

Water Transfers and Water Leases: Impacts on Acequias

Presentation to the Land Grant Interim Committee
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David Benavides, New Mexico Legal Aid
Paula Garcia, New Mexico Acequia Association



Presentation Outline

Legal Overview: David Benavides

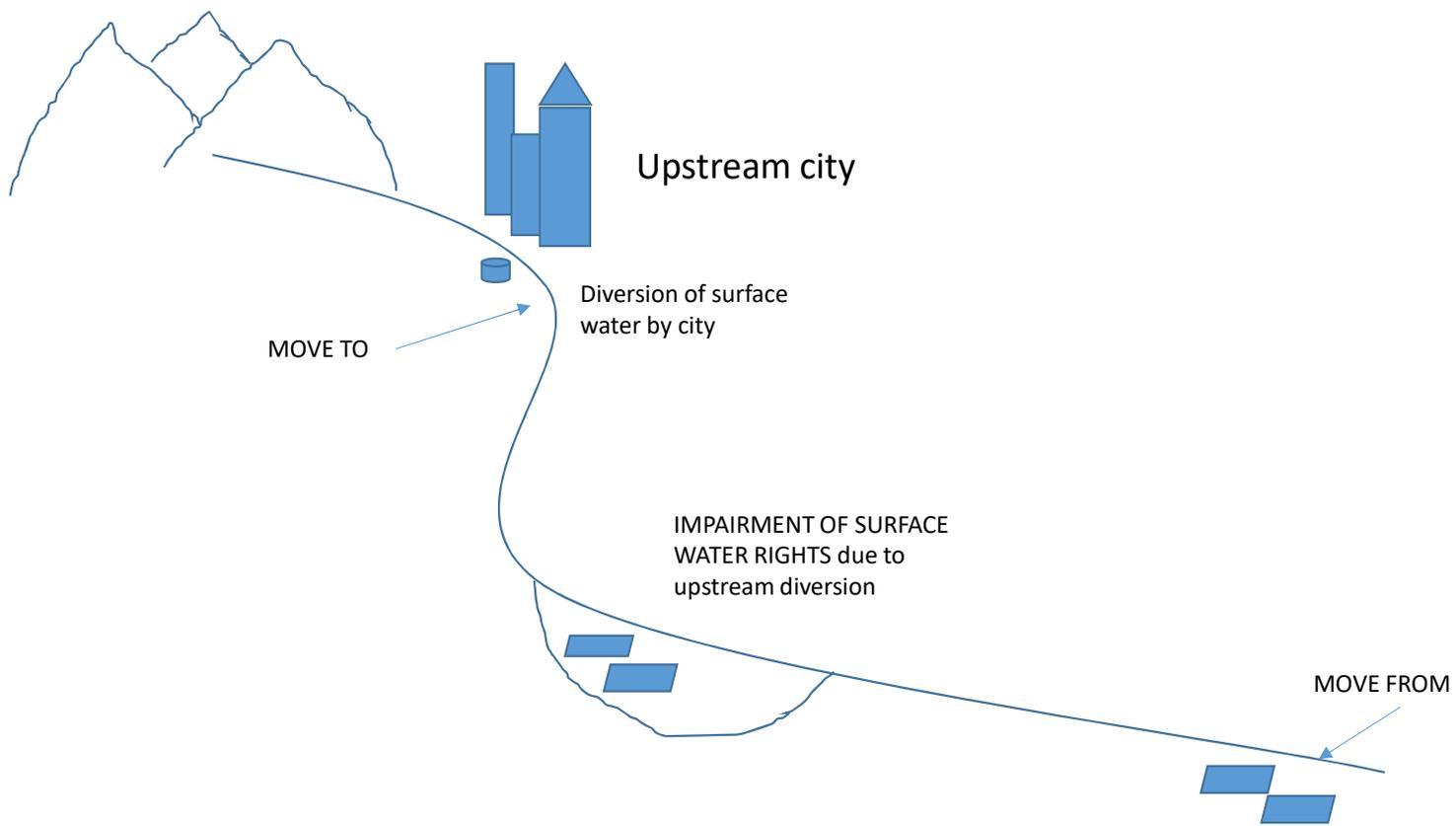
Implications for Acequias: Paula Garcia

Policy Recommendations: Paula Garcia
and David Benavides

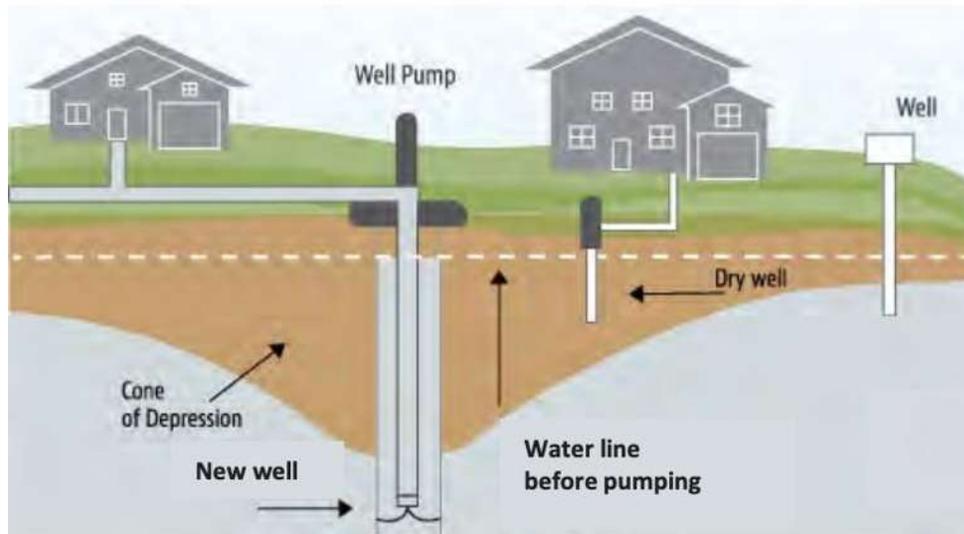
Questions from the Committee

How New Mexico Law is Designed to Protect Water Right Owners

