries. The ARA does not re-define water rights, nor does it give *acequias* a governance role beyond their own ditches. The ARA is especially incomplete in failing to create a role for *acequias* as participants in decision-making and as consultative bodies in matters affecting conditions in the watersheds on which their survival depends. In spite of its limitations, the ARA does create an opportunity for *acequia* farmers to renew their commitments to communal governance, and to revisit their commitments to the prior appropriation system and its logic of water as commodity. That achievement may create a foundation for further activism that can improve the effectiveness of the *acequias* within their watersheds.

## VI. THE HUMAN RIGHTS FRAMEWORK AND ITS SIGNIFICANCE

There are two principal international human rights declarations that speak to the circumstances of Colorado's *acequia* communities as communities of smallholder farmers dependent

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39. See generally Colo. Rev. Stat. § 7-42-101.

upon irrigation landscapes of their own making for economic well-being and as anchors of culture and identity. They are the Universal Declaration of Human Rights (hereinafter UDHR)<sup>40</sup> and Agenda 21 of the United Nations Conference on Environment and Development (hereinafter UNCED).<sup>41</sup>

UDHR Article 17 is of particular relevance to the protection of individual and group rights in natural resources, especially those resources that may have been created in part by the labor of the communities that depend on them. Article 17 provides that: (i) everyone has the right to own property alone as well as in association with others, and (ii) no one shall arbitrarily be deprived of his property. Article 17 is of importance as a statement of rights for *acequia* communities because of its acknowledgement of common, as well as individual, ownership of property and its statement against arbitrary expropriation. It makes problematic the changes in *acequia* water rights brought by the arrival of the system of prior appropriation in the late nineteenth century, which supplanted a system of community ownership of water with a system of individualized water rights whose attributes undermined the fundamental character of water within the *acequia* communities.

UNCED Agenda 21 adds to UDHR Article 17 a specific statement of the connection between human rights and the right to participate fully in the management of natural resources on which life and culture may depend.<sup>42</sup> Chapter 3 of Agenda 21 encourages governments to enable the poor to achieve sustainable livelihoods through community-driven approaches to sustainability, including fostering effective community participation in the management and

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40. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 (Dec. 10, 1948), available at <http://www.udhr.org/udhr/udhr.HTM>. The UDHR is the theoretical and structural basis for subsequent international conventions declaring civil and political rights and—although not legally binding—is of great political and symbolic importance. It is a source of the evolution of soft law, an aggregation of practices that become customary and emerge as law.

41. United Nations Conference on Env't and Dev. June 3-14, 1992, *Agenda 21*, U.N. Doc. A/CONF.151/26 (Vol. II) (Aug. 13, 1992), available at <http://www.un.org/documents/ga/conf151/aconf15126-2.htm>. Agenda 21 is a non-binding statement of priorities in the areas of sustainable development, environmental management and conservation. It was developed jointly by participating governments at the 1992 United Nations Conference on Environment and Development (the "Earth Summit"). A number of its 40 chapters provide a moral foundation supporting national action and international agreements in favor of sustainable agricultural livelihoods, community-grounded governance of natural resources and resource landscapes, and the engagement by vulnerable communities in the protection of fragile ecosystems.

42. *Id.*



protection of local natural resources to enhance their productive capacity.<sup>43</sup> Chapter 10 endorses integrated approaches to the planning and management of land resources, including the integration of traditional and indigenous methods, and the encouragement of active participation in decision-making processes by all affected persons, especially persons and communities who may previously have been excluded.<sup>44</sup> Chapters 12 and 13 of Agenda 21 acknowledge the importance of full participation by local people, especially of women and indigenous peoples, in the protection of fragile ecosystems, particularly recognizing the importance of their knowledge and experience in protecting vulnerable landscapes and sustaining livelihoods.<sup>45</sup> Chapter 14 calls for the promotion of a sustainable agriculture and of equitable rural economic development through appropriate technologies and farming techniques that ensure people's participation and the development of their human capital, grounded in equitable access to land, water, and forest resources, and to the material assets and support needed to make that access effective.<sup>46</sup> Chapter 18 deals specifically with protection of the quality and supply of freshwater resources through projects and programs that are economically efficient and socially appropriate, based on an approach of full public participation, including that of women and local communities in water policy-making and decision-making.<sup>47</sup> Taken together, the provisions of UNCED Agenda 21 and UDHR Article 17 affirm the necessary tie that exists between the success of rural, farming communities and the strength of their rights to own and to participate fully in the governance of the natural resources on which their lives and cultures depend.

