



Overview of Acequia Policy Issues

Presentation to the Land Grant Legislative Interim Committee

Wednesday, July 12, 2023

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.

Presentation Outline

1. Background: Commonalities and Differences between Acequias and Land Grant - Mercedes
2. Adjudication of Water Rights
3. Water Right Transfers/Leases/Applications
4. Acequia Infrastructure
5. Acequia Disaster Recovery

Background: Land grant-mercedes and acequias

- Acequia and land grants have a shared history. Most acequias, but not all, were established in the settlement of the community land grant-mercedes.
- Although they have this shared history, their legal definition and status as local governments have evolved differently. Land grants and acequias are governed by different statutes.

Territorial Period and 1907 Water Code

- Acequias remained in tact and expanded significantly during the New Mexico Territorial period. The 1907 territorial water code was a comprehensive code that defined governance of water.

Statehood, Constitution, and Acequia Statutes

- The Constitution recognized all pre-1907 water rights, including those that were acequia-based. Water rights are governed by the water code and acequias are governed by Chapter 72 Articles 2 and 3 as “Special Districts” and were defined as political subdivisions of the state in 1965.

~700 Acequias in New Mexico

Rio Grande and Tributaries
 San Juan River
 Rio Chama
 Nambe/Pojoaque/Tesuque

Pecos River (Gallinas)

Pecos River

Canadian (Mora)

