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

WILDEARTH GUARDIANS,
***Petitioner*,**

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

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*.**

ALTERNATIVE WRIT OF MANDAMUS

To: Mr. Tom Blaine, New Mexico State Engineer
Office of the State Engineer
130 South Capitol St.
Concha Ortiz y Pino Bldg.
Santa Fe, NM 87504

YOU ARE HEREBY COMMANDED FORTHWITH TO:

1. Within 30 days of issuance of this Writ, comply with your mandatory, nondiscretionary duty under § 19.26.2.13(C) NMAC to either set a due date for demonstrating proof of beneficial use of water under Permit Nos. 0620 and 1690 or

cancel the permits, or show cause before the Court why you have not taken either of these actions.

2. Reimburse Petitioner for costs incurred in this action, including but not limited to attorneys' fees.

A copy of the Petitioner's Verified Petition for Alternative Writ of Mandamus is attached to this Writ pursuant to Rule 1-065(E) as Petitioner's Exhibit 1.

Date:_____

Approved:

_____
First Judicial District Judge

Petitioner's Exhibit 1

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MIDDLE RIO GRANDE CONSERVANCY DISTRICT,
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***Real Parties in Interest*.**

FIRST AMENDED VERIFIED PETITION FOR ALTERNATIVE WRIT OF MANDAMUS

INTRODUCTION

Pursuant to NMSA Sections 44-2-1 through 44-2-14, Petitioner WildEarth Guardians ("Guardians") respectfully requests the Court issue an alternative writ of mandamus directed at Respondent Tom Blaine in his capacity as the New Mexico State Engineer. Guardians requests the Court order the State Engineer to comply with his nondiscretionary duty under § 19.26.2.13(C) NMAC to either set a due date for demonstrating proof of beneficial use of water under Permit Nos. 0620 and 1690 or cancel the permits, or show cause before the Court why he has not taken either of these actions.

Beneficial use is "the basis, the measure and the limit of the right to use water" in New Mexico. N.M. Const. Art. XVI, § 3, NMSA 1978 § 72-1-2. The State Engineer determines whether a permittee has put water to beneficial use for the purpose of obtaining a water right by requiring the permittee to file proof of beneficial use of the amount of water claimed for development in the permit. Once the permittee has demonstrated proof of beneficial use, the State Engineer issues a license pursuant to NMSA 1978 § 72-5-13 that constitutes a right to appropriate the amount of water the permittee has put to beneficial use.

Despite the statutory requirement that a permittee demonstrate proof of beneficial use to perfect a water right, the Middle Rio Grande Conservancy District ("District") and continues to divert and store water under Permit Nos. 0620 and

1690 (hereafter, "the subject permits") issued over 80 years ago without ever having provided the requisite proof of beneficial use to the State Engineer to perfect its claimed water right. Under State law, the State Engineer cannot allow the District to continue diverting almost the entire flow of the Rio Grande—in the reach between Cochiti Dam and Elephant Butte Reservoir in central New Mexico ("Middle Rio Grande")—under the subject permits without demonstrating that it is putting that water to beneficial use. As set forth below, the State Engineer's duty to require the District to quantify the actual amount of water it is putting to beneficial use is mandatory, the facts are undisputed, and the writ should issue unless the State Engineer can show cause before the Court as to why he has not held the District accountable for over 80 years of unchecked water diversions.

JURISDICTION AND PARTIES

A. Jurisdiction

1. This Court has original jurisdiction over petitions for writ of mandamus under NMSA 1978 § 44-2-3, and venue is proper under NMSA 1978 § 38-3-1(G).

2. Mandamus is the proper remedy to compel an official act by a state officer, as to which the officer has no discretion. *City of Santa Rosa v. Jaramillo*, 1973-NMSC-119, ¶7, 85 N.M. 747,749; *see also New Energy Economy, v. Martinez*, 2011-NMSC-006, ¶¶ 21-23, 149 N.M. 207, 213-14 (issuing writ to

compel Governor and State Records Administrator to comply with statute and regulation).

B. Respondent and Real Parties in Interest

3. Respondent Tom Blaine, in his capacity as the New Mexico State Engineer, is responsible for the general supervision of waters of the state and of the measurement, appropriation, distribution thereof pursuant to state law. NMSA 1978 § 72-2-1.

