

BEFORE THE NEW MEXICO STATE ENGINEER

IN THE MATTER OF THE APPLICATIONS) BY LOS POBLANOS ORCHARD HOME-) OWNER'S ASSOCIATION FOR PERMITS) TO CHANGE POINT OF DIVERSION AND) PLACE AND PURPOSE OF USE FROM) SURFACE TO GROUNDWATER IN THE) RIO GRANDE UNDERGROUND WATER) BASIN IN NEW MEXICO)	Hearing Nos. 04-008 & 04-009 Consolidated OSE File Nos. 04724 into RG-69046; 04756 into RG-69046
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**REPORT AND RECOMMENDATION
OF THE HEARING EXAMINER**

This matter came on for hearing before Victor Kovach, the State Engineer's designated Hearing Examiner, on November 1, 2006, at the District 1 Office of the State Engineer, in Albuquerque, New Mexico. The parties appeared as follows: Richard D. Barish, Esq., represented the Applicant Los Poblanos Orchard Homeowner's Association; and Barbara Brill, Esq., represented the Water Rights Division (WRD) of the Office of the State Engineer (OSE). Having considered the evidence presented, the Hearing Examiner recommends the following findings and order.

FINDINGS OF FACT

1. The State Engineer has jurisdiction of the parties and subject matter.
2. On April 23, May 8 and May 19, 2003, Los Poblanos Orchard Homeowner's Association (hereinafter "Los Poblanos") filed Application No. 04724 into RG-69046 and Application No. 04756 into RG-69046 with the State Engineer for Permits to Change Point of Diversion and Place and Purpose of Use from Surface Water to Ground Water in the Rio Grande Underground Water Basin of New Mexico. Both Applications seek to transfer declared pre-1907 surface water rights, claimed to be appurtenant to lands located within the Middle Rio Grande Conservancy District (MRGCD), to 5 acres of land owned by Los Poblanos, and described as within Tract No. 6A6, MRGCD Map 31, for community park irrigation.
3. By Application No. 04724 into RG-69046 (hereinafter "Application 1"), Los Poblanos proposes to discontinue the diversion of 1.62 acre-feet per year (afy) of surface

water of the Rio Grande, and claimed consumptive use of 1.134 afy, for the irrigation of 0.54 acres of land owned by Ms. Cathleen Trujeque and described as Tract 81 (known as Lot 6, Elizabeth Subdivision) MRGCD Map 46, located within Section 2, Township 9 North, Range 2 East, NMPM, approximately one mile west of the intersection of Isleta Boulevard and Blake Road in Bernalillo County, New Mexico. The described move-from point of diversion from the Rio Grande is at the Angostura Diversion Dam, located in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 3, Township 13 North, Range 4 East, NMPM, with delivery to the move-from land described as being via the Pajarito Ditch. Los Poblanos further proposes to commence the diversion of 1.62 afy, and consumptive use of 1.134 afy, from existing well RG-69046 located at a point where X = 376,800 feet and Y = 1,508,500 feet, NMCS Central Zone, Elena Gallegos Grant, Bernalillo County, also described as within Tract No. 6A6, MRGCD Map 31, in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ of projected Section 31, Township 11 North, Range 3 East, NMPM, for community park irrigation on the 5 acres of land described in Finding 2.

4. A Declaration of Ownership of Water Right Perfected Prior to March 19, 1907 (Form WR-1) concerning the 0.54 acres of move-from land involved in Application 1 was filed on December 30, 1999 and January 12, 2000, by Mr. Herkermer Rodriguez, acting as agent for Ms. Trujeque.
5. By Application No. 04756 into RG-69046 (hereinafter "Application 2"), Los Poblanos proposes to discontinue the diversion of 1.59 afy of surface water of the Rio Grande, and claimed consumptive use of 1.113 afy, for the irrigation of 0.53 acres of land owned by Mr. Lorenzo Vigil and described as Lot 43-A Pancho Villa Annex, MRGCD Map 24, located within projected Section 15, Township 11 North, Range 3 East, NMPM, approximately 800 feet north of Alameda Boulevard and 1,100 feet east of State Road 47 in Bernalillo County, New Mexico. The described move-from point of diversion from the Rio Grande is at the Angostura Diversion Dam with delivery to the move-from land described as being via the Alameda Ditch. Los Poblanos proposes to commence the diversion of 1.59 afy, and consumptive use of 1.113 afy, from existing well RG-69046 for community park irrigation on the same 5 acres of land

previously described above.

