


ACEQUIAS and water right transfers: Who decides?

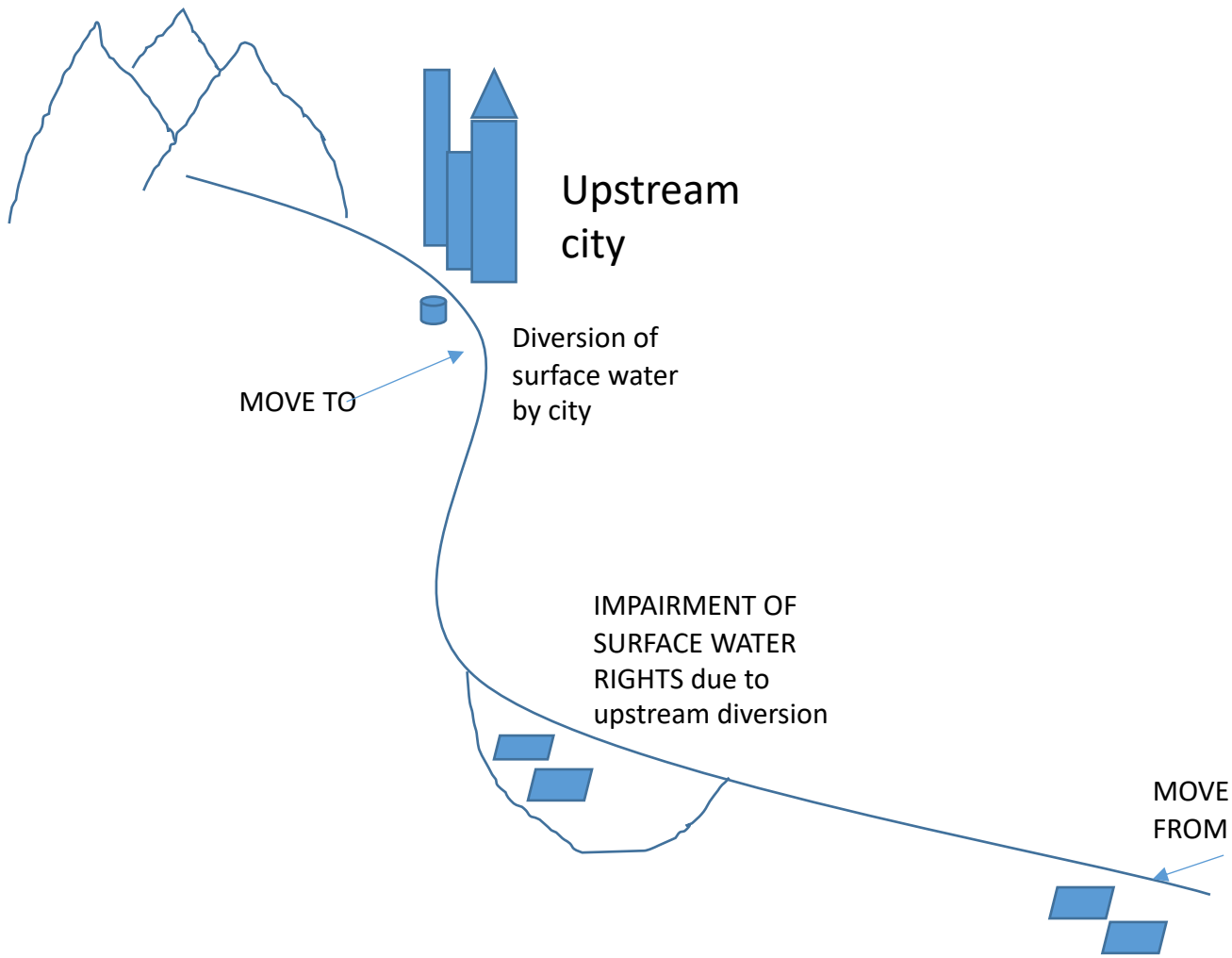
Land Grants, Acequias and the Law

October 15-16, 2021

- *Water . . . symbolizes such values as opportunity, security, and self-determination . . . Strong communities are able to hold on to their water and put it to work. Communities that lose control over water probably will fail in trying to control much else of importance.*