4. The United States Bureau of Reclamation ("Reclamation") is a real party in interest because it assumed ownership, control, and authority over all assets and operations of the District in 1951, including water storage and diversion rights. The rights and interests of the District in Permit Nos. 0620 and 1690 were assigned to the United States to benefit the Middle Rio Grande Project.

5. The Middle Rio Grande Conservancy District ("District") is a real party in interest because it operates and maintains water operations under Permits Nos. 0620 and 1690 as an agent of the United States.

C. Standing of Petitioner and the General Public

6. Petitioner WildEarth Guardians ("Guardians") is a non-profit, public interest organization with its main office in Santa Fe, New Mexico. Guardians' mission is to protect and restore the wildlife, wild places, wild rivers, and health of the American West. Guardians has approximately 120,000 members and activists,

many of whom reside in the Rio Grande Basin. One of Guardians' main focus areas is the Wild Rivers Program, which works to enhance and restore flows in the Rio Grande. Guardians, as an organization and on behalf of its members, is concerned about impairment of the Rio Grande due to federal, state, and local water management activities, and physical modification of the river's ecosystems through water diversions. Guardians works through administrative appeals, litigation, public outreach, and other efforts to ensure that all federal, state, and local agencies fully comply with the provisions of all pertinent laws to protect the Rio Grande. Guardians' work aims to ensure that its members as well as the general public can use and enjoy the Rio Grande and its tributaries and adjoining public lands for recreational, scientific, aesthetic, and other purposes. Guardians' members regularly canoe, kayak, and raft the Rio Grande, hike in the Bosque, take photographs, and birdwatch, among other activities.[1]

7. Guardians has standing to seek relief from this Court because it is "beneficially interested" in the State Engineer's compliance with the law governing appropriation of water for beneficial use. *State el rel. Coll v. Johnson*, 1999-NMSC-036 ¶ 17, 128 N.M. 154, 159 (holding that parties that are "beneficially interested" are entitled to sue for mandamus relief). Guardians and its

[1] In the context of standing to bring a lawsuit, 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.

members are beneficially interested in compelling the State Engineer to provide an accounting of the District's water use or cancel the subject permits because such actions would (1) provide accountability of water use in the Middle Rio Grande, ensuring that the District was not exceeding the amount of water permitted to it, (2) serve to limit the diversions of the District to the acreage actually put to beneficial use and leaving the excess water in the river to support the non-consumptive values and uses of Guardians and its members,[2] including obtaining water for instream flows to support recreation, terrestrial and aquatic wildlife, and a healthy river ecosystem, and (3) free up water in an otherwise over appropriated system allowing that water to become available for non-consumptive uses by Guardians

[2] A State Engineer Memorandum dated May 21, 1996 shows his concern that the District was irrigating significantly less acreage historically than the amount claimed in Permit 0620, resulting in the District not putting all of the water claimed in the permit to beneficial use. Comparing the amount of "Non-Indian" irrigated acreage under the District's permits claimed in 1928 (100,533 acres) with actual irrigated acreage in 1979 (54,866 acres) shows a significant reduction in both irrigable acreage and the amount of water being put to beneficial use—301,599 acre-feet in 1928 versus 164,598 acre-feet in 1979. **Petitioner's Exhibit 2** at 11, Tables 1, 3 (1996 SE Memorandum). If the State Engineer issued a license under the 1979 factual scenario, then 137,000 acre-feet of surface water would be available for new appropriation as the State Engineer can only "issue a license to appropriate water to the extent and under the condition of the *actual* application thereof to beneficial use." NMSA 1978 § 72-5-13 (emphasis added). One acre-foot equals 326,000 gallons, which is enough water to cover a football field a foot deep with water.

and its members, such as an instream flow appropriation in the Middle Rio Grande or for filling the environmental storage pool[3] in Abiquiu Reservoir.[4]

8. The State Engineer's failure to perform his nondiscretionary duties under state law harms Guardians and its members because they have not been able to take advantage of the opportunity for environmental storage to protect their interests in the Rio Grande given that "there is no unappropriated surface water." § 19.26.2.12(F)(1)(e) NMAC; *see also Carangelo v. Albuquerque-Bernalillo Cty. Water Util. Auth.*, 2014-NMCA-032, ¶ 49, 320 P.3d 492, 507 (noting "[i]t cannot be ignored that the Rio Grande Basin is fully appropriated and has been for some