6. A Declaration of Ownership of Water Right Perfected Prior to March 19, 1907 (Form WR-1) concerning the 0.53 acres of move-from land involved in Application 2 was filed on December 30, 1999, by Mr. Herkermer Rodriguez, acting as agent for Mr. Vigil.
7. An Affidavit of Publication filed on July 2, 2003, reflects that legal notice of Applications 1 and 2 was published in *The Albuquerque Journal* on June 14, 21 and 28, 2003. No protests were received.
8. The applications were denied on August 22, 2003 (Application 2) and October 23, 2003 (Application 1) based on WRD's determination that there are no valid, existing pre-1907 water rights appurtenant to, and available for transfer at, the described move-from lands.
9. Applicant filed timely notice of aggrievment and the applications were referred for hearing and docketed as Hearings Nos. 04-008 (Application 1) and 04-009 (Application 2). The matters were consolidated for purposes of hearing by order entered on September 2, 2005.
10. A scheduling conference was held on October 18, 2005, and a Scheduling Order was entered on October 26, 2005, wherein the following issues were identified:
 - A. Nature and extent of the claimed water right.
 - B. Whether granting the application would result in impairment to existing water rights.
 - C. Whether granting the application would be detrimental to the public welfare of the state.
 - D. Whether granting the application would be contrary to the conservation of water within the state.
11. Section 3 of Article XVI of the Constitution of New Mexico provides that "[b]eneficial use shall be the basis, the measure and the limit of the right to the use of water." Applicant has the burden to show, by a preponderance of the evidence, that water has been applied to beneficial use at the move-from locations at times and in amounts sufficient to support an administrative determination that there is a valid

existing surface water right appurtenant to the move-from land that can be considered available for transfer by the present applications.

12. Applicant Exhibit 23 is a memorandum dated October 21, 2001 setting forth criteria to be used by the WRD District 1 in evaluating the priority and validity of claimed pre-1907 surface water rights associated with land within the MRGCD and a template for application of the criteria. The criteria provide for review of the following items for evidence of irrigation: the 1917-1918 Rio Grande Drainage Survey; the 1926-27 MRGCD Appraisal Sheets; the 1926-1927 MRGCD Plane Table Survey; 1936 Rio Grande Joint Investigation; aerial photographs from 1935, 1947, 1955, 1963, and later. Available aerial photographs taken after 1963 are reviewed along with field investigation data, for evidence of beneficial use from 1963 to the present.
13. Applicant Exhibit 23, WRD Exhibit 1 and the testimony of Ms. Elizabeth Cervantes, WRD District 1 Water Resource Supervisor, indicate that where there is evidence of irrigation commencing prior to 1907 and continuing up through 1963, followed by an extended period of non-use, WRD District 1 staff consider whether the period of non-use is so unreasonable that a potential of a court determination of abandonment exists. With respect to the present applications, WRD Exhibit 1 to Hearing Nos. 04-008 and 04-009 reflects that District 1 staff found that the move-from lands did not “have valid pre-1907 water rights . . . due to the absence of applying water to beneficial use for at least 16 years” and concluded that the applications should be denied “because there is no evidence of irrigation since 1982.”
14. The 1917-1918 Rio Grande Drainage Survey; 1926-27 MRGCD Appraisal Sheets; 1926-1927 MRGCD Plane Table Survey; 1936 Rio Grande Joint Investigation; and aerial photographs from 1935, 1947, 1955, and 1963, 1967 and 1973 all reflect that the 0.54 acres of move-from land at issue in Application 1 was irrigated as part of a larger tract of agricultural land. Subsequently, the general area has undergone increasing residential subdivision development.