The norms affirmed by UDHR Article 17 and UNCED Agenda 21 are strongly paralleled in Colorado's Acequia Recognition Act, which, with all its limitations, recognizes the value of local institutional adaptations in water management and celebrates the ties between people, place, and the communal governance of natural resource property. That common insight—that there are profound ties between people and the natural resource landscapes their labor creates—could be the foundation of deeper policy commitments in

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43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. UNCED, *supra*, note 41.

the American West, promoting more successful engagement by rural people in the landscapes on which they depend for their livelihoods and identities. In the context of the United States, the language and policy implications of ARA suggests that the dominant construction of rights as strictly pertaining to individuals is not truly exhaustive or deserving of absolute primacy as a legal principle. Rights attendant to the protection of an endangered culture, understood here as a whole way of life, and of the corresponding institutions of self-governance, can also be legitimately asserted as deserving of equal status. This does mark a profound departure from the dominant individualist construct of human rights in the United States. The following section describes challenges and strategies for encouraging more effective engagements in watershed resource governance, including water and land, by *acequia* farmers to achieve justice and ecosystem health in Colorado's Culebra watershed.

## VII. THE ROAD AHEAD

### A. *A Summary of Challenges to Recovery of Acequia Autonomy*

On the ground, there is a wide range of issues presenting immediate challenges for *acequia* communities in re-knitting their social and physical landscapes. Among the more serious threats already noted are the minimal investments of energy and commitment by *acequia* farmers in governance and management of irrigation systems, continued defections from non-legally binding norms of *acequia* self-governance, lack of authority to protect the landscapes and water sources on which *acequia* survival depends, and accelerating land development within critical and sensitive watershed areas. Simply put, the *acequias* have been diminished by loss of water and by loss of authority in the very landscape they have created and whose survival depends on their presence.

A newly emerging threat brings into focus the peril to *acequia* survival represented by loss of authority over the water landscape. It is possible that the 80,000-acre historical montane commons constituting the watershed and snowshed for *acequia* irrigation waters might be purchased by the federal government and managed as a National Forest. The upper watershed for the *acequias* in the Culebra River villages is presently the only high mountain watershed in Colorado (and indeed the entire Southwestern U.S.) that is

currently under complete private ownership.<sup>48</sup> However, despite being privately owned, those lands are also part of the historic common lands of the Sangre de Cristo land grant, the foundation of the Culebra *acequia* settlements.<sup>49</sup> Access to those common lands, as noted above, was an essential right of the *acequia* settlers. In a unique, precedent-setting decision, the Colorado Supreme Court ruled in 2002 in the case of *Lobato v. Taylor* to recognize the traditional use rights of the heirs and successors of the original Mexican land grant community, rights that had been repudiated for many years by the private owners of the land.<sup>50</sup> The decision means that, although the lands are privately owned, they are subject to the use rights of gathering wood and grazing livestock, of some 500 families that maintained those rights over the generations. The court's ruling has compelled a *modus vivendi* between the private owners of the Mountain Tract and the local holders of commons rights, who have arrived at a working relationship, though not without difficulty. One of the consequences of having regained rights of access to the historic community commons has been to strengthen awareness among *acequia* irrigators of the need for good management of the Mountain Tract to assure the protection of the watershed and the value of commons rights.

Ken Salazar, President Barack Obama's Secretary of the Interior and a native son of the San Luis Valley, visited San Luis on August 28, 2009, to participate in the dedication of the newly designated "Sangre de Cristo National Heritage Area" (hereinafter SCNHA), and, while there, made a shocking announcement: The federal government was actively planning to purchase all of the privately-held high mountain estates in the Sangre de Cristo Mountains in south central Colorado and north central New Mexico.<sup>51</sup> The families that have only recently won recognition of

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48. Gregory Hicks & Devon Peña, *Conflicting norms in the struggle for community governance in the acequias of the Upper Rio Grande watershed*, presented at Programme Justicia Hidrica: Acumulación de Agua, Conflictos, y Acción de la Sociedad Civil 22-28 (Nov. 2009), available at

[https://digital.lib.washington.edu/researchworks/bitstream/handle/1773/16402/Conflicting\\_Norms\\_in\\_the\\_Struggle\\_for\\_Community\\_Governance\\_in\\_the\\_Acequias\\_of\\_the\\_Upper\\_Rio\\_Grande\\_Watershed.pdf?sequence=1](https://digital.lib.washington.edu/researchworks/bitstream/handle/1773/16402/Conflicting_Norms_in_the_Struggle_for_Community_Governance_in_the_Acequias_of_the_Upper_Rio_Grande_Watershed.pdf?sequence=1).

