

BEFORE THE NEW MEXICO STATE ENGINEER

**IN THE MATTER OF THE APPLICATION
OF THE CITY OF RIO RANCHO AND
THE CENTER FOR EDUCATIONAL
INITIATIVES 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-07396-E
into RG-6745 et al.**

**PROTEST TO APPLICATION FILED BY
CITY OF RIO RANCHO AND THE CENTER FOR EDUCATIONAL INITIATIVES**

WildEarth Guardians (“Guardians”) protests the proposed change of existing water rights, State Engineer File No. SD-07396 into RG-6745 et al. (“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 The Center for Educational Initiatives (“Applicants”) propose to change the point of diversion, place and purpose of use from surface water used to irrigate land owned by the Center for Educational Initiatives (“the Center”) in Bernalillo County within the Middle Rio Grande Conservancy District (“District”) to Sandoval County for municipal and related purposes of use within the service area of the Rio Rancho metropolitan area. 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. Applicants propose to discontinue the farm delivery requirement of 11.3226 acre-feet of surface water per year (including the consumptive irrigation requirement of 7.9258 acre-feet per year) from the Newborn Ditch for the irrigation of 3.7742 acres of land owned by the

Center in Bernalillo County. Applicants propose to transfer the consumptive use amount (7.9258 acre-feet per year) to the City of Rio Rancho, in Sandoval County, for municipal and related purposes of use within the service area of the Rio Rancho municipal water system.

3. 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 11.3226 acre-feet per year of surface water to the farm in Bernalillo County and its use in the Rio Rancho water system would deprive the Rio Grande of water that would otherwise flow through about 15 miles of the river from the Angostura Diversion Dam to Bernalillo County ("Impacted Reach"). In addition to loss of the consumptive irrigation requirement of 7.9258 acre-feet to the upstream diversion point, the river will also be deprived of the "carriage water" necessary to move water through the system..

4. The loss of flows to the Impacted Reach 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.

5. The Application is contrary to the conservation of water in the state and detrimental to the public welfare because it would eliminate at least 3.3968 acre-feet per year of return flows (unconsumed water) from returning to the Rio Grande in Bernalillo County. The effected reaches of the Rio Grande—including the Angostura, Islcta, and San Acacia Reaches—contain some of the best habitat for fish, wildlife and plants in the region. The amount and timing of these return flows is important to maintaining flows in these critical reaches of the Rio Grande during the irrigation season. Such losses of return flows to the river will impact the water supply to Bosque del Apache National Wildlife Refuge, result in exacerbated low flows in these reaches 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.

6. 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 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.

7. 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 3.7742 acres originally irrigated and the abandonment and closure of the existing supplemental well (declared well RG-91219). The 3.7742 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.

8. Guardians' members reside near, recreate on, and enjoy the Rio Grande, and its extensive floodplain and cottonwood Bosque, including the impacted Impacted Reach and Angostura, Isleta, and San Acacia Reaches of the Rio Grande. 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 Reach and the Angostura, Isleta, and San Acacia Reaches, 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 Reach and the Angostura, Isleta, and San Acacia Reaches. The proposed transfer of water from Bernalillo 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 Reach and the Angostura, Isleta, and San Acacia Reaches.

9. Guardians and its members who use the Impacted Reach and Angostura, Isleta, and San Acacia Reaches 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 7.9258 acre-feet per year from Bernalillo to Sandoval County will deprive the Impacted Reach of the Rio Grande 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, the supplemental well closed, and the availability of the so-called Water Bank of the District will lead to further irrigation of the move-from land, increasing the overall depletions 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 Isleta and San Acacia Reaches, 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 known to provide habitat for and contain listed species, Guardians will be substantially and specifically affected by the Application.

10. 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.

11. The Application, if approved, will also be detrimental to the public welfare because the reduction of flows through approximately 15 miles of the river and the loss of return flows back to the river in the Isleta and Bosque del Apache Reaches impairs 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, ¶15. 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.

12. This protest is timely filed in the Albuquerque office of the State Engineer on February 6, 2018, within nine (9) calendar days following the last date of publication of Applicant's Notice on January 28, 2018 in the *Rio Rancho Observer*.

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WHEREFORE WildEarth Guardians requests the State Engineer deny the Application, State Engineer File No. SD-07396-E into RG-6745 et al., 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 6th day of February, 2018.



Samantha Ruscavage-Barz
WildEarth Guardians
516 Alto Street
Santa Fe, New Mexico 87501
(505) 401-4180
ruscavagebarz@wildearthguardians.org

Attorney for Protestant WildEarth Guardians

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CERTIFICATE OF SERVICE

I certify that a copy of this Protest was mailed to the following Permit Applicant on February 6, 2018.

The City of Rio Rancho
c/o Jim Chiasson, P.E.
3200 Civic Center Circle NE
Rio Rancho, NM 87144

The Center for Educational Initiatives
c/o J. Alan Marks
240 Valley High Street SW
Albuquerque, NM 87105


Samantha Ruscavage-Barz

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