

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

STATE OF NEW MEXICO, *ex rel.*
State Engineer

Plaintiff,

vs.

ROMAN ARAGON, *et al.*,

Defendants.

69cv07941-BB-LFG

RIO CHAMA STREAM SYSTEM

Section 7, Rio Brazos

**STATE OF NEW MEXICO’S RESPONSE IN OPPOSITION
TO MOTION FOR LEAVE TO FILE OBJECTION**

The State of New Mexico, *ex rel.* State Engineer “(State”) by and through its undersigned counsel files this response in opposition to the *Motion for Leave to File Objection* filed October 25, 2011, by the Parkview Community Ditch (Doc. No. 10650) (“Motion”). The State objects to the granting of the Motion for the following reasons: (1) the Parkview Community Ditch has not identified the specific tracts or water rights under the Ensenada Ditch for which it seeks to file an *inter se* objection to the State’s proposed priority date of 1861, nor has the Parkview Community Ditch served its Motion upon the owner(s) of those tracts so that those individuals might respond to the Motion; and (2) the Parkview Community Ditch has made no showing of excusable neglect as required by Fed. R. Civ. P. 6(b) for not meeting the filing deadline of September 2, 2011.

In its Motion, the Parkview Community Ditch seeks leave to file an objection to the State’s proposed priority date “for the Ismael Ulibarri portion of the Ensenada Ditch in the Rio Brazos Subsection of Section 7.” Motion at 1. Specific tracts of land or subfiles are not identified and what

tracts, subfiles or water rights might be intended is uncertain and unknown.¹ The State Engineer's hydrographic survey of the Rio Brazos Subsection did not identify any ditch by this name in this subsection, and no such community or private ditch appears on the hydrographic survey maps showing the irrigated lands in this subsection.² Nor have any individual subfile orders been entered in this subsection that refer to this ditch as the source of water or point of diversion for the irrigated lands identified in those subfile orders. Any owners of land or water rights under the Ensenada Ditch that might be affected by the Motion, persons who should be notified of an *inter se* objection and given the opportunity to defend the offer made by the State with respect to the priority of their water rights, should be specifically identified by the Parkview Community Ditch. Those persons should be personally served with a copy of the Motion and have the opportunity to respond. Service of the Motion upon the attorney for the Ensenada Community Ditch (John W. Utton) is not sufficient. While Mr. Utton represents the Ensenada Community Ditch as an association (*see* Doc. 10511), he does not *ipso facto* represent its individual members.

Under Federal Rule of Civil Procedure 6(b), this Court may, in its discretion, accept a late filing if the failure was due to "excusable neglect." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 896-97 (1990); Fed. R. Civ. P. 6(b). To determine whether the neglect is "excusable" a court must take into account all relevant circumstances surrounding the omission, including "the danger of prejudice to the [other parties], the length of the delay and its potential impact on the judicial proceedings, the

¹ A document described in the Motion as Exhibit A that may have assisted in this regard appears not to have been filed with the Court and is not available on the Court's electronic docket.

² The State has identified and mapped an "Ismael Ulibarri Ditch" in the Tierra Amarilla Subsection of Section 7. The water rights associated with this ditch take water from the Rito de Tierra Amarilla and are described in a single subfile order entered on April 7, 2008 (Doc. 9158).

reason for the delay, including whether it was within the reasonable control of the [party making the omission], and whether the movant acted in good faith.” *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P’ship*, 507 U.S. 380, 388 (1993).

The Parkview Community Ditch was served the Court’s Notice and Order to Show Cause (“Notice/Order”) with respect to the State’s proposed priority date for all water rights under the Ensenada Ditch on July 6, 2011 (Doc. 10502). The deadline for filing an objection to the State’s proposed priority date was September 2, 2011. Thus the Parkview Community Ditch had approximately two months to consider the information in the Notice/Order, and to retain separate counsel in this matter in the event Mr. Utton was unable to make an objection on their behalf due a conflict of interest. The State believes it was well within the reasonable control of the Parkview Community Ditch to adhere to the stated schedule and deadline. In support of its Motion, the Parkview Community Ditch merely states that no parties will be prejudiced in allowing the late filing, and that the Motion is not filed for delay, obstruction or any other improper purpose. Motion at 2. The State believes these allegations are insufficient to justify granting the Motion.

In addition, in its Motion the Parkview Community Ditch cites to objections made in July 2010 by the Asociación de Acéquias Norteñas de Rio Arriba (“Acéquias Norteñas”) and the Tierra Amarilla Community Ditch to the irrigation water requirements proposed by the State for the Tierra Amarilla Subsection of Section 7. Motion at 2. The State does not understand the relevance of that information. After being served with the Court’s order to show cause with respect to irrigation water requirements for the Tierra Amarilla Subsection, these two associations filed objections to those proposals and stated, among other things, that “there may be two different ditches in the area known to (sic) as the Ismael Ulibarri Ditch,” and they “objected to the extent that the incorrect ditch is

referred to in the Notice and Order to Show Cause.” *Objections of the Asociación de Acéquias Norteñas de Rio Arriba and the Tierra Amarilla Community Ditch to Proposed Irrigation Water Requirements* ¶ 6 (July 28, 2010, Doc. 9922). A short time after Acéquias Norteñas and the Tierra Amarilla Community Ditch filed their objections, the undersigned counsel for the State contacted their attorney (John W. Utton) to clear up any confusion on the location of the Ismael Ulibarri Ditch described in the 2010 order to show cause. It was explained that a ditch by that name had only been mapped and described in the Tierra Amarilla Subsection of Section 7, that no ditch by that name had been mapped or described in any other area, and that the reference to the Ismael Ulibarri Ditch in the 2010 order to show cause was correct. Mr. Utton is also the attorney of record for the Parkview Community Ditch.

There should be no confusion on part of the Parkview Community Ditch with regard to the information contained in the July 2011 Notice/Order. The Notice/Order did not describe an Ismael Ulibarri Ditch because no community or private ditch by that name has been mapped in the Rio Brazos Subsection of Section 7, and no individual subfile orders have been entered for subfiles in this subsection that refer to such a ditch. The Notice/Order that was served on the Parkview Community Ditch in July 2011 proposed a priority date of 1861 for the Ensenada Ditch in the Rio Brazos Subsection of Section 7 including “any individual irrigation water rights under that ditch.” *See* Notice/Order filed July 6, 2011 (Doc. 10502). This applied to all portions of the Ensenada Ditch, and all water rights and individual subfile orders entered in the Rio Brazos Subsection that described the Ensenada Ditch as the source of water and point of diversion for the water rights described in those subfile orders.

For the reasons discussed above, the State respectfully requests that the Court deny the

Motion for Leave to File Objection by the Parkview Community Ditch filed October 25, 2011.

Respectfully submitted,

/s/ Ed Newville
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10th day of November, 2011, I filed the foregoing electronically through the CM/ECF system which caused the parties on the electronic service list, as more fully set forth in the Notice of Electronic Filing, to be served via electronic mail.

/s/ Ed Newville
EDWARD G. NEWVILLE