

**STATE OF NEW MEXICO  
COUNTY OF SANTA FE  
FIRST JUDICIAL DISTRICT COURT**

**WILDEARTH GUARDIANS,** )  
)  
**Petitioner,** )  
)  
**vs.** )  
)  
**TOM BLAINE, in his capacity** )  
**as New Mexico State Engineer,** )  
)  
**Respondent,** )  
)  
**and** )  
)  
**MIDDLE RIO GRANDE CONSERVANCY** )  
**DISTRICT, U.S. BUREAU OF** )  
**RECLAMATION,** )  
)  
**Real Parties in Interest.** )

**No. D-101-CV-2016-00734**

**THE MIDDLE RIO GRANDE CONSERVANCY DISTRICT’S  
RESPONSE TO WRIT OF MANDAMUS**

**COMES NOW**, Respondent Intervenor Middle Rio Grande Conservancy District (“MRGCD”), by and through its attorneys of record, Law & Resource Planning Associates, P.C., and hereby respectfully submits its Response to the Writ of Mandamus issued by this Court to Tom Blaine, New Mexico State Engineer.

**Introduction**

In this proceeding, Petitioner WildEarth Guardians (“Petitioner”) asks this Court to issue a Writ of Mandamus to the New Mexico State Engineer (“State Engineer”) directing the State Engineer to exercise his discretionary authority to require that the MRGCD file a Proof of Beneficial Use (“PBU”) with respect to two Permits issued by the State Engineer for two independent water rights files. The first is Permit No. 1690. This is not a water right use Permit;

it is a permit for storage of water in El Vado Reservoir. The Reservoir construction was completed over eighty years ago. A proof of completion of works was filed and accepted by the New Mexico State Engineer at that same time. The Reservoir has been filled and refilled multiple times. This claim is frivolous. The second Permit is Permit No. 0620, which allows changes in points of diversions for numerous *acequias* from direct river diversions, to four new diversion dams on the Rio Grande at Cochiti, Angostura, Isleta Pueblo and San Acacia. Water has been diverted from those new dams under this Permit for eighty-five years. On its face, it contains no obligation to file a PBU. This claim is frivolous as well.

As will be shown in this Response, as well as in motions that the MRGCD intends to file in this matter, and as will be clearly explained by the State Engineer, the State Engineer has the discretion to determine when and how PBU's should be filed in every case. In the case of the MRGCD, the State Engineer and the MRGCD are jointly working on a database to document tracts using Rio Grande water. Furthermore, the Conservancy Act, which controls the MRGCD's actions, has a specific procedure for documenting use of water within the MRGCD in filings made in the Conservancy Court that formed the MRGCD by Court Order. Thus, there can be no legal basis for issuance of a Writ of Mandamus in this case.

The MRGCD allocates water among thousands of land owners irrigating approximately 70,000 acres along 160 river miles of the Rio Grande from Cochiti Dam to Bosque del Apache National Wildlife Refuge through an estimated 1,100 miles of ditches. Waters of the Rio Grande were fully appropriated for irrigation uses prior to the turn of the last century; this was documented in the Rio Grande Compact in 1938 and is an accepted fact today. The MRGCD measures all major diversions from the River and return flows. It is governed by detailed policies and rules requiring conservation and the MRGCD has improved its efficiency and reduced its consumptive

use of water dramatically over the past 10 years. Moreover, the MRGCD and other users within the Middle Rio Grande Basin have accordingly met the delivery requirements of the Rio Grande Compact, and in many cases, have over delivered to the Basin. Thus, even though the Middle Rio Grande is fully appropriated, the MRGCD has made even more and better use of the limited water supplies.

