



Water governance in New Mexico: Adjudication, law, and geography

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ABSTRACT

Water rights adjudications lie at the intersection of law, space, and the geography of resource governance, combining elements of field cartography, archival research, and judicial supervision and decree. However, few geographers have examined the water rights adjudications now active in most western US states. Using case material and ethnographic vignettes from a larger geographic project on water rights and governance in New Mexico, I examine water adjudication as a vital instrument in the state's pursuit of spatial knowledge. Resources and water users are seen by the state through this process, while at the same time, water users may elude or confuse state legibility. In this process, altered forms of governance are produced. Here, I explore how the formalizing of water rights in New Mexico has articulated new legal-spatial relationships, which are often viewed differently by state and local agents. I then examine the products of adjudications and the tension between local and expert knowledge in natural resources governance over being seen and governed by the state and the struggle to retain local autonomy and governance in water management.

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1. Introduction

Sure, I remember the mapping. . . we thought they were doing some new property tax survey for the county. But they told us they were doing mapping for the [State] engineer's office, for water use and adjudication stuff. Then we got really pissed and scared (Rodriguez, 2010)

In the American West, nearly every state is engaged in some form of legal adjudication to document, quantify, and allocate water use and water rights. However, as the lead quote from an irrigator in the Taos Valley, northern New Mexico, implies, state attempts to map and govern water may create new tensions, those between local and so-called expert knowledges. Understanding these tensions is important for multiple reasons. First, such tensions help to explain why adjudications have taken so long, over 100 years and ongoing in the case of New Mexico. Second, they illustrate the different perceptions of water by water users as opposed to water administrators and managers. Third, they are partially why the state still has such a poor understanding of its own waters. Finally, the tensions between local and state interests are among the main challenges in managing water at different scales.

Although geographers have documented various cases of state and local property-making regimes (Emel et al., 1992; Hannah, 2000; Blomley, 2003, 2008; Delaney, 2003; Platt, 1994; Correia,

2009; Hausermann, 2012), we have largely ignored the cartographic and legal processes of water rights adjudications. This is striking given that adjudication determines the spatial and temporal distributions of water and who can use it. Here, I examine adjudication from the perspective of how the state spatializes water resources, and how state efforts to “see” water users, and local resistance to being seen, confound water resource management.¹ By deploying Scott's (1998, 2009) ideas on state legibility and simplification and local attempts to elude state legibility, the analysis holds implications for the production and renegotiation of local and expert knowledges in locales of water management and use (Robbins, 2000, 2003; Birkenholtz, 2008).

Nation-state pursuits of natural resource mapping are already well-documented (Scott, 1998; Craib, 2004; Carter, 2008). Previous studies have shown that the maps used in nation-state or parastatal projects can hide, lie, or reveal notions of state governance, of local understandings, and of citizenship (Anderson, 1983; Harley, 1988; Scott, 1998; Agrawal, 2005). In some cases, property rights as a bundle have been increasingly severed into distinct layers of resource allocation (e.g., land, water, mineral rights). Even wildlife has been subject to this aspect of severable resources, as Robbins and Lugnbuhl (2005) illustrated for the state of Montana. These resource rights are often held differentially—and unequally—whether by

¹ Here, I am in no way trying to dichotomize local versus state expertise as a binary. I am simply using this phrase as shorthand for the contrast in the scales of water management most visible in New Mexico. I do not presume, either, that the local is the inherently superior scale for water management following Brown and Purcell's (2005) cautionary work. To be sure, locals are often state experts, and state experts live in places where they are, in fact, locals themselves.

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fee simple ownership rights or exclusionary ones based on collective management. For example, a person may have access to a forest and wood collection, yet have no legal access to the water in that same forest. Furthermore, in many countries, states, and provinces, a person can own land without owning the water that flows across or underneath the land. This is the case in New Mexico, where water rights reflect historical use, but can also be purchased and legally severed from the land.

Adjudication thus represents a nexus of law and geography, connecting to both pragmatic and critical geographic studies as well as critical legal studies and anthropology (Matthews, 1984; Blomley, 1989, 2003; Platt, 1994; Blomley et al., 2001; Delaney, 2003, 2010; Benda-Beckmann et al., 2009). The study of adjudication also parallels literature on the legal aspects and institutional understandings of state resource governance (see Bauer, 2004; Blomley, 1989; Emel and Roberts, 1995; Robbins, 2000; Mitchell, 2002; Liverman, 2004; Agrawal, 2005; Mitchell, 2005; Roth et al., 2005; Birkenholtz, 2008). Few studies, however, have addressed water rights adjudications as a spatial practice of the state. In this study, I examine adjudication as among the “mundane state practices” that “can illuminate the mechanics of state spatialization” (Ferguson and Gupta, 2002, p. 984). The potential or real uncoupling of land from water is a real, palpable, local concern. For this reason, the language of the “bundle of rights” might be better understood as a “prism” of property rights (following Merrill, 2011). Like a prism, the perceptions of water from different viewpoints refract differently based on the viewer and their perspective, even if adjudications attempt to define water and water rights in a particular, singular way (Boelens, 2009)

1.1. Historical context and process of adjudication

To understand adjudication as a state practice in New Mexico, some historical context is necessary. The adjudication today grinding its way through New Mexico’s courts was mandated in the 1907 water code, which called for adjudication to map and then enforce prior appropriation of waters.² The concept of prior appropriation was initially applied to mining claims in the western US before being widely adopted as water law, including in New Mexico, where it became the official water law in 1891. Based on the principle of “first in time, first in use,” prior appropriation assigns better rights to earlier use dates. Senior water rights, in other words, are older (earlier use) and have priority over junior (later user) water rights.