Rio Pueblo/Rio Embudo

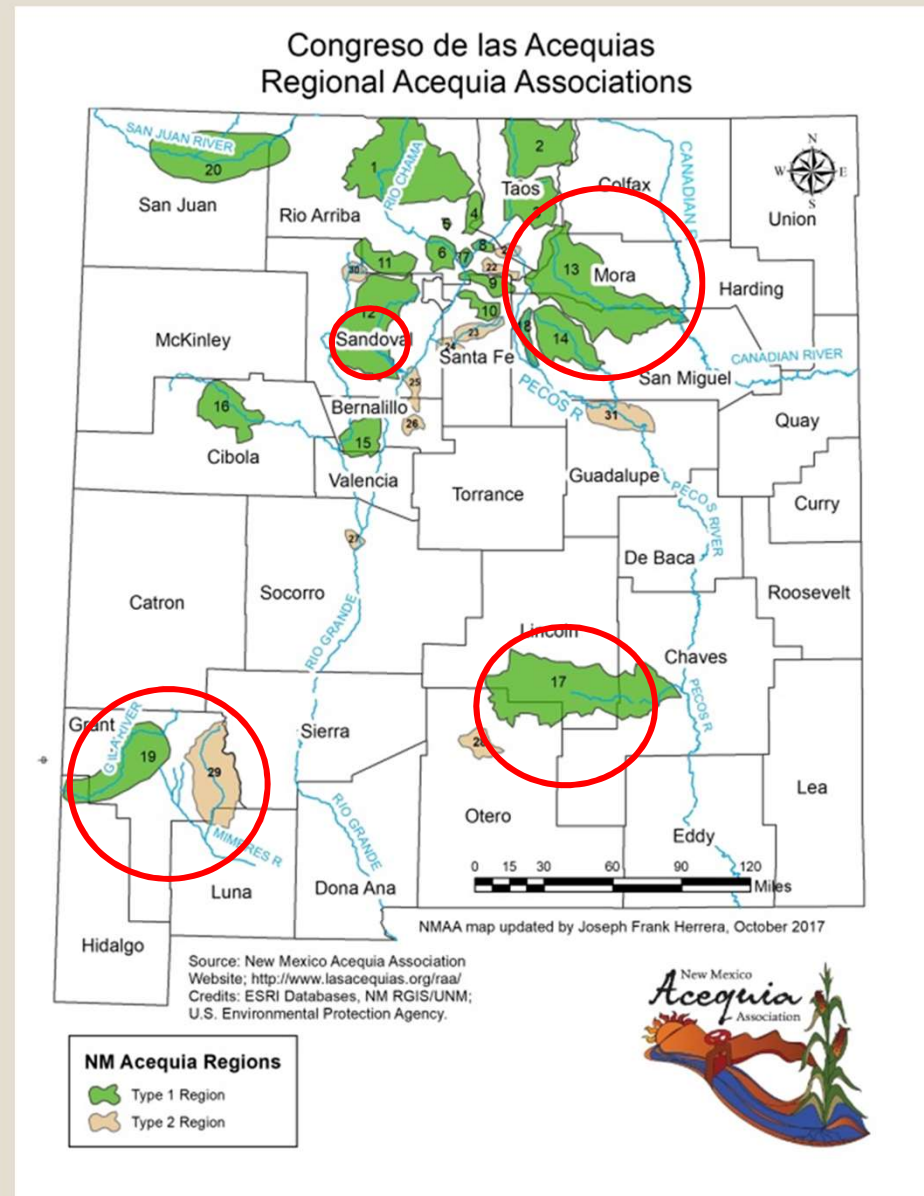
Jemez River

Rio San Jose

Hondo River

Gila River

Mimbres River



Adjudication: Decades-Long Legal Proceedings

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

STATE OF NEW MEXICO, ex rel.,
S. E. Reynolds, State Engineer,

Plaintiff,

vs.

United States of America, Pueblo de
San Ildefonso; Pueblo de Pojoaque;
Pueblo de Nambe; Pueblo de Tesuque;
Lee R. Aamodt; Procopio Acuna; Simon
and Eddie Acuna; E. H. Alexander; Ted
Amsden; Thomas Anderson; Albert Aragon;
Joseph M. Aragon; Ernesto Arch
Armando Archuleta; Eduardo Arch
Esteban Archuleta; Leo P. Arch
Virgin Archuleta; Kelly Arma

6639

Civil Action

FILED
AT ALBUQUERQUE

APR 20 1966

WM. D. BRYARS
CLERK

Filed in 1966
Settled in 2013

Parciantes
named as
DEFENDANTS



Acequia and Community Ditch Fund

- The Acequia and Community Ditch Fund (ACDF) was created in statute in 1988 to ensure that acequias would have a **fair and equitable defense** in adjudication proceedings.
- The ACDF is used for **attorneys and experts** for acequias to advocate for common elements of water rights such as priority dates, duty of water, etc.
- Acequias who are parties to settlements need legal representation and technical experts to advise on their role in implementation and compliance with settlements.
- The NM Acequia Association and NM Acequia Commission have taken the position that acequias that are involved in activities related to the adjudication process, including **settlement implementation**, are eligible for the ACDF.