Petitioner's theory of the case in pursuing the Writ seeks to elevate a piece of paper over the realities of hydrology. Even though flow in the river is carefully measured by the Interstate Stream Commission, the Rio Grande Compact Commission, and by the MRGCD, Petitioner argues that if a PBU form were filed, this would suddenly make excess water available for the Rio Grande Silvery Minnow ("RGSM") as required by the Endangered Species Act. The extent of the obligations owed by the Middle Rio Grande institutions to the RGSM will be decided in a matter filed in Federal Court by the Petitioners. The factual issues relating to the MRGCD and the nature of its title raised herein are also raised in that case and that matter is pending on an administrative appeal before the United States District Court.<sup>1</sup> In that matter, the administrative record is complete and will be decided in that forum, thereby becoming collateral estoppel on most of the issues raised here as to the duties of the United States Bureau of Reclamation ("BOR") and the MRGCD. Thus, the argument that a filing a piece of paper with the State Engineer could create excess water in an over-appropriated River is not only specious, it must await the outcome of the Federal Court case.

Thousands of water users from Cochiti Dam to Bosque del Apache National Wildlife Refuge divert water for their crops daily and are doing so today. There has never been an adjudication suit determining the nature and scope of their water rights. However, until

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<sup>1</sup> See *WildEarth Guardians v. U.S. Bureau of Reclamation, et al.*, Fed. Dist. Ct. Cause No. 14-cv-00666-RB-SCY (D.N.M.).

adjudicated to the contrary, their rights are valid. Petitioner proposes that this Court utilize a Writ of Mandamus to adjudicate all of these rights and thereby order that these entitlements to use waters from the four diversion dams on the Rio Grande be declared void. Petitioners are asking this Court, without providing notice or joining a single water user, to direct the State Engineer to cancel the MRGCD's permits for storage and diversion of water. The destruction of crops, the chaos that would ensue, and the cultural impact on the acequias within the MRGCD would be unimaginable. Not only is this claim frivolous, the filing of this claim constitutes a frontal attack by an environmental group on the very existence of the irrigation community within the Middle Rio Grande Valley. For this reason, and the reasons set out below in the paragraph by paragraph Response, the Alternative Writ of Mandamus issued by this Court must be quashed.

### **Response to Petitioner's Allegations of Jurisdiction and Parties**

#### **A. Jurisdiction.**

1. The MRGCD admits that District Courts have original jurisdiction to issue Writs of Mandamus under NMSA 1978, § 44-2-3. For reasons explained below, the MRGCD denies that that jurisdiction can be properly exercised in this case. Furthermore, the MRGCD denies that venue is proper in the Santa Fe County District Court because the MRGCD is a conservancy district organized pursuant to the Conservancy Act, NMSA 1978, § 73-14-1 *et seq.*, and jurisdiction of matters affecting the lands of the MRGCD rests exclusively in the Conservancy Court, which is the Bernalillo County District Court. *See* NMSA 1978, § 73-14-4(B) (1927) (“The conservancy court shall thereafter, for all purposes of this act, except as heretofore or hereinafter otherwise provided, maintain and have original and exclusive jurisdiction coextensive with the boundaries of said district, and of lands and other property proposed to be included in said district or affected by said district, without regard to the usual limits of its jurisdiction.”) and NMSA 1978,

§ 73-14-5 (1927).

2. The MRGCD admits that mandamus is a remedy that is properly employed to compel the exercise of a ministerial duty by a state official. The MRGCD denies that mandamus is properly invoked by Petitioner in this matter because the State Engineer has discretion to decide when a PBU will must be filed. The State Engineer has and should have great discretion in determining what is in the public interest. *See State ex rel. Reynolds v. Aamodt*, 1990-NMSC-099, 111 N.M. 4, 5, 800 P.2d 1061, 1062 (holding that the State Engineer may grant an extension of time to place water to beneficial use at any time.) A Writ of Mandamus is not available to control the discretion of a public official. *Mimbres Valley Irrigation Co. v. Salopek*, 2006–NMCA–093, ¶ 11, 140 N.M. 168. *See also, Nat’l Educ. Ass’n of New Mexico v. Santa Fe Pub. Sch.*, 2016-NMCA-009, ¶ 3, 365 P.3d 1, 6-7 (“A writ of mandamus applies to ministerial duties—those arising when the law dictates that ‘a public official must act when a given state of facts exist’—and is inappropriate ‘when the matter has been entrusted to the judgment or discretion of the public officer.’” (quoting *Mimbres*, 2006–NMCA–093, ¶ 11)).

