

Acequias and the Cannabis Regulation Act: Advocacy, Water Protection, and Local Governance



**Presentation to the New Mexico
Cannabis Bar Association CLE**

Santa Ana Pueblo, NM - August 12, 2022

Presentation Roadmap:

- **NMAA and Acequias, Brief Introduction**
- **Acequia Concerns that Led to Grassroots Advocacy Campaign for CRA Water Protections**
- **CRA's Water Protection Provisions**
- **CRA's Implementing Regulations and Water Protection**
- **2022 Legislative Session's SB 100 and the Proposed Amendment to Remove the CRA's Critical Water Protection Provisions**
- **Local Acequia Water Governance and the CRA**



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.*

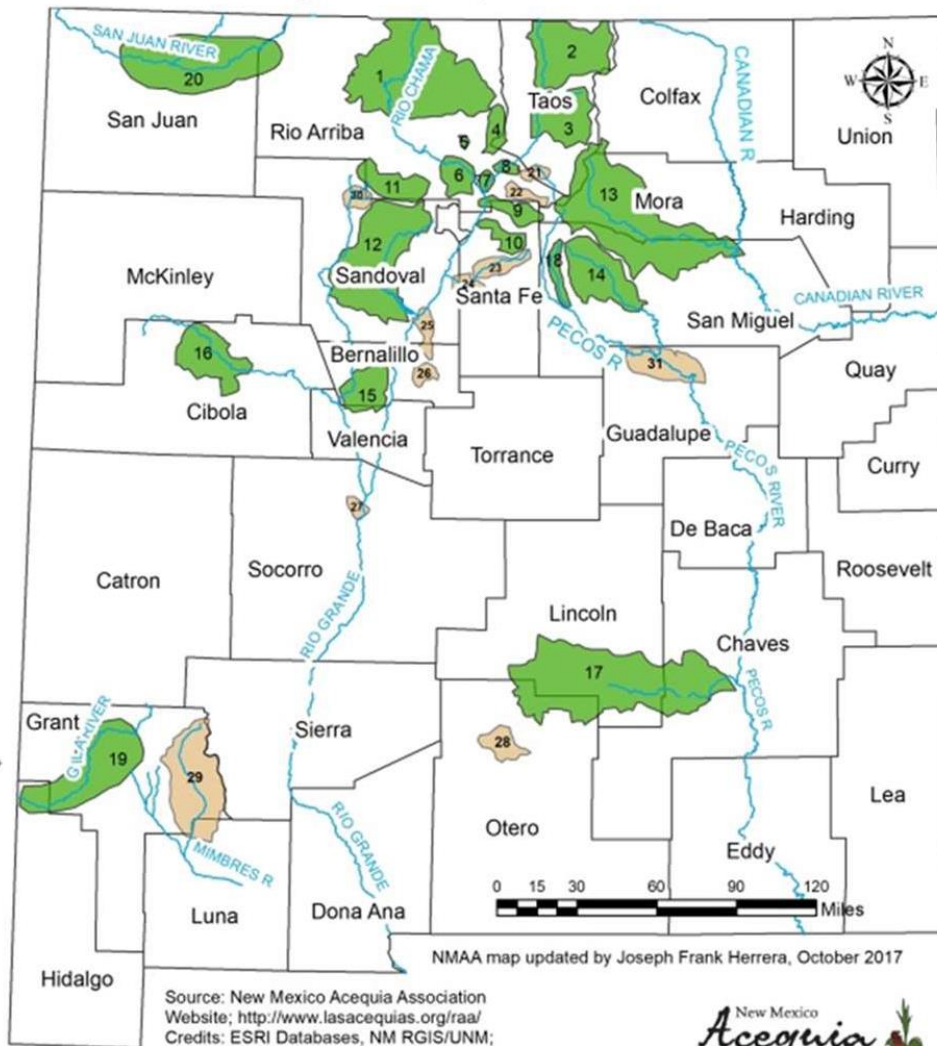
artwork by Ed Sandoval

Congreso de las Acequias
Regional Acequia Associations



*~ 640 Acequias
in New Mexico*



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



NM Acequia Regions

-  Type 1 Region
-  Type 2 Region



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.



Acequia Concerns Regarding Commercial Recreational Cannabis Production that Led to a Grassroots Acequia Advocacy Campaign for Water Protection Provisions in the Cannabis Regulation Act

- ❖ Current and future climatic conditions
- ❖ Commodification of water
- ❖ Other Unintended Consequences of Commercial Cannabis Production