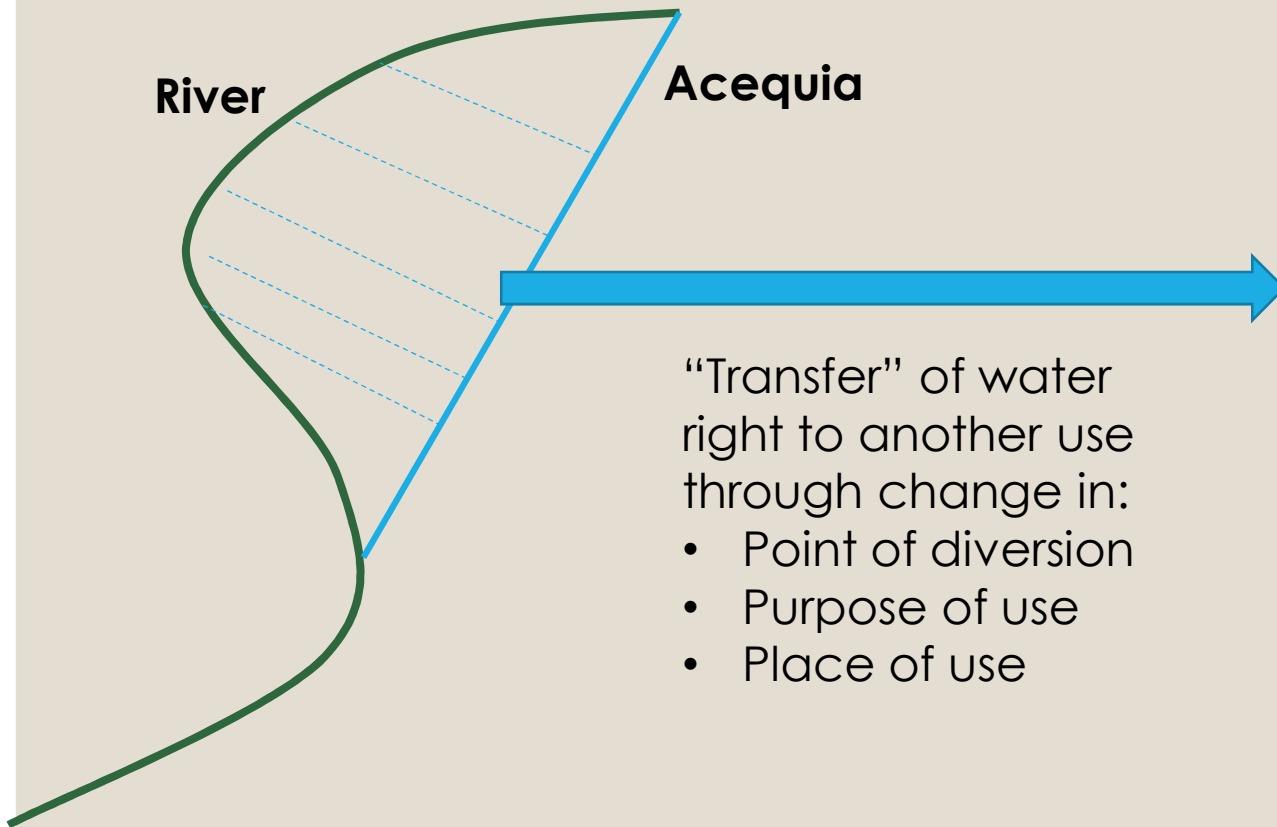
Policy Recommendations

Support acequias in the adjudication process with increased funding for the Acequia and Community Ditch Fund. Increase the current level from \$830,000 to \$1 million.

Ensure that funds can be used for post-decree settlement implementation. An AG Opinion from 2020 interpreted the ACDF statute that settlement implementation is part of the “adjudication process.”

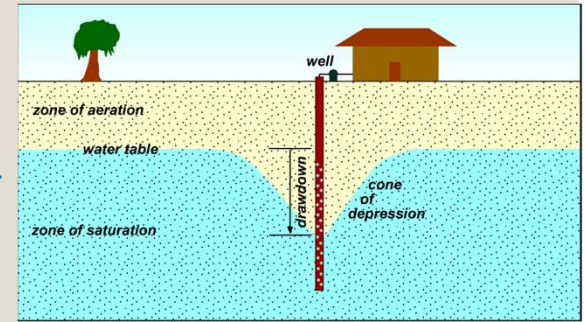


What is a “water transfer”?



“Transfer” of water right to another use through change in:

- Point of diversion
- Purpose of use
- Place of use



Groundwater well for municipal or industrial (M&I)

= or =

Other Ag

REVIEW OF TERMS

Water transfer – A change in a water right in terms of:

- Purpose (e.g. agriculture, municipal, industrial, etc.)
- Place of Use
- Point of Diversion

Water lease – A water lease is a TEMPORARY water transfer.

- Maximum of ten years (with some exceptions)
- Same application process as a water transfer

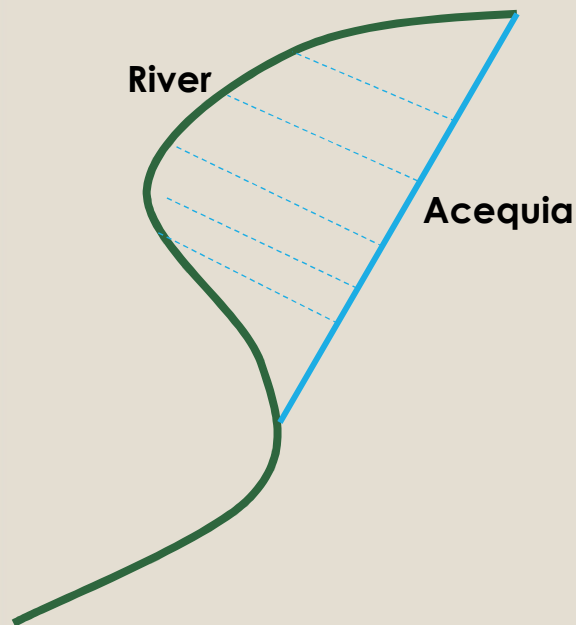
Water transfer process – This is the process of applying for a water transfer:

- Application to OSE, publishing notice, providing opportunity for protest.
- If protested, public hearing process is MANDATORY.
- Only after process is complete, OSE may grant permit for new/changed water use.

Preliminary approval – A relatively new and controversial practice by the State Engineer

- Preliminary approval is not authorized in state law or regulation
- By granting a permit for “immediate use”, OSE bypasses requirement for public hearing before approving new permit.
- Violates due process of impacted communities and existing water right owners.

Why do acequias care so much about water transfers and water leases?



Transfers/leases **out of acequia** affect viability of acequia:

- Less water diverted from stream into main headgate
- Fewer parciantes for collective work and governance

Transfers/leases **outside an acequia** may impair existing water rights:

- Groundwater depletion
- Upstream diversion of surface water

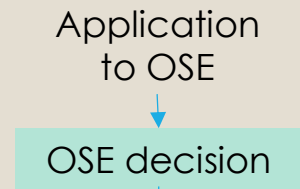
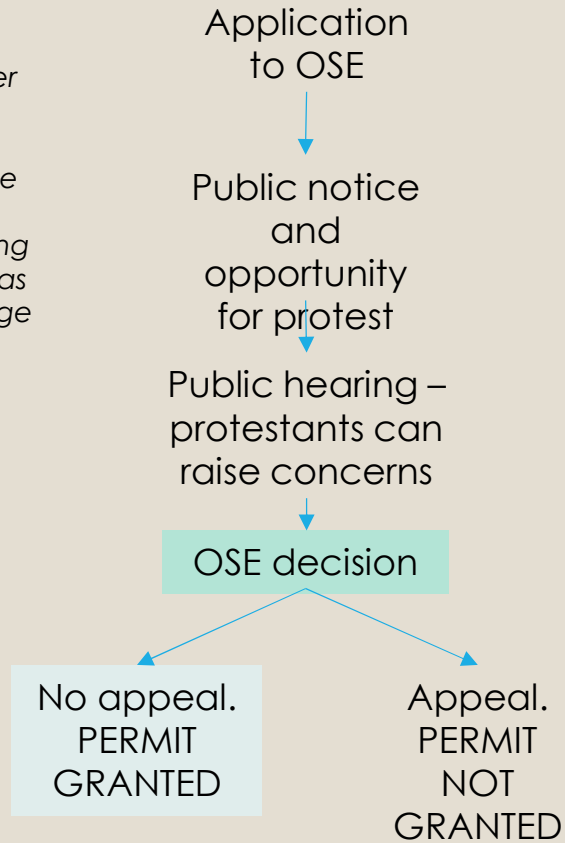
How acequias respond:

- Transfers within an acequia - For specific applications into or out of acequia, the acequia has authority to deny transfers (due to 2003 law)
- Transfers outside an acequia - Filing protests to water transfers that impact them
- **Protests are a vital tool for acequias (and other stakeholders) to raise concerns about water transfers/leases**

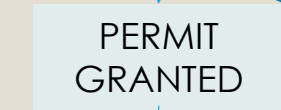
NORMAL Water Transfer/Lease Process

NOT NORMAL Preliminary Approval 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).



OSE approves application before notice, protest, and public hearing



Water is being used by the applicant while the protest is pending.



Pay back water? Proceed?

The OSE Practice of Preliminary Approval is Unlawful

The 5th Judicial District held in 2020 that “preliminary approval/authorization” is unlawful. In *Carlsbad Irrigation District and Otis Mutual Domestic Water Consumers & Sewage Works Association v. John D’Antonio, State Engineer* (April 1, 2020), the court held that, “The State Engineer has no authority under the Water-Use Leasing Act to grant the applicants ‘preliminary authorization’ to change the use and location of leased water.” Initially, the OSE appealed the decision and then withdrew the appeal. That makes this decision a final judgement and binding on the State Engineer.

