

Water Right Declarations and New Mexico Land Grants

An Outline of the Potential Issues and Conflicts in filing a Water Right Declaration for New Mexico Land Grants.

Prepared by New Mexico Legal Aid Inc. for the New Mexico Land Grant Council

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Water Right Declarations and New Mexico Land Grants

A “Declaration of Ownership of Water Rights” is a sworn statement made on a form issued by the Office of the State Engineer (OSE) in which a water right owner describes the nature and extent of his or her water right.^{1,2} The format of a declaration is like an affidavit and it must be notarized. However, it is different from other types of affidavits because New Mexico statutes give declarations special status as credible proof of a person’s water right claim.

In the declaration, the water right owner, who is referred to as the “declarant” or the “claimant”, describes the key **elements of the water right**, including: (1) the quantity of the water right, based on past beneficial use, (2) the year the water right was initiated, also called the “priority date”, (3) the purpose of use, (4) a description of the delivery system (e.g. the ditch or the well), (5) the location of the point of diversion, and (6) if it is an irrigation right, the location and amount of land irrigated.³

A declaration for a surface water right is only used for water rights that were initiated **before 1907**.⁴ Before 1907, a person could initiate a water right by simply diverting the water and putting it to beneficial use without any governmental forms or permission. After 1907, an OSE permit was required to initiate a new surface water right.⁵ Thus, a declaration serves as a paper record for a pre-1907 surface water right. For underground water rights, a declaration is used to declare a well or underground diversion that was constructed before the year that permits began to be required in the particular underground basin.⁶ These dates vary from basin to basin, but are always from 1931 or later.

If a declaration has been filed by a previous owner of your water right, you can benefit from it even though you did not file it, and you do not have to file your own separate declaration.⁷

¹ See Office of State Eng’r, *Declaration of Ownership of Water Rights*, http://www.ose.state.nm.us/WR/Forms/WR-03%20Declaration%20of%20Ownership_2012-06-14_final.pdf. A copy of the Declaration of Ownership of Water Rights is attached hereto as Attachment “A”.

² Special thanks to Shane Maier and the University of New Mexico Natural Resources and Environmental Law Clinic for their editorial assistance.

³ See NMSA 1978, § 72-1-3 (1961) (copy of this statute attached as Attachment “B”).

⁴ See NMSA 1978, § 72-1-3 (1961) (copy of this statute attached as Attachment “B”).

⁵ See NMSA 1978, § 72-5-1 (1941) (originally enacted in 1907).

⁶ See NMSA 1978, § 72-12-5 (1931).

⁷ See NMSA 1978, § 72-1-4 (1961) (stating declarations filed before laws requiring certain content and form for declarations are valid and act with the same force and effect as newer declarations). A copy of this statute is attached hereto as Attachment “B”.

There is no legal requirement that you file a declaration for your water right, so it is completely optional.

How is a declaration useful to a water right owner?

The importance of a declaration comes into play in any proceeding where evidence of the water right is required. New Mexico law says that a declaration is legitimate proof of the water right, even if the claimant has no additional proof.⁸ Some aspects of a water right can be difficult to prove because of how long ago the water right may have been initiated and the lack of living witnesses or old documentation. For example, if a previous owner filed a declaration stating that the water right was initiated in 1850, and somebody contests that fact in court but does not have any proof to disprove the 1850 date, then the declaration may be enough to prove your case. The judge is supposed to accept that the 1850 date has been sufficiently proven by the declaration, and as long as there is no evidence to the contrary, the judge should award an 1850 date for the water right. In other words, the statute requires a judge to accept the statements in the declaration unless there is actual proof to the contrary.⁹

So a declaration is not the final determination of a water right, but it is proof of the water right, and it can be conclusive proof depending on whether evidence is offered to rebut the declaration. However the timing of filing a declaration can be important. For most people the most important court case to give legal recognition to their water right is a proceeding called a **stream adjudication**. The court in a stream adjudication will weigh all the evidence pertaining to each water right on the stream and make a decision as to the validity and extent of each water right. So if you want your declaration to serve most usefully as your evidence you would want to file it any time **before** the water right is adjudicated in a stream adjudication. Many areas of the state have not completed a stream adjudication, so for many people it is not too late to file a declaration.

What water rights might a land grant want to declare?

A good example of water rights that a land grant might want to declare would be water rights that are exercised on common lands or that are somehow associated with common lands. For example, if there is a spring, a stock pond, or a well with a stock tank on the common lands, particularly if it is open to general use by heirs of the land grant, then the land grant might declare those water rights because they are not intended to be for the private exclusive use of any one person or heir. The land grant should declare these rights in order to assert that they are owned by the land grant and are under the management of the land grant as a common resource

⁸ See, e.g., NMSA 1978, § 72-1-3 (1961); *Montgomery v. Lomos Altos, Inc.*, 2007-NMSC-002, ¶ 29, 141 N.M. 21 (recognizing that declarations provide “prima facie” evidence if they are not rebutted by other evidence). A copy of this statute is attached hereto as Attachment “B”.

⁹ See *Montgomery v. Lomos Altos, Inc.*, 2007-NMSC-002, ¶ 29, 141 N.M. 21.

for all the heirs. This would eliminate the risk of the water rights going unclaimed, or being claimed incorrectly by an individual as a private claim. The land grant should try to determine the maximum amount of water that was put to beneficial use in any prior year to use as the declared amount.

An example of a filled-out declaration form that a land grant actually filed to claim water rights for stock tanks on common lands is included as Attachment “A”. It is notable that the land grant declared a priority date of 1734, meaning the date of first use of the water. As supporting documentation, the land grant attached to the declaration a court order by an adjudication court finding that certain irrigation water rights on the grant were entitled to a 1734 date. The land grant declared that the amount of water use was 3,600 gallons per day. The land grant also attached maps showing the locations of some of the stock tanks. It is advisable to have a lawyer familiar with water law review not only the declaration form itself but also any maps or documents you may wish to attach to the declaration.

It is more problematic for a land grant to declare water rights that have always been exercised only by the landowner on a particular piece of private land. For example, most pre-1907 irrigation water rights are legally tied to the particular piece of irrigated land where they have historically been used.¹⁰ The private landowner would normally assume the right to declare the water rights, if a previous owner has not already done so. Land grants or acequias usually are not considered the owners of irrigation rights on private lands, although they can sometimes be the owners of ponds or reservoirs on private lands if the water in the ponds or reservoirs are for community use. A land grant should evaluate carefully all water uses on the grant for those uses that are community-wide or where the land grant itself is the primary user. A land grant may want to get legal advice, if it is not sure whether to declare a particular water right.

Are land grant water rights protected by the Treaty of Guadalupe Hidalgo even if they are not declared?

In theory, yes, but there are exceptions to Treaty protections when it comes to water rights.

The biggest problem is asserting water rights that were not in actual use (i.e., not vested) at the time of the Treaty. The City of Las Vegas tried to use the Las Vegas Land Grant to assert a large quantity of water rights that were not in use at the time of the Treaty, and the N.M. Supreme Court ruled that the Treaty only protected vested water rights.¹¹ If the Spanish or Mexican granting documents provide that waters of the land grant are granted for certain future uses, then those water uses that were actually in place prior to 1848 would have Treaty protection. Water rights that were first exercised on a land grant after 1848 would not come under Treaty protection and would be governed by state law, as opposed to Spanish or Mexican law, according to the Court.¹²

¹⁰ See NMSA 1978, § 72-1-2 (1907).