- Acts of others that could decrease the amount of water supplying your water right
 1. Surface Water Right
 2. Groundwater right (well)
- What prevents these acts?
- The law and a process



Interception of Surface Water



Lowering of Groundwater Table by Nearby Well

The law prohibits impairment

- No (re)positioning of a water right to the detriment of any existing water right
- Applies to:
 1. New appropriations
 2. Transfers of water rights
 3. Water Leases (temporary transfers)

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

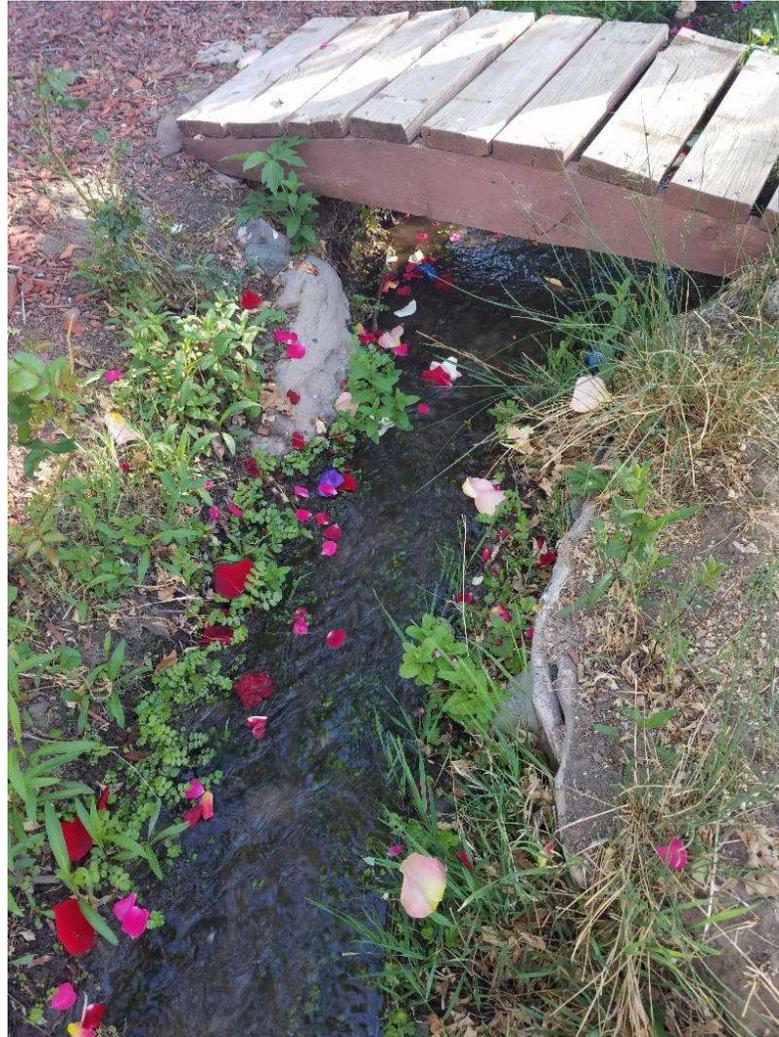
Water-Use Leasing Act (1967)