**B. Respondent and Real Parties in Interest.**

3. The MRGCD admits that as New Mexico State Engineer, Tom Blaine is generally responsible for the supervision of the waters of the state. The MRGCD denies, however, that his authority extends to compelling the MRGCD to file a PBU in this case. Permit No. 1690 is a permit allowing the storage of water and once the Proof of Construction of Works was filed and reservoir filled, as has occurred many times, there is no basis for requiring a PBU. Furthermore, Permit No. 0620 has no such requirement on its face.

4. The MRGCD admits the BOR is a real party in interest in this litigation because it operates the El Vado Dam on behalf of the MRGCD, it is coordinating with MRGCD in fulfilling

the requirements of the Endangered Species Act, and has entered into an Emergency Drought Water Agreement with the MRGCD to utilize water stored in El Vado Reservoir to aid the RGSM. The MRGCD denies that the BOR is a real party in interest by virtue of the MRGCD having granted the United States a security interest in its works for the repayment of a loan that has since been repaid in full. Furthermore, this Court has no jurisdiction to adjudicate ownership of any works of the United States; that jurisdiction is vested solely in the United States District Court pursuant to the Federal Quiet Title Act, 28 U.S.C. § 2409a. The MRGCD also denies that the BOR has “ownership, control, and authority over all assets and operations” of the MRGCD. The BOR has explicitly taken the position that irrespective of the differences of opinions as to ownership of certain of the works, the BOR does not control diversions of the MRGCD for use of water rights owned by the MRGCD and its users under New Mexico state law.

5. The MRGCD admits that it is a real party in interest, and therefore, must be permitted to intervene in this action. Rule 1-024(A) NMRA.

**C. Standing of Petitioner and the General Public.**

6. The MRGCD is without sufficient knowledge to admit or deny Petitioner’s allegations with respect to its organization, mission, and activities, and therefore, denies the same.

7. The MRGCD denies that Petitioner is a beneficially interested party under NMSA 1978, § 44-2-5 or that it has standing in this matter to seek a Writ of Mandamus directed to the New Mexico State Engineer. Any duties owned by the State Engineer to enforce its own regulations are duties owed to the State generally and as the owner of all waters within the State. The State Engineer owes no special duties to Petitioner, and Petitioner has no standing to enforce any general duty owed to the State as a whole. *State ex rel. Coll v. Johnson*, 1999-NMSC-036, ¶ 17, 128 N.M. 154, 159, 990 P.2d 1277, 1282 (“The rule to be deduced from these cases is that the

existence of a generalized duty that state officials owe to the people of the state as a whole . . . is not sufficient to authorize an enforcement action by a person seeking to serve as a ‘private attorney general.’”). Any attempt to direct the State Engineer to take any action vis-à-vis water rights of another can only be raised by protest to some proposed action of the water user. *See, e.g.,* NMSA 1978, § 72-5-23 and NMSA 1978, § 72-5-24.

8. The MRGCD denies the allegations in Paragraph 8 of the Petition. Petitioner assumes that if the State Engineer imposes an obligation upon the MRGCD to file a PBU, or cancels its Permits for not filing a PBU, additional water will be available to Petitioner for appropriation due to non-use or forfeiture by the MRGCD. However, the MRGCD affirmatively states that it is the owner of significant water rights covered by its Permit No. 0620 by operation of law and cannot lose those water rights either by abandonment or forfeiture. NMSA 1978, § 73-14-21 (“The rights of the district to the waters of the district, or the use thereof, or the land within the district and property owned by it shall not be lost by the district by prescription or by adverse possession, or for nonuse of the waters.”). Because the MRGCD, as a matter of law, cannot lose any of its water rights, Petitioner cannot succeed in having additional water available to it for appropriation. Because the Petitioner is not currently an owner of Rio Grande water rights, this matter is not justiciable because there is no guarantee that Petitioner will ever be successful in appropriating water from a fully appropriated stream system. *See, Schreiber v. Baca*, 1954-NMSC-110, ¶ 16, 58 N.M. 766, 770-71, 276 P.2d 902, 905 (“Inasmuch as plaintiffs have no absolute right to a license, as contended, or to consideration of their application therefor, their bill of complaint is devoid of allegations disclosing a justiciable interest in them in the question of whether defendant Quick was properly granted a license or should be permitted to sell spirits.”). Finally, the MRGCD states that pursuant to its Permit No. 0620, it delivers pre-1907 water rights

to the owners of those rights within the MRGCD's boundaries. A determination by this Court that the State Engineer should cancel the MRGCD's Permit No. 0620 would not make water rights delivered by the MRGCD but belonging to others available for appropriation by Petitioner.

