



Water, Equity, and Cannabis Production: Implications for Acequias

Presentation to the Water and Natural Resources Legislative Interim Committee
Taos, NM - August 12, 2021

The New Mexico Acequia Association is a grassroots, membership based organization of acequias and community ditches in New Mexico. Since 1989, we have been working to protect acequias and agricultural water rights through community education, organizing, and advocacy.

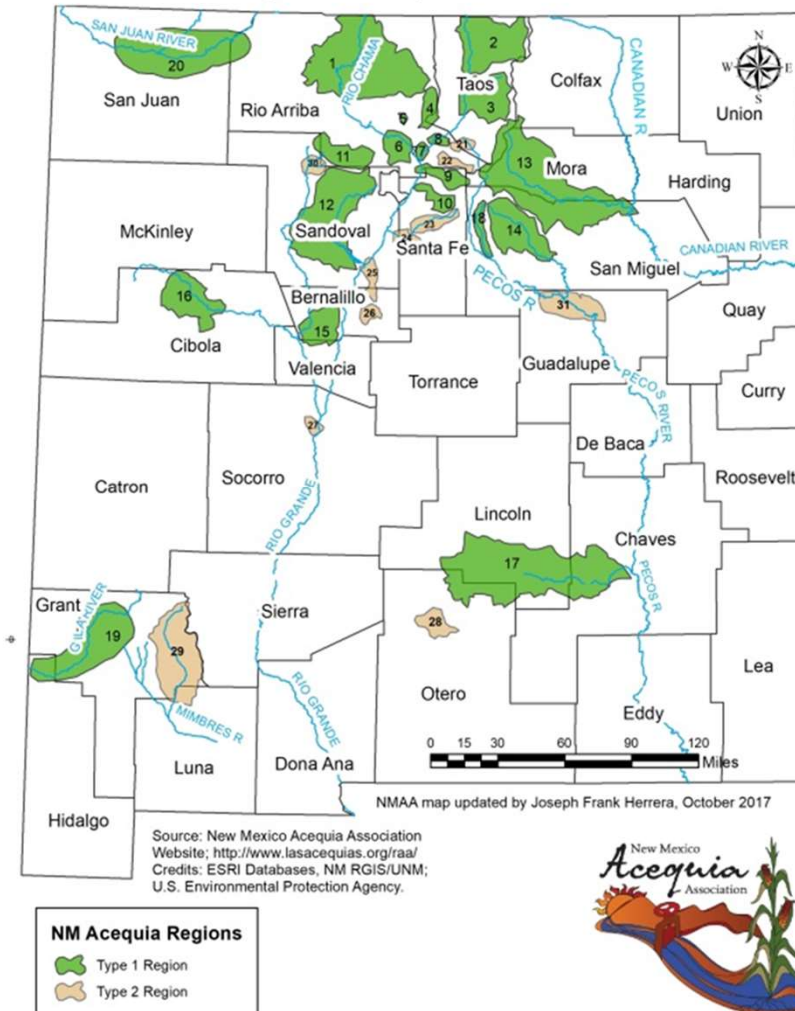


Our vision is for acequias to flow with clean water, to work together to grow food, and to celebrate our cultural heritage.

~640 Acequias in New Mexico

Rio Grande and Tributaries
San Juan River
Rio Chama
Narbe/Pojoaque/Tesuque
Pecos River (Gallinas)
Canadian (Mora)
Rio Pueblo/Rio Embudo
Jemez River
Rio San Jose
Hondo River
Gila River
Mimbres River

Congreso de las Acequias Regional Acequia Associations



Imagine ten years in the future after cannabis legalization...

Scenario #1: Social Equity and Water Protections in Cannabis Production

- Thriving small-scale production and small-businesses due to access to capital.
- Economic opportunities for small-scale producers in rural communities.
- Robust water protections that support diversification and also protect historic, existing rights in land-based communities.
- Farmer cooperatives that produce, process, and market high-quality cannabis.
- More farmers have diverse operations with both locally grown food and cannabis.
- Less outmigration by rural families due to more the ability to earn an income from their land and water.



Scenario #2: No Equity, No Water Protections

- Expedited permits and/or variances for wells, water transfers, leases that deplete or impair local water resources.
- Lack of access to capital for small-scale producers and businesses leading to dominance by larger, corporate entities.
- Rural farmland and water bought out by cannabis corporations.
- Accelerated outmigration of land-based families, replaced by low-wage cannabis workers.