¹¹ State ex rel. Martinez v. City of Las Vegas, 2004-NMSC-009, 135 N.M. 375.

¹² See *id.*

It is also not entirely clear what it means for a pre-1848 water right to be “protected” by the Treaty. Certainly, it would mean that the government cannot arbitrarily disclaim or terminate a pre-1848 water right, because a water right is a property right and property rights “of every kind” were protected by the Treaty.¹³ However, the courts have not determined whether the Treaty specifically protects a pre-1848 water right from being forfeited or legally abandoned for non-use. Non-Treaty-protected water rights can be lost due to non-use, under the New Mexico’s use it or lose it doctrine.¹⁴

Land grants should feel free to pursue their water rights through declarations, Treaty claims, or both if they so choose. However, a land grant may compromise Treaty protection for a water right if the land grant declares the water right was initiated after 1848, for the reasons discussed above.

What are the current issues in New Mexico surrounding declarations?

The issues surrounding declarations have recently changed. Previously, the main issue was whether it was advisable for you to file a declaration and whether you had enough accurate information to do so. Today, because the OSE has begun a practice of rejecting many declarations, often with no legal basis to do so, there may be also an issue of whether you will be able to file your declaration and what to do if the OSE refuses to accept it for filing.

The importance of accurate information in declarations

Generally, it is better not to file a declaration than to file a declaration that may be inaccurate and would inadvertently claim less water rights or more junior water rights than you have a right to claim. For example, if you file a declaration that asserts that the water right was initiated in 1850, but you later learn that the water right was probably initiated in 1750, it places you in the position of disproving the statement you made earlier in the public record that 1850 was the correct date. (In New Mexico it is better to have an older priority date for a water right.) If the evidence for the 1750 date is word-of-mouth or not well-documented, which sometimes is the case, you might end up with a court giving more weight to the declaration and determining that 1850 is the correct date. You may have been better off waiting until you had more complete facts or research before filing the declaration so as not to have to contradict or disprove yourself later on. To avoid this, it is a good idea to have an attorney who is familiar with water law review a draft of your declaration and your supporting evidence. Keep in mind that the law does not require a declaration to be filed. It may be wise, therefore, to hold off until you are confident that every element of the water right, to the extent you are entitled, is correctly being declared.

¹³ See Treaty of Peace, Friendship, Limits, and Settlement with the United States of America and the Republic of Mexico, Treaty of Guadalupe Hidalgo, Feb. 2, 1848, U.S. – Mex., Art. VIII, 9 Stat. 922.

¹⁴ See NMSA 1978, § 72-5-28 (2002).

You may not have the opportunity to correct a mistake and file a revised declaration later on, as is discussed in the next section.

The problem of the OSE refusing to accept declarations

There is nothing in the declaration statute that suggests that the OSE has the right to reject a properly filled-out declaration form. Yet, the OSE is currently rejecting many declarations that are filed. The idea behind the declaration law is for there to be a process for people to make a written claim as to their water rights, not that anyone or any agency necessarily has to agree with the claim.¹⁵ Previously, the OSE would return a copy of the declaration to the claimant with boilerplate language stamped on the copy or with a cover letter stating that acceptance by the OSE of the declaration for filing did not constitute endorsement or agreement by the OSE with the statements made in the declaration. This is perfectly consistent with the declaration law. In doing so, the OSE maintained the option to contest the claim at a later date. But it was unheard of that the OSE would not accept a properly filled-out declaration form – acceptance appears to be required by statute.

So are there legitimate grounds for the OSE to reject a declaration? There is only one reason that the courts have recognized -- in a case decided in 2005 involving the community of Eldorado. The New Mexico Court of Appeals ruled in that case that the OSE has the discretion to refuse a declaration, if the declaration is claiming non-vested water rights.¹⁶ A non-vested water right is a water right that has not fully come into being because it has not fully been put to beneficial use. For example, you might have a permit from the OSE that says you can construct a well of a certain capacity and divert a certain amount of water, but if you have never pumped any water from the well, you have not completed (or vested) the water right itself – you simply have a permit, but no actual legal water right. You would only have a water right if you started putting the well water to beneficial use, and the amount of your water right would be the maximum amount beneficially used in any one year. If no water has been put to beneficial use and you filed a declaration for the amount stated in the permit, then the OSE could reject the declaration because no water rights are vested. However, the Court said there must be some evidence in the OSE records that the rights are non-vested in order to kick it into that category.¹⁷ In that case, Eldorado Utilities, Inc. filed a declaration in 1971 and then tried filing an amended declaration in 1997 as a correction, claiming 50 times more water than it claimed in 1971.¹⁸ The N.M. Court of Appeals ruled that there was evidence in the record that the additional water rights Eldorado was claiming in 1997 were not vested.¹⁹ Thus, the OSE was within its rights to reject the amended declaration in that case.

So if a land grant wants to avoid its declaration being rejected by the OSE, then the land grant should claim in the declaration only water rights based on *actual prior use*, and not additionally claim rights with no history of actual use that would be used in the future.

¹⁵ The OSE and the county clerks' offices are the two places designated by law to file declarations. See NMSA 1978, § 72-1-3 (1961) (copy of this statute attached as Attachment "B").

¹⁶ Eldorado Utilities, Inc. v. State of N.M., ex rel. D'Antonio, 2005-NMCA-041, 137 N.M. 268.

¹⁷ See *id.* ¶¶ 12-13.

¹⁸ See *id.* ¶¶ 3-4.

¹⁹ See *id.* ¶¶ 15-17.

The problem is that rejections of declarations by the OSE have increased dramatically in the last decade, and most of the time the rejections have nothing to do with people claiming future rights or non-vested rights. The OSE often provides other reasons for refusing to file declarations – but these reasons have not been recognized as valid by New Mexico courts or in statute. This is contrary to the Eldorado case, which implied that declarations should typically be routinely accepted by the OSE. The fact that the OSE is not routinely accepting declarations means the benefit that people are supposed to gain from using a declaration in a court proceeding is being undermined. A land grant should be prepared for the possibility of an improper rejection of its declaration and having to challenge that rejection.

Step-by-step guidelines for filling out declaration form

Attachment A is a declaration form filled out by a land grant. Below are some suggestions for filling in various blanks on the form. Please refer to the corresponding blanks in Attachment A.