9. The MRGCD denies the allegations stated in Paragraph 9 of the Petition. The MRGCD affirmatively states that Petitioner does not have standing pursuant to the great public interest doctrine to establish standing as this matter poses no "clear threats to the essential nature of state government" because the State Engineer has discretion to decide when to require a PBU, and because any requirements for the filing of a PBU by a conservancy district are contained within the Conservancy Act. Any complaint in this regard would be properly directed to the Conservancy Court. The MRGCD's water rights are established pursuant to statute, and exist once the MRGCD has constructed works and/or acquired water rights:

Where the district acquires by purchase, condemnation or otherwise, water or water rights, or where it conserves, develops or reclaims water, it shall have the rights which go with the appropriation and beneficial use thereof, save and except such use for which benefits have been appraised and assessments levied by the district upon property for irrigation purposes; and the development, conservation or reclamation of water by the district is hereby declared to be an appropriation thereof by the district, and the disposition thereof under the terms of this act is hereby declared to be a beneficial use thereof by said district and by the lands included therein.

NMSA 1978, § 72-14-47(F) (1927). Indeed, the determination of the extent of water rights on lands within the MRGCD lies within the jurisdiction of the Conservancy Court after the Board of Directors of the MRGCD presents the Conservancy Court with a report detailing water use within the boundaries of the District and water users are afforded the opportunity to present evidence concerning their water rights. NMSA 1978, § 73-14-47 (D) (1927). The final determination by the Conservancy Court as to the report "shall be the basis of any future use of the waters in the district." NMSA 1978, § 73-14-47(E) (1927).



**Response to Petitioner's Grounds in Support of Issuance of the Writ**

**A. The State Engineer's Statutory and Regulatory Duties.**

10. The MRGCD agrees that Petitioner generally states the law with respect to water rights, but affirmatively states that conservancy districts, such as the MRGCD, have separate governing statutes not identified in Paragraph 10 of the Petition and which govern any determination of the nature and extent of water rights within the boundaries of the MRGCD.

11. The MRGCD agrees that Petitioner generally states the law with respect to water rights, but affirmatively states that conservancy districts, such as the MRGCD, have separate governing statutes not identified in Paragraph 11 of the Petition and which govern any determination of the nature and extent of water rights within the boundaries of the MRGCD.

12. The MRGCD agrees that Petitioner generally states the law with respect to water rights, but affirmatively states that conservancy districts, such as the MRGCD, have separate governing statutes not identified in Paragraph 12 of the Petition and which govern any determination of the nature and extent of water rights within the boundaries of the MRGCD.

13. The MRGCD agrees that Petitioner generally states the law with respect to water rights, but affirmatively states that conservancy districts, such as the MRGCD, have separate governing statutes not identified in Paragraph 13 of the Petition and which govern any determination of the nature and extent of water rights within the boundaries of the MRGCD.

14. The MRGCD agrees that Petitioner generally states the law with respect to water rights, but affirmatively states that conservancy districts, such as the MRGCD, have separate governing statutes not identified in Paragraph 14 of the Petition and which govern any determination of the nature and extent of water rights within the boundaries of the MRGCD.

15. The MRGCD agrees that Petitioner generally states the law with respect to water

rights, but affirmatively states that the State Engineer has discretion as to when a PBU should be filed, and in any event, conservancy districts, such as the MRGCD, have separate governing statutes not identified in Paragraph 15 of the Petition and which govern any determination of the nature and extent of water rights within the boundaries of the MRGCD. The MRGCD further affirmatively states that its water rights are established by statute, and hence, the PBU requirement described in the Alternative Writ is inapplicable. The development, reclamation, or conservation of water by the MRGCD is a beneficial use of water, as a matter of law. *See* NMSA 1978, § 72-14-47(F) (1927). The determination of the extent of those rights rests in the Conservancy Court after the Board of Directors files its report concerning water use within the boundaries of the MRGCD. NMSA 1978, § 73-14-47.