49. *Id.*

50. *Labato v. Taylor*, 71 P.3d 938 (Colo. 2002); *Labato v. Taylor*, 70 P.3d 1152 (Colo. 2003).

51. Sangre de Cristo National Heritage Act, H.R. 171, 111<sup>th</sup> Cong. (2009); Nat'l Park Service, *Sangre de Cristo National Heritage Area*, <http://www.nps.gov/grsa/parknews/sangre-de-cristo-nha.htm>.

commons rights are now concerned that their cherished traditional resource rights, regained after a struggle of many years, will once again be lost now, as the result of a proposed "federalization" of La Sierra. Local *acequia* farming families fear that even if the Obama Administration and Secretary Salazar adopt a management plan that includes respect for and security of historic use rights, the political reality is that once the lands become part of the federal domain they will become subject to the cycles of shifting priorities that have long characterized management of the federal public lands. As a result, some local residents have pledged to engage in direct resistance to prevent a public domain enclosure that fails to secure and respect the historic use rights in perpetuity.<sup>52</sup> Others fear that the conversion of La Sierra to the public domain will close off the dream shared by the majority of the heirs to directly purchase the lands through a community land trust. This, too, has a precedent in the form of the Rio Costilla Cooperative Livestock Association (hereinafter RCCLA), which wisely gained ownership control of a significant chunk of the southern end of the Sangre de Cristo Land Grant in New Mexico.

Some of the *acequia* farmers who have regained rights of access to the mountain commons point out that the experience of Chicano people with federal ownership of lands once subject to rights arising under Mexican or Spanish land grants, has been anything but positive.<sup>53</sup> The management of federal forest lands typically has been driven either by the insistence of industry on destructive and non-sustainable resource extraction or by the efforts of environmental advocates to protect forest lands through preservation.<sup>54</sup> Neither agenda has proved congenial to protection of use rights by Hispano farmers and ranchers, and the United States Forest Service usually has been backward in following its own regulations to invest in stabilizing traditional rural, cash-poor, and resource-dependent communities, communities that are capable of being effective stewards of the land. The federalization of the lands, and especially the rumored creation of a national heritage park, would probably spell the end of the local farming community because this would bring unprecedented levels of pressure for development of and investment in private lands bordering the proposed federal lands. Those pressures would likely drive out

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52. Hicks & Peña, *Community Acequias*, *supra* note 3.

53. *Id.*

54. *Id.*

many of the multigenerational farm families. This is exactly what has transpired in other communities where the public domain has brought not just extractive industries like mining and logging but second-home amenity industries that drive the price of farm lands to speculatively high levels and thus undermine local farming systems.

The *Lobato* litigation secured a property right for *acequia* families in the historic commons of the Culebra settlements and revived the possibility of effective involvement by *acequia* communities in the stewardship of the vulnerable high mountain watershed.<sup>55</sup> The particular sting of the threat of federal ownership is substitution of public lands administration for the set of owner-to-owner negotiations that would otherwise shape how the recently won easements would be exercised. That shift would represent a loss of property and a loss of autonomy, echoing historical processes that have undermined *acequias* as effective actors in protecting and managing their water resources and landscape.

#### *B. Next Steps in Reviving Acequia Watershed Governance*

The primary focus of work by *acequia* activists in the Culebra watershed has been to improve *acequias* as water governance institutions, to protect the physical integrity of the watershed, to promote solidarity in facing external political and policy threats, and to promote a neighbor-to-neighbor culture for the sharing of water, skills, and labor. The passage of the Acequia Recognition Act has served as a rallying point for new commitment to *acequia* institutions and to the landscape created by *acequia* irrigation. The Sangre de Cristo Acequia Association, in particular, has worked to build and demonstrate the competency of *acequia* farmers and *acequia* organizations as stewards of water and of the watershed. It has undertaken successful watershed and stream monitoring projects, it has worked to improve internal governance within *acequias*, and it has been a voice in the state legislature and before state water management agencies, speaking on water policy, water rights, and watershed management.

