



## Attorney General of New Mexico

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Attorney General

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Chief Deputy Attorney General

October 31, 2008

Robert Kyzer  
Los Padillas Community Acequia Association  
7725 Black Mesa Loop SW  
Albuquerque NM 87105

**Re: Determination of Open Meetings Act and Inspection of Public Records Act complaints**

Dear Mr. Kyzer:

Thank you for responding to our request for information regarding a complaint Susan White, Mike Gadler and Gerald Padilla alleging that the Commissioners of the Los Padillas Community Acequia Association ("Acequia") may have violated the Open Meetings Act ("OMA"), NMSA 1978, Sections 10-15-1 through 10-15-4, and the Inspection of Public Records Act, ("IPRA"), NMSA 1978, Sections 14-2-1 through 14-2-12.

With regard to the OMA, the complaint alleges that the Acequia did not properly provide notice of its meetings, specifically its February 20, 2008 meeting. With regard to the IPRA, the complaint alleges that the Acequia did not timely permit inspection of its records as requested on March 20, 2008. As discussed below, it appears that the Acequia violated both the OMA and the IPRA in several ways.

Before addressing the violations, we note that, for purposes of this letter, the Acequia as described in the Los Padillas Community Acequia By-Laws (adopted December 12, 2006) appears to be a public body subject to the OMA and the IPRA. The By-Laws refer to the Acequia as a "political subdivision of the State of New Mexico" and state that the management and operation of the Acequia "shall be in compliance with [state] laws." By-Laws, Art. I, §§ 2, 3; Art. II, § 1; see also NMSA 1978, § 73-2-28 (acequias and community ditch associations are political subdivisions). As a political subdivision of the state, the Acequia must act in accordance with both the OMA and the IPRA.

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### OMA Violations

Your September 1, 2008 response to this Office states that the Acequia does not have a written open meetings resolution but, as set forth in the Acequia's By-Laws, follows "notification procedures which conform" to the OMA for its membership and commission meetings. Art. II, § 7, 8, 10. Your response also states that the Acequia's meetings are governed by NMSA 1978, Sections 73-3-1 through 73-3-4; these statutes address the election and duties of the Acequia's officers and mayordomo. The OMA mandates that the Acequia "shall determine at least annually in a public meeting what notice for a public meeting is reasonable" for the Acequia. Section 10-15-1(D) (emphasis added). While the meeting notice provisions in the By-Laws may comport with the OMA, the By-Laws do not substitute for the annual open meetings resolution. The Acequia violates the OMA by its failure to annually adopt an open meetings resolution that identifies what the Acequia has determined to be reasonable notice of its meetings and sets forth how this notice must be given to Acequia members and to the public. Id.; see also Attorney General's Open Meetings Act Compliance Guide 13-16 (6<sup>th</sup> ed. 2008) ("OMA Guide") [copy enclosed; additional copies may be downloaded from [www.nmag.gov](http://www.nmag.gov)].

Any meeting of a quorum of the Acequia held to formulate public policy, take action or discuss public business may be held only after reasonable notice of the meeting's date, time and location has been given to the public, so as to permit the public to attend. Section 10-15-1(A), (B), (D). The intent of the OMA's notice requirement is to ensure that the public has reasonable notice of meetings. All meeting notices must include an agenda listing each specific item of business to be discussed or transacted at the meeting or must state how the public can obtain a copy of the agenda. Section 10-15-1(F). The meeting "agenda shall be available to the public at least twenty-four hours prior to the meeting," and the Acequia "shall take action only on items appearing on the agenda." Id.

The OMA requires that draft minutes "shall be prepared within ten working days after the meeting" and "shall be approved, amended or disapproved at the next meeting" of a quorum of the Acequia. Section 10-15-1(G). Meeting minutes must include the date, time and location of the meeting, the names of the Acequia's members attending the meeting and those who are absent, the substance of all those proposals considered and a record of any votes taken that show how each member voted. Id. Further, "All minutes are open to public inspection." Id.