16. The MRGCD agrees that Petitioner generally states the law with respect to water rights, but affirmatively states that conservancy districts, such as the MRGCD, have separate governing statutes not identified in Paragraph 16 of the Petition and which govern any determination of the nature and extent of water rights within the boundaries of the MRGCD. The MRGCD further affirmatively states that its Permit No. 1690 is a storage permit, for which a Proof of Completion of Works was filed on August 16, 1935. Pursuant to NMSA 1978, § 72-14-47(F), the development, conservation or reclamation of water under Permit No. 1690 is both an appropriation of water and placement of water to beneficial use, as a matter of law. The MRGCD has no further duty to file any PBU with the State Engineer. The MRGCD further states that its Permit No. 0620 is a permit consolidating numerous points of diversion on the Rio Grande into four separate points of diversion, and which Permit contains no requirements for the filing of a PBU. Were this Court to reject the argument of the State Engineer that he has discretion to decide when and under what circumstances a PBU should be filed when the Permit on its face does not

require a PBU, the Writ cannot issue. The development, conservation or reclamation of water under Permit No. 0620 is both an appropriation of water and placement of water to beneficial use. No resident between Cochiti Dam and Bosque del Apache National Wildlife Refuge could fail to notice that water is being diverted from four diversion dams onto thousands of acres of irrigated lands, and is thus being beneficially used. The MRGCD and the State Engineer staff are exchanging databases and working diligently to define the extent of water use within the MRGCD. The Rio Grande is perennially short and supplies are shared in short times virtually every year. No rational person would conclude that the outcome of this work will illustrate there is additional water that could be taken from irrigators and made available to the Petitioner without injuring other water users. Even were this the case, the sole method for making this determination is through a water rights adjudication with proof of use developed in coordination between the MRGCD and the New Mexico State Engineer.

17. The MRGCD agrees that Petitioner generally states the law with respect to water rights, but affirmatively states that conservancy districts, such as the MRGCD, have separate governing statutes not identified in Paragraph 17 of the Petition and which govern any determination of the nature and extent of water rights within the boundaries of the MRGCD. The MRGCD further states that it is not subject to the provisions of either 19.26.2.13(C) NMAC or NMSA 1978, § 72-5-28 with respect to filing a PBU or requesting an extension of time to do so. Pursuant to statute, the development, reclamation, and conservation of water is a beneficial use as a matter of law. Any conflict between statutes governing conservancy districts and other statutes are of no effect. *See* NMSA 1978, § 73-17-23 (C) (1927), which provides as follows:

All other acts or parts of acts conflicting in any way with any of the provisions of this act, in regard to improvements of the character contemplated by this act, or regulating or limiting the power of taxation or assessment or otherwise interfering with the execution of this act

according to its terms, are hereby declared inoperative and ineffective as to this act, as completely as if they did not exist, but all such acts and parts of acts shall not in any way be otherwise affected by this act.

18. The MRGCD agrees that Petitioner generally states the law with respect to water rights, but affirmatively states that conservancy districts, such as the MRGCD, have separate governing statutes not identified in Paragraph 18 of the Petition and which govern any determination of the nature and extent of water rights within the boundaries of the MRGCD.

**B. Response to Petitioner's Statement of the Relevant Background for Permit Nos. 0620 and 1690.**

19. The MRGCD agrees with Petitioner's allegations in Paragraph 19.

20. The MRGCD agrees with Petitioner's allegations in Paragraph 20. The MRGCD agrees that Pueblo water rights by their very nature cannot be abandoned or forfeited, but likewise asserts that by statute, the rights of the MRGCD cannot be abandoned or forfeited and thus no PBU is required for MRGCD non-pueblo rights as well. *See* NMSA 1978, § 73-14-21.