- Blank no. 1. Be sure that the NAME is the name of the land grant and not an individual's name. If the land grant has its own mailing address, include that address. Otherwise it is fine to use the contact information for the president or other officer of the land grant, but do not put that person's name in the NAME blank, but only where it says CONTACT OR AGENT.
- Blank no. 2. The most likely uses a land grant would declare would be livestock, domestic or irrigation, although some land grants may have other uses to declare. Before filling out this blank, carefully review the section above, "What Water Rights Might a Land Grant Want To Declare?" Attachment A is an example of a land grant declaring a livestock tank system on the common lands. If a land grant operates a community domestic well, or if there is not already a functional separate entity that operates the community well, the land grant may want to declare the water rights for the well as a "domestic" right. Likewise, if there is an irrigation pond or irrigation of any of the common lands, the land grant might claim those as "irrigation" rights. There are two important things to consider in each of these cases. First, is there another entity or person that would be better as a declarant of those rights? For example, if there is a community well, it might be a good idea for the land grant to consult with whoever operates the well as to who would be best to declare the well rights. That way the land grant can be sure that the rights don't go undeclared and that the most appropriate declarant is used. If no one else would declare the rights in any of these categories, the land grant might decide to declare them. Secondly, the AMOUNT OF WATER portion of this blank is very important, and the land grant will be limited in the future to whatever they put in the blank. The land grant will not want to shortchange itself in terms of things such as the size of a pond, the number of irrigated acres, the amount that is diverted from a stream or any other quantifiable aspect of the water right. In addition, certain quantities, such as diversion amounts for irrigation, vary for the different regions of the state, so the amount that one land grant may use might not apply to another land grant. For these reasons, it is

a very good idea to consult with a water right attorney and/or a hydrologist on the DIVERSION and CONSUMPTIVE USE portions of this blank.

- Blank no. 3. This can be a difficult date to fill in because the first use of the water may have been so long ago that there may not be any actual record of it. In these cases it is acceptable for a land grant to base the date on second-hand or indirect information that the land grant believes to be valid. The date of a water right is a very important element of the right, so it is worthwhile for a land grant to declare the earliest date for which there is supporting information. In Attachment A the land grant filled in 1734 as the priority date. As supporting documentation, the land grant attached to the declaration a court order by an adjudication court finding that certain private irrigation water rights on the grant, but not belonging to the land grant, were entitled to a 1734 priority date. From this, the land grant knew that the date of settlement of the grant and the date of first use of water for irrigation on the grant had already been proven to the satisfaction of a court. The land grant may have had good reason to believe this same date applied to the stock watering uses the grant was declaring. Other documents that might be used in a similar manner for the priority date could be the original Spanish or Mexican granting document (see Attachment C) or the U.S. patent for the land grant (see Attachment D). Spanish and Mexican law governed land grant common lands and it is good to be familiar with laws such as Los Leyes de Las Indias and how waters were reserved for land grants under these laws. (Contact the Land Grant Council for more information about these laws.)
- Blank no. 4. This is self-explanatory – fill in the county where the use takes place.
- Blank no. 5. This is one of the more technical blanks on the form and it might be necessary to use GPS or get assistance from someone who is experienced with GPS. It asks for the exact location of the point of diversion and, if a well is being declared, the exact characteristics of the well. For a surface water right, the point of diversion is where the diversion from the stream is located. For an underground right, it is the exact location of the well. In addition it asks for detailed information on the characteristics of the well and the pump. Sometimes this information is included in the records from when the well was drilled -- those records can be attached to the declaration. Like any other quantities in the declaration form, the land grant does not want to shortchange itself. For example, the capacity of a well (in gallons per minute) might determine the amount of the water right, so do not underestimate this figure.
- Blank no. 6. This blank is also fairly technical and may require the use of GPS. It asks for the exact location where the water use takes place and, if an irrigation right is being declared, the number of acres irrigated.
- Blank no. 7 and ATTACHMENTS. This is self-explanatory. It is a good idea to have a water right lawyer and/or hydrologist review any additional statements or attachments to the declaration to ensure that they do not contradict other statements that are made in the declaration. Attachments can be court documents, maps, plats, land grant documents, well drilling records, historical documents or anything else that might give more detailed information relating to one of the blanks of the declaration form. See Attachment A.
- If you have any questions or need assistance, you can ask for help from the NM Land Grant Council at nmlandgrantcouncil@unm.edu or New Mexico Legal Aid at (505) 982-9886.

Checklist for declaring land grant water rights

- Think through whether you should file a declaration: how does it actually help the land grant? Is there an upcoming adjudication and a lack of documentation about the history of the water right? Might the water right go unclaimed and possibly fall between the cracks and go unrecognized?
- Don't claim future water use that has not yet taken place, claim only actual historic uses.
- Only pre-1907 claims should be declared for surface water rights. Only pre-basin claims should be declared for underground or well rights. (Verify what year the underground basin was declared if you are not sure.)
- If you decide to file a declaration, then file before the rights are determined by an adjudication court or before the deadline for asserting new claims in an adjudication court.
- If you decide to file, then have it checked for accuracy beforehand – when in doubt hold off.
- If you want to claim Treaty protection, then don't claim a post-1848 priority date.
- If your declaration is rejected by the OSE, seek legal assistance.
- If you have any questions or need assistance, you can ask for help from the NM Land Grant Council at nmlandgrantcouncil@unm.edu or New Mexico Legal Aid at (505) 982-9886.

Appendix A

**Abiquiu Water Rights Declaration Form and
Supporting Documentation**



NEW MEXICO OFFICE OF THE STATE ENGINEER

DECLARATION OF OWNERSHIP OF WATER RIGHTS FOR (check one):



Surface Water (Perfected Prior to March 19, 1907)

Groundwater

1. DECLARANT(S)

Name: Merced Del Pueblo Abiquiu	Name:
Contact or Agent: Jaun O Lopez check here if Agent <input type="checkbox"/>	Contact or Agent: check here if Agent <input type="checkbox"/>
Mailing Address: P.O. Box 179	Mailing Address:
City: Abiquiu	City:
State: New Mexico Zip Code: 87510	State: Zip Code:
Phone: 505-685-4361 <input checked="" type="checkbox"/> Home <input type="checkbox"/> Cell Phone (Work):	Phone: <input type="checkbox"/> Home <input type="checkbox"/> Cell Phone (Work):
E-mail (optional):	E-mail (optional):

2. PURPOSE OF USE & AMOUNT OF WATER

<input type="checkbox"/> Domestic <input checked="" type="checkbox"/> Livestock <input type="checkbox"/> Irrigation <input type="checkbox"/> Municipal <input type="checkbox"/> Industrial <input type="checkbox"/> Commercial <input type="checkbox"/> Other Use (specify): _____ Describe a specific use if applicable (i.e. sand & gravel washing, dairy etc): _____	Amount of Water (acre-feet per annum): If more details are needed, type "See Comments" in "Other" field below, and explain in Additional Statements Section. Diversion: <u>2" pvc pipe</u> Consumptive Use: <u>3,600 Gal/Day</u> Other (include units): _____
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3. BENEFICIAL USE

Water was first applied to beneficial use on: 1734 (enter date), and since that time has been used fully and continuously for all of the above described purposes except as follows:

4. COUNTY WHERE WATER RIGHT IS USED

Rio Arriba

5. POINT(S) OF DIVERSION (POD)

Surface POD OR Ground Water POD (Well)

POD Location Required: Coordinate location must be reported in NM State Plane (NAD 83), UTM (NAD 83), or Latitude/Longitude (Lat/Long - WGS84).

District II (Roswell) and District VII (Cimarron) customers, provide a PLSS location in addition to above.