Although the complaint suggests that the Acequia held at least six meetings between October 2006 and May 2008, your response states that the Acequia has held only four meetings since its formation. The documents you provided indicate that these meetings were: (a) October 26, 2006 (initial Acequia reorganization meeting for election of commissioners and mayordomo); (b) November 21, 2006 (joint special meeting with South Valley Regional Association of Acequias

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("SVRAA") to adopt bylaws); (c) October 1, 2007 (regular meeting for election of commissioners and mayordomo); and (d) February 20, 2008 (regular commission meeting).<sup>1</sup>

Regarding the October 26, 2006 meeting, three Acequia members/parciantes issued a notice that called for a special election under state law<sup>2</sup> to elect the three commissioners of the Los Padillas Acequia. The minutes of this meeting of the "Los Padillas Acequia Association" merely show that commissioners and the mayordomo were nominated and elected, and mention discussions on bylaws, statutes and acequia governance. These minutes are inadequate and violate the OMA Section 10-15-1(G) because they do not include the time or location of the meeting, the names of the members present and absent, information describing how the nominations were made, or a record of how the members voted on the nominations. See OMA Guide 19-20.

The following month, notice was given for a November 21, 2006 special joint meeting of the commissioners of four acequias comprising the SVRAA to adopt acequia bylaws "by those entitled to vote." Given the notice of this meeting, we assume this was a commissioner, rather than a membership, meeting. You provided no minutes of this meeting. The lack of minutes for this meeting is a violation of Section 10-15-1(G).

Although the Acequia By-Laws state that they were adopted by "the owners of water rights of the Los Padillas Community Acequia on this 12<sup>th</sup> day of December, 2006" and were signed by the three commissioners, you provided no documentation for any December 12, 2006 meeting at which the By-Laws were presented to the Acequia members for a vote. We assume, therefore, that a meeting was not held on December 12, 2006.

Nearly a year after what you refer to as the initial reorganization meeting, the Acequia commissioners noticed an October 1, 2007 meeting for the biennial election of officers in compliance with state law.<sup>3</sup> The SVRAA published a legal notice of this meeting of the Los Padillas and at least three other acequias. Your response included the SVRAA tentative agenda for this meeting which, in addition to six other agenda items, listed "Acequia Old Business - October 1, 2007 - Biennial Election of acequia officers." You provided the "Los Padillas Acequia Association" minutes indicating that the meeting was held in association with the SVRAA and that Acequia members/parciantes nominated and elected a mayordomo and three commissioners as president, treasurer and secretary. These minutes are inadequate and violate the OMA Section 10-15-1(G) because they do not include the time of the meeting, the names of

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<sup>1</sup> Other meetings referenced by the complainants are May 12, 2008 (no information received) and September 13, 2007 (SVRAA special meeting).

<sup>2</sup> NMSA 1978, § 73-2-15 (if an acequia does not hold an election for officers on the first Monday in December, the current commissioners shall call and hold an election as soon as practicable thereafter; if the current commissioners do not do so, three or more acequia members may call a special election for commissioners).

<sup>3</sup> NMSA 1978, § 73-3-1 (acequia officers shall be elected biennially on the first Monday of October in odd-numbered years).

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the members absent, information describing how the nominations were made, or a record of how the members voted on the nominations. See OMA Guide 19-20.

The minutes for the February 20, 2008 meeting, which purportedly was held for the purpose of defining the Acequia's boundaries and electing or appointing a mayordomo, are inadequate and violate Section 10-15-1(G). They are deficient because they do not include the time or location of the meeting, or information describing how the appointments to fill the commissioner and mayordomo vacancies were made. The minutes reflect no discussion or action on at least four other items specifically listed on the agenda, thus providing an incomplete record of the meeting.

None of the minutes of the three meetings after October 26, 2006 reflects any consideration of or action on the minutes of the previous meeting. None of the meeting notices or agendas for these three meetings lists action on the previous meeting's minutes. The Acequia's failure to properly act upon its meeting minutes violates the OMA Section 10-15-1(G).

The OMA provides that no action taken by the Acequia "shall be valid unless taken or made at a meeting held in accordance with the requirements of ... Section 10-15-1." Section 10-15-3(A). Any action taken at a meeting that violates the OMA is invalid, but the Acequia can legally correct prior mistakes and effectively give legal force to its prior invalid actions. See OMA Guide 41-45.

