

BEFORE THE NEW MEXICO STATE ENGINEER

**IN THE MATTER OF THE APPLICATION
OF THE CITY OF RIO RANCHO AND BOSQUE
DEL SOL, LLC TO CHANGE THE POINT OF
DIVERSION, PLACE, AND PURPOSE OF USE
FROM SURFACE TO GROUNDWATER IN THE
RIO GRANDE UNDERGROUND WATER BASIN
IN NEW MEXICO**

**OSE FILE NO. SD-08707
into RG-6745 et al. and
(RG-6745 et al. into SD-
08707)-T**

**PROTEST TO APPLICATION FILED BY
CITY OF RIO RANCHO AND BOSQUE DEL SOL, LLC**

WildEarth Guardians (“Guardians”) protests the proposed change of existing water rights, State Engineer File No. SD-08707 into RG-6745 et al. and (RG-6745 et al. into SD-08707)-T (“Application”), because it is contrary to the conservation of water in the State of New Mexico and will be detrimental to the public welfare. The City of Rio Rancho and Bosque del Sol, LLC (“Applicants”) propose to change the point of diversion, place and purpose of use of surface water used by Bosque del Sol for irrigation within the Middle Rio Grande Conservancy District (“District”) in Socorro County for use upstream as groundwater to offset the impacts of the City of Rio Rancho’s well field in Sandoval County. Based on the City’s lack of need for this water for the next 10 years, Applicants also seek to change the point of diversion, place and purpose of use of that groundwater back to surface water under the Water Leasing Act for a period of 10 years to allow Bosque del Sol to resume irrigation in Socorro County. The Application should be dismissed or denied based on the following grounds:

1. The State Engineer should deny the Application as contrary to the conservation of water within the State of New Mexico and detrimental to the public welfare. NMSA § 72-12-13.D. Guardians’ members will be substantially and specifically affected by the grant of this Application. *Id.*
2. Water Transfer. Applicants propose to discontinue the farm delivery requirement of 714.285 acre-feet of surface water per year (including the consumptive irrigation requirement of 500 acre-feet per year) from the Socorro Main Canal and the Luis Lopez Ditch for the

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irrigation of 238.1 acres of land owned by Bosque del Sol in Socorro County. Applicants propose to transfer the consumptive use amount (500 acre-feet per year) to the City of Rio Rancho, in Sandoval County, to offset the impacts of pumping the City's wells under RG-6745 et al. on the Rio Grande and its tributaries.

3. Water Lease. Applicants propose to discontinue the consumptive use of 500 acre-feet of groundwater per year to offset the City's pumping for a period of 10 years and lease the water back to Bosque del Sol. Bosque del Sol proposes to re-commence its diversion of the farm delivery requirement of 714.285 acre-feet of surface water from the Socorro Main Canal and Luis Lopez Ditch to irrigate the 238.1 acres it owns in Socorro County for the 10-year lease period.

4. The Applicants' proposed water transfer is contrary to the conservation of water in the state and detrimental to the public welfare because it would result in diminished flows between the move-from and the move-to locations. Discontinuing the delivery of 714.285 acre-feet per year of surface water to the farm in Socorro County would deprive the Rio Grande of water that would otherwise flow through nearly 100 miles of the river from north of Albuquerque to the San Acacia Diversion Dam in Socorro County. In addition to loss of the consumptive irrigation requirement of 500 acre-feet to the upstream diversion point, the river will also be deprived of the "carriage water" necessary to move water through the system.

5. The loss of flows to this 100 miles of the river is particularly important given the river serves as critical habitat for several endangered and threatened species including the Rio Grande silvery minnow, Southwestern willow flycatcher, and yellow-billed cuckoo. These species are protected under the Endangered Species Act and are the subject of management guidance by the U.S. Fish and Wildlife Service in the form of Biological Opinions in 2003 and 2016. The Biological Opinions, however, do not require the replacement of any water lost in this transfer in time, place, and amount as necessary to mitigate the impact to the river and the identified endangered and threatened species listed above.

