



# Acequia Local Water Governance

Cannabis and Acequia Water Transfer Authority



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# Why present on acequias and cannabis?

- ▶ Acequias are found in 2/3 of New Mexico's Counties
- ▶ Acequias provide surface water for irrigation to thousands of parciantes, or members, across New Mexico
- ▶ Besides surface water governance associated with Indian Pueblos, Tribes and Nations, Acequias are the oldest form of local water governance in New Mexico and are political subdivisions of the State of New Mexico
- ▶ Acequias possess statutory powers to assess their members fees for acequia expenses, allocate water internally, and make decisions regarding watersharing with neighboring acequias
- ▶ In 2003, the legislature recognized the importance of local water governance at the acequia level and passed laws giving authority to acequias to regulate transfers of acequia-served water rights



# Why present on acequias and cannabis?

- ▶ The cannabis regulations require a commercial water right for indoor production of cannabis (16.8.2.22 (A))
- ▶ The NMOSE (and the CCD?) has interpreted “indoor” production broadly, for example growing cannabis in-ground and under a hoop house with surface irrigation water (OSE Commercial Growing Water USE FAQs)
- ▶ Acequia-served water rights have a purpose of use that includes irrigation and livestock – and sometimes domestic – but not a “commercial” purpose of use
- ▶ Acequia parciantes wanting to grow cannabis commercially **and “indoors”** need to invoke the acequia water transfer process to add a commercial use to their acequia-served water right
- ▶ Acequia parciantes that seek to grow cannabis **outdoors** with their acequia-served water right, do not need a commercial water right and DO NOT need to invoke the acequia water transfer process

## 16.8.2.22(A)(3) NMAC

- ▶ (3) 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.

# OSE FAQs for Commercial Growers

Q: I want to grow in a hoop house with my irrigation right?

A: Growing in a hoop house is considered a greenhouse and would require a commercial water right.



Note: This FAQ sheet is intended to assist those interested in commercial cannabis cultivation. This may be updated and subject to revision. Page **2** of **2**

This version is valid as of 09/24/2021



# OSE FAQs for Commercial Growers


**Q:** I found someone willing to sell me water rights that I will need to move to my property, is there anything I should be concerned with before purchasing these water rights?

**A:** If someone offers to sell you water rights from an acequia system, check to see if that acequia commission has bylaws that prohibit or limit such transfers. Most acequia commissions do have bylaws, and they often have the right to refuse the transfer. Also, you must research to make sure the water rights that you are being offered are valid rights. There are also some specific rules governing groundwater basins that limit how water can be transferred to different places of use. Check with the OSE, local District Office to find out more about what restrictions might be in place for transferring water rights.

# OSE FAQs for Commercial Growers

Q: What is the timeline for changing the place, purpose, and/or point of diversion of water rights?


A: Once you have found water rights to purchase, get ready to get in line again. The Office of the State Engineer has **over 500 non-cannabis related water applications backlogged statewide** to act upon, with an average wait time of eight to 10 months. If someone protests the application or contests those water rights, it could take another possible one to two years of waiting while the protest is resolved through legal processes.



# What is the acequia water transfer process?


- ▶ Statutes:
  - ▶ Acequia Statutes: Section 73-2-21 (E) and 73-3-4.1, NMSA 1978
  - ▶ OSE Statutes: Section 72-5-24.1, NMSA 1978
- ▶ Acequia bylaws provisions:
  - ▶ Article 9
  - ▶ Appendix A
- ▶ Steps in the Acequia Water Transfer Process
- ▶ Considerations for Outdoor Cannabis Grows





# Section 73-2-21 (E), NMSA 1978

- ▶ Acequias must adopt the authority to regulate water transfers into their bylaws
  - ▶ E. Pursuant to the rules or bylaws duly adopted by its members, an acequia or community ditch may require that a change in point of diversion or place or **purpose of use of a water right** served by the acequia or community ditch, or a change in a water right so that it is moved into and then served by the acequia or community ditch, shall be subject to approval by the commissioners of the acequia or community ditch. The change may be denied only if the commissioners determine that it would be detrimental to the acequia or community ditch or its members. The commissioners shall render a written decision explaining the reasons for the decision. If the person proposing the change or a member of the acequia or community ditch is aggrieved by the decision of the commissioners, he may appeal the decision in the district court of the county in which the acequia or community ditch is located within thirty days of the date of the decision. The court may set aside, reverse or remand the decision if it determines that the commissioners acted fraudulently, arbitrarily or capriciously, or that they did not act in accordance with law.