- Helen Ingraham: *Water Policies: Continuity and Change*, quoted in Bates, Getches, MacDonnell, Wilkinson, Searching Out the Headwaters, p. 182 (Island Press 1993)

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- “An unlimited power to tax involves, necessarily, the power to destroy.” Chief Justice John Marshall in *McCulloch v. Maryland* (1819)
 - “The power to transfer water is the power to destroy.” David Benavides (2021)



Interception of Surface Water

Water

State Engineer Transfer Criteria: Surface Water

- “. . . all or any part of the right may be severed from the land . . . or may be transferred for other purposes . . . if such changes can be made without (1) **detriment to existing water rights and (2) are not contrary to conservation of water within the state and (3) not detrimental to the public welfare of the state . . .**”
NMSA 1978, Section 72-5-23

- Decision of Judge Art Encinias, *Sleeper v. The Ensenada Land and Water Association*, RA 84-53(C), slip op. (N.M. District Ct., April 16, 1985), *rev'd.*, 107 N.M. 494, 760 P.2d 787 (Ct. App. 1988), *cert. quashed*, 107 N.M. 413, 759 P.2d 200 (1988).
- “I am persuaded that to transfer water rights, devoted for more than a century to agricultural purposes, in order to construct a playground for those who can pay is a poor trade, indeed. I find that the proposed transfer is clearly **contrary to the public interest**, and on that separate basis, the application should be denied.”

- “Whether a given area is to be preserved for traditional uses such as agriculture, or converted to new uses such as subdivision and commercial enterprises is more appropriately decided by local governmental entities charged with land zoning development activities.” Findings and Order at 9, *In the Matter of the Application of the El Prado Water and Sanitation District*, Application Nos. 57, 0932, 0933 -A-A, 57, 0931, 0932 and 0933 into RG-40450 thru RG-40450-S-2, N.M. Office of the State Engineer, April 30, 1992.
- “. . . WHEREAS: The Guadalupe County Commission has statutory authority over local zoning and land development matters in Guadalupe County; . . .
- NOW THEREFORE BE IT RESOLVED, that the transfer of water rights in Guadalupe County from traditional uses, such as irrigation by the acequias, to residential subdivision or commercial uses elsewhere in the county or state will generally not promote the public welfare because of the adverse effects on the acequias and communities involved.”
- Guadalupe (N.M.) County Commission Resolution No. 07-94-14, adopted July 15, 1994

- “NOW, THEREFORE, BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO that it find that it is **detrimental to the public welfare** of the state of New Mexico for the office of the state engineer or any other relevant state agency to approve water right transfer applications designed to move the point of diversion or place of use of water rights from above the Otowi stream gage to a new point of diversion or a new place of use below the latitude of the Otowi stream gage . . .”
- House Joint Memorial 6 (2001)

2003 Acequia Transfer Statute

- Acequias may adopt decision-making authority over transfers into their bylaws.
- “. . . The change may be denied only if the commissioners determine that it would be **detrimental to the acequia or community ditch or its members. . .**” § 73-2-21(E), § 73-3-4.1.

COMPARE TO:

- “. . . all or any part of the right may be severed from the land . . . or may be transferred for other purposes . . . if such changes can be made without **detriment to existing water rights and are not contrary to conservation of water within the state and not detrimental to the public welfare of the state . . .**” NMSA 1978, Section 72-5-23, Criteria for State Engineer evaluation of proposed transfer of surface water right.

*Pena Blanca Partnership v. San Jose de
Hernandez Community Ditch*

2009-NMCA-016, 202 P.3d 814, *cert denied*, 2009-
NMCERT-1 (2009)

- Held deferential standard of review in § 73-2-21(E) did not violate Equal Protection or the right to an appeal.
- “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.” ¶ 12.