The Attorney General Opinion No. 23-01 (January 30, 2023) states that “preliminary approval/authorization” is unlawful. The opinion states that “no explicit or implied legal authority exists for the State Engineer to issue a “preliminary approval” or “preliminary authorization” of an application to temporarily change the place or purpose of use or the point of diversion of a water right leased under the Water Use Lease Act, and that issuing a preliminary approval circumvents clear procedural requirements and may violate due process enshrined in our state constitution.

HB 121 Overview

- HB 121 from the 2023 legislative session was intended to protect due process in the Water Lease Use Act.
- The bill passed HENRC with the support of a broad coalition of water advocates and opposition from industry lobbyists. HB 121 CS (compromise bill) passed the HJC. HB 121 CS would have created an expedited hearing process to fast track some water leases but also retain due process protections “up front” as required by existing law.
- HB 121 CS was a compromise agreed to by the sponsors, NMAA and other water advocates, and the Office of the State Engineer. Industry continued to oppose it and it did not come to a vote on the House floor.
- The OSE has continued to grant Preliminary Approvals despite the 5th Judicial District ruling and the AG opinion.
- The OSE is planning a rulemaking on expedited water right hearings for water lease applications.

Completed Acequia Infrastructure Projects



Acequia del Alto del Norte, Mora County. Price: \$160,000 (pre-Covid, pre-inflation)
Design: NRCS
Construction:

- EQIP 50%
- ISC 45%
- Local cost share 5%



Acequia Martinez y Medio
Price: ~\$220,000 (pre-Covid)
Engineering Design: RCPP
Construction:

- RCPP \$100,000
- ISC 90-10 Approx. \$90,000
- Local Share Approx. \$10,000
- Capital Outlay \$20,000

Acequia and Community Ditch Infrastructure Fund (ACDIF)

- Created in statute with SB 428 (2019) with delayed enactment for FY22
- Administered by the Interstate Stream Commission (ISC)
- Receives \$2.5 million annually from the Irrigation Works Construction Fund (IWCF)
- FY23 was first full ACDIF funding cycle
- ACDIF funds:
 - Planning
 - Engineering Design
 - Construction
- The source of funds for the ACDIF is the Irrigation Works Construction Fund (IWCF). The fund balance is being depleted by use of the fund for OSE/ISC operations. The fund balance has to be stabilized.

Acequia Infrastructure Challenges

Recent Progress

More Work To Do...

- Acequias vary greatly in **capacity and project readiness**. Most need assistance with governance, financial compliance, and planning.
- **Agency capacity** is limited for the extent of need. Currently, ISC administers over 250 CO projects.
- **Funding** for acequia infrastructure continues to be uncertain. The ACDIF depends on the IWCF, the principle of which is depleting.

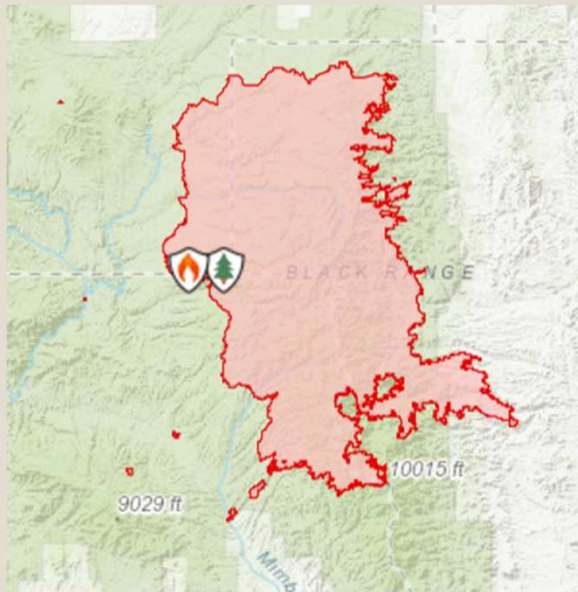
- The **ACDIF** was established by the State Legislature for FY22 and the ISC has completed a full year of projects in FY23. Amended to remove local cost share.
- ISC recently established an **Acequia Bureau** and is adding an additional two staff for a total of five staff.
- The **NMAA completes 30-50 ICIPs** per year, partners with COGs.
- NMAA assists over 100 acequias per year with governance and financial compliance.