Acequias: Land, Water, People

- 600-700 community acequias in New Mexico (not including private ditches)
- Over 100,000 acres of irrigated land
- Tens of thousands of acequia families have water rights
- Acequia irrigators rely primarily on seasonal surface waters for irrigation
- Acequias and community ditches contribute to aquifer recharge

Source: NMSU "Acequias of the Southwestern United States: Elements of Resilience in a Coupled Natural & Human System"



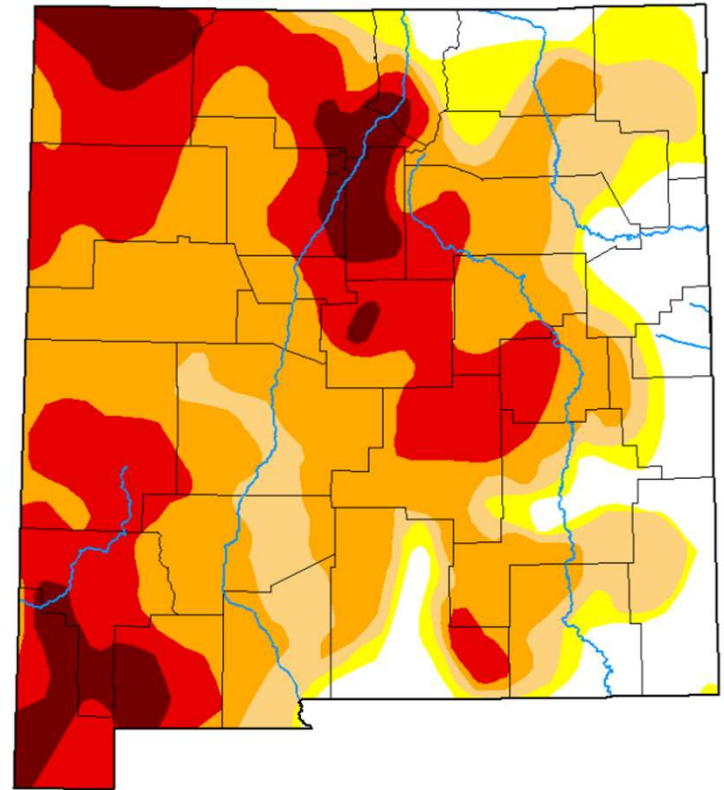
New Mexico is in a MEGADROUGHT

The Southwest is in the worst MEGADROUGHT in 1,200 years.

67% of New Mexico is in severe to exceptional drought.

Indicators of diminishing water supplies:

- **Fallowing land:** OSE asked NM farmers to not irrigate and grow crops this year. OSE is implementing a new farmland fallowing program in the Lower Rio Grande due to dwindling water supplies; MRGCD is following suit.
- **Shortage sharing:** Many acequias, where they didn't dry completely, had to curtail water use and share shortages all summer.
- **No new water:** OSE has issued several groundwater basin closures this year (Capitan, East Mountains)



US Drought Monitor, August 3, 2021

Commodification of Water

Water in New Mexico is limited and fully appropriated (and likely overappropriated). Any new uses of water have to come from existing uses of water through water transfers or water leases.

A core principle enshrined in our water laws is that **existing water rights are protected** from potential impairment from new uses of water (i.e. new appropriations or water transfers/leases).

New demands for water are driving a water market in New Mexico, which puts **pressure on rural, agricultural communities** and also on any uses that serve the common good.

The commodification of water has profound implications for the future of New Mexico. It raises the question on the relationship between **economic power and control of water**.



Cannabis Production and WATER

With passage of the Cannabis Regulation Act (CRA), adult-use cannabis production will add a new demand to already strained water supplies in New Mexico.

Study released by UC-Berkley in February 2021 expects the overall legal U.S. cannabis industry to grow at a compound annual growth rate of 21% through 2025, and total water use in the legal cannabis market to increase by 86 percent.

There is a LACK OF DATA on the source of water and extent of water use for medical cannabis production in New Mexico.