These efforts will require response from the law and from other actors with the power to include or exclude the *acequias* as active agents in the shaping of water and land policy for the watershed. Among the legal responses that could be helpful would be authorization of a new class of Conservancy District for *acequias* to

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55. Hicks & Peña, *Community Acequias*, *supra* note 3.

formalize their political identity and to give them a secure place as a source of land management policy and of conservation initiatives within the watershed. If the acquisition of the mountain commons of the *acequias* by the United States goes forward, it would be highly desirable for the federal government to develop a management plan for the upper watershed that involves the *acequias*, that fully reflects the needs of *acequias* as a working landscape, and that is effective in protecting the ecosystems and agro-ecological wealth of the Culebra watershed. Additionally, of great importance would be the continuing evolution of understandings of appropriate water use and irrigation methods under Colorado law to make a more comfortable place for *acequia* methods as generators of natural resource wealth and as adaptive tools of effective water management. That evolution would be consistent with the spirit of the Acequia Recognition Act, and it would help to redeem the injury caused by past applications of prior appropriation doctrine to the irrigation technologies and water uses of the *acequias*.

An additional area of concern for restoring the effectiveness of water governance by *acequias* is increasing the participation and leadership of women. Anthropological studies suggest women have historically been the most critical players in the maintenance of *acequia* household farming economies. Yet, their role has not always been visible, and building women's participation in community leadership has been difficult. An example of the importance of women's participation is their impact on land management. Local women have been known to help mitigate the impact of livestock by pressuring men to keep grazing out of riparian areas where most of the wild-crafted plant species thrive. The inclusion of women will help strengthen the effects of ecological restoration values while enhancing the growing respect local men have for women as leaders and farmers. It is a vital part of the process of building a leadership for the *acequias* that is grounded in the intimate relation that must exist between *acequia* institutional arrangements and the requirements of sustainable farming and grazing by small holders in an environmentally demanding landscape.

Finally, in October of 2012, the *acequia* communities will convene the First Congress of Colorado Acequias in San Luis, Colorado. This important gathering will be an annual event and serve to place *acequia* farmers and their associations and networks in direct contact, collaboration, and exchange with other irrigators, local, state, and federal government officials, the philanthropic

community, academic scholars, and other stakeholders. The 2012 meeting will focus on several key issues, including the adaptation of *acequia* systems to climate change through the acquisition of additional water rights currently vested in more junior and conventional agribusiness interests. The meeting will also discuss the ongoing planning for the implementation of a recent Colorado Supreme Court ruling that requires junior groundwater rights holders to mitigate senior (*acequia*) surface rights holders for damages caused by overdrawn aquifers.<sup>56</sup> The Congress will also highlight issues facing women and younger farmers with limited resources and initiate discussions related to the establishment of a payment for an ecosystem services policy in Colorado that rewards the investments made by *acequias* in creating and protecting the “natural capital” of their watersheds.

The steps suggested here, both for law and policy changes and for strengthening the quality and responsiveness of self-governance, address the justice and the functionality of water management for the Culebra *acequias*. Each of the suggestions can also be linked to a provision of UNCED Agenda 21 or is in service to the community property interests recognized by UDHR Article 17.<sup>57</sup> It is perhaps a measure of the insight that Agenda 21 and Article 17 reflect that their provisions correspond so readily to the elements needed within the Culebra *acequias* to promote a revival of autonomy, democratic participation, and ecologically sound resource management by a sustainable community of smallholder farmers.

### VIII. CONCLUSION

This commentary, based on field work and investigations by Professors Devon G. Peña and Gregory A. Hicks, is intended to illuminate the common ground that exists between the discourse of human rights in water and the elements that must be in place to retrieve the potential of a particular community of irrigators to participate effectively in the governance of their watershed and water resources. The essential work to be done is to improve the capacity of the *acequia* farmers of the Culebra watershed to manage critical natural assets—both land and water—on which their livelihoods and way of life depend. Those goals can be significantly

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56. Well Augmentation Subdistrict of Cent. Colo. Water Conservancy Dist. v. City of Aurora, 221 P.3d 399 (Colo. 2009).

57. UNCED, *supra*, note 41.

advanced if the law and policies regulating watershed and water rights in the American West begin to reflect more completely the norms found in the Universal Declaration of Human Rights and in UNCED's.