- NM State Plane (NAD83) (Feet) UTM (NAD83) (Meters) Lat/Long (WGS84) (to the nearest 1/10th of second)
 NM West Zone Zone 12N
 NM East Zone Zone 13N
 NM Central Zone

POD Number (if known):	X or Easting or Longitude:	Y or Northing or Latitude:	Provide if known: -Public Land Survey System (PLSS) (Quarters or Halves , Section, Township, Range) OR - Hydrographic Survey Map & Tract; OR - Lot, Block & Subdivision; OR - Land Grant Name
	36,067086	106.354.072	T21N R5E

NOTE: If more PODS need to be described, complete form WR-08 (Attachment 1 – POD Descriptions)

Additional POD descriptions are attached: Yes No **If yes, how many** _____

Other description relating point(s) of diversion to common landmarks, streets, or other:

Point of Diversion is on Land Owned by: US Forest Service

Note: The following information is for wells only. If more than one (1) well needs to be described, provide attachment.

Date drilled:	Driller:
Depth (feet):	Outside diameter of casing (inches):
Original capacity (gallons per minute):	Present capacity (gallons per minute):
Pumping lift (feet):	Static water level (feet): <input type="checkbox"/> above/ <input type="checkbox"/> below land surface
Make of pump:	Type of pump:
Power plant make, type, horsepower, etc.:	
Fractional or percentage interest claimed in well:	

Note: The following information is for surface PODS only.

Name of ditch, acequia, or spring: Vallecitos Creek

Stream or water course:	Tributary of:
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Constructed works consist of (e.g., enumerate diversion dams, main canals, head gates, pipelines, flumes, reservoirs, laterals, etc.):

If application proposes a new point of diversion involving a diversion dam, storage dam, main canal, and/or pipeline, complete Attachment 2. Check here if Attachment 2 is included in this application packet.

6. PLACE(S) OF USE (list each individually)

a. n/a Acres of Irrigated Land Described as Follows (if applicable):

b. Legally Described By: <input checked="" type="checkbox"/> Public Land Survey System (PLSS) <input type="checkbox"/> Hydrographic Survey Report or Map <input type="checkbox"/> Irrigation or Conservation District Map <input type="checkbox"/> Subdivision	c. PLSS Section <u>and/or</u> Map No. <u>and/or</u> Lot No.	d. PLSS Township <u>and/or</u> Tract No. (Please list each tract individually) <u>and/or</u> Block No.	e. PLSS Range	f. Acres	g. Priority
PLSS Quarters or Halves, <u>and/or</u> Name of Hydrographic Survey or District, <u>and/or</u> Name and County of Subdivision					
Merced Del Pueblo Abiquiu, Rio Arriba County		T21N	R5E	N/A	1734
		T21N	R6E	N/A	1734
		T22N	R5E	N/A	1734
		T22N	R6E	N/A	1734

h. Other description relating place of use to common landmarks, streets, or other:

i. Place of use is on land owned by:

j. Are there other sources of water for these lands? No Yes If yes, describe by OSE file number:

Note: If on Federal or State Land, please provide copy of lease

7. ADDITIONAL STATEMENTS OR EXPLANATIONS

See Maps and Documents

Note: A declaration may be accompanied by a map prepared pursuant to 19.26.2.26 NMAC and may be accompanied by deeds, survey plats, affidavits and other evidence tending to substantiate the claim.

ACKNOWLEDGEMENT

(I, We) Abiquiu Land Grant
_____ Print Name(s)

affirm that the foregoing statements are true to the best of (my, our) knowledge and belief.

Declarant Signature

Declarant Signature

NOTARY

This instrument was acknowledged before me this _____ day of _____ A.D., 20____,

By (name of declarant): _____

State of _____)

ss.

County of _____)

Notary Public: _____

My commission expires: _____

ACCEPTANCE OF THE STATE ENGINEER

This Declaration form is hereby accepted for filing in accordance with NMSA-1978 (1985), as amended. The acceptance by the State Engineer Office does not constitute validation of the right claimed.

By: _____
Signature Print

Title: _____

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

RIO CHAMA STREAM SYSTEM

Section 1, Chama Mainstream

Acequia del Pueblo de Abiquiu

**ORDER ON PRIORITY DATE OF WATER RIGHTS
UNDER ACEQUIA DEL PUEBLO DE ABIQUIU**

THIS MATTER is before the Court following the April 11, 2011, *Motion for Order on Priority Date of Water Rights Under Acequia del Pueblo de Abiquiu* in Section 1 of the Rio Chama Stream System (Chama Mainstream) (Doc. No. 10,025).

The Court finds:

1. Pursuant to the *Amended Order on the Adjudication of Water right Priorities* (Doc. 3497, filed July 8, 1994), all known and unknown claimants of water rights under the Acequia del Pueblo de Abiquiu were served with a Notice and Order to Show Cause setting forth a priority date of 1734 for their water rights under this acequia. See *Certificate of Service* filed October 20, 1994 (Doc. No. 3526.A); *New Mexico's Certificate of Publication for Priority Date Notices and Orders to Show Cause* filed November 29, 1995 (Doc. No. 4413). The commissioners of the Acequia del Pueblo de Abiquiu (a community ditch) were served with a Notice and Order to Show Cause setting forth a priority date of 1734 for the water rights under this acequia. See *Certificate of Service* filed December 12, 1994 (Doc. No. 3979.33).

480522

3. No objections to the proposed priority date of 1734 for water rights under the Acequia del Pueblo de Abiquiu were filed by either individual water users or the Acequia del Pueblo de Abiquiu.

4. There is no just reason for a delay for the entry of a final judgment as to the priority date of the water rights for lands irrigated by the Acequia del Pueblo de Abiquiu.

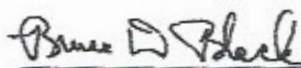
IT IS ORDERED, THEREFORE, that 1734 is the priority date of the water rights under the Acequia del Pueblo de Abiquiu.

IT IS FURTHER ORDERED, that the priority dates in all subfile orders heretofore entered in the Chama Mainstream Section that describe irrigation water rights under the Acequia del Pueblo de Abiquiu are revised and amended as follows:

Priority: 1734

The individual subfiles in the Chama Mainstream Section affected by the above provision of this Order are listed in Appendix 1 attached hereto.

IT IS FURTHER ORDERED, that the Court enters this Order as a final judgment, subject to the right of other water rights owners to file objections to individual adjudication orders prior to the entry of a final decree.