[3] In 2013, Guardians and the Albuquerque-Bernalillo County Water Utility Authority entered into an agreement securing an environmental pool of 30,000 acre-feet of storage space in Abiquiu Reservoir under which Guardians can store water and order the water released to benefit flows in the Rio Grande. The agreement only results in protection and restoration of Rio Grande flows if Guardians can acquire wet water to fill the space, which it can only do by (1) making a new appropriation in the Middle Rio Grande (if the basin was not already fully appropriated or if water were to come available for appropriation through the State Engineer requiring proof of beneficial use of a permittee that could not show full use of the water it claimed); or (2) the lease or purchase of existing water rights in the Middle Rio Grande and transferring them to non-consumptive instream uses or storage in the environmental pool. **Petitioner's Exhibit 3** (2013 Agreement).

[4] The New Mexico Supreme Court has recognized that non-consumptive water uses, such as recreation, are part of the suite of "beneficial uses" of public water. *State ex rel. State Game Com'n v. Red River Valley*, 1945-NMSC-034, ¶ 23, 51 N.M. 207, 218; *see also Carangelo v. Albuquerque-Bernalillo Cty. Water Util. Auth.*, 2014-NMCA-032, ¶ 40, 320 P.3d 492, 505 (holding that "[a] beneficial use of water does not require its consumption, and a non-consumptive, beneficial use can be the basis for an appropriation of water as much as a consumptive one.").

time."). If the State Engineer performed his nondiscretionary duty to either set a deadline for demonstrating proof of beneficial use or canceled the subject permits for failure to do so, then surface water could be available to Guardians and the public for beneficial use. *See* 19.26.2.13(E) NMAC (stating that once a permit to appropriate water is cancelled, "the water subject to the permit reverts to the public.") Thus, Guardians is beneficially interested in the State Engineer's compliance with the law governing allocation of the Rio Grande's water for beneficial use and harmed by the State Engineer's failure to comply with the law.

9. Guardians and its members also have standing to bring this action because the State Engineer's compliance with the law is an issue of great public importance. The failure of the State Engineer in the just and efficient administration of the Rio Grande's water to ensure beneficial use of the waters of the state presents "clear threats to the essential nature of state government guaranteed to New Mexico citizens under their Constitution." *State ex rel. Coll v. Johnson*, 1999-NMSC-036, ¶ 21, 128 N.M. 154, 161. By allowing the District to continue diverting water without ensuring its beneficial use as required by the Constitution and the Legislature, the State Engineer has essentially written the proof of beneficial use requirement out of State law in violation of separation of powers principles whereby the Constitution entrusts law-making exclusively to the legislative branch. N.M. Const. Art. III, § 1; *see also State vs. Fifth Judicial*

District Court, 1932-NMSC-023, ¶ 9, 36 N.M. 151, 153 (recognizing "[t]he Legislature makes, the executive executes, and the judiciary construes, the laws."). Beneficial use is a fundamental criterion governing the right to use water, Art. XVI, § 3; NMSA 1978 § 72-2-2, and by law the State Engineer cannot recognize a water right until an applicant has demonstrated that it has beneficially used the amount of water requested in its permit application. NMSA 1978 §§ 72-5-6, 72-5-13.

GROUNDS IN SUPPORT OF ISSUANCE OF THE WRIT

A. The State Engineer's Statutory and Regulatory Duties

10. The New Mexico Constitution explicitly declares that the state's waters belong to the public. N.M. Const. Art. XVI, § 2. The Constitution also provides that beneficial use is "the basis, the measure and the limit of the right to the use of water." *Id*. at § 3. As the official responsible for supervising the waters of the state and one that has jurisdiction over all water rights applied for after 1907, the State Engineer is largely responsible for ensuring that water rights are "beneficially used."