To cure the OMA violations as specifically discussed above, the Acequia must convene and hold a meeting in accordance with Section 10-15-1, at which it must adopt an open meetings resolution and address past problems with providing reasonable notice of its meetings and preparing and adopting minutes that comply with the law. Section 10-15-3(B). At this meeting, the Acequia should acknowledge its past OMA violations and agree to use its best efforts in the future to comply with the law regarding meeting notices and minutes. The Acequia must give reasonable notice of such a meeting and timely provide an agenda pursuant to Section 10-15-1(D) and (F), and must timely prepare minutes as required by Section 10-15-1(G). Please provide me with a copy of the notice, agenda and minutes of the meeting where the Acequia takes the corrective action described here.

#### IPRA Violations

In addition to the OMA matters addressed above, the complainants allege that the Acequia did not timely respond to their March 20, 2008 written request to inspect public records. Your response states that the Acequia's records are governed by the IPRA. This written request to inspect was sent by certified mail, return receipt requested, to you as Acequia President and to Gary Luchetti as Mayordomo. "Every person has a right to inspect any public records of this state" except as otherwise provided by law. Section 14-2-1(A). "Any person wishing to inspect public records may submit an oral or written request to the custodian [of public records]."

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Section 14-2-8(A). The By-Laws reiterate this right to inspect, in part, by reference to the records of commissioner proceedings and financial records. Art. III, § 4. However, unless specifically exempted by law, all of the Acequia's records are public records subject to inspection.

The Acequia must permit inspection of its public records within fifteen calendar days after the records custodian receives the written request to inspect. Section 14-2-8(D). If inspection is not permitted within three business days after receiving the request, the records custodian must send a letter to the requester informing him as to when during the fifteen day period inspection will be permitted or when the Acequia will respond to the request. Id. Your response states that the Acequia's custodian of public records, Gilbert Valdez, received the request to inspect on March 21, 2008, and did not fulfill the request until May 14, 2008. This nearly eight week delay in permitting inspection violates Section 14-2-8(D) of the IPRA. See Attorney General's Inspection of Public Records Act Compliance Guide 38 (5<sup>th</sup> ed. 2008) ("IPRA Guide") [copy enclosed; additional copies may be downloaded from [www.nmag.gov](http://www.nmag.gov)].

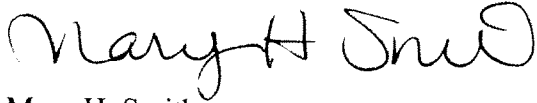
If the Acequia's records custodian determined that the complainants' written request to inspect was excessively burdensome or broad, he was obligated to notify the requester in writing that he needed additional time in which to respond. Section 14-2-10; see also IPRA Guide 41-42. Your response states that the Acequia's records custodian telephoned the requester that he needed additional time to gather the records. The custodian's failure to send the requester written notification of his need for more time violates the IPRA Section 14-2-10.

The Acequia must have a written notice of the right to inspect public records that is posted in a conspicuous place at the Acequia's administrative office. Section 14-2-7(D). This notice must describe the rights of persons to inspect public records, set forth the procedures for requesting inspection and copies of public records, identify the reasonable fees for copying public records, and describe the Acequia's responsibility to make its public records available for inspection. Id.; see also IPRA Guide 34-35, 54 (model notice). Without this notice, the Acequia violates the IPRA Section 14-2-7(D); therefore, the Acequia must prepare and post this IPRA notice as soon as possible. If the Acequia has no office, we would consider it reasonable if this IPRA notice was posted wherever the Acequia records are maintained or in another location where the public is likely to see the notice.

In enforcing the law, our Office educates public bodies about their obligations under, and how they can comply with, the OMA and the IPRA. We trust that the Acequia will take all steps necessary, including those described above, to ensure that it fulfills its obligations under both of these laws in the future. Provided it takes those steps, our Office will take no further action against the Acequia. We will, however, maintain the complaint in our files in the event additional complaints suggest a continued pattern and practice of violations. If you have questions about the specific matters addressed in this letter, please let us know.

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Very truly yours,

A handwritten signature in black ink that reads "Mary H. Smith". The signature is written in a cursive, flowing style.

Mary H. Smith  
Assistant Attorney General

Enclosures (2) as stated

xc (w/o enclosures):

Susan White

Mike Gadler

Gerald Padilla

Gilbert Valdez, Records Custodian, Los Padillas Community Acequia Association  
South Valley Regional Association of Acequias

Albert J. Lama, Chief Deputy Attorney General

Phil Sisneros, Attorney General's Communications Director