6. The Application is contrary to the conservation of water in the state and detrimental to the public welfare because it would eliminate at least 214.285 acre-feet per year of return flows (unconsumed water) from returning to the Rio Grande and/or the low flow conveyance channel in Socorro County. The impacted reach—between the San Acacia Diversion Dam and Elephant Butte Reservoir ("Bosque del Apache Reach")—is one of the most natural reaches in the Middle Rio Grande and serves as an important sanctuary for fish, wildlife and plants. The amount and timing of these return flows is important to maintaining flows in this critical reach of the Rio Grande during the irrigation season. Such losses of return flows to the river and the conveyance channel will impact the water supply to Bosque del Apache National Wildlife Refuge, result in exacerbated low flows in this reach of the Rio Grande, and threaten the ability of the State of New Mexico to meet its delivery obligation to Texas under the Rio Grande Compact.

7. The irrigation water that is the subject of this transfer is part of the Middle Rio Grande Project and comes partly from water stored at El Vado Reservoir. If the full consumptive use portion of a water right is transferred, part of the transferred right comes from stored project

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water. Transfers of full consumptive use quantities, as proposed by this Application, will result in project water being moved to locations outside of the project area.

8. The State Engineer should deny the application as contrary to the conservation of water in the state and detrimental to the public welfare because the proposed water transfer would create additional surface water depletions at the move-from location unless the transfer is specifically conditioned on the complete dry up of the 238.1 acres originally irrigated. The 238.1 acres of original irrigation are within the boundaries of the District. The District operates a so-called "Water Bank" that would allow the lease of water to the move-from location. Because the source of the water for the bank is not accounted for and the properties served are those where the water was severed from the land and transferred to upstream municipalities, new surface water depletions will result from this transfer.

9. Guardians' members reside near, recreate on, and enjoy the Rio Grande, and its extensive floodplain and cottonwood Bosque, including the impacted Rio Grande reach between the move-from and move-to locations and the Bosque del Apache Reach, throughout the year. Guardians' members specifically use the Rio Grande, its floodplain and Bosque for the 175 miles from Cochiti Dam to Elephant Butte Reservoir (the "Middle Rio Grande"), including the impacted Rio Grande reach between the move-from and move-to locations and the Bosque del Apache Reach, for bird and wildlife watching, kayaking, canoeing, walking, hiking, horseback riding and photography among other activities. Guardians' members frequently observe fish, wildlife and plants along the Rio Grande (e.g. sandhill cranes, porcupine, egrets, and raptors) and are especially interested in and work to protect the endangered and threatened species that inhabit the river and the Bosque, including the Rio Grande silvery minnow, Southwestern willow flycatcher, New Mexico meadow jumping mouse, and yellow-billed cuckoo, among others. The New Mexico Supreme Court has recognized ecological, recreational, and aesthetic interests as "deserving of legal protection." *De Vargas Sav. and Loan Ass'n of Santa Fe v. Campbell*, 1975-NMSC-026, ¶ 12, 87 N.M. 469, 472-73. Guardians' members are interested in and work to preserve the health of the Rio Grande ecosystem as a whole, including the impacted Rio Grande reach between the move-from and move-to locations and the Bosque del Apache Reach. The proposed transfer of water from Socorro to Sandoval County would impact flows in the Rio Grande, return flows back to the Rio Grande, and will substantially and specifically affect the interests of Guardians' members in recreating and conducting bird and wildlife viewing on and along the Rio Grande, particularly the impacted Rio Grande reach between the move-from and move-to locations and the Bosque del Apache Reach.