- **Stabilize the IWCF** (Irrigation Works Construction Fund) to ensure recurring funding for the ACDIF. Increase appropriation incrementally from \$2.5 million to \$5 million over the next few years.
- Continue to build capacity for the **ISC Acequia Bureau**.
- Support the role of **NMAA and COGs** with resources for infrastructure planning.

2022 was a catastrophic year for wildfires....

Black Fire

325,136 Acres
24 Damaged Acequias



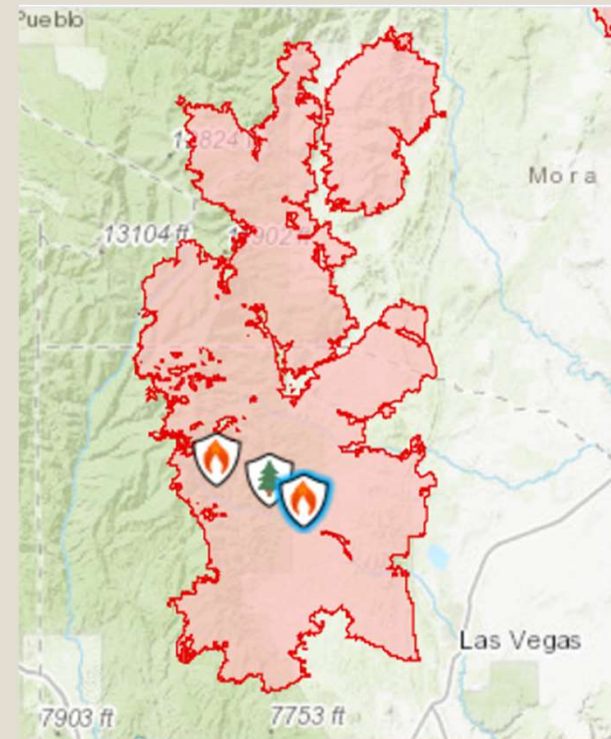
Cerro Pelado Fire

45,605 Acres
1 damaged Acequia



Hermits Peak Calf Canyon Fire

341,735 Acres
45+ Damaged Acequias





Impacts on Acequias from Flooding

Realignment of and damage to river channel causing diversion structures could be disconnected from the river.

Debris flows may damaged structures, such as diversions, headgates, dividers, sluices, crossings, etc.

Heavy flooding may **damage structures** by dislodging them or washing them away, by damaging fences, and by causing erosion.

Debris flows, ash, and sediment can **clog acequia waterways** and can deposit on farmlands.