## IX. APPENDIX

Concerning The Recognition Of Acequias, And, In Connection Therewith, Authorizing Acequia Ditch Corporations. *Be it enacted by the General Assembly of the State of Colorado:*

**SECTION 1. Legislative declaration.**

(1) The general assembly hereby finds that:

(a) The first nonnative Americans to settle in Colorado were Hispanics from colonial Mexico, who brought with them their ancient irrigation practices based on a community ditch called an "acequia", pursuant to which water was treated as a community resource and allocated based upon equity and need rather than priority of appropriation;

(b) Colorado's territorial session laws from 1868, 1872, and 1874 recognized the validity of acequias within the counties of Costilla, Conejos, Huerfano, and Las Animas, including the requirement for irrigators to contribute labor to the upkeep of the acequia and a preference over other diversions for acequias' diversions regardless of priority;

(c) As the general assembly recognized in the following excerpt from Senate Joint Resolution 02-028, the continued operation of these historic acequias is an "essential foundation for the sustenance of the local economy":

"WHEREAS, Spanish American settlers founded the Town of San Luis in the Culebra Valley in 1852, thus making it the oldest town in Colorado; and

"WHEREAS, In keeping with their ancestors' acequias tradition, these settlers quickly initiated an irrigation system; and

"WHEREAS, The oldest water right in Colorado is attributed to the San Luis People's Ditch, with a priority date of April 10, 1852, in the amount of 21 cubic feet per second from Culebra Creek in Costilla County; and

"WHEREAS, Originally, the land adjacent to the Ditch was divided into strips approximately 100 yards wide and 16 to 20 miles long, allowing settlers to have irrigated farmland near the Ditch and also to have access to range and timber land, and today, the Ditch is 4 miles long and irrigates 1,600 acres of farmland; and

"WHEREAS, The San Luis People's Ditch has been continuously operated for irrigation purposes for 150 years, thus making it an essential foundation for the sustenance of the local economy; . . ."

(d) Upon adoption of Colorado's constitution, the prior appropriation system became the law governing water allocation; and

(e) The prior appropriation system is, in fundamental ways, inconsistent with the community-based principles upon which acequias were founded.

(2) The general assembly hereby determines that:

(a) Notwithstanding the constitutional establishment of the prior appropriation system, communities that were historically served by an acequia have used informal methods to continue to allocate water based upon equity in addition to priority and to treat water as a community resource; and

(b) Recognition by the general assembly of the continuing existence and use of acequias, while continuing to comply with the constitutional requirements of priority administration of tributary water, is critical to preserving the historic value that acequias provide to the communities in which they are located.

(3) The general assembly hereby declares that the purpose of this act is to promote and encourage the continued operation of acequias and the viability of the historic communities that depend on those acequias.

**SECTION 2.** Article 42 of title 7, Colorado Revised Statutes, is amended by the addition of a new section to read:

**7-42-101.5. Acequia mutual ditch - definition - powers.** (1) For purposes of this section, "acequia" means a ditch that:

(a) originated prior to Colorado's statehood;

(b) has historically treated water diverted by the acequia as a community resource and has therefore attempted to allocate water in the acequia based upon equity in addition to priority;

(c) relies essentially on gravity-fed surface water diversions;

(d) supplies irrigation water to long lots that are perpendicular to the stream or ditch to maximize the number of landowners who have access to water;

(e) has historically been operated pursuant to a one landowner-one vote system; and

(f) has historically relied on labor supplied by the owners of irrigated land served by the acequia.

(2) Subject to any contrary provision of subsection (3) of this section, the procedural and substantive requirements of this article

other than this section that apply to the creation, powers,

(3) An acequia ditch corporation may be organized pursuant to this article, and a ditch corporation organized pursuant to this article may convert to an acequia ditch corporation, if:

(a) at least two-thirds of the irrigated land served by the ditch is platted or organized into long lots, the longest axes of which are perpendicular to the stream or ditch;

(b) surface water rights provide all of the water rights used for irrigation in the ditch, and such water rights have had substantially uninterrupted use since before Colorado's statehood;

(c) the irrigated land served by the ditch is located wholly in one or more of the counties of Costilla, Conejos, Huerfano, and Las Animas; and

(d) as required pursuant to section 7-42-101, the stockholders of the ditch file articles of incorporation, or an amendment to the articles of incorporation, that state the stockholders' intention to create or convert to an acequia ditch corporation.

(4) an acequia ditch corporation, if its articles of incorporation so state, may specify in its bylaws that:

(a) its elections may be held pursuant to a one landowner-one vote system;

(b) owners of land irrigated by the ditch can be required to contribute labor to the maintenance and repair of the acequia or, in the alternative, to pay an assessment in lieu of such labor;

(c) water in the ditch may be allocated on a basis other than pro rata ownership of the corporation; and

(d) the corporation has a right of first refusal regarding the sale, lease, or exchange of any surface water right that has historically been used to irrigate long-lot land by the acequia.

**SECTION 3. Safety clause.** The general assembly hereby finds, Determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety. duties, and governance of a ditch corporation subject to this article shall be deemed to apply to the creation, powers, duties, and governance of an acequia ditch corporation.