

BEFORE THE NEW MEXICO STATE ENGINEER

**IN THE MATTER OF THE APPLICATION
OF AUGUSTIN PLAINS RANCH, LLC FOR
PERMIT TO APPROPRIATE GROUNDWATER
IN THE RIO GRANDE UNDERGROUND WATER
BASIN IN NEW MEXICO**

OSE FILE NO. RG-89943

**PROTEST TO APPLICATION FILED BY
AUGUSTIN PLAINS RANCH, LLC**

WildEarth Guardians (“Guardians”) protests the proposed permit to appropriate groundwater, State Engineer File No. RG-89943 (“Application”), because it is contrary to the conservation of water in the State of New Mexico and will be detrimental to the public welfare. Augustin Plains Ranch, LLC (“Applicant”) proposes to appropriate and divert 54,000 acre-feet of groundwater per year from 37 yet-to-be-drilled wells on land owned by the Applicant. The Application should be dismissed or denied based on the following grounds:

1. The Application seeks to appropriate and divert 54,000 acre-feet of groundwater per year from 37 yet-to-be-drilled wells on Applicant’s property in Catron County. Applicant proposes to convey this water from the wells to the Albuquerque metropolitan area through a yet-to-be constructed, 141-mile pipeline. To offset the effects of pumping from the 37 proposed wells, Applicant proposes constructing enhanced water recharge facilities to collect runoff from the Plains of San Augustin.

2. The Application provides detailed information regarding locations of the 37 proposed wells to be drilled on Applicant’s property to access groundwater. The Application does not specify who would be the end user of the appropriated groundwater or the purpose or place of use of that water as required by NMSA § 72-12-3.A. For “Purpose of Use” the Application indicates the following uses: municipal, industrial, commercial, and other (referring to offset of surface water depletions, replacement, sale, and/or lease); however the Application does not indicate how the 54,000 acre-feet of groundwater will be apportioned each year among these uses. For “Place of Use,” the Application generally states that the water will be used in those portions of Catron, Sierra, Socorro, Valencia, Bernalillo, Sandoval, and Santa Fe Counties that are within the geographic boundaries of the Rio Grande Basin, a use area encompassing tens of millions of acres. The Applicant’s proposal to carry out commercial bulk water sales for any number of purposes in a vast area of the State is a purely speculative water grab.

3. As an initial matter, the Application is incomplete as a matter of law, and the State Engineer should not have accepted the Application pursuant to NMSA § 72-12-3.C. But

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because the State Engineer has already accepted the Application, he should take the same course he took with the 2008 Application (which is substantially similar to the current Application) for the same reasons, that is to deny the Application because it “lacks specificity as to the actual end-user of the water” and also lacks “specific identification of delivery points and methods of accounting for that water.” Order Denying Application (March 30, 2012). The Seventh Judicial District upheld the State Engineer’s denial of the Application, characterizing the Applicant as acting like “the dog in the manger” by claiming an appropriation covering nearly all possible beneficial uses over large swaths of the state in an attempt to secure a monopoly on that water. *Augustin Plains Ranch v. Verhines*, Case No. D-728-CV-2012-008 (Dec. 11, 2014). Because the current Application has the same deficiencies that led to denial of the previous application, the State Engineer should deny the Application on the same grounds without subjecting the protestants to the time and expense of a hearing on an Application that is deficient as a matter of law.

4. Alternatively, the State Engineer should deny the Application because it would be contrary to the conservation of water within the State of New Mexico and detrimental to the public welfare. NMSA § 72-12-13.D. The State Engineer addressed these grounds in his Order denying the prior application. There, the State Engineer identified aspects of that application that would be contrary to sound public policy including: lack of specificity regarding purpose of use or as to the actual end-user of the water, allowing pumping of groundwater from a declared groundwater basin into a stream without specific identification of delivery points and methods for accounting for that water, and an application that is so vague and overbroad on its face that the effects of granting it cannot be reasonably evaluated. Because the Applicant has not corrected these deficiencies in the current Application, the State Engineer should deny the Application on the same grounds without a hearing.

5. The Application, if approved, will also be detrimental to the public welfare because the proposed appropriation will impair the availability of water in the State 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 has 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 this state.” *Sanders-Reed v. Martinez*, 2015-NMCA-063, ¶ 15. Therefore, allowing the Applicant to appropriate and in essence monopolize groundwater for the purpose of engaging in commercial bulk water sales for undetermined amounts of water at undetermined locations is contrary to Guardians’ and New Mexico citizens’ interests in preventing impairment to a state groundwater resource through privatization of that resource for monetary gain. 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 a public trust resource is detrimental to public welfare, the State Engineer should deny the Application.