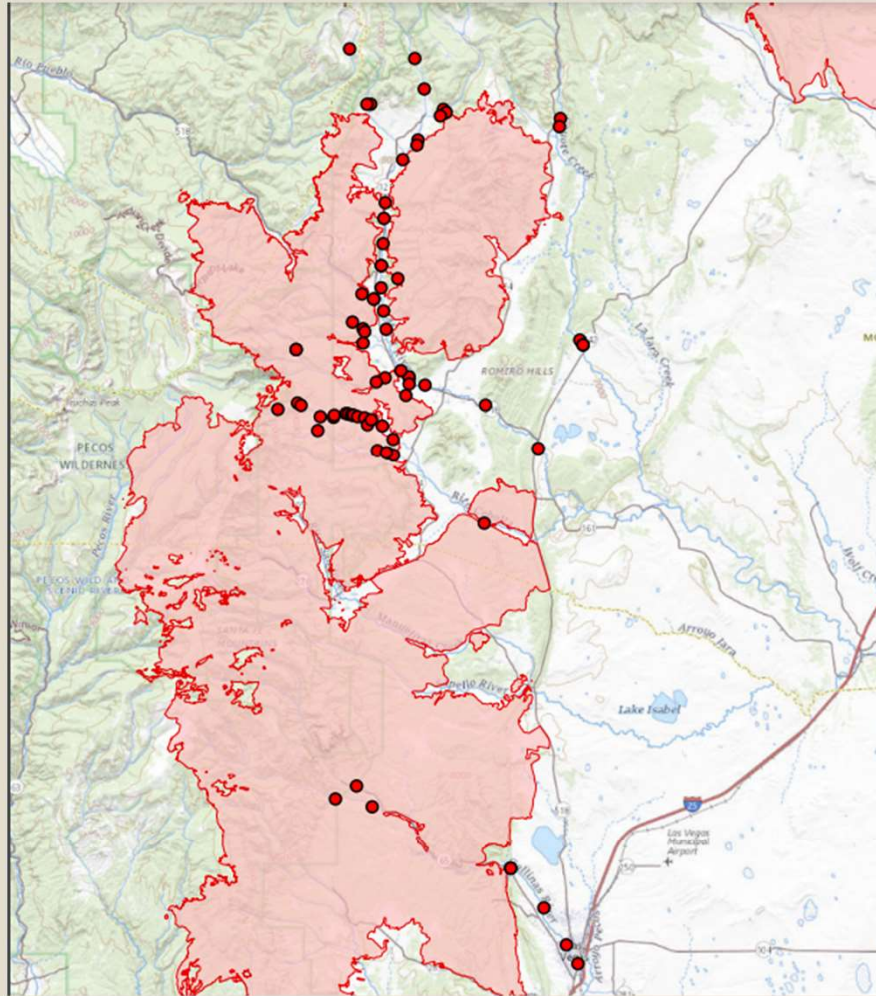


Above: Flooding from the Black Fire and impacts to the Grijalva Ditch Diversion in Grant County

Burn Scar Flooding, Acequia del Lado Sombrillo



Flooding from the HPCC burn scar in Gascon, Mora County destroyed the diversion structure and changed the flow of the river. The acequia waterway was clogged with silt and debris from burned forest on the side slopes.



Hermits Peak/Calf Canyon

Acequias mapped and inventoried	75
FEMA RPA Applications	43
NMDOT Debris Removal MOA	28
NMDOT Completed	14
NRCS EWP Applications	52