- NMSA 1978, §§ 72-6-1 through 72-6-7
- Same process/protections
- 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

OSE acting unilaterally and unlawfully

- Examples
- Limited in water volume & duration & type
- OSE exceeding all this in water leasing
 1. Legislature never intended to allow this to happen without checks and balances
 2. Intrepid decision on legality of practice
 3. Intrepid decision on water rights
 4. OSE reaction to these developments

Implications for Acequias



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**.



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

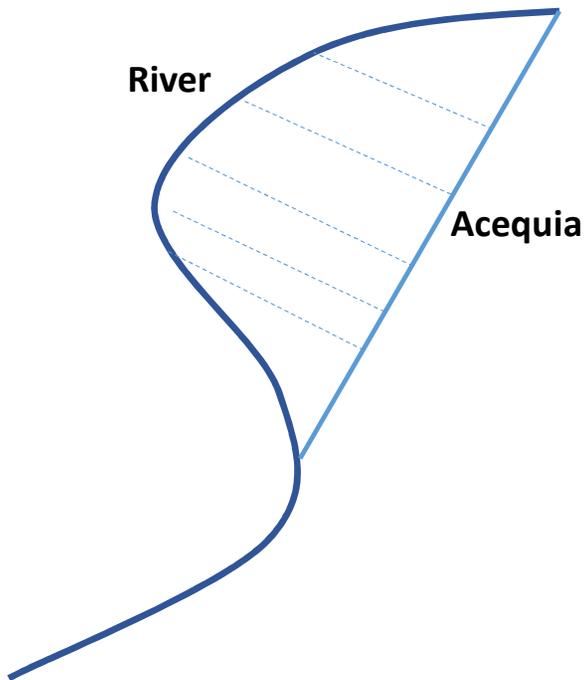
Water transfer process – This is the process of applying for a water transfer:

- 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:

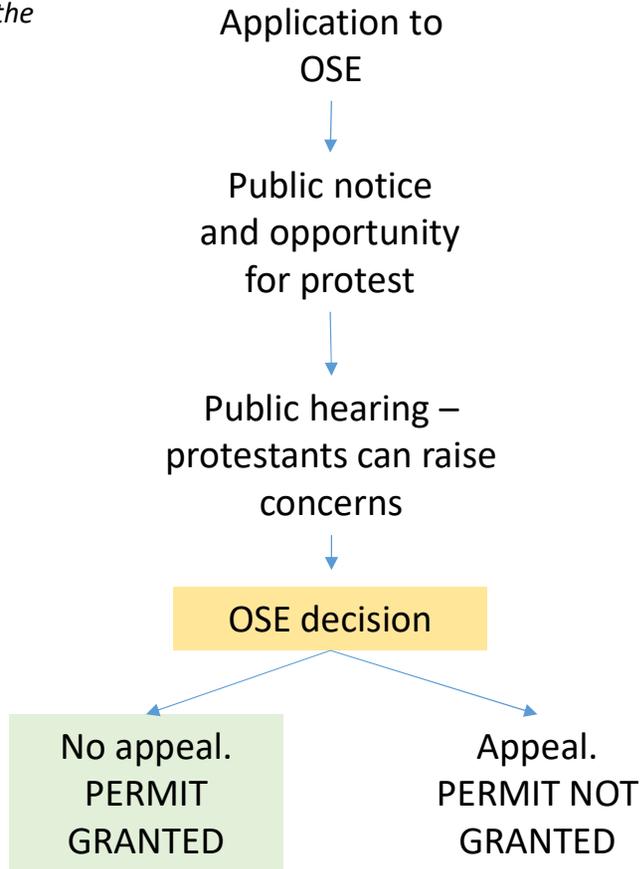
- Groundwater depletion
- Upstream diversion of surface water