# Section 72-5-24.1, NMSA 1978

- ▶ A. The state engineer shall not approve an application for a change, including an emergency change, in point of diversion or place or **purpose of use of a water right** into or out of an acequia or community ditch if the applicant has not complied with the applicable requirement adopted by an acequia or community ditch pursuant to Subsection E of Section 73-2-21 or Section [73-3-4.1](#) NMSA 1978.
- ▶ B. The applicant for a change described in Subsection A of this section shall submit with the application to the state engineer documentary evidence provided by the commissioners of the acequia or community ditch of the applicant's compliance with any applicable requirement for the change adopted by the acequia or community ditch pursuant to Subsection E of Section 73-2-21 or Section [73-3-4.1](#) NMSA 1978.
- ▶ See also OSE implementing regulations for changes to water rights: 19.26.2.11 (F) NMAC 2005 (“Additional application requirements for water rights associated with acequias or community ditches”)



# WR-06 Application for Permit to Change an Existing Water Right

## 11. ACEQUIA OR COMMUNITY DITCH REQUIREMENTS

A. The water right is not within a Community Ditch or Acequia

B. The water right is within a Community Ditch or Acequia. **If you checked box B you must:**

- 1) Attach documentary evidence provided by commissioners of the Community Ditch or Acequia confirming applicant's compliance with any applicable requirement for the change adopted by the Community Ditch or Acequia or
- 2) Attach an affidavit from the commissioners of the Community Ditch or Acequia stating that no such requirement has been adopted by the relevant association bylaws.

*This documentation is required pursuant to NMSA 1978 § 72-5-24.1.*




# Acequia Bylaws (NMAA Template)

- ▶ Article 6, Section 9

- ▶ Any type of change or modification whatsoever to the point of diversion, **purpose of use**, or place of use of a water right served by the Acequia, including but not limited to any type of partial or temporary or supplemental or emergency change or water-use lease, is a water transfer and must comply with Article 9 and Appendix A of these Bylaws. Any type of change or modification to a water right so that it is moved into and then served by the Acequia, including but not limited to any type of partial or temporary or supplemental or emergency change or water-use lease, is a water transfer and must comply with Article 9 and Appendix A of these Bylaws. Appendix A also addresses any uncertainty whether a particular change is a “transfer” reviewable by the Commission under these bylaws. If a water transfer has been approved by all necessary authorities, the transferring parciante shall provide updated information about the water right to the Secretary for recording in the records of the Acequia.



# Acequia Bylaws (NMAA Template)

- ▶ Article 9
  - ▶ Water transfers shall be governed by Appendix A: Water Transfers, which is adopted under Section 73-2-21 (E), NMSA 1978 (2003) or Section 73-3-4.1, NMSA 1978 (2003), whichever is applicable.
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# Acequia Bylaws (NMAA Template)

- ▶ **APPENDIX A: WATER TRANSFERS**

- ▶ Section 1: General

- ▶ The members of Acequia de la Comunidad declare that a transfer of a water right served by the Acequia, or a transfer of a water right so that it is moved into and then served by the Acequia, may be detrimental to the Acequia and/or its members. Therefore, any such proposed transfer by any person or entity must be formally considered by the Commission using the procedure set forth below, and must be approved prior to application for the transfer to the Office of the State Engineer. As used in this document, “transfer” means any type of change or modification whatsoever to the point of diversion, and/or place of use, and/or purpose of use of a water right, including but not limited to any type of temporary transfer, partial transfer, transfer to a supplemental supply of water, emergency transfer, or water-use lease.

# Acequia Water Transfer Application

## **WATER RIGHT TRANSFER APPLICATION FORM**

*A copy of this form must be delivered by certified mail to each of the three commissioners of the acequia.*

Name of Applicant: \_\_\_\_\_

Address: \_\_\_\_\_  
\_\_\_\_\_

Phone No.: \_\_\_\_\_

Current point of diversion of water right:

Current place of use of water right: (If a Hydrographic Survey is available, provide map name, map number, and tract number. Otherwise, provide a legal description of the tract of land. Attach map.)  
\_\_\_\_\_

Number of acres to transfer: (Please specify or designate on attached map where rights would transfer from if part of a larger tract.)  
\_\_\_\_\_

Number of acre-feet per year to transfer: \_\_\_\_\_

Current purpose of use of water right:

Proposed new point of diversion of water right: \_\_\_\_\_

Proposed new place of use of water right: \_\_\_\_\_

Proposed new purpose of use of water right: \_\_\_\_\_

Please attach documentation demonstrating you are the true owner of the water right.

If the proposed new place of use is on land already served by the Acequia, explain how the proposed transfer would not exceed the maximum amount of water rights allowed on that land.

\_\_\_\_\_  
Signature of Applicant

\_\_\_\_\_  
Date

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FOR ACEQUIA USE ONLY

Received by \_\_\_\_\_ Date \_\_\_\_\_

# Water Transfers: Acequia Commission Process

Created by the New Mexico Acequia Association

## 90 Days Commission Meeting

- Each commissioner receives the application sent by certified mail. Set a date for a meeting on the transfer. The earlier the better but a maximum of **90 days after receiving the application**.
- The commission provides notice of the meeting, using the notice procedures required for an annual meeting.
- The commission also sends notice by mail to the applicant and posts notice at least **10 days before the meeting** at a prominent public place near the site of origin of the requested transfer.