6. Guardians and its members 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. Pumping 54,000 acre-feet of groundwater annually out of the Augustin Plains Subbasin will eventually deplete

flows in the Rio Grande, Gila River, as well as depleting flows in Alamosa Creek almost immediately. Guardians has interests in protecting all of these surface waters, as well as the listed and non-listed species that depend on them.

7. First, Alamosa Creek is fed by the Augustin Plains groundwater basin, so pumping a significant amount of groundwater—54,000 acre-feet per year—out the Basin will impact the Creek almost from the inception of pumping as proposed in the Application. In an attachment to the Application, the Applicant states that the annual natural recharge of the Basin is only 18,000 acre-feet per year, leaving a 36,000 acre-foot per year deficit in the Basin and resulting in significantly less groundwater to feed the Creek on an annual basis. Guardians' members recreate and observe wildlife along Alamosa Creek, so their recreational and aesthetic enjoyment will be substantially affected as Creek flows are depleted and when the Creek dries up from loss of groundwater. Moreover, Alamosa Creek provides habitat for species listed under the Endangered Species Act ("ESA") including the Chiracahua leopard frog and the Alamosa spring snail, as well as Wright's marsh thistle (a candidate species under the ESA). Recently, Guardians has worked to increase protections for two of these species. Guardians petitioned for a critical habitat designation for the Chiracahua leopard frog, and achieved that critical habitat designation in 2012. Alamosa Creek is included in the Alamosa Warn Springs Recovery Unit for the leopard frog, and the U.S. Fish and Wildlife Service identified "large-scale groundwater pumping" as one of the threats to critical habitat. 77 Fed. Reg. 16,324 (March 20, 2012). Guardians also petitioned for listing Wright's marsh thistle, and this species was added to the ESA candidate list in 2010. Therefore, Guardians has a significant interest in ensuring that Alamosa Creek remains a healthy, flowing creek to allow species recovery, and will be substantially affected if these species go extinct from loss of habitat.

8. Second, because Alamosa Creek drains in the Rio Grande, depletion of flows in Alamosa Creek from excessive groundwater pumping will eventually deplete flows in the Rio Grande. For decades, Guardians has advocated to protect flows in the Rio Grande and also for protections for listed species such as the Rio Grande silvery minnow and Southwestern willow flycatcher that depend on the Rio Grande for survival. Depletion of Rio Grande flows resulting from depletions in Alamosa Creek will reduce or adversely impact the aquatic and riparian habitat required for the protection and recovery of these endangered species. Therefore, Guardians has a significant interest in protecting the Rio Grande from depletions caused by the Applicant's proposed actions, and will be substantially affected by decline and/or eventual extinction of these listed species.

9. Third, the Augustin Plains aquifer drains into the Gila Basin and eventually ends up in the Gila River. The extent of groundwater pumping proposed in the Application will result in eventual flow depletions in the Gila River. Similar to Guardians' interests in Alamosa Creek, Guardians' members recreate and observe wildlife along all three forks of the Gila River, its headwaters, and its tributaries. Therefore, Guardians' members' recreational and aesthetic enjoyment will be substantially affected as the affects of the Application are felt on the Gila River and its tributaries.

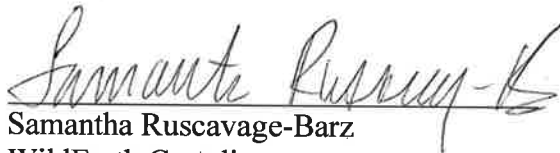
10. Ultimately, this Application represents water speculation of the worst kind. The Application contemplates appropriating, monopolizing, and selling off a significant portion of

the Augustin Plains Subbasin's groundwater to multiple potential end-users for multiple potential purposes. The Application should be denied as speculative. Only if the Applicant submits a new application that correctly identifies use areas with sufficient specificity, satisfies the State Engineer that new future use is not mere for-profit water speculation, and provides specific information as to the nature and extent of beneficial use can an application be given full consideration.

11. This protest is timely filed in the Albuquerque office of the State Engineer on September 29, 2016, within ten (10) calendar days following the last date of publication of Applicant's Notice on September 21, 2016, in the *Herald*.

WHEREFORE WildEarth Guardians requests the State Engineer deny the Application, State Engineer File No. RG-89943, 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 29th day of September, 2016.



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 September 29, 2016.

Augustin Plains Ranch, LLC
c/o Draper & Draper, LLC and Montgomery & Andrews, P.A.
325 Paseo de Peralta
Santa Fe, NM 87501


Samantha Ruscavage-Barz

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