BRUCE D. BLACK
UNITED STATES DISTRICT JUDGE

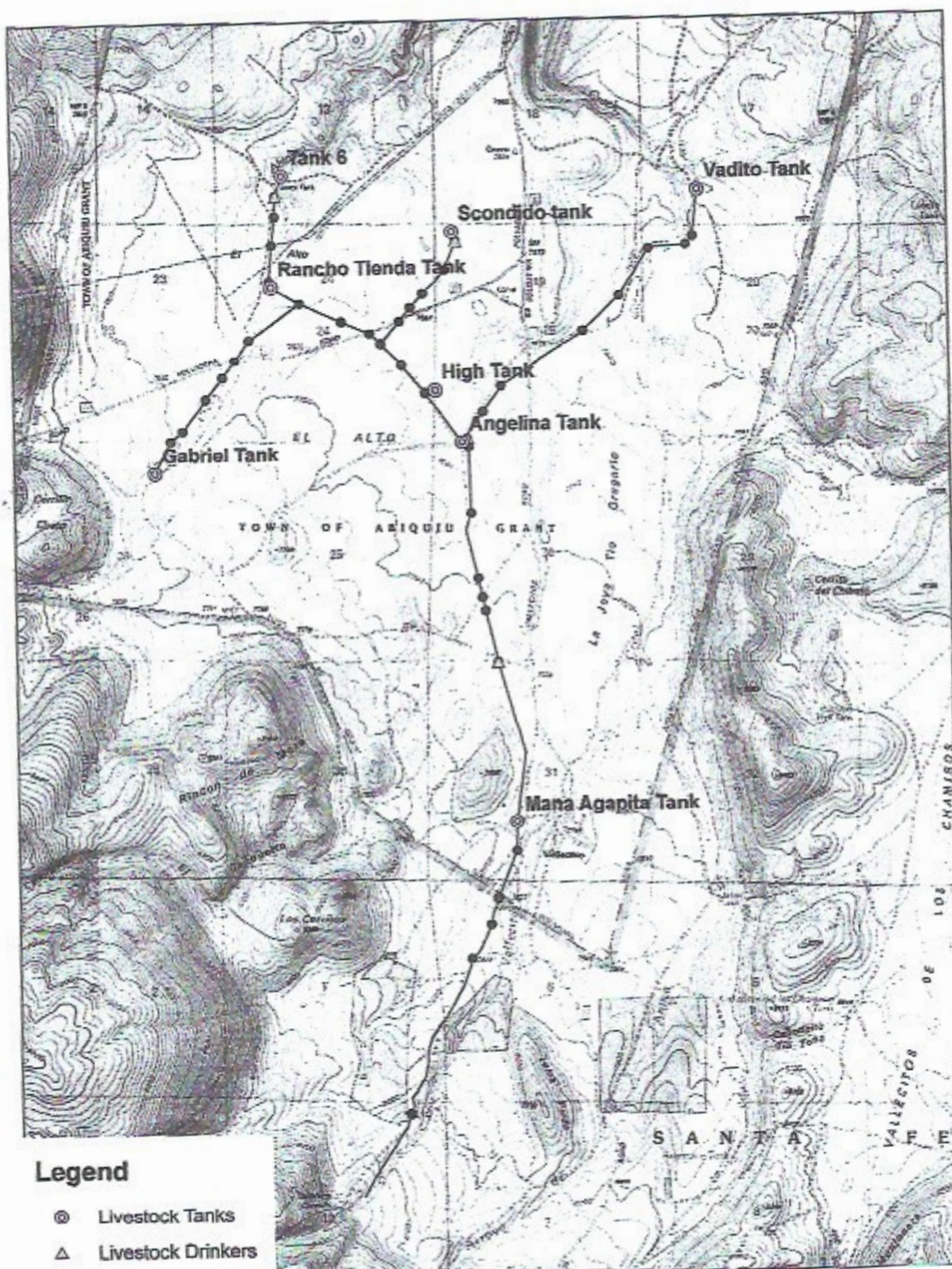
Recommended for approval:



SPECIAL MASTER VICKIE L. GABIN

3

Livestock Tanks and Drinkers



R5E

25/30
36/37

Located in the Juan Lopez Grant
(Section corners are approximate)

Abiquiu 10 Mile

Windmill

Sta 81735
End pipeline

3 mile

Abiquiu Grant Boundary

Patent Land

Pipeline

116
127

112
113

Abiquiu Grant Association
Livestock Pipeline

Location Map

U. S. DEPARTMENT OF AGRICULTURE
SOIL CONSERVATION SERVICE

DESIGNED BY
W. E. GASSMAN

CHECKED BY

DATE: 9/5/67

Scale: 1"=2000'
(Traced from USGS Quad)

12
13

112
113

APPROVED BY

DRAWING NO.

SHEET 1 OF 1



SPECIAL USE PERMIT

Act of June 4, 1897, or February 15, 1901
This permit is revocable and nontransferable

NAME OF PERMITTEE Abiquiu Cooperative Livestock Association	KIND OF USE Water Transmission
DATE OF PERMIT October 2, 1967	FILE CODE 2720

REGION 3	STATE New Mexico	FOREST Santa Fe	RANGER DISTRICT Española
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Permission is hereby granted to Abiquiu Cooperative Livestock Association
of Abiquiu, New Mexico 87510
hereinafter called the permittee, to use subject to the conditions set out below, the following described
lands or improvements:

A tract of National Forest land, 10 feet in width (5 feet
either side of centerline of pipeline to be constructed)
across unsurveyed lands in the JJ Lobato Grant as shown
on SCS map dated September 5, 1967 which is hereby made
a part of this permit.

This permit covers ~~XXXXXX~~ 1.4 acres and/or 1.4 miles and is issued for the purpose of:
Construction and operation of a water transmission line
from a source on the Vallecitos Creek to a point on
patented land.

The exercise of any of the privileges granted hereby constitutes acceptance of all the conditions of
this permit. Issued Free under Regulation U-11

In consideration for this use, the permittee shall pay to the Forest Service, U.S. Department of
Agriculture, the sum of ~~10~~ Dollars (\$) ~~for the period~~
from ~~19~~, to ~~19~~, and thereafter
annually on ~~_____~~
Dollars (\$ ~~_____~~);

Provided, however, Charges for this use may be made or readjusted whenever necessary to place the
charges on a basis commensurate with the value of use authorized by this permit.

2. Construction or occupancy and use under this permit shall begin within 1 months, and construction, if any, shall be completed within 1 months, from the date of the permit. This use shall be actually exercised at least 365 days each year, unless otherwise authorized in writing.

3. Development plans; layout plans; construction, reconstruction, or alteration of improvements; or revision of layout or construction plans for this area must be approved in advance and in writing by the forest supervisor. Trees or shrubbery on the permitted area may be removed or destroyed only after the forest officer in charge has approved, and has marked or otherwise designated that which may be removed or destroyed. Timber cut or destroyed will be paid for by the permittee as follows: Merchantable timber at appraised value; young-growth timber below merchantable size at current damage appraisal value; provided that the Forest Service reserves the right to dispose of the merchantable timber to others than the permittee at no stumpage cost to the permittee. Trees, shrubs, and other plants may be planted in such manner and in such places about the premises as may be approved by the forest officer in charge.

4. The permittee shall maintain the improvements and premises to standards of repair, orderliness, neatness, sanitation, and safety acceptable to the forest officer in charge.

5. This permit is subject to all valid claims.

6. The permittee, in exercising the privileges granted by this permit, shall comply with the regulations of the Department of Agriculture and all Federal, State, county, and municipal laws, ordinances, or regulations which are applicable to the area or operations covered by this permit.

7. The permittee shall take all reasonable precautions to prevent and suppress forest fires. No material shall be disposed of by burning in open fires during the closed season established by law or regulation without a written permit from the forest officer in charge or his authorized agent.