The process: to prevent negative effects to existing water rights

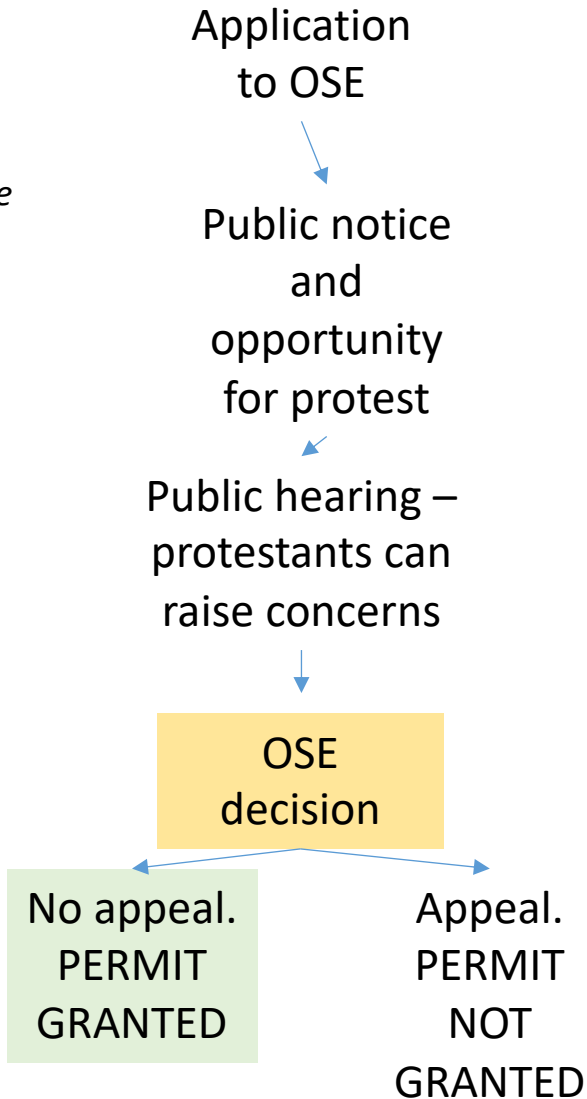
- Application to OSE: to determine impairment
- Public notice
- Any water right owners can join the process -- to prove impairment to own water right
- Right of appeal to district court
- Applicant may not use water until this process is complete
- OSE not authorized to allow use right away

Water-Use Leasing Act (1967)

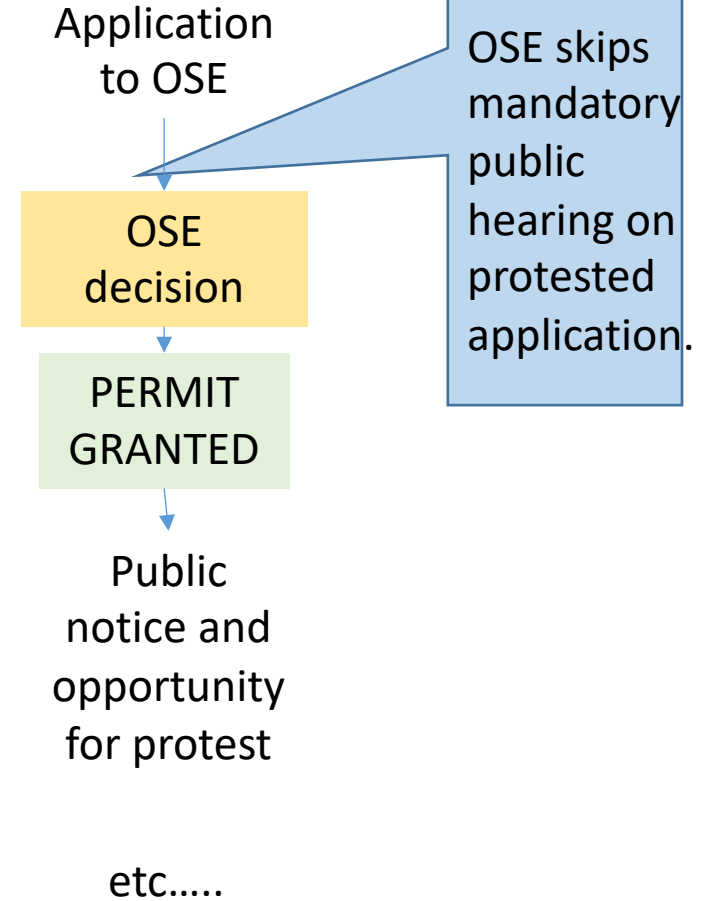
- NMSA 1978, §§ 72-6-1 through 72-6-7
- Same process/protectations
- OSE followed the process for decades
- OSE changed rules without legislative authorization
- OSE now tells lessees they may use the water right away, before notice or hearing: unlawful