21. The MRGCD admits that the MRGCD irrigators became unable to pay their assessments as a result of a national depression which affected the entire country including MRGCD irrigators. The MRGCD denies that the opinion in *Rio Grande Silvery Minnow v. Keys*, 333 F.3d 2209 (10th Cir. 2003) can be cited as factual or legal authority for any proposition, having been vacated by the Tenth Circuit and withdrawn by the United States District Court.

22. The MRGCD denies that any of the federal acts mentioned in this paragraph awarded control of any of the private water rights or facilities constructed by the MRGCD. Indeed, the Reclamation Act of 1902, section 8, specifically precludes such action.

23. The MRGCD agrees that in 1951, the MRGCD received a loan from the United States government for the refurbishment of MRGCD works, which loan was secured by an easement on MRGCD works. The MRGCD affirmatively states that the loan was in the form of a

repayment contract, and contained three components: 1) the United States' payment of the outstanding bonds of the MRGCD; 2) an agreement for the United States to serve as a contractor for the MRGCD in the rehabilitation of its works; and 3) an agreement for the United States to conduct operations in the river bed itself to ensure the flow of water at no cost to the MRGCD. The MRGCD denies that the loan agreement with the federal government allowed the BOR "to assume ownership, control, and authority over all assets and operations of the District including water storage and diversion rights." The MRGCD also agrees that Paragraph 23 of the Petition correctly quotes provisions of the MRGCD's 1951 Contract with the BOR. The MRGCD disputes that any of its water rights or other assets have ever been assigned or deeded to any other entity, including the BOR or any other agency of the United States. The only conveyances that took place were for easements necessary for the BOR to perform work on the MRGCD ditches as required by the 1951 Contract. The MRGCD further denies and disputes that it acts as an agent of the BOR for any purpose.

The MRGCD further states that the loan has been repaid in full and the security agreement is no longer applicable to any activities of the MRGCD. The MRGCD denies that the opinion in *Rio Grande Silvery Minnow v. Keys*, 333 F.3d 2209 (10th Cir. 2003) can be cited as factual or legal authority for any proposition having been vacated by the Tenth Circuit and withdrawn by the United States District Court.

24. The MRGCD agrees that flood control is one of its purposes and part of its mission. *See* NMSA 1978, § 73-14-1 through § 73-18-43. The MRGCD disputes, however, that its Permit Nos. 1690 and 0620 relate only to its mission of flood control.

25. The MRGCD admits that the allegations of Paragraph 25 of the Petition generally describe some of the language in the permits, however, MRGCD denies that the MRGCD sought

any new appropriation of water. The perfected water rights had already been appropriated. The balance of the water rights created by conservation and related efforts became the property of the MRGCD by operation of law as described in the Conservancy Code. The phrase “newly reclaimed lands” is a term defined in federal statutes relating to Pueblo lands and has no application to this case.

26. The MRGCD admits the allegations of Paragraph 26 of the Petition.

27. The MRGCD admits the allegations of Paragraph 27 of the Petition except that it disputes there are any time deadlines of any kind associated with its Permit No. 0620 or that the MRGCD has any duties with respect to placing water to beneficial use within any specified time period. The MRGCD further affirmatively states that it filed a Proof of Completion of Works reflecting completion of El Vado Reservoir on August 16, 1935 and that it has no further duties or obligations to place water to beneficial use within any specified time period with respect to its Permit No. 1690.

28. The MRGCD admits the allegations of Paragraph 28 of the Petition except that it disputes there are any time deadlines of any kind associated with its Permit No. 0620 or that the MRGCD has any duties with respect to placing water to beneficial use within any specified time period. The MRGCD further affirmatively states that it filed a Proof of Completion of Works reflecting completion of El Vado Reservoir on August 16, 1935 and that it has no further duties or obligations to place water to beneficial use within any specified time period with respect to its Permit No. 1690.

29. In response to Paragraph 29 of the Petition, the MRGCD states that the attached documents speak for themselves. The MRGCD otherwise denies the allegations stated in Paragraph 29. The MRGCD further affirmatively states that it has no obligations pursuant to any

statute to either file a PBU with the Office of the State Engineer or to place water to beneficial use within any time deadline, and the former State Engineer Thomas J. Turney ceased requesting the filing of a PBU once he was convinced it was not necessary and no other State Engineer has adopted the position taken by State Engineer Turney during that one year period of 1997.