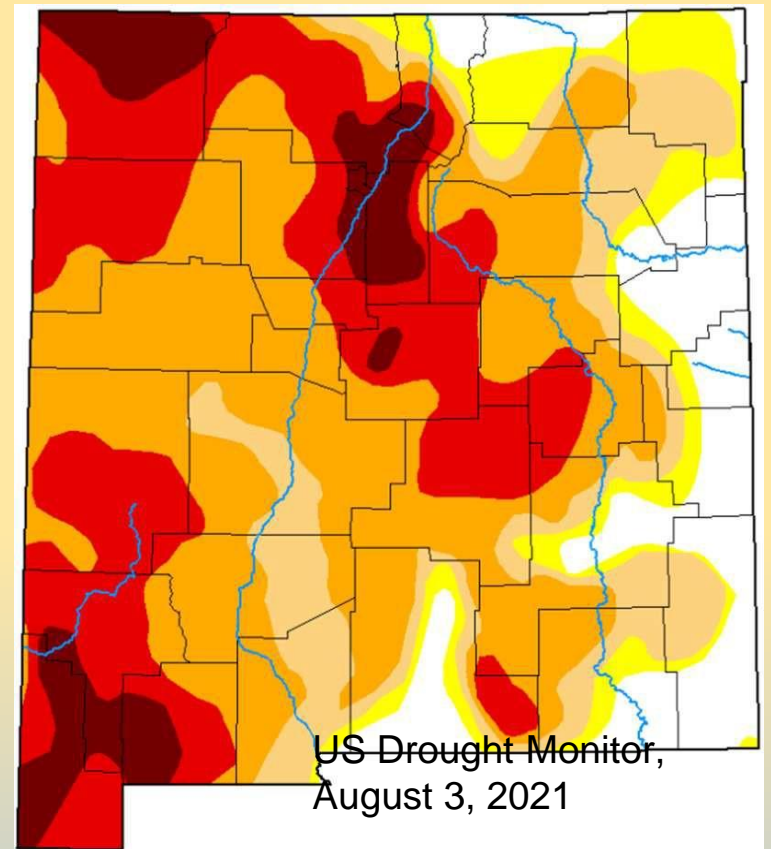


New Mexico is in a MEGADROUGHT

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)



Commodification of Water

Water in New Mexico is limited and fully appropriated (and likely over-appropriated). 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**.



Recreational Commercial Cannabis Production and The Commodification of Water



- Recreational Commercial Cannabis Production adds a new demand to already strained water supplies in New Mexico.
- A study released by UC Berkeley in Feb. 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%.
- More data is needed on the source of water and extent of water use for medical cannabis production in New Mexico, hence the need to collect data now on commercial recreational production.

Recreational Commercial Cannabis Production and The Commodification of Water



Possible Sources of Water for Recreational Commercial Cannabis Production:

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

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

- **New users** — *have a limited understanding about water scarcity and water sharing traditions.*
- **Transfers of surface water rights out of the acequia for commercial production elsewhere** — *The fewer members, the less water rights. This means a potentially reduced diversion amount which could affect the viability of acequias.*
- **Transfer of surface water rights to groundwater rights within the acequia or change of surface water to supplemental groundwater wells** — *These transfers cause aquifer depletion which could eventually affect stream flows.*
- **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*

NMAA Grassroots Advocacy Resulted in Protections for Water in the Final Cannabis Regulation Act:

1 HOUSE BILL 2
2 55TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SPECIAL SESSION, 2021
3 INTRODUCED BY
4 Javier Martínez and Andrea Romero and Deborah A. Armstrong and
5 Katy Duhigg and Linda M. Lopez
6
7
8
9
10 AN ACT

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

***Section 26-2C-7.B(3)
of the
Cannabis Regulation Act
(CRA):***

B. In carrying out its commercial cannabis activity licensing duties, the division shall:

(3) Require as a condition of licensing pursuant to the Cannabis Regulation Act that the *applicant demonstrate that the applicant has a legal right* to a commercial water supply, water rights or another source of water sufficient to meet the water needs as determined by the division related to the license *as evidenced by documentation* from the office of the state engineer of a valid water right or from a water provider that the use of water for cannabis production is compliant with that water provider's rules;

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 as much water as they want without regard to how water is allocated and shared on an acequia by the mayordomo;
- 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



Section 26-2C-7.B(3) NMSA 1978

Serves to:

- Provide notice to an applicant for a producer license, a water provider and other third parties likely to be affected by the water use that a new use of water for commercial cannabis production may occur;
- Hold applicants and licensees accountable and ensure that the applicant/licensee is not unlawfully taking surface or groundwater and impairing existing water rights owners, or unlawfully taking water from a water provider; and
- Minimize disputes over new uses of water by the commercial cannabis production industry through establishing on the front end that the applicant has a valid water right or legal access to a commercial source of water sufficient to meet the needs of the associated license



Additional CRA Water Protection Provisions NMAA Secured:

- Inclusion of a Water Resources Expert on the Cannabis Regulatory Advisory Committee (Section 26-2C-3.G(5)(k) NMSA 1978); and
- Requirement that rules specific to water use, quality and supply in the commercial cannabis production industry be promulgated in consultation with the Office of the State Engineer (Section 26-2C-3.D(2), NMSA 1978)

NMAA Advocacy During the CRA Implementing Regulations Rulemaking Proceedings: Additional Water Protections Secured!