11. The Legislature entrusted the New Mexico State Engineer with the authority to manage water "apportionment" in the state, which includes the responsibility to issue permits and licenses to appropriate water for beneficial use. NMSA 1978 §§ 72-2-9, 72-5-6, 72-5-13. A "permit" authorizes diversion of water

from a specific diversion point for a particular beneficial use at a particular location, but "does not constitute a water right." § 19.26.2.7(W) NMAC. A "license" is issued only after the holder of a water permit files final proof of application of water to beneficial use and the State Engineer "confirms the extent of diversion and beneficial use of water" conforms with the permit conditions. § 19.26.2.7(S) NMAC.

12. In issuing a permit to appropriate surface water, the State Engineer "shall determine" whether there is any unappropriated water available and, if so, the State Engineer "shall" approve the application provided it "is not contrary to the conservation of water within the state and is not detrimental to the public welfare of the state." NMSA 1978 § 72-5-6. The application becomes "a permit to appropriate water" that must include "the time within which water shall be applied to beneficial use." *Id*.

13. In issuing a permit to appropriate water, the State engineer "shall state in such approval the time within which the construction [of works to appropriate water for beneficial use] shall be completed and the time within which water shall be applied to beneficial use." *Id*. The statute provides limits on the State Engineer's discretion in setting a time frame for proof of beneficial use:

> The time allowed by the state engineer for completion of works or application of water to beneficial use shall be governed by the size and complexity of the project, but *in no case shall exceed five years from the date of approval within which to complete construction, and*

> *four years in addition thereto within which to apply water to beneficial use*; provided that the state engineer shall have the power to grant extensions of time for completion of works or application of water to beneficial use as provided in Section 72-5-14 NMSA 1978."

Id. (emphasis added).

14. Once the State Engineer approves a permit to appropriate water that includes the requisite time period within which the water will be put to beneficial use, he may subsequently grant extensions of time for the permit holder to apply water to beneficial use and file proof of doing so upon the permit holder's showing of "due diligence or reasonable cause for delay." NMSA 1978 § 72-5-14. The statute provides the State Engineer the authority to grant further extensions of time to apply water to beneficial use as set forth below:

> Extensions of time not exceeding five years beyond the time for construction allowed in the original permit, *and in no case exceeding a total of ten years after the date of approval of the application*, may be granted by the state engineer for construction of works and application of water to beneficial use; provided, that if it shall be made to appear to the state engineer by affadavit of the applicant . . . and by such other evidence as the state engineer may require, that at least one-fourth of the actual construction work has been completed within such period as extended, the state engineer may, if he is satisfied of the good faith of the applicant and that the project will be to the interest of the development of the state, extend the time for completion of works and application of water to beneficial use *for any additional periods he may deem necessary, but not exceeding two years for any one extension*, upon such reasonable terms and conditions as he may prescribe; and at the time of granting such extension shall endorse his approval thereon and shall make the proper entry in his records.

Id. (emphasis added).

15. The State Engineer adopted Title 19, Chapter 26, Part 2 of the New Mexico Administrative Code to aid him in accomplishing his statutory duties. Section 19.26.2.13 NMAC provides rules governing the application of water permitted by the State Engineer to beneficial use. These rules outline the responsibilities of both the State Engineer as well as the permittee in perfecting its permit by applying water to beneficial use and demonstrating that it has done so through filing proof of beneficial use with the State Engineer.

16. Section 19.26.2.13(B) NMAC states (emphasis added):

> Upon applying water to beneficial use as provided by the permit, *on or before the due date set by the permit, the permittee shall file with the state engineer proof of application of water to beneficial use*. The beneficial use of water must be in accordance with the permit conditions of approval. *Once a proof of application of water to beneficial use has been filed, the water right shall be limited to the amount of water that has been put to beneficial use*, and no further development of the water right may occur.

Thus, the permittee's duty is to file proof of beneficial use with the State Engineer on or before the due date set by the permit. Once the permittee has demonstrated proof of beneficial use, the State Engineer "issue[s] a license to appropriate water to the extent and under the condition of the actual application thereof to beneficial use." NMSA 1978 § 72-5-13. The "license" constitutes a water right, and "define[s] the extent and conditions of use under which the water right has been established." § 19.26.2.13(D) NMAC.