8. The permittee shall exercise diligence in protecting from damage the land and property of the United States covered by and used in connection with this permit, and shall pay the United States for any damage resulting from negligence or from the violation of the terms of this permit or of any law or regulation applicable to the national forests by the permittee, or by any agents or employees of the permittee acting within the scope of their agency or employment.

9. The permittee shall fully repair all damage, other than ordinary wear and tear, to national forest roads and trails caused by the permittee in the exercise of the privilege granted by this permit.

10. No Member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this agreement or to any benefit that may arise herefrom unless it is made with a corporation for its general benefit.

11. Upon abandonment, termination, revocation, or cancellation of this permit, the permittee shall remove within a reasonable time all structures and improvements except those owned by the United States, and shall restore the site, unless otherwise agreed upon in writing or in this permit. If the permittee fails to remove all such structures or improvements within a reasonable period, they shall become the property of the United States, but that will not relieve the permittee of liability for the cost of their removal and restoration of the site.

12. This permit is not transferable. If the permittee through voluntary sale or transfer, or through enforcement of contract, foreclosure, tax sale, or other valid legal proceeding shall cease to be the owner of the physical improvements other than those owned by the United States situated on the land described in this permit and is unable to furnish adequate proof of ability to redeem or otherwise reestablish title to said improvements, this permit shall be subject to cancellation. But if the person to whom title to said improvements shall have been transferred in either manner above provided is qualified as a permittee and is willing that his future occupancy of the premises shall be subject to such new conditions and stipulations as existing or prospective circumstances may warrant, his continued occupancy of the premises may be authorized by permit to him if, in the opinion of the issuing officer or his successor, issuance of a permit is desirable and in the public interest.

13. In case of change of address, the permittee shall immediately notify the forest supervisor.

14. The temporary use and occupancy of the premises and improvements herein described may be sublet by the permittee to third parties only with the prior written approval of the forest supervisor but the permittee shall continue to be responsible for compliance with all conditions of this permit by persons to whom such premises may be sublet.

15. This permit may be terminated upon breach of any of the conditions herein or at the discretion of the regional forester or the Chief, Forest Service.

16. In the event of any conflict between any of the preceding printed clauses or any provision thereof and any of the following clauses or any provisions thereof, the preceding printed clauses will control.

17. This permit is accepted subject to the conditions set forth above and to conditions 13 to 19 attached hereto and made a part of this permit.

18. This permit conveys no rights to the permittee for the water used and transported by this transmission line.

19. See attached non-discrimination clause.

DATE	SIGNATURE OF ISSUING OFFICER	TITLE
October 2, 1967	Harry L. Severson	Acting Forest Supervisor

The permittee will comply with the following Nondiscrimination provisions:

- (1) The permittee will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin. The permittee will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin. Such action shall include, but not be limited to, the following: employment, upgrading, demotion or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The permittee agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the Forest Service setting forth the provisions of this Nondiscrimination clause.
- (2) The permittee will, in all solicitations or advertisements for employees placed by or on behalf of the permittee state that all qualified applicants will receive consideration for employment without regard to race, creed, color, or national origin.
- (3) The permittee will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the Forest Service, advising the said labor union or workers' representative of the permittee's commitments under this section, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.
- (4) The permittee will comply with all provisions of Executive Order No. 10925 of March 6, 1961, as amended, and of the rules, regulations, and relevant orders of the President's Committee on Equal Employment Opportunity created thereby.
- (5) The permittee will furnish all information and reports required by Executive Order 10925 of March 6, 1961, as amended, and by the rules, regulations, and orders of the said Committee, or pursuant thereto, and will permit access to his books, records and accounts by the Forest Service and the Committee for purposes of investigation to ascertain compliance with such rules, regulations, and orders.
- (6) In the event of the permittee's noncompliance with the Nondiscrimination clauses of this permit or with any of the said rules, regulations, or orders, this permit may be canceled, terminated, or suspended in whole or in part and the permittee may be declared ineligible for further Government permits in accordance with procedures authorized in Executive Order No. 10925 of March 6, 1961, as amended, and such other sanctions may be imposed and remedies invoked as provided in the said Executive Order or by rule, regulation, or order of the President's Committee on Equal Employment Opportunity, or as otherwise provided by law.
- (7) The permittee will include the provisions of the foregoing paragraphs (1) through (6) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the President's Committee on Equal Employment Opportunity issued pursuant to section 303 of Executive Order No. 10925 of March 6, 1961, as amended, so that such provisions will be binding upon each subcontractor or vendor. The permittee will take such action with respect to any subcontract or purchase order as the Forest Service may direct as a means of enforcing such provisions, including sanctions for noncompliance: Provided, however, that in the event the permittee becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the Forest Service, the permittee may request the United States to enter into such litigation to protect the interest of the United States.

R-3 2700-16 (2/64)

Appendix B

**Abiquiu's Original Spanish Grant
Documentation and Translation**

en sus d. de curro, y de su indio don mil quinientos cincuenta y tres
dhas. Castellanas para el dho. comprehendido en dha. merced la com-
y tierras de un vecino llamado nombrado Juan Truxillo y
los herederos de Miguel Encarnación por el presente igualmte
medios de el centro de el referido Pueblo de los Señales o sea
don mil quinientos y cincuenta varas comprehendidas
en dha. merced para otras tierras del rancho de Jeronimo
Encarnación y todas las dhas. tierras con sus montes y sembrados con
asistencia del justicia mayor de aquella jurisdicción y villa
de la fundación Juan de los Rios. lo que se para llevar de dha. la
total, y todas las dhas. cosas con comodidad de sus dueños
de sus herederos y sucesores. Por el rumbo del Sur de los Señales y un
diez la legua de espaldas hacia San Lorenzo al noroeste las mercedas
de las tierras de el Pueblo. Por el Sur el camino real que ha
a Nabasco. Por el oriente el nacimiento del arroyo que corre
ende a Abasco del dicho Pueblo; y por el presente el otro de
los dichos Señales, con parcelas superabundantes a villa cali-
dad por las granjas y otras en la misma con muchas asnas.
Y para que así como todo lo referido y practicado acordado
de lo mandado por el Sr. Rey, y pedido por el Sr.
fiscal de S. M. con aprobación de sus reales leyes, y como
se ha de dha. Pueblo. Yo don Juan de Alvarado
de la nación de los Señales, y de la nación de los Señales
en forma de república, lo
puse por diligencias q. firmé con dho. justicia mayor
y los testigos de mi cargo con quienes actúo a falta
de escribanos que de ninguna clase hay en este Reyno.
Yo Juan de Alvarado = Juan de los Rios =
en un el Same de S. Martin = don Juan de Alvarado y collado =
Convenida con su original que queda en este archivo
de Gobierno de donde. Pa. posesión de los primitivos del Pue-
blo de San Lorenzo de Abasco. Yo don Pedro Ferrer de
errindimera Cavallero de la corte de Santiago coronel
de Infantería de los reales exercitos Governador y Cap.
General de este Reyno de S. M. lo hizo sacar de
fidei m. lo sacado examinado y comovado y de los dhas. dhas.
corregido y comovado fueron testigos los de mi cargo
con quienes actúo a falta de escribanos q. de ninguna
clase hay en esta gobernación. Y testimonio de
verdad hago mi firma = Pedro Ferrer de errindimera