30. In Paragraph 30, Petitioner makes only legal arguments and no factual allegations. If the Paragraph can be construed to contain any factual allegations, the MRGCD denies those allegations. The MRGCD affirmatively states that while Petitioner generally recites a portion of the requirements necessary for the issuance of a Writ of Mandamus, Petitioner fails to note that mandamus is “a drastic remedy to be invoked only in extraordinary circumstances.” *Johnson*, 1999-NMSC-036, ¶ 12, 128 N.M. 154. Petitioner further fails to note that “A writ of mandamus may be issued ‘only to force a clear legal right against one having a clear legal duty to perform an act and where there is no other plain, speedy and adequate remedy in the ordinary course of law.’” *Nat’l Educ. Ass’n of New Mexico v. Santa Fe Pub. Sch.*, 2016-NMCA-009, ¶ 17 (quoting *Brantley Farms v. Carlsbad Irrigation Dist.*, 1998-NMCA-023, ¶ 16, 124 N.M. 698, 954 P.2d 763). In this action, Petitioner does not have a clear legal right to enforce any obligation that the State Engineer may or may not have to the general public. Furthermore, the State Engineer has no authority to require a PBU from the MRGCD, much less “a clear legal duty” to do so. When a legal duty is based on statute, “mandamus is appropriate only when that duty is clear and indisputable.” *State ex rel. Stapleton v. Skandera*, 2015-NMCA-044, ¶ 4, 346 P.3d 1191, 1193-94 (quoting *Johnson v. Vigil-Giron*, 2006-NMSC-051, ¶ 22, 140 N.M. 667, 146 P.3d 312). Finally, mandamus is a method of enforcing existing rights. It is not a method for determining rights as between parties. *Mimbres Valley Irrigation Co. v. Salopek*, 2006-NMCA-093, ¶ 19, 140 N.M. 168 (“rights between parties are not adjudicated by mandamus because it is a method of enforcing an existing right.”

(quoting *State ex rel. State Highway Comm'n v. Quesenberry*, 72 N.M. 291, 294, 383 P.2d 255, 257 (1963)); see also, *Schein v. N. Rio Arriba Elec. Co-op., Inc.*, 1997-NMSC-011, ¶ 22, 122 N.M. 800, 806, 932 P.2d 490, 496 (“Relevant rights and duties must be established before a writ of mandamus can issue.”). No duty exists in the MRGCD to file a PBU and no right to require one exists in the State Engineer. Thus, mandamus is not appropriate in this action.

31. In response to Paragraph 31, the MRGCD affirmatively states that the enforcement of the provisions of 19.26.2.13(C) NMAC is discretionary, and further the MRGCD, is governed by the provisions of the Conservancy Act with respect to applying water to beneficial use. Therefore, 19.26.2.13(C) establishes no mandatory, non-discretionary duty on the part of the State Engineer in 2016 to either establish a date certain on which the MRGCD must file a PBU or a responsibility on the part of the MRGCD to request an extension of time from that date. Furthermore, the MRGCD is not susceptible to having its Permit No. 1690 or Permit No. 0620 cancelled by the State Engineer who has no authority to do so.

32. In response to Paragraph 32, the MRGCD affirmatively states that it is not subject to the provisions of 19.26.2.13(C) NMAC because the State Engineer has not breached a mandatory non-discretionary duty and, were the issue to be properly raised in this case, the rules for the beneficial use of water by the MRGCD are contained within the Conservancy Act. Significantly, the following enumerated conditions render this Court without jurisdiction to entertain the Petition under any rational view of water rights administration: 1) issuance of a Writ results in the cancellation of the water rights of thousands of water users within the MRGCD without notice and without joinder in a water rights adjudication suit; 2) the United States is an indispensable party, which cannot be joined in a state court proceeding; 3) the Petition is filed in the wrong venue; 4) mandamus is a narrow remedy that is not appropriate for the control of the



discretion of the State Engineer and which is not appropriate given the provisions of the Conservancy Act as they apply to conservancy districts.