17. Section 19.26.2.13(C) NMAC provides for when the State Engineer may grant extensions of time for proof of beneficial use as well as mandatory actions the State Engineer must take if a permittee fails to file proof of beneficial use within the stipulated time frame:

> When a permittee is unable to construct the necessary works or apply water to beneficial use within the time authorized, the permittee may file with the state engineer an application for extension of time . . . The state engineer may grant an extension of time upon a proper showing of due diligence or reasonable cause for delay, or *upon the state engineer finding that it is in the public interest to allow additional time* . . . Failure of the permittee to provide a proper showing of due diligence or reasonable cause for delay as described in Section 72-5-28 NMSA, shall result in denial of the extension of time . . . *Failure to file proof of beneficial use within the time allotted by the state engineer shall result in cancellation of the permit*.

Emphasis added. Accordingly, in a situation where a permittee has neither demonstrated proof of beneficial use within the time period stipulated in the permit or most recent extension of time, nor applied for and been granted an extension of time to show proof of beneficial use, the State Engineer may not allow the permittee to continue to develop water under the permit. Instead, the State Engineer is required to take one of two actions: (1) require the permittee to demonstrate proof of beneficial use by a date certain, or (2) cancel the permit. The former action requires a finding by the State Engineer that granting additional time to file proof of beneficial use is in the public interest. § 19.26.2.13(C) NMAC.

18. Section 19.26.2.13(C)(1) NMAC adds guidance regarding the parameters surrounding extensions of time to show proof of beneficial use, as follows:

> An extension of time may be granted for a period not to exceed three (3) years. Except as provided in Subsections F and G of 19.26.2.19 NMAC,[5] no extensions of time shall be granted which in combination extend the time allowed by the permit beyond ten (10) years from the initial date of approval of the application, unless the state engineer in his discretion expressly waives this limitation pursuant to Section 72-5-14 NMSA.

B. Relevant Background for Permit Nos. 0620 and 1690

1. History of the Middle Rio Grande Conservancy District

19. The District was established in 1925 to provide flood control, drainage and irrigation to the residents of the Middle Rio Grande. *See In re Proposed Middle Rio Grande Conservancy Dist.*, 1925-NMSC-058, 31 N.M. 188 (discussing formation of the District); NMSA 1978 §§ 73-14-1 to 73-14-5 (providing legal framework for organization and operation of conservancy districts throughout the State).

[5] These provisions apply to water development plans for municipalities, counties, member-owned community water systems, school districts, and state universities developing and using water pursuant to a water development plan authorized by NMSA 1978 § 72-1-9. The statute allows a 40-year water use planning period, and Subsections F and G of 19.26.2.19 NMAC recognize that these "forty-year planning entities" have "up to 40 years from the date of the application" to put water to beneficial use. These provisions are not applicable in this case.

20. Prior to the formation of the District, there were upwards of 70 direct diversion points from the Rio Grande for numerous acequias and ditches in the Middle Rio Grande, including diversions for the six Middle Rio Grande Pueblos. The District's consolidation of these diversion points into four diversion points resulted in the District needing to incorporate the Pueblos' irrigation systems into the District's broader irrigation system. By the Act of 1928, Congress set forth the terms and conditions under which the Pueblos' irrigation systems could be incorporated into the District's proposed water delivery system. Act of March 13, 1928, ch. 291, 45 Stat. 312 ("Act of 1928"). In the Act of 1928, Congress made clear that the Pueblos' water is protected from forfeiture or abandonment under state law, providing that such rights "shall not be subject to loss by nonuse or abandonment." *See also* **Petitioner's Exhibit 4** (1998 Reclamation Memorandum). Therefore, Pueblo water rights are not subject to state law's proof of beneficial use requirement because Pueblo water rights are neither created by nor subject to state law.

21. Notwithstanding the creation of the District in 1925 and construction of El Vado Dam and Reservoir in 1935, irrigated agriculture in the Middle Rio Grande continued to be impacted by variable river flows, flooding, erosion, and waterlogging of farmlands. As a result, many irrigators in the District could not pay their assessments and the District acquired agricultural lands in lieu of

payment of unpaid assessments. By the 1940s, many of the District's facilities were in disrepair, and the District lacked the financial resources to repair the facilities because it was also in debt. These conditions led to pressure for assistance from the federal government. *Rio Grande Silvery Minnow v. Keys*, 333 F.3d 1109, 1125 (10th Cir. 2003), vacated as moot, 355 F.3d 1215 (10th Cir. 2004).