15. Aerial photographs taken in 1982, 1986, 1991, 1996, 2000, 2002, and 2004, submitted into evidence as Attachments (M) through (S) of WRD Exhibit 1 to Hearing No. 04-008, reflect that the 0.54-acre tract was developed as a residential property. A residence appears on photographs of the property from 1982 on, with what appears to be an acequia or lateral running adjacent to the northern boundary of the 0.54-acre tract. Evidence of agricultural use of the property is not indicated on the photographs.
16. Mr. Paul Powers purchased the subject 0.54-acre tract for residential purposes on August 15, 1977. At the time of purchase, the entire tract had an alfalfa crop on it. Shortly after acquiring the property, Mr. Powers placed a mobile home on the land.
17. Mr. Powers testified that he irrigated grass on the property from the ditch periodically until his son moved onto the property in 1979. According to Mr. Powers, he personally observed residential irrigation of lawn and landscaping on the property several times over the course of the next ten years.
18. Mr. Powers indicated that the property was sold to Cathleen Trujeque on February 1, 1990. He testified that he assisted Ms. Trujeque to repair ditch works and that she irrigated a garden from the ditch periodically through 1996 or 1997.
19. Ms. Cervantes provided expert testimony concerning her review and interpretation of the aerial photographs submitted as attachments to WRD Exhibit 1. Ms. Cervantes noted some difficulty in interpreting the photographs taken in 1982 and 1996 but indicated that there was no evidence of farmed acreage or agricultural irrigation on any of the photos from 1982 on.
20. Ms. Cervantes stated that residential irrigation of the subject property would constitute beneficial use and that the aerial photographs from the 1980s and 1990s were not inconsistent with Mr. Power's testimony concerning periodic residential irrigation of the property.
21. Los Poblanos Exhibit 1 is an agreement signed on January 21, 1999, whereby H & R Enterprises LLP purchased up to 1.00 acre-feet of consumptive use right from Ms. Trujeque. The agreement provides for payment of \$500.00 as a credit toward the final price once the State Engineer determines the "exact amount of transferable

water rights.” If the amount determined transferable by the State Engineer were to be less than 1 acre-foot, the agreement calls for acquisition on a pro-rata basis at the rate of \$1,250.00 per acre-foot. Mr. Herkermer Rodriguez signed the agreement for H & R Enterprises LLP.

22. Applicant’s Exhibit 2 is a Water Right Quitclaim Deed to H & R Enterprises LLP, for 1 acre-foot of consumptive use associated with 0.54 acre of land identified as Lot 6 of the Elizabeth Subdivision (formerly known as MRGCD Tract 81).
23. On August 30, 2002, Mr. Rodriguez, as agent for New Mexico Land & Water Conservancy LLC (NMLWC), purported to Quit Claim to Los Poblanos all right, title and interest in a consumptive use water right of 1.34 acre-feet appurtenant to 0.54 acres of land at Lot 6 of Elizabeth Subdivision.
24. A Change of Ownership of Water Right from NMLWC to Los Poblanos for a consumptive use of 1.134 afy was filed with the WRD on April 23, 2003.
25. During field visits to the property in September 2003 and February 2006 WRD found no evidence of recent irrigation of the 0.54-acre tract.
26. No evidence was presented to show that the 0.54-acre tract was irrigated from the ditch since the purchase agreement referenced in Finding 20 was signed. MRGCD records from 2005 (Attachment V to WRD 1, Hearing 04-008) list the property owners as Jerry J. & Kathy L. Pena, with no benefited acreage or water service charge. Bernalillo County tax records from 1997 and 2005 (Attachment W to WRD 1, Hearing 04-008) reflect that the 0.54-acre tract is classified as residential.
27. The preponderance of the evidence reflects that water was placed to beneficial use on the move-from property consistently and continuously from prior to 1907 through 1977 and that water was used periodically for residential irrigation from 1977 through 1997.
28. The preponderance of the evidence reflects that a valid transferable water right exists appurtenant to the 0.54-acre move-from tract of land.
29. However, the instruments of conveyance referenced in Findings 20 thru 23 evidence transfer of ownership of 1.00 acre-foot consumptive use appurtenant to 0.54 acres of land.