33. In response to Paragraph 33 of the Petition, the MRGCD affirmatively states that there is no nondiscretionary duty on the part of the State Engineer to require the MRGCD to file a PBU and that mandamus is not appropriate in this matter. Because there is no such duty on the part of the State Engineer, it is irrelevant whether Petitioner has a “plain, speedy, adequate remedy in the ordinary course of law.” Nonetheless, if the Petitioner owned a valid water right, which it does not as of the filing of this case, the remedy of a stream adjudication is available to the Petitioner for determination of the relative water rights of appropriators of Rio Grande water and for a determination as to whether there is additional water available for appropriation. *See* NMSA 1978, § 72-4-17 *et seq.*

34. In response to Paragraph 34 of the Petition, the MRGCD incorporates its responses to Paragraphs 1 through 33 above and restates them as if set forth in full.

35. Any allegation that is not specifically admitted in this response is hereby denied.

#### **AFFIRMATIVE DEFENSES**

1. The allegations stated in the Writ of Mandamus fail to state claims on which the requested relief can be granted.

2. This Court does not have jurisdiction to decide any issues affecting the MRGCD’s water rights and the water rights appurtenant to lands included within its boundaries.

3. The Petition fails to join all real parties in interest in the litigation.

4. The Petition fails to join indispensable parties, including the United States Bureau of Reclamation, the six Indian Pueblos within the boundaries of the MRGCD, and the holders of pre-1907 water rights within the boundaries of the MRGCD, whose water rights will be negatively

impacted by this litigation.

5. The Petition must be dismissed because indispensable parties who are immune from suit in this forum cannot be joined in the litigation.

6. Petitioner is not beneficially interested in this matter and has no standing to pursue this litigation.

7. This matter presents issues that are not justiciable in this forum.

8. The State Engineer has no duty, ministerial or otherwise, to require the MRGCD to file a PBU with his office.

9. The State Engineer has no authority to require the MRGCD to file a PBU with his office.

10. The State Engineer has no authority to cancel the MRGCD's Permits No. 1690 and No. 0620.

11. The MRGCD is in complete compliance with the provisions of its Permit No. 1690 and its Permit No. 0620.

12. The Petitioner has no clear legal right against the State Engineer.

13. If the Court were to erroneously find that the State Engineer has a mandatory, non-discretionary duty to attempt to apply the PBU requirement to the MRGCD and thereby undercut the on-going efforts of the MRGCD and the State Engineer to compile a common database, the Court should still deny the Petition because the MRGCD's duties and obligations with respect to placement of water to beneficial use are governed solely by the provisions of the Conservancy Act, NMSA 1978, § 73-1-1 *et seq.*

14. The MRGCD is not governed by the provisions of 19.26.2.13 NMAC.

15. Petitioner has a plain, speedy, adequate remedy in the ordinary course of law.

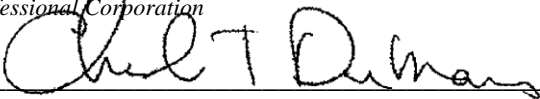
16. The Petitioner cannot control the discretion of the State Engineer through a Writ of Mandamus

17. The relief requested in this matter is duplicative of actions pending in federal court in *WildEarth Guardians v. U.S. Bureau of Reclamation, et al.*, Fed. Dist. Ct. Cause No. 14-cv-00666-RB-SCY (D.N.M.), and the Court should abstain from creating findings of fact and conclusions of law inconsistent with those in the record of the current administrative appeal in the United States District Court.

**WHEREFORE**, for the reasons set forth above in this Response, Respondent Intervenor Middle Rio Grande Conservancy District respectfully requests that the Alternative Writ of Mandamus issued by this Court be quashed and for such other relief as the Court deems just and proper.

Respectfully submitted,

LAW & RESOURCE PLANNING ASSOCIATES,  
*A Professional Corporation*

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**CERTIFICATE OF SERVICE**

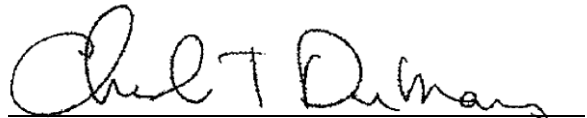
I HEREBY CERTIFY that on the 28th day of June, 2018, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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