22. Due to deteriorating conditions within the District and its financial woes, Congress authorized the "Middle Rio Grande Project" as a part of the 1948 and 1950 Flood Control Acts. *See* Flood Control Act of 1948, Pub. L. 80-858, Title II, § 201 *et seq*.; Flood Control Act of 1950, Pub. L. 81-516, Title II, § 204. This federal reclamation project allowed Reclamation to assume ownership, control, and authority over all assets and operations of the District including water storage and diversion rights, El Vado Dam and Reservoir, the four Middle Rio Grande diversion dams (Cochiti, Angostura, Isleta, and San Acacia) and other canals, works and levees within the District. **Petitioner's Exhibit 5** (1951 Repayment Contract between Reclamation and the District).

23. The 1951 contract further provides that "any and all [water right] filings made in the name of the District" are "to be assigned to the United States for beneficial use in the project and for Indian lands in the project area." Also pursuant to the 1951 contract, Reclamation assumed operation and maintenance of all District facilities. In 1963, the District executed a Transfer and Assignment of

Water Rights to the United States in which the District stated that it "does grant and convey to the United States" its "water rights" for Permit No. 1690. **Petitioner's Exhibit 6** (1963 conveyance document between Reclamation and the District). In the 1970s, Reclamation permitted the District to assume, as the United States' agent, the operation and maintenance of the irrigation facilities associated with the Middle Rio Grande Project, with the exception of El Vado Reservoir. Although the District has assumed operation and management of most irrigation facilities associated with the project, the 1951 contract makes clear that it does so as the "agent" of Reclamation and must implement Reclamation's instructions. The District repaid its debt in 1999, but the transferred assets have not reverted back to District ownership by the required act of Congress. *Keys*, 333 F.3d at 1127.

2. Chronology of Permit Nos. 0620 and 1690

24. To meet the flood control goal for which the District was formed, the District applied for, and the State Engineer approved, two permits (Permit Nos. 1690 and 0620) to store and divert Rio Grande water.

25. The State Engineer issued Permit No. 1690 on August 20, 1930, authorizing construction of El Vado Dam and Reservoir and storage of 198,110 acre-feet of water for the purpose of supplementing the Rio Grande's natural flow during the irrigation season. **Petitioner's Exhibit 7** (Permit No. 1690). The

District completed construction of El Vado Dam and Reservoir in 1935 and filed the required "completion of construction of works" on August 16, 1935.

26. The State Engineer issued Permit No. 0620 on January 26, 1931, authorizing the District to change the points of water diversion within the District from a series of 70 acequias to four discrete diversion points at Cochiti, Angostura, Isleta and San Acacia diversion dams. **Petitioner's Exhibit 8**[6] (Permit No. 0620). Permit No. 0620 also included a claim by the District to irrigate 123,267 acres of land in the Middle Rio Grande.[7] *Id*. at 10. This irrigated acreage was of two types: (1) 80,785 acres with "perfected prior water rights" of 242,355 acre-feet per year by virtue of being continuously irrigated or experiencing only a temporary disruption of irrigation "due to conditions beyond control of the owner," and (2) 42,482 acres of new lands[8] reclaimed for irrigation agriculture by means of the District's drainage of saturated lands, for which the District sought to appropriate 127,446 acre-feet per year of reclaimed water. *Id*. at 29-30. The amount of water to irrigate the newly reclaimed lands was based on a farm delivery requirement of "3

[6] This document was repaginated for consistency using Adobe Acrobat 8 Professional.

[7] This claimed irrigated acreage total included the Pueblos prior and paramount and newly reclaimed acreage. As discussed above, Pueblo water rights are exempt from the state law requirement to show proof of beneficial use and are not within the scope of this request for writ of mandamus.

[8] Commonly referred to as "newly reclaimed lands," these lands were waterlogged from the natural flow of the Rio Grande and could be farmed only after construction of El Vado Dam and other structures built by the District. **Petitioner's Exhibit 8** at 16.

acre feet per acre per annum," which the State Engineer determined was the farm delivery requirement for the perfected prior water rights discussed in the 1930 application. *Id*. at 30.