30. WRD Exhibit 2 to Hearing No. 04-008, is a March 16, 2006 Memorandum from Alan Cuddy, Hydrology Bureau, which reflects that the projected impacts from the application are within the guidelines for review of water right applications for the Middle Rio Grande Administrative Area (MRGAA) and within the allowable limits recommended by the Hydrology Bureau of the OSE.
31. The applicable Farm Delivery Requirement (FDR) for irrigation at the move-from and move-to lands is 3.00 afy per irrigated acre. The Consumptive Irrigation Requirement (CIR) is 2.1 afy per irrigated acre.
32. Partial approval of Application 1 for a diversion of 1.4286 afy and consumptive use of 1.00 afy will not impair existing water rights.
33. Partial approval of Application 1 for a diversion of 1.4286 afy and consumptive use of 1.00 afy will not be contrary to the conservation of water within the state or detrimental to the public welfare of the state.
34. Application 1 should be partially approved for a change in point of diversion and place of use for a diversion of 1.4286 afy and consumptive use of 1.00 afy. Application 1 should be denied for a diversion of .1914 afy and consumptive use of 0.134 afy.
35. The 1917-1918 Rio Grande Drainage Survey; 1926-27 MRGCD Appraisal Sheets; 1926-1927 MRGCD Plane Table Survey; 1936 Rio Grande Joint Investigation; and aerial photographs from 1935, 1947, 1955, and 1963, 1967, 1973 and 1975 all reflect that the 0.53 acre tract of move-from land at issue in Application 2 was irrigated as part of a larger tract of agricultural land. The larger tract of agricultural land was subsequently subdivided into 10 parcels.
36. Aerial photographs taken in 1982, 1986, 1991, 1996, 2000, 2002, and 2004, submitted into evidence as Attachments (N) through (T) to WRD Exhibit 1 (Hearing No. 04-009), show residential development of the property. A residence appears on the property in a 1982 aerial photograph and a second structure appears in photos in the 1990s. There are no apparent ditches running through, or adjacent to, the property.

37. Lorenzo Vigil is the owner of the move-from 0.53-acre tract of land involved in Application 2. Mr. Vigil purchased the property in 1982 and a new house was built on the property shortly thereafter.
38. Mr. Vigil testified that he subsequently irrigated the land on several occasions by running a hose from a neighbor's property, located to the south of his property, at times when he was informed that water was flowing in a ditch located on the neighbor's property. Mr. Vigil testified that he irrigated trees, shrubs, some lawn, and roses in an area covering approximately 1/8th of his property. Mr. Vigil testified that he contacted the MRGCD on several occasions to see whether he could get water delivered via a different ditch, that was closer and more accessible to his land, but got no response. Mr. Vigil stated that he irrigated intermittently until 1994 or 1995 at which point he decided he would sell the claimed water right because of the difficulty in obtaining water.
39. Ms. Cervantes provided expert testimony concerning her review and interpretation of the aerial photographs submitted as attachments to WRD Exhibit 1 (Hearing 04-009). Ms. Cervantes testified that aerial photographs through the 1970s show that the 0.53 acres of move-from land involved in Application 2 was irrigated agricultural land. Ms. Cervantes stated that subsequent aerial photographs showed residential development of the property and no evidence of irrigation. She further noted that there was no evidence of a ditch immediately accessible to the property and that the ditch running through the Armijo property is down gradient from the subject move-from land.
40. Ms. Cervantes stated that irrigation for residential uses such as landscaping could be considered permissible beneficial use. She testified that the aerial photographs from 1982 on were not inconsistent with Mr. Vigil's testimony that he irrigated approximately 1/8th of his property, except that ditches serving the property are not shown on the photos.
41. WRD staff visited the move-from property in June 2003 and January 2006 during which no evidence of recent irrigation of the 0.53-acre tract was found. WRD Exhibit 1 (U) (Hearing No. 04-009) is a Field Report of the June 2003 field check. The

report concludes that the subject lands do not appear to be irrigated with surface water from the main ditch and that there is no evidence of any