Town of Abiquiú Land Grant
Certified copy of original granting documents (1754)
Spanish Archives of New Mexico I

[Document No. 1]

✓
1. In the town of Santa Fe, on the tenth day of the month of May of the year one thousand seven hundred and fifty four. Don Thomas Velez Cachupin, Governor of this Kingdom of New Mexico;

In virtue of that which was ordered by His Excellency the Viceroy Captain General, of this New Spain, Count Revilla Gigedo in the certified copy transmitted by His Excellency with the opinions of His Majesty's Attorney General, and the Auditor General of War in the matter of the Inspection Reports and in approval of it and in regard to the assembling of the half-breed Indians at the old town [town] Abiquiu with the fact of there having been appointed by His Excellency the Viceroy a Doctrinal Teacher [town] its administration in its formal founding and establishment and in relation to giving the said half-breed Indians sufficient cultivable land as asked for by the Attorney General in accordance with law eight, title three, book six, of the Recopilacion of these Kingdoms of the Indies, in which His Majesty directs that in the tracts (liticias)

(Note: liticias. I cannot find this word in any dictionary to which I have access. In the paper following (Document No. 2) the word sitios (tracts) is used. I am inclined

See foot of next page.

Town of Abiquiú Land Grant

Translation of a certified copy of original granting documents (1754)
Spanish Archives of New Mexico I, SG 140, Reel 26, Frames 327-331

2. in which Pueblos and settlements of converted Indians are to be established shall have a sufficiency of waters, lands, woods, entrances and exits, and cultivable lands and one league in length of commons in order that they may keep their herds without interfering with those of the Spaniards. In fulfillment of which I the said Governor went to the said Pueblo of Abtom- about half-breed] Doctrinal Teacher who recently came from Mexico to take charge of the spiritual administration of the said Pueblo Fray Felix Joseph de Ordoñez y Machado of the order of Our Father Saint Francis and other districts of its jurisdiction and placing him in possession of it [he] having taken it in conjunction with his Prelate the Vice Custodian of this Holy Tabernacle Fray Thomas Murriani de la Cruz; I proceeded to the examination of all the lands, fields, woods, pastures and waters with the object of marking off for the said Pueblo of half-breed Indians recently assembled that which is ordered by the said law, and all advantages of rich lands of fine quality abundance of waters, pastures, and [town].

[Note continued]

to think that liticio is a clerical error and that sitio was intended— (Translated)

Town of Abiquiú Land Grant

Translation of a certified copy of original granting documents (1754)
Spanish Archives of New Mexico I, SG 140, Reel 26, Frames 327-331

3. being equal; there were measured for the said Pueblo of Santa Tomas Apostol de Abiquiu, on the South from the centre of the said Pueblo five thousand Castilian varas, along the edge of a permanent creek, ^(arroyo permanente) which descends in the said direction along the edge of the Pueblo with capacity to irrigate all the lands in the said direction. On the North also measuring from the centre there were marked off two thousand four hundred varas because of having come to the deep river, ^[Rio caudaloso] called Chama which runs from West to East and without a ford at this point, which [river] serves as a boundary in the said direction; On the East starting also from the centre there were measured two thousand five hundred and fifty said Castilian varas having included within the said measurement the house and lands of a resident named Juan Trujillo, and the heirs of Miguel Martin. On the West also measured from the centre of the said Pueblo there were measured another two thousand five hundred and fifty varas including in said measurement part of the lands of the ranch of Gerónimo Martin; and all the said lands so measured and marked off with the assistance of Juan José Levante.

Town of Abiquiú Land Grant

Translation of a certified copy of original granting documents (1754)
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the chief magistrate of said jurisdiction and town of the Canada are cultivable of good quality and all under
4. irrigation with advantages of much water, forests and woods; On the South there was marked off and measured for them the league of commons its boundaries being on the North the South boundaries of the lands of the Pueblo, on the South the high road which goes to Navajo on the East the source of the creek (arroyo) which descends along the edge of said Pueblo, and on the west the height [or hill] of the Rio de los Frijoles with most abundant pastures of fine quality because they are of grama grass and others of the same with much water; And in testimony of all that has been set forth and done according to that which was ordered by His Excellency the Viceroy, and asked for by His Majesty's Attorney General in accordance with his Royal laws and with consideration and illegible - one line] [hard of word] for the said Pueblo [town] Santa Thomas Apostol de Abiquiu of the Nation of the Half-breeds recently assembled for their permanent establishment in it in the form of a Republic. I made it a part of the proceedings which I signed with the said Chief Magistrate

Town of Abiquiú Land Grant

Translation of a certified copy of original granting documents (1754)
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and my assisting witnesses with whom I act in the absence of notaries of which there is none of any class in this Kingdom, I certify.

Thomas Velez Cachupin

Juan Jose Lovato

Manuel Sainz de Garviza

Thomas de Alvear y Collado.

It agrees with its original which is in this archive of the Government where at the petition of the Headmen of the Pueblo of Santo Thomas de Abiquiu, Don Pedro Fermín de Mendinueta, Knight of the Order of Santiago, Colonel of Infantry of the Royal Armies, Governor and Captain General of this Kingdom of New Mexico had it made; it is faithfully copied, corrected and compared, and my assisting witnesses with whom I act in the absence of Notaries of which there is none in this Kingdom were those who saw it ^{made} corrected and compared. In testimony of the truth of which I sign my name.

Pedro Fermín de Mendinueta.

Town of Abiquiú Land Grant

Translation of a certified copy of original granting documents (1754)
Spanish Archives of New Mexico I, SG 140, Reel 26, Frames 327-331

Appendix C
United States Patent of the Abiquiu Land
Grant

61067
INTX
A
M
JAN 11 1909
RECORDED
SARSA COUNTY
DEPUTY

The United States of America,

P. L. C. To all to whom these presents shall come, Greeting:
Docket No. 140, New Mexico.

WHEREAS, There has been deposited in the General Land Office of the United States evidence whereby it appears that in accordance with the provisions of the Act of Congress approved March 3, 1891, entitled "An act to establish a court of private land claims and to provide for the settlement of private land claims in certain States and Territories," the private land claim known as the Town of Abiquiu Grant, has been duly confirmed to the Heirs, Assigns, and Legal Representatives of the converted half-breed Indians of the Pueblo of Abiquiu; and

WHEREAS, Said Claim has been surveyed and designated as in Townships twenty-one, twenty-two, and twenty-three north of Ranges five and six east of the New Mexico Meridian, New Mexico, containing sixteen thousand seven hundred eight and sixteen hundredths acres, according to the plat and survey of the said grant approved by the Court of Private Land Claims, November 16, 1896, copies of which are on file in the office of the Surveyor General for the Territory of New Mexico and in the General Land Office; said grant being more particularly described as follows:

Bounded on the north by the Chama River; on the east by the source of the arroyo which descends along the border of the Pueblo; on the south by the highway formerly called the Teguas road, leading to Navajo; and on the west by the hill of the Rio de los Frijoles, and the lands formerly of Geronimo Martin:

NOW KNOW YE, That the UNITED STATES OF AMERICA, in consideration of the premises, HAS GIVEN AND GRANTED, and by these presents DOES GIVE AND GRANT, unto the said Heirs, Assigns, and Legal Representatives of the converted Half-breed Indians of the Pueblo of Abiquiu, the tract above described; TO HAVE AND TO HOLD the same, together with all the rights, privileges, immunities, and appurtenances, of whatsoever nature thereunto belonging, unto the said Heirs, Assigns, and Legal Representatives of the converted half-breed Indians of the Pueblo of Abiquiu, and to their heirs and assigns forever, in accordance with the terms of the decree of said Court, but subject to the proviso that this grant shall not confer any right or title to any gold, silver, or quicksilver mines or minerals of the same, but all such mines and mineral shall remain the property of the United States, with the right of working the same; and that the said grant is made subject to all the limitations and terms of the said Act of Congress of March 3, 1891 and all the restrictions and limitations of said decree.

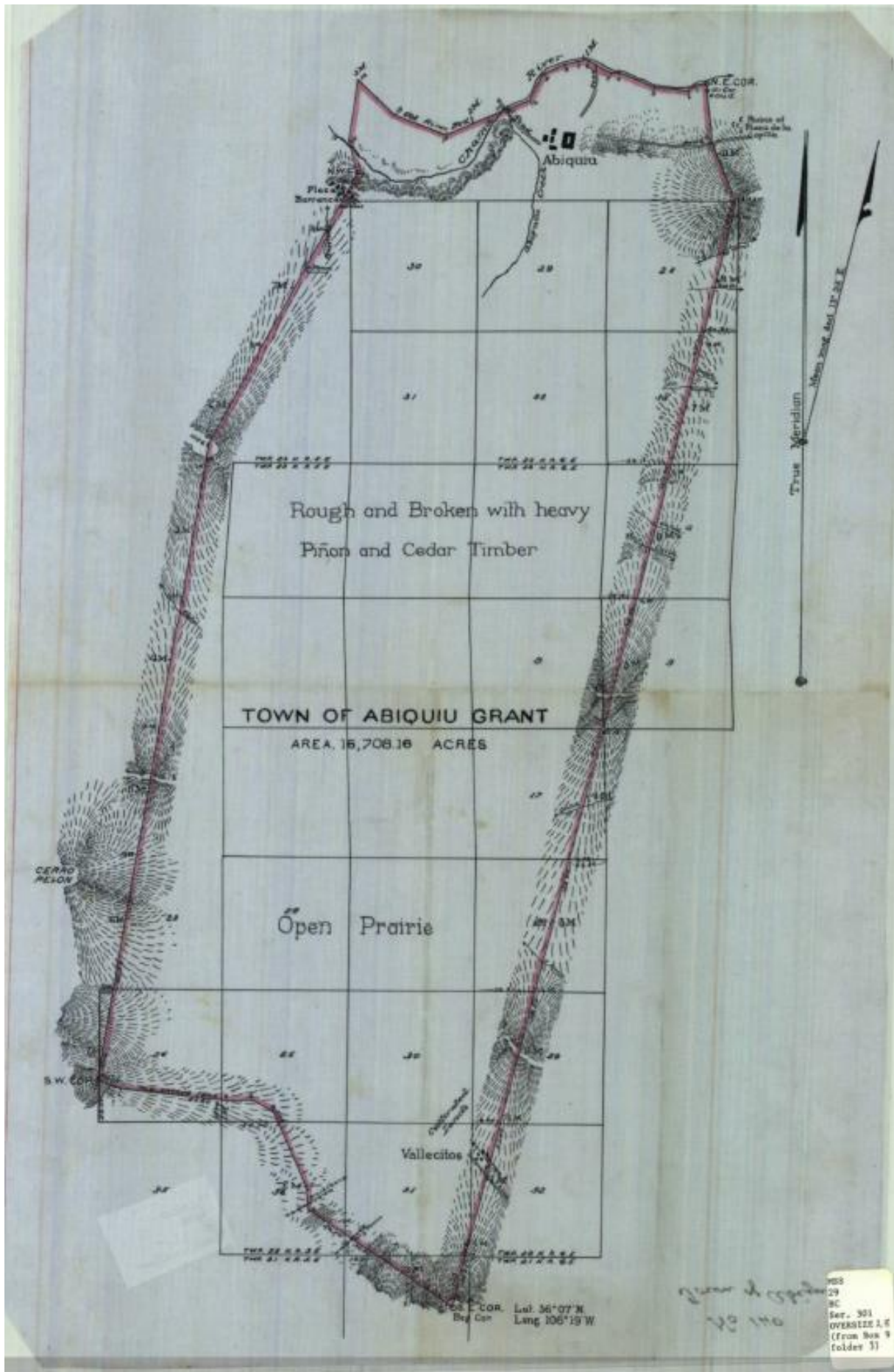
RECEIVED
APP 3 11 1909

IN TESTIMONY WHEREOF, I, William H. Taft, President of the United States of America, have caused these letters to be made Patent, and the seal of the General Land Office to be hereunto affixed.

GIVEN under my hand, at the City of Washington, the FIFTEENTH day of NOVEMBER, in the year of our Lord one thousand nine hundred and NINE, and of the Independence of the United States the one hundred and THIRTY-FOURTH.

By the President: Wm H. Taft
By W. O. Emery Secretary.
C. W. Reynolds
Recorder of the General Land Office.

Patent Number
Recorded 89315 Vol. Page



Map of Town of Abiquiú Land Grant Patent, 1909

Thomas B. Catron Collection

Center for Southwest Research, UNM

Appendix D
New Mexico Statutes on Water Rights

New Mexico Statues on Declarations of Water Rights

72-1-3. Declaration of water rights vested prior to 1907; form; contents; verification; filing; recording; presumption.

Statute text

Any person, firm or corporation claiming to be an owner of a water right which was vested prior to the passage of Chapter 49, Laws 1907, from any surface water source by the applications of water therefrom to beneficial use, may make and file in the office of the state engineer a declaration in a form to be prescribed by the state engineer setting forth the beneficial use to which said water has been applied, the date of first application to beneficial use, the continuity thereof, the location of the source of said water and if such water has been used for irrigation purposes, the description of the land upon which such water has been so used and the name of the owner thereof. Such declaration shall be verified but if the declarant cannot verify the same of his own personal knowledge he may do so on information and belief. Such declarations so filed shall be recorded at length in the office of the state engineer and may also be recorded in the office of the county clerk of the county wherein the diversion works therein described are located. Such records or copies thereof officially certified shall be prima facie evidence of the truth of their contents.

72-1-4. [Declaration of water rights vested prior to 1907; force and effect of prior declarations.]

Declarations heretofore filed in substantial compliance with Section 1 [72-1-3 NMSA 1978] hereof shall be recognized as of the same force and effect as if filed after the taking effect of this act [72-1-3 and 72-1-4 NMSA 1978].