27. As required by statute, in approving the permits the State Engineer specified deadlines for project construction and for a showing by the District that it had put the water to beneficial use. For example, for Permit No. 1690, the State Engineer mandated that "the time for application [of water] to beneficial use shall not be later than August 20, 1935." **Petitioner's Exhibit 7**. In 1931 and 1932, the State Engineer granted one-year extensions for application of water to beneficial use until August 20, 1936 and August 20, 1937, respectively. *Id*.

28. Such extensions for proof of beneficial use continued every two years from 1937 until 1987.[9] A review of the State Engineer's files by Guardians, however, revealed that after 1987 there were no further applications or approvals for extensions of time. A table showing the history of extension requests for the subject permits is included as **Petitioner's Exhibit 9**.

29. Based on Guardians' review of the State Engineer's files for Permit Nos. 1690 and 0620, following Reclamation's last request for an extension of time in 1987, the State Engineer made efforts a decade later to address the failure to file

[9] The District filed the applications for extension of time from 1930 through 1961. Following the transfer and assignment of the District's rights in Permit No. 1690 to the United States in 1963, Reclamation continued the filings for extensions of time from 1963 to 1987. **Petitioner's Exhibit 9**.

proof of beneficial use. In a letter dated June 16, 1997, State Engineer Tom Turney acknowledged the failure to file proof of beneficial use (for the past 60 years) and apply for extensions of time (for the past 11 years), and set a deadline of December 31, 1997 for filing proof of beneficial use.[10] **Petitioner's Exhibit 10**. On October 22, 1997, Turney again requested the District/Reclamation file proof of beneficial use and emphasized that even though proof of beneficial use is unique for the Permits 0620 and 1690, "there must be adherence to the statutes and practice of water rights documentation which govern water rights statewide." **Petitioner's Exhibit 11** at 2. After some back and forth between the State Engineer and the District/Reclamation, the State Engineer set an interim deadline of April 1, 1998 to develop a plan and scope of work for completing proof of beneficial use. **Petitioner's Exhibit 12**. More than 15 years later, there has been no proof of beneficial use filed with the State Engineer. The permit files do not indicate that either the District or Reclamation requested an extension of time beyond the April 1, 1998 proof of beneficial use deadline. Further, the files do not contain a finding

[10] The impetus for the State Engineer's setting a new deadline for proof of beneficial use was his determination that "the District is no longer growing, but rather acreage within the District is actually decreasing." **Petitioner's Exhibit 10**. In a 1996 memorandum, the State Engineer recognized the need to require the District/Reclamation to show proof of beneficial use by analogizing the "deficiency in the quantification [of] the District's water rights" to "giving an individual a blank check with no constraints on the amount of the withdrawal that can be written in." **Petitioner's Exhibit 2** at 8.

by the State Engineer that an additional extension of time to demonstrate proof of beneficial use is in the public interest.

3. The State Engineer's Failure to Perform His Nondiscretionary Duty Can and Should Be Corrected by Mandamus.

30. "Mandamus lies to compel performance of a ministerial act or duty that is clear and indisputable." *New Energy Economy v. Shoobridge*, 2011-NMSC-006, ¶ 10, 149 N.M. 207, 211. "A ministerial act is an act which an officer performs under a given state of facts, in a prescribed manner, in obedience to a mandate of legal authority, without regard to the exercise of his own judgment upon the propriety of the act being done. *Id*. (quoting *State ex rel. Perea v. Bd. of Comm'rs of De Baca County*, 1919-NMSC-030, ¶ 6, 25 N.M. 338, 340). Such is the nature of the act with which the State Engineer has failed to comply under § 19.26.2.13(C) NMAC.

31. Section 19.26.2.13(C) NMAC requires the State Engineer to take one of two actions when a permit holder has missed the State Engineer's deadline for filing proof of beneficial use, and the State Engineer has not extended the time to do so. First, the State Engineer may extend the time to file proof of beneficial use if he determines "that it is in the public interest to allow additional time." *Id*. Second, if the State Engineer does not make a finding that an extension is in the public interest, then he must cancel the permit. *Id*. Neither the statutes nor regulations governing water appropriation provide the State Engineer with the

discretion to allow a permit holder to divert water in perpetuity without providing proof of beneficial use.

