

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-MV/LFG

RIO CHAMA STREAM SYSTEM
Section 7, Village of Chama

Subfile No. CHCV-001-0005

**REPLY BY THE STATE OF NEW MEXICO TO
CHAMA VALLEY INDEPENDENT SCHOOL DISTRICT NO. 19'S RESPONSE
IN OPPOSITION TO STATE'S MOTION TO REVISE CONSENT ORDER**

The plaintiff State of New Mexico, *ex rel.* State Engineer ("State") files this reply to the May 15, 2013 *Chama Valley Independent School District No. 19's Response in Opposition to State's Motion to Revise Consent Order* (Doc. 10912).

As indicated in its May 2, 2013 *Motion to Revise the Consent Order Describing the Water Rights of the Chama Valley Independent School District No. 19 in Subfile CHCV-001-0005* (Doc. 10907), the irrigation ditch from which the School District takes its water supplies irrigation water both to tracts of land in the Village of Chama under the Chama Town Ditch, and to tracts of land located west of the Village of Chama and the Rio Chamita under the M-B Ditch. The diversion and ditch that supplies water to small lots in the Village of Chama was originally constructed about 1900. Only after the State Engineer issued a permit in 1931 for the enlargement of the Chama Town Ditch was it also used to transport water to large tracts of land irrigated by the M-B Ditch west of the Rio Chamita. Thus, the right-of-way for the ditch from which the School District takes its water was originally and

solely associated with irrigation use in the Village of Chama. In addition, it is consistently referred to as the Chama Town Ditch in various filings with the State Engineer. For these reasons, the State believes that the better description of the ditch from which the School District takes its water is the “Chama Town Ditch.”¹ A more detailed description of the somewhat confusing history of the Chama Town Ditch follows.

There is no declaration of water rights for surface water use under the Chama Town Ditch. The first available documentary reference to this ditch comes from a report on irrigation water supply by Herbert W. Yeo in 1910. In a table listing ditches in upper Rio Chama, Yeo lists the “Town” ditch with a point of diversion located 2 miles above the Village of Chama on the west bank of the Rio Chama. Exhibit 1 (Rio Grande, New Mexico Area, Tabulation of Ditches, H. W. Yeo 1910, p. 20). The reverse side of the tabulation states that the water is used for lawns and gardens. The following year (1911), Frank W. Broad filed an application (OSE No. 585) to appropriate water through three ditches that he called Broad Ditches No. 1, No. 2 and No. 3. Because he withdrew his application in 1914, only limited documents associated with that application are now available. In an affidavit submitted to the State Engineer in 1911, Broad stated that Broad No. 1 was originally constructed by Wilmot E. Broad about 10 years earlier to water the Town of Chama (generally now known as the Village of Chama). Exhibit 2 (Affidavit of Frank W. Broad dated September 12, 1911). The map of the three ditches Broad submitted to the State Engineer shows the alignment of Broad Ditch No. 1 from its diversion on the Rio Chama to the Town of Chama. Exhibit 3 (Map of the Broad Ditches No’s 1, 2, & 3, July 1911). The current alignment of the Chama Town Ditch is shown on Sheet Map 1 of the Rio Chama

¹ The water rights of the School District in subfile CHCV-001-0005 were transferred to their present place of use from land under the Willow Creek Mesa Ditch near Rutherford. *See* OSE No. 1545 & 1699 into 1974-F approved February 8, 1991.

Hydrographic Survey, Village of Chama Section, July 31, 2003, filed with the Court on August 5, 2003 (Doc. 7211). These maps show that Broad Ditch No. 1, which was identified by Yeo in 1910 as the “Town” ditch, is currently called the Chama Town Ditch. In a letter to the State Engineer in 1914 withdrawing his application, Broad stated that as per his affidavit in 1911, Broad Ditch No. 1 had already been constructed, and that it was not necessary to make further proof of beneficial use of water as to that ditch. Exhibit 4 (letter to State Engineer from Lewis B. Johnson, attorney for Frank W. Broad, dated September 17, 1914).

In 1915, H. L. Hall and William Rice submitted an application to appropriate water from the Rio Chama (OSE No. 967) that would entail the enlargement and the extension of the Chama Town Ditch to transport water to the Rio Chamita and the Rice tract west of the Town of Chama. The map submitted with the application shows the upper segment of the existing Chama Town Ditch that would be enlarged and used to transport the additional water, and the needed extension of that ditch to reach the Rio Chamita and the Rice tract. Exhibit 5 (Map of the Chama Town Ditch, Enlargement and Extension, June 1915); *see also* Exhibit 6 (Application for Permit (OSE No. 967) stating that “this filing is made for the purpose of diverting water from the Chama River through the Chama Town Ditch”).