## Meeting Procedure: Comments

- The commission holds the meeting on the transfer.
- At the beginning of the meeting, the commission chair explains that the commission is acting as an *impartial decision-making body*, and will listen and ask questions, but will not be commenting until after the parcientes have all commented.


## Meeting Procedure: Commission Action

- After the commission has received all of the information presented, the commission may **(1)** vote on the proposed transfer and provide a written decision explaining the reasons for approval or denial, *or* **(2)** recess and reconvene the meeting at a later time if the commission needs additional time to individually consider the proposal before voting or needs additional time to draft a decision
- If the commission recesses the meeting it must follow notice requirements for recessed and reconvened meetings.

## 120 Days Commission Vote & Written Decision

- At the reconvened meeting the decision is reviewed and any necessary changes are made. Each commissioner then casts a vote on the written decision and the meeting is adjourned.
- The written decision must be provided within **120 days of the commission receiving the application**.
- The commissioners provide their written decision to the applicant.






# Pena Blanca P'ship v. San Jose de Hernandez Comm. Ditch

- Challenge to the “deferential” standard of review in Section 73-2-21

Owners fail to meet their difficult burden in this case. Section 73-2-21 (E) grants acequia commissioners the authority to deny approval of "change[s] in point of diversion or place or purpose of use of a water right served by the acequia" if the commissioners determine that the change "would be detrimental to the acequia . . . or its members." The deferential standard of review to be applied to such decisions helps assure that acequia commissioners, who have greater familiarity than does a district court with the unique needs of the acequia and its members, retain the power to decide whether such changes will harm the operation of the acequia or those who depend on it for access to their water rights. See *Wilson v. Denver*, 1998 NMSC 16, P 43, 125 N.M. 308, 961 P.2d 153 (recognizing that "each ditch system is unique and has individualized needs"). In light of what Owners concede is an "important interest" in permitting acequias to govern "the distribution of water within the acequia," the standard of review that leaves primary decision-making authority in the acequias rather than shifting it to the district court for a hearing de novo on appeal is rationally related to this purpose.

Pena Blanca P'ship v. San Jose de Hernandez Comm. Ditch, 2009-NMCA-016, ¶ 21, 145 N.M. 555, 202 P.3d 814



# Pena Blanca P'ship v. San Jose de Hernandez Comm. Ditch

Owners seem to suggest that because Section 73-2-21 (E) grants acequias greater authority than they may have previously had under the law, the statute must not be rationally related to a legitimate government interest. We disagree, and we conclude that even if Section 73-2-21 (E) grants more powers to acequia commissioners than were previously held, there is nothing about the fact that such powers are newly conferred that undermines the government's legitimate interest in conferring them.

Pena Blanca P'ship v. San Jose de Hernandez Comm. Ditch, 2009-NMCA-016, ¶ 22, 145 N.M. 555, 202 P.3d 814



# Considerations for Outdoor Cannabis Grows on Acequias

- ▶ Pro: Outdoor grows do not require any change in the acequia-served water right
- ▶ Con: No guaranteed delivery of water necessary to grow cannabis (or any other crop!)
- ▶ A fixed water delivery is never guaranteed
  - ▶ Water is shared equitably on the acequia – no one parciante is entitled to a greater pro rata percentage of water than another
  - ▶ Surface water on acequias can be highly variable depending on the stream system – most acequias cease irrigation in the summer and rely on monsoons to supplement surface flows
  - ▶ Water distribution is up to the mayordomo, commission and the acequia's bylaws, or any combination of the three
    - ▶ Water schedule, by request, rotations, etc.
  - ▶ Also, paper water rights defined in terms of AFY is seldom the measurement used by acequias for water distribution
    - ▶ Peones, tiempos, derechos, etc.
    - ▶ You have to know how much water is delivered and when and assume variation



# Summary

- The Cannabis Regulations require a “commercial” water right for “indoor” grows
- Growing in a hoophouse and in the ground using flood or drip irrigation is an “indoor” grow
- Acequia-served water rights do not carry with them a commercial use
- Indoor grows on acequias will require a change in the purpose of use of an acequia-served water right
- The acequia water transfer process is outlined in the acequia’s bylaws
- While the acequia water transfer process is much shorter than the OSE process, the acequia must act on a water transfer application within 120 days
- An acequia may deny changes to commercial use if such a change will be “detrimental to the acequia or its members”
- Acequia decisions on water transfers are only overturned if they are arbitrary, capricious or not in accordance with law