Possible sources of water for recreational cannabis production:

- Municipal water supplies
- Rural community water systems and community wells
- Private wells
- Bulk water purchases (truck and tank)
- Surface water (acequias or irrigation/conservancy districts)

The Cannabis Regulation Act (CRA) contains some protections for water:

- To prevent illegal uses of water
- To hold licensees accountable for the amount of water uses
- To minimize conflicts UP FRONT by requiring documentation of water in license application

Specifically, Section 26-2C-7.B(3) of the CRA does the following:

- Requires that applicant demonstrate that the applicant has a legal right to a commercial water supply, water rights, or another source of water.
- Documentation from the OSE of a valid water right or from a water provider that the water use is compliant with that water provider’s rules.

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HOUSE BILL 2
55TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SPECIAL SESSION, 2021
INTRODUCED BY
Javier Martínez and Andrea Romero and Deborah A. Armstrong and
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AN ACT

Why Section 26-2C-7.B(3) is Necessary:

Cannabis producers may incorrectly think they can:

- Use a domestic well for commercial production;
- Use acequia water whether their land has water rights or not;
- Use water from a mutual domestic water consumer association despite local rules that water is for domestic purposes only; and
- Use water by pumping directly from a river or other water body despite not having any surface water rights



CCD's Revised rule 16.8.2.15.A(5) states:

demonstration of a legal right to use the quantity of water that the division determines is needed for cannabis production, as evidenced by either:

- (a)** documentation from a water provider that the applicant has the right to use water from the provider and that the use of water from cannabis production is compliant with provider's rules, or
- (b)** documentation from the office of the state engineer showing that the applicant has a valid and existing water right, or a permit to develop a water right, for irrigation purposes for outdoor cultivation, or a commercial purpose for indoor cultivation at the proposed place of use of the cannabis establishment.



However, the recent draft rules also contain provisions for granting variances.

- “Any applicant or licensee may seek a variance from division rule(s)”
- “At the discretion of the division, the adjudicatory procedures of the Uniform Licensing Act may be used for guidance and shall not be construed to limit, extend, or otherwise modify the authority and jurisdiction of the division”
- “The division may act as the hearing officer...”
- “The division may grant the requested variance, in whole or in part, subject to conditions, if the variance is not contrary to the public interest or detrimental to public health and safety, or the division may deny the variance.”
- “A permanent variance may be granted”
- Final decisions on variance petitions “shall not be subject to judicial review”

A concern of the NMAA is that a variance could be used to circumvent some of the important water protections in the CRA and the CCD rules. This concern was communicated to CCD in the August 6 public hearing.

Acequias are concerned about water transfers and water leases for cannabis production:

- New users who lack understanding about water scarcity and water sharing traditions
- Transfers of surface water rights out of the acequia for commercial production elsewhere
- Transfer of surface water rights to groundwater rights within the acequia or change of surface water to supplemental groundwater wells
- Applications for water right leases that are based on “preliminary approval” by the OSE. This OSE practice is being litigated currently.
- *Note that acequias and community ditches have the authority to deny applications for water transfers and water leases*

Water transfers of water rights out of acequias are a concern because of fewer members, less water rights, and potentially reduced diversion amount.

This affects the viability of acequias. Transfers from surface to groundwater may cause aquifer depletion which could eventually affect stream flows.

Problems that stem from new cannabis production in New Mexico:

- Variance in the regulations could circumvent some of the regulatory language to protect water.
- Water providers (municipalities, rural water systems, etc.) will face requests for water and/or documentation of compliance.
- Acequias and other irrigation entities may face increased applications to transfer surface water rights to groundwater for cannabis production.
- OSE may receive more applications for the controversial administrative practice of granting “preliminary approval” on water lease applications.
- OSE may receive more requests for documentation of valid water rights.
- Uncertainty and lack of resources/capacity to effectively enforce state law or local rules against “bad actors”

Policy Recommendations

- The CCD draft rule that allows variances to be granted to waive certain requirements under the rules should be revisited.
- Analysis on the potential impact on water supplies in New Mexico should be a requirement on any new legislation for water intensive industries.
- Ensure that the OSE has staff and resources 1) to implement the water protection provisions of the CRA and the CCD rules, 2) to fully exercise their responsibility of fully reviewing applications for water rights, and 3) to effectively use their enforcement powers against illegal uses of water.
- Provide support to rural communities, specifically community water systems and acequias, for technical assistance and capacity building to effectively govern and manage their respective water supplies.
- The Legislature should scrutinize the OSE practice of granting “preliminary approvals” in water leases which circumvent important protections in water law for existing water rights.