10. Guardians and its members who use the impacted Rio Grande reach between the move-from and move-to locations and the Bosque del Apache Reach will be substantially and specifically affected if the State Engineer grants this Application. NMSA § 72-12-3.D. Guardians works to protect and restore the wildlife, wild places, wild rivers and health of the American West. Allowing a water transfer of 500 acre-feet per year from Socorro to Sandoval County will deprive the Rio Grande reach between the move-from and move-to locations and the Bosque del Apache Reach of the consumptive irrigation requirement and the "carriage water" necessary to allow for the delivery requirement to be fulfilled. Further, the lack of assurances that the original irrigated acreage will be permanently dried up and the availability of the so-called Water Bank of the District will lead to further irrigation of the move-from land, increasing

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the overall depletions between the move-from and move-to locations and the Bosque del Apache Reach and ultimately in the Basin. Because Guardians is interested in protecting flows in the Rio Grande, including the impacted Rio Grande reach between the move-from and move-to locations and the Bosque del Apache Reach, as well as protecting the listed and non-listed species that rely on the river for their survival, and the Application will result in depletions in an area know to provide habitat for and contain listed species, Guardians will be substantially and specifically affected by the Application.

11. Guardians has played a pivotal role in water management of the Rio Grande for more than two decades. Guardians has voiced its concerns about impairment of the Rio Grande due to federal, state, and local water management activities and physical modification of the river's ecosystems in state and federal court and in similar water transfer proceedings by the State Engineer. In 2016, Guardians filed a mandamus action against the State Engineer over his failure to perform his nondiscretionary legal duty to require the District demonstrate proof of beneficial use of water under its permits. *See WildEarth Guardians v. Tom Blaine*, Case No. D-101-CV-2016-00734. At the same time this state action was filed, Guardians filed an application to appropriate water in the Rio Grande that may result from the State Engineer holding the District accountable and limiting its diversions to only the water it can prove was historically put to beneficial use. Guardians sought to appropriate water from the Rio Grande to fill its environmental storage pool of 30,000 acre-feet in Abiquiu Reservoir and appropriate an instream flow right in the Rio Chama and Rio Grande to ensure environmentally adequate river flows. The water transfer sought in this Application will substantially and specifically impact Guardians' interest in holding the District accountable to its historic beneficial use and Guardians' new appropriations. The State Engineer cannot proceed with changing the point of diversion, place, and purpose of use as described in this Application without first addressing the threshold question regarding the District's failure to prove beneficial use of its permit. The State Engineer should deny the Application because it is contrary to the conservation of water within the State of New Mexico and detrimental to the public welfare. NMSA § 72-12-13.D.

12. The Application, if approved, will also be detrimental to the public welfare because the reduction of flows through 100 miles of the river and the loss of return flows back to the river in the Bosque del Apache Reach impair the health of the Rio Grande in violation of the Public Trust Doctrine. The New Mexico Supreme Court acknowledged that "public waters of this state are owned by the state as trustee for the people[.]" *State ex rel. Bliss v. Dority*, 55 N.M. 12, 18 (1950). The New Mexico Court of Appeals determined that "our state constitution recognizes that a public trust duty exists for the protection of New Mexico's natural resources for the benefit of the people of the state." *Sanders-Reed v. Martinez*, 2015-NMCA-063, ¶ 11. Therefore, allowing this agricultural to municipal water transfer without significant conditions to protect river flows and the environment is contrary to Guardians' and New Mexico citizens' interests in preventing impairment to the Rio Grande. Approving the Application would run contrary to the public trust principle "that [its] use shall not be injurious to the rights of others, or of the general public." *State ex. Rel. Erickson v. McLean*, 62 N.M. 264, 273 (1957). Because impairment to the public trust resource is detrimental to public welfare, the State Engineer should deny the Application.

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13. This protest is timely filed in the Albuquerque office of the State Engineer on February 27, 2017, within ten (10) calendar days following the last date of publication of Applicant's Notice on February 17, 2017, in the *Albuquerque Journal*.

WHEREFORE WildEarth Guardians requests the State Engineer deny the Application, State Engineer File No. SD-08707 into RG-6745 et al. and (RG-6745 et al. into SD-08707)-T, on the grounds that granting the Application would be detrimental to the public welfare of the State and contrary to the conservation of water within the State.

Dated this 27th day of February, 2017.



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CERTIFICATE OF SERVICE

I certify that a copy of this Protest was mailed to the following Permit Applicant on February 27, 2017.

The City of Rio Rancho
c/o Steve Gallegos
3200 Civic Center Circle NE
Rio Rancho, NM 87144

Bosque del Sol, LLC
c/o Tessa Davidson
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