Finally, in 1931, Kenneth Heron and his associate H. L. Hall filed an application with the State Engineer (OSE No. 1974) for an appropriation of water from both the Rio Chamita and Rio Chama for irrigation use on the Martin and Borders Subdivision west of the Town of Chama and the Rio Chamita. The application again called for an enlargement of the Chama Town Ditch and the transport of water from the Rio Chama through that ditch to irrigate the lands described in the application. The map submitted with the application shows both the proposed M-B Ditch with its diversion from the Rio Chamita and that portion of the Chama Town Ditch that would be enlarged and used to transport

water from the Rio Chama to the Rio Chamita. Exhibit 7 (Map of the M-B Ditch). The map noted that from the principal diversion from the Rio Chama, “which is also the diversion for the Chama Town Ditch, water is to be diverted through the said Chama Town Ditch, which is to be enlarged.” The map shows a traverse of the then existing “Chama Town Ditch” from the Rio Chama (Station 0) to the Rio Chamita (Station 6). The application by Heron and Hall (OSE No. 1974) was approved by the State Engineer on February 27, 1932. After multiple extensions of time that were granted to complete the proposed works, the State Engineer, on July 17, 1970, issued a final license to the water users under the M-B Ditch for the appropriation of 1,896.735 acre-feet of water for use within the Martin and Borders Subdivision. Exhibit 8 (License to Appropriate Water, OSE No. 1974). The license does not describe by name the use of the Chama Town Ditch.

Following the approval of Heron and Hall’s application to the State Engineer, the residents of Chama became uneasy and took some limited steps to protect their water rights under the Chama Town Ditch. In 1944, A. K. Barr acting as an individual water user, wrote to the State Engineer stating that it appeared that Mr. Heron was going to attempt to stop the town’s people from using water from the ditch by erecting a solid concrete curb where the take-off for the town was located, and requesting any information that the State Engineer could provide in regard to their rights. Exhibit 9 (letter to Thomas M. McClure dated September 6, 1944). In 1948, Mr. Barr again wrote to the State Engineer on behalf of the Chama Ditch Association, a community ditch, requesting to be kept informed of all developments pertaining to Application No. 1974, and asserting that such rights as may be granted to Mr. Heron by virtue of Application No. 1974 were subject and inferior to the prior rights of the residents of the Town of Chama. Exhibit 10 (letter to John Bliss dated May 26, 1948). Although advised to do so by the State Engineer, the residents of the Town of Chama never filed a declaration of their water rights.

Instead, for over 30 or 40 years they simply sent the State Engineer a copy of their annual membership irrigation schedule, also stating that their ditch was constructed 1900-1901. Exhibit 11 (Chama Ditch Association, member users for 1977).

The location where the School District takes its water for irrigation is situated along the upper portion of the original Chama Town Ditch above the take-off for water users located within the Town of Chama, and along that portion of the ditch that is used for the transport of water to the Martin and Borders Subdivision to the west of the Rio Chamita.² To describe this section of the ditch as the M-B Ditch could be misleading and, at a minimum, would lead to confusion. It also could be construed by some to diminish the rights of the residents of the Town of Chama. It would ignore the fact that this ditch was in existence 30 or more years prior to the approval of Heron and Hall's application to enlarge that section of the Chama Town Ditch and use it to supply water to their lands in the Martin and Borders Subdivision. As indicated, the right-of-way for this ditch was originally and solely associated with irrigation use in the Town of Chama. Significantly, the granting of the application for the use of upper portion of the Chama Town Ditch to transport water to lands in the Martin and Borders Subdivision in no way removed or did away with the established rights of the owners of land in the Town of Chama. Like all approved permits for new appropriations of water, the permit approved by the State Engineer in OSE No. 1974 came with the condition that it cannot be exercised to the

² There are also three other subfiles describing irrigated lands along this section of the upper Chama Town Ditch: CHCV-001-0002, CHCV-001-0003 and CHCV-001-0004. The water rights in these subfiles were either transferred to these locations under permits issued by the State Engineer, or are associated with the permit and license that was issued for the appropriation of water in OSE No. 967. The subfile orders that have been entered in connection with these subfiles all refer to the Chama Town Ditch as the ditch associated with the point of diversion for the water rights described. *See* Consent Order filed December 12, 2003 (Doc. 7346); Consent Order filed December 12, 2003 (Doc. 7345); Consent Order filed June 30, 2004 (Doc. 7496).

detriment of others having prior, valid and existing rights to the use of water. Exhibit 12 (Application for Permit, OSE No. 1974), Approval of State Engineer, p. 3).

For all of these reasons, the State believes that the better description of the ditch from which the School District takes its water is the Chama Town Ditch. This portion of the original Chama Town Ditch has consistently been described as the Chama Town Ditch in the filings with the State Engineer, and it has been used by the residents of the Town of Chama for irrigation purposes since thirty or more years prior to the construction of the M-B Ditch by Mr. Heron and Mr. Hall.

Respectfully submitted,

/s/ Ed Newville

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 29th day of May 2013, 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