32. Because the required proof of beneficial use showing for Permit Nos. 0620 and 1690 is nearly two decades overdue from the last deadline set by the State Engineer in 1997, the District continues to develop water under the subject permits, and the State Engineer has not extended the time to show proof of beneficial use nor set a new deadline for doing so, the State Engineer must either cancel the subject permits or require that the District/Reclamation demonstrate proof of beneficial use by a date certain. § 19.26.2.13(C) NMAC. Given the facts set forth here, the relief prayed for falls into the Supreme Court's well-established definition of a "ministerial act." *See New Energy Economy v. Shoobridge*, 2011-NMSC-006, ¶ 10, 149 N.M. 207, 211.

33. Moreover, Petitioner has no "plain, speedy, adequate remedy in the ordinary course of law." *New Energy Economy v. Shoobridge*, 2011-NMSC-006 ¶ 11, 149 N.M. 207, 211 (citation omitted); NMSA 1978 § 44-2-5. There is no administrative or other legal mechanism by which Petitioner can compel the State Engineer to perform his nondiscretionary duty to either require that the District/Reclamation show proof of beneficial use by a date certain or cancel the permits.

34. Wherefore, this Court should issue an alternative writ of mandamus directing the State Engineer to either set a deadline for the District/Reclamation to demonstrate proof of beneficial use for Permit Nos. 0620 and 1690 or cancel the permits within 30 days of issuance of the Writ, or show cause before the Court why he has not taken either of these actions.

RELIEF SOUGHT

WHEREFORE, Petitioner respectfully requests this Court:

1. Issue the Alternative Writ of Mandamus pursuant to NMSA § 44-2-7 and Rule 1-065.E, directing the Respondent New Mexico State Engineer to, within 30 days of issuance of the Writ, perform his nondiscretionary duty to either set a due date for the District/Reclamation to demonstrate proof of beneficial use of water for Permit Nos. 0620 and 1690 or cancel the permits, or show cause before the Court as to why he has not taken either action;

2. Order Respondent to reimburse Petitioner for costs incurred in this action, including but not limited to attorneys' fees.

Respectfully submitted on this 28th day of March 2015.

/s/ Samantha Ruscavage-Barz
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Attorney for Petitioner

STATEMENT OF COMPLIANCE

Pursuant to Rule 12-504(H) NMRA, the undersigned certifies that this Petition complies with Rule 12-504(G)(3) in that the body of the Petition is prepared in Times New Roman typeface and contains 5,742 words. The word count was obtained using Microsoft Word for Mac, version 14.5.7.

/s/ Samantha Ruscavage-Barz
Samantha Ruscavage-Barz

CERTIFICATE OF SERVICE

I hereby certify that on March 28, 2016, I served a copy of the foregoing First Amended Petition for Writ of Mandamus on the following by first class mail:

Tom Blaine, New Mexico State Engineer
Office of the State Engineer
130 South Capitol St.
Santa Fe, NM 87504

Hector Balderas, New Mexico Attorney General
408 Galisteo St.
Santa Fe, NM 87501

Derrick Lente, Chairman
Middle Rio Grande Conservancy District
1931 Second St. SW
Albuquerque, NM 87102

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Middle Rio Grande Conservancy District
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Albuquerque, NM 87103

/s/ Samantha Ruscavage-Barz

VERIFICATION

STATE OF COLORADO)
) ss.
COUNTY OF ARAPAHOE)

Jennifer Pelz, WildEarth Guardians' Wild Rivers Program Director, being first duly sworn, deposes and states upon oath that all representations in the foregoing Verified Petition for Alternative Writ of Mandamus are true as far as she knows or is informed and that the Verified Petition is true, accurate, and complete to the best of her personal knowledge and belief.

Jennifer Pelz

SUBSCRIBED AND SWORN TO before me this 18 day of March 2016, by Jennifer Pelz.

Notary Public

My commission expires on:

12/14/2019

KEVIN J FEHR
NOTARY PUBLIC
STATE OF COLORADO
NOTARY ID 20154043024
MY COMMISSION EXPIRES DECEMBER 14, 2019