- ❖ **16.8.2.22.A(8) NMAC:** Initial Applications must include estimated monthly water use for a 1-year period for both mature and immature cannabis plants (also see 16.8.2.22.A(4)(d), requiring an applicant to include estimated water and energy use related to the applicant's cultivation plan in the applicant's plan to use, or certification that the applicant cannot feasibly use, energy and water reduction opportunities);
- ❖ **16.8.2.20.H(1) NMAC:** Producer Reports must include actual water and energy use in the preceding 12 months (submitted on an annual basis);
- ❖ **16.8.2.23.A(3) and (4) NMAC:** An Amended Cannabis Producer License is required when there is a "change in water source, or licensee's water and energy conservation plan, including the reuse of water and disposal of effluent" and when there is an increase in plant count limit beyond which licensee is currently licensed to produce; and
- ❖ **16.8.2.8.Y(3) and (5) NMAC: Strict parameters for the variance rule:** The division shall deny any request for a waiver related to a legal right to water pursuant to Paragraphs (3) and (4) of Subsection B of Section 26-2C-7 NMSA 1978; and

The division may not grant a variance in whole or in part if the variance is contrary to the CRA or public interest, has a negative environmental impact, is not detrimental to public health and safety

16.8.2.22.A(3)
NMAC
Application
Requirements
for Cannabis
Producer
License

(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. The documentation may include any of the following:

(i) a state engineer permit or license in good standing, but not including a permit issued pursuant to Sections 72-12-1, -1.1, or -1.3, NMSA 1978;

(ii) a subfile order or decree issued by a water rights adjudication court;

(iii) the findings of an office of the state engineer hydrographic survey; or

(iv) other documentation the office of the state engineer has deemed in writing as acceptable to the office of the state engineer under this rule

2022 Legislative Session Senate Bill 100 and the Failed Attempt to Remove the CRA's Critical Water Protection Provisions

- Sponsored by Senator Linda Lopez and Representative Andrea Romero
- Touted as a “clean up bill” to correct some technical deficiencies with the CRA and to also increase the plant count limit for micro-producers from 200 plants to 1,000 plants since the CCD, via an emergency rule, increased the corporate cannabis producers plant count limit to 20,000 plants. The CRA doesn't provide a cap on corporate cannabis producer plant count limits, yet it provides a hard cap of 200 plants for micro-producers
- During the bill's hearing with the Senate Judiciary Committee an amendment was adopted removing entirely the CRA's water protection requirement
- While on the Senate Floor, Senator Pirtle put forth an amendment that was adopted by the Senate and then sent over to the House
- SB 100 as amended was then assigned to only one House committee rather than two committees, as is standard practice: House Judiciary Committee

SB 100 As Amended by Senate Judiciary Committee to the Senate Tax & Transportation Committee Substitute:

~~(3) require as a condition of licensing pursuant to the Cannabis Regulation Act that the applicant demonstrate that the applicant has a legal right to a commercial water supply, water rights or another source of water sufficient to meet the water needs as determined by the division related to the license as evidenced by documentation from the office of the state engineer of a valid water right from a water provider that the use of water for cannabis production is compliant with that water provider's rules;~~

Floor Amendment Adopted:



SENATE FLOOR AMENDMENT number 1 to SENATE TAX, BUSINESS AND TRANSPORTATION COMMITTEE SUBSTITUTE FOR SENATE BILL 100, as amended

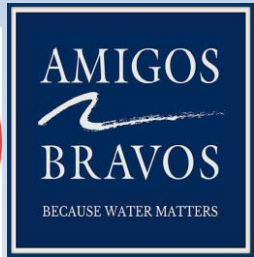
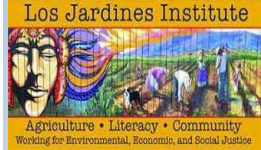
Amendment sponsored by Senator Cliff R. Pirtle:

1. On page 36, between lines 7 and 8, insert the following new subsection:

"M. A license issued pursuant to the Cannabis Regulation Act is revocable if a licensee is using water to which the licensee does not have a legal right. The division and the office of the state engineer shall develop a guide for water providers and cannabis licensees on water rights and the legal use of water."

SB 100 (as amended by the SJC and Senate) Continued:

- NMAA quickly put together a coalition of diverse stakeholders fighting to restore the CRA's critical water protection provisions.
- This grassroots coalition flooded state legislators with over 31,000 letters demanding that the CRA's water protection provisions be restored.
- SB 100 as amended never had its hearing, though the coalition remained vigilant that a rare procedural maneuver known as "blasting" might occur during the final hours of the Legislative Session, sending SB 100 as amended straight out of HJC without a hearing and to the House Floor for a vote.
- SB 100 as amended ultimately died and the CRA's water protection provisions remain intact.



**Final Thoughts
on the
Proposed
Amendment
Re: Water
Protection
Requirement:**

Removing the CRA's critical water protection requirements will not result in leveling the playing field between micro-producers and corporate cannabis producers. Taking the following actions would level the playing field:

- 1) Providing access to start-up capital for micro-producers in a timely manner
- 2) Placing a hard plant count on corporate cannabis producer licenses
- 3) Placing a hard limit on the total number of cannabis producer licenses issued

Final Thoughts on the Proposed Amendment Re: Water Protection Requirement

NMAA maintains that the prudent approach to any CRA amendments regarding the water protection requirement should be deferred until after two years' collection of cannabis producer water use data. This will allow for meaningful amendments based on sound science and hard data.