How acequias respond:

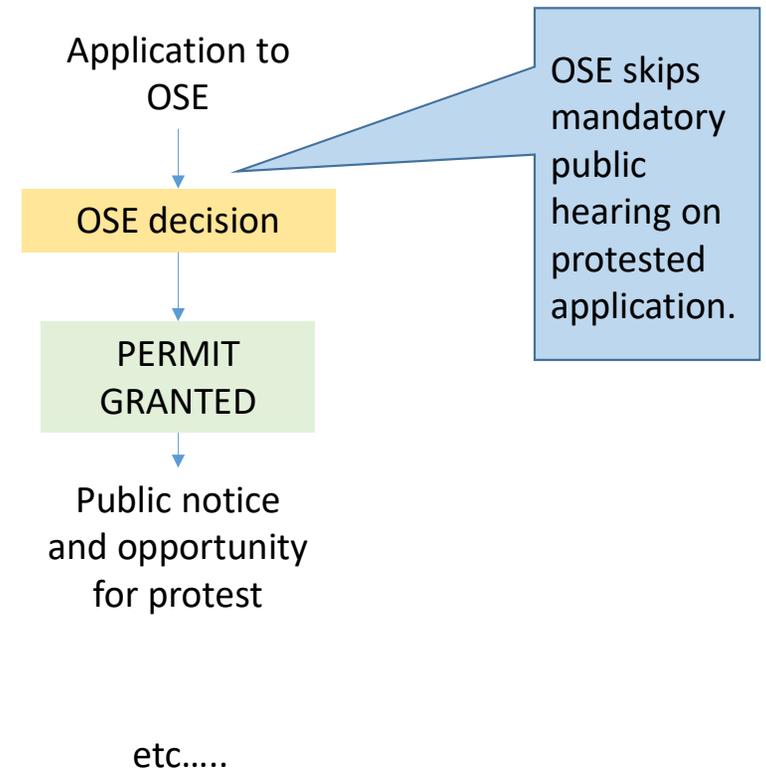
- Transfers within an acequia - For specific applications into or out of acequia, the acequia has authority to deny transfers (due to 2003 law)
- Transfers outside an acequia - Filing protests to water transfers that impact them
- **Protests are a vital tool for acequias (and other stakeholders) to raise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

NORMAL Water Transfer/Lease Process

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).

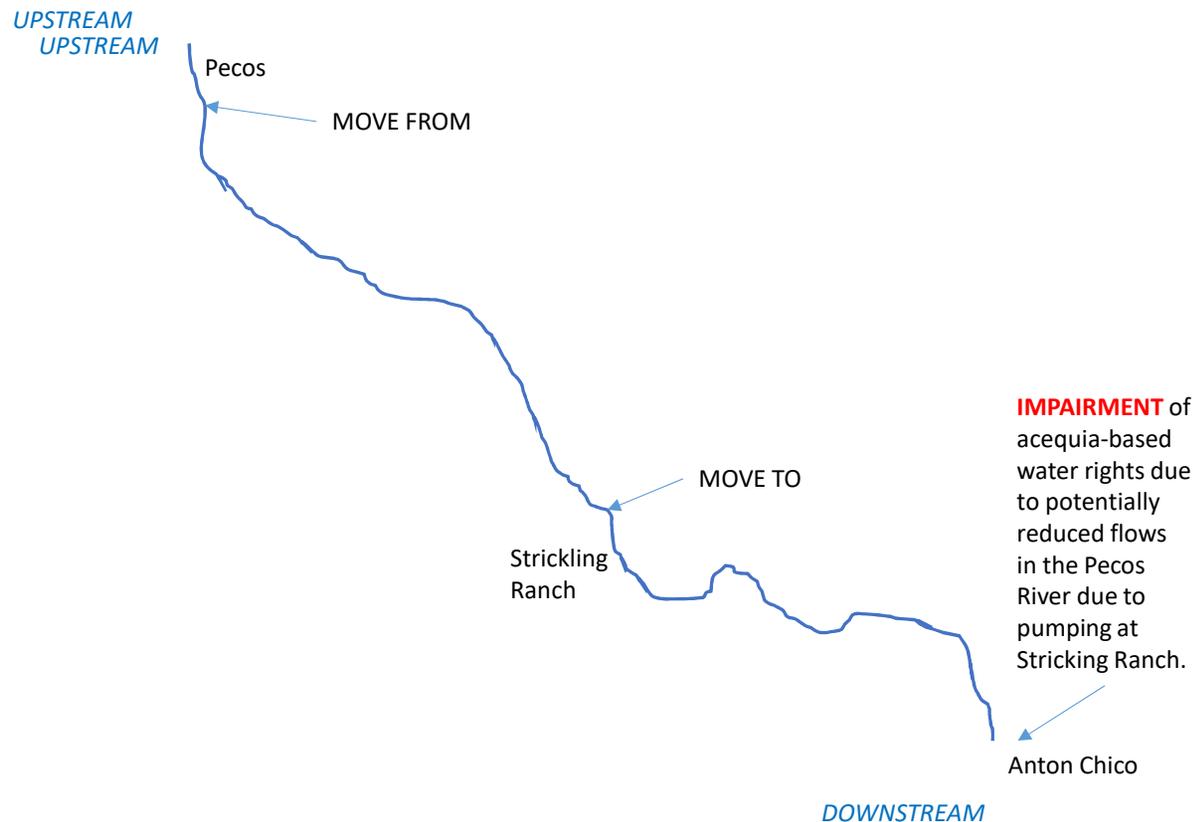


NOT NORMAL Preliminary Approval Process



A tale of two protests: #1 Anton Chico

Anton Chico acequias protested a water transfer from Pecos to Strickling Ranch because of potential impairment of their water rights.



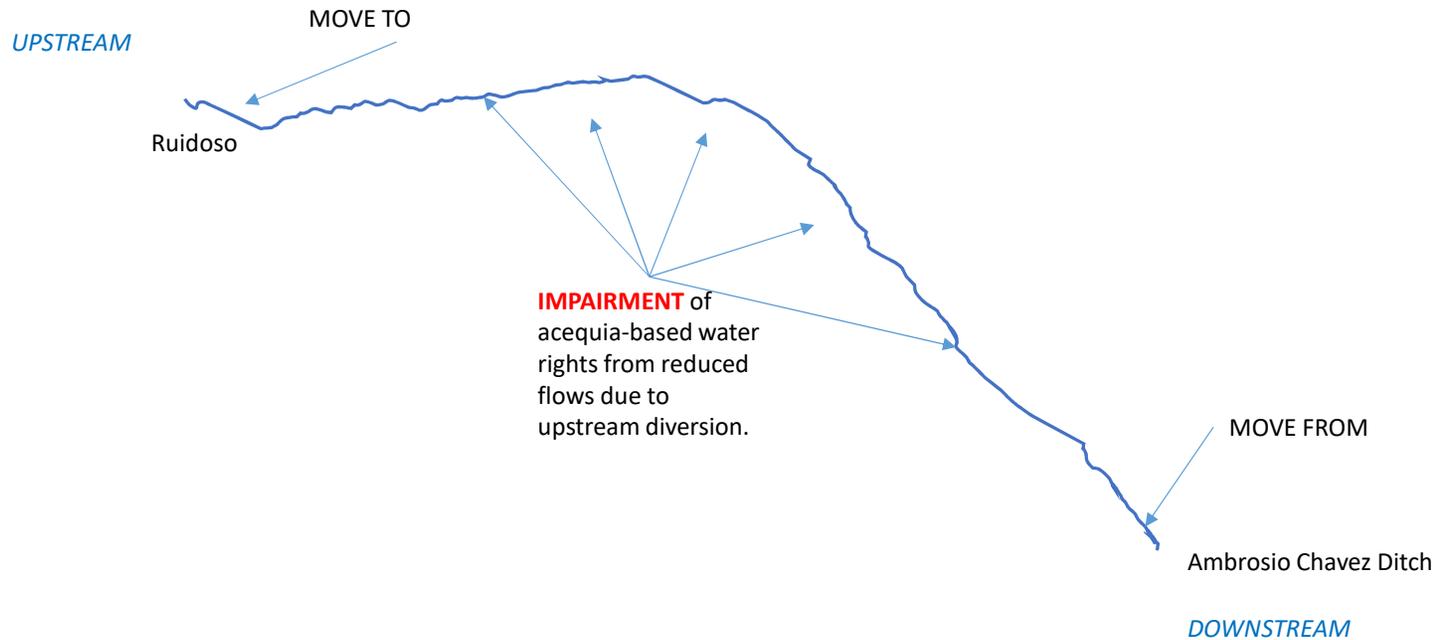
Proposed transfer seeks to move surface water from an acequia in Pecos to Strickling Ranch.

Could result in potential impairment of downstream acequias in Anton Chico because Strickling would pump directly from the river, resulting in less flow in the Pecos River.

Acequias filed a protest, had a hearing, and continue to fight for conditions on the permit to protect them from impairment. In this scenario, at least acequias can raise their concerns.

A tale of two protests: #2 Upper Hondo

OSE granted **preliminary approval** to water lease applications that moved water from downstream, **leapfrogged over several acequias**, and moved water to the Village of Ruidoso. Acequias in between the move-from and move-to points likely suffered impairment of their water rights.



Upper Hondo acequias who would potentially be impaired by the water lease filed protests.

However, the OSE granted the water use lease permit before the public notice and before protests were filed.

The use of water happened while the protest was pending.

This was an unprecedented action on acequias. Approving a lease while a protest is pending is unlawful.

Decades of advocacy by acequias on water transfers and water leases:

1980s-1990s

Acequias file their first protests to water transfers in Ensenada Community Ditch (near Tierra Amarilla) and Anton Chico

2000s

Acequias mobilize to change state law to authorize acequias to approve or deny water transfers out of an acequia. Since 2003, hundreds of acequias have adopted bylaws with language to regulate water transfers.

2010s

Since 2014, acequias have consistently opposed OSE practice of “preliminary approval” including introduction of bills to strengthen existing language on due process.

In 2019, acequias, with support of the Land Grant Interim Committee, successfully advocated for passage of a new law requiring that the OSE post notices of water transfers/leases ONLINE, improving transparency.

.... Meanwhile, acequias continue to file protests when their water rights are at risk of impairment.

Policy Recommendations

- A District Court Judge (Romero) ruled that the OSE is not authorized to grant preliminary approvals in water use leases. Until this works its way through the courts, the OSE should discontinue the practice.
- Any future legislation that seeks to change the Water Use Lease Act (WULA) should be developed in a manner that upholds the long-standing protections in New Mexico law for existing water rights.
- The process for developing future legislation should engage diverse stakeholders including acequias and community land grant-mercedes.
- Because the positions differ so widely between industry and acequias/conservation organizations/community groups, this legislation would not be appropriate for a 30-day session. If any changes to WULA are contemplated, the soonest legislation could be proposed would be 2023 and only after a robust and inclusive stakeholder process.

Questions?