Debris Removal by NMDOT

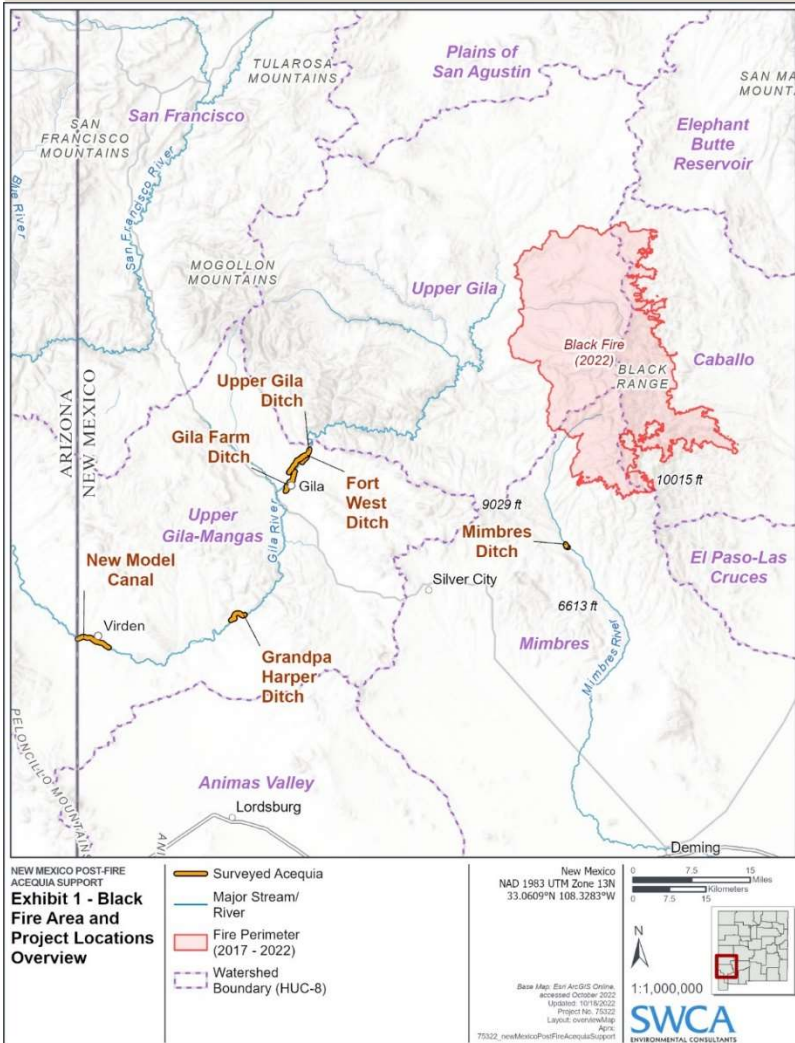
Acequia Madre de Holman

BEFORE



AFTER





Black Fire

Acequias Mapped and Inventoried	20
NMDOT Debris Removal	10
ISC Damage Assessments	10
DHSEM DAP Applications	15
EWP	0



USDA NRCS Emergency Watershed Program (EWP)

Some of the purposes of EWP:

- Remove debris from stream channels, road culverts and bridges;
- reshape and protect eroded streambanks;
- correct damaged or destroyed drainage facilities;
- establish vegetative cover on critically eroding lands;
- repair levees and structures

How it works:

Local sponsor is required, usually a SWCD or a County

25% local cost share match is required
(except for HPCC where 100% is covered)

Acequias are eligible for EWP.

- Over 50 acequias have requested EWP in HPCC. NMACD conducting assessments.
- The program is not yet available to Black Fire acequias because the local sponsors cannot afford cost share.

State funds are needed to leverage EWP for Black Fire Recovery!



Disaster Recovery Challenges

Recent Progress

More Work To Do...

- **Reimbursement structure.** FEMA and DHSEM work on a reimbursement basis. This can be prohibitive for acequias.
 - **Cost share.** FEMA (75/12.5/12.5), DHSEM (75/25) and EWP (75/25) have a cost share requirement (except for the HPCC disaster for which FEMA pays 100%). Local EWP sponsors cannot afford the 25% cost share.
 - **Technical assistance/Communications.** Acequias need significant technical assistance and disaster agencies need up to date maps and contact lists.
 - **Cascading events.** Disaster programs should cover ongoing flood events.
-
- The **ACDIF** was amended to add “disaster recovery” to the purpose of the fund and to encourage cost share arrangements.
 - **NMDOT** worked with FEMA and DHSEM to conduct debris removal for acequias and get reimbursed.
 - **NRCS EWP** rules allow acequias impacted in 2022 disasters to participate. This can be for debris removal or repairs. Several sponsors are in place statewide.
 - NMAA and partner, High Water Mark, developed a map and contact list and provided assistance navigating FEMA and DHSEM.
-
- Meet **25% cost share requirement** with state funds. FEMA, DHSEM, EWP.
 - Formalize the **acequia disaster support** based on lessons learned from the NMDOT debris removal work recently.
 - Ensure resources are mobilized for acequia technical assistance, mapping, and communications.

Recap of Policy Recommendations

ACDF: Increase funding level to support acequias in the adjudication process and settlement implementation.

Water Leasing: Protect due process in water leasing applications through legislation or rulemaking. OSE should adhere to judicial rulings and AG opinions. Legislative body should closely monitor OSE to protect the public interest.

Acequia Infrastructure: Stabilize the balance of the Irrigation Works Construction Fund, the source of funding for the Acequia and Community Ditch Infrastructure Fund (ACDIF). Support the newly created Acequia Bureau with staffing. Support continued acequia technical assistance for infrastructure planning.

Acequia Disaster Recovery: Acequias need support with the required cost share for state and federal disaster programs. This could be met with special appropriations to the ACDIF. Support continued acequia technical assistance for disaster recovery.

Questions?