NORMAL Water Transfer/Lease Process

Note that if the water right is served by an acequia, the application has to be approved by the acequia before going to OSE (if acequia has appropriate language in bylaws).



NOT NORMAL Preliminary Approval Process



“Neither [the Water-Use Leasing Act] nor its implementing regulations authorize the State Engineer to preliminarily authorize the use of leased water without a permit . . . The State Engineer cannot, because he desires an expedited method to address water use needs, sidestep the process . . .”

- Findings of Fact and Conclusions of Law, *Carlsbad Irrigation District and Otis Mutual Domestic Water Consumers & Sewage Works Association v. John D’Antonio*, No. D-503-CV-2019-01871 (N.M. Fifth Jud. Dist. April 1, 2020).

Acequia Water Transfer Process: The Power to Regulate Water Transfers

- Statutory authority is found in § 73-2-21(E) and § 73-3-4.1.
- The OSE statutes and regulations recognize and support this authority:
 - 72-5-24.1, NMSA 1978
 - Title 19, Chapter 26, Part 2 NMAC
- Acequia Bylaws

Section 72-5-24.1, NMSA

- Statute does several things:
 - 1) Prohibits the OSE from acting on an application if an applicant has not complied with the acequia process
 - 2) Requires “documentary evidence provided by the commissioners” demonstrating compliance
 - 3) No bylaw, then an affidavit from the commissioners
 - 4) 120-day deadline to render decision or deemed approved
 - 5) Requires applicant’s request to be in writing and delivered by certified mail to the commissioners

OSE Regulations

19.26.2.11 NMAC

- Provide for additional application requirements for water rights associated with acequias
 - Documentary evidence demonstrating compliance with 72-5-24.1
 - Copy of written request (acequia application form)
 - Evidence of delivery by certified mail
 - And one of the following:
 - Documentary evidence of compliance with bylaw
 - Affidavit from commissioners – no bylaw
 - Affidavit of applicant – failure of acequia to render decision

19.26.2.12 (B) NMAC

- Failure to provide any one of the requisite documentary evidence results in
 - Rejection of application
 - “When, after preliminary review of the information provided by the applicant, the state engineer is of the opinion that...the applicant has not complied with the applicable requirements of Section 72-5-24.1 NMSA, then the application **shall** be rejected. The state engineer **shall** decline to order the publication of notice of any such application.”

Storm Ditch Dissent

“Because the Applicants failed to submit the required affidavit with their original application, the mandatory language required the application to be rejected by the State Engineer and returned to the Applicants for correction and refile. This application procedure was not followed, and the majority failed to establish a proper basis for disregarding this statutory requirement. As a result, the Applicants should have been required to restart the application process anew when they failed to submit the required affidavit, and their application should not have been processed or approved.”

Storm Ditch v. D'Antonio, 2011-NMCA-104, ¶ 39, 150 N.M. 590, 598, 263 P.3d 932, 940

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 parciantes 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.