The 1907 water code also created a new agency, the office of the “Territorial Engineer,” later renamed the Office of the State Engineer after New Mexico became an official state in 1912 (Saurí, 1990; Lane, 2011). The agency was given the duty to adjudicate the state’s waters, but with the low population of New Mexico and essentially no permanent staffing, little adjudication occurred during the first four decades. State efforts to quantify and map waters and to allocate private water rights were delayed.

The 20th century drive for large water infrastructure such as dams and irrigation, as Clark (1987) argued, created a legal need for adjudication. By the 1950s the western US entered its peak dam development phase (Worster, 1986; Reisner, 1986; Clark, 1987), largely driven by the federal government. Federal and state agencies planning for reservoirs and large irrigation projects needed to jointly account for water rights. This prompted the state of New Mexico to create its own version of a bureaucracy and legal process to account for the state’s waters so that large-scale water infrastructure could proceed. One of the state’s central and early

concerns for adjudication was the Pecos River, shared with the larger and more populous state of Texas (Hall, 2002).

At the core of this effort was the Office of the State Engineer (hereafter, OSE), now strengthened in personnel and funding by the 1950s. The OSE began the process of its original charge, adjudicating water rights. Adjudications in New Mexico are basin-wide lawsuits, so-called general stream adjudications, with the state as plaintiff and all potential or actual water rights claimants as defendants. The process begins with a hydrographic survey of all properties with water rights, or claims to them, within a particular basin. Once the technical mapping and research phase is completed by the OSE, the state’s attorney general files the suit to begin the adjudication process by river basin or stream segment. After completing cartographic and historical research on water rights, Offers of Judgment are sent by the OSE to individuals claiming rights. These Offers of Judgments can either be signed (accepted) or disputed. A typical offer describes the point of water diversion, the location of the land parcel, information on the water source, and the volumetric amount of water in acre feet per year.³ The amount of water per acre, the so-called duty of water⁴, varies from 2.5 to 4 acre feet per year. This vertical relationship between a water user and the OSE is not a simple matter.

This first phase creates one level of tension between the state experts and local water users and their perceptions on the proper use and amounts of water. The next phase, the *inter se* process of adjudications, allows individuals to contest details of neighboring owners and include such aspects as the point of diversion, the priority date assigned to the (other) owner, or more rarely the actual owner of the plot of land to which water rights might be assigned. This is where a second and arguably more problematic level of spatial tension – a horizontal relationship across users – is created as the state offer inserts itself above neighbors using the same waters (Levine, 1990). The state remains “above” in this case because the claimants to water rights are pitched into an adversarial relationship in the *inter se* phase, with the state playing objective third party. Nevertheless, claimants are given repeated opportunities to document their water rights and to dispute the rights of others in the same basin.

Once an entire basin has been mapped, served, and all claims settled, a final decree for the basin is recorded by a judge in state or federal court. That basin is then considered adjudicated and falls under priority administration of waters by the OSE.⁵ As of late 2010, more than 72,000 defendants (water rights claimants) were involved in adjudications across the state. These cases often become famous, if not infamous, throughout New Mexico, known colloquially by the first surname in the legal case (such as the “Aamodt” adjudication for the Pojoaque Valley, to name but one example).

Adjudications and the measurements and decrees that accompany them are necessary in order for the state to account for territorial waters that flow through or originate within state

³ A point of diversion, for example in an offer of judgment, can be contentious if water users have historically or recently changed the point at which natural surface waters are diverted from a river or stream course. If an offer from OSE relies on an older documented diversion point, but does not account for a more recent diversion point, it is up to a water rights claimant to rebut or debate this point of fact with the State Engineer’s Office.

⁴ The ‘duty of water’ refers to the amount of water used and allocated to the parcel of land.

⁵ This is a crude and simplified description of the adjudication process. All water adjudications, since they are done stream by stream, take particular directions that make them distinct from others. Some can take as little as five years, while others have lingered in the courts for more than four decades. State judges can also file partial decrees when stream adjudications have taken years, or when only a few stream segments remain problematic for any final decree to be declared. This serves as a useful incremental approach to the court process and allows for disputes to be resolved prior to any finalizing decree for the entire basin. But see Tarlock (1989) on the illusion of finality in most general stream adjudications.

² Prior appropriation doctrine governs most, but not all, state statutes in the western US. It is also known as the Colorado doctrine, as this state was one of the first to wholeheartedly adopt prior appropriation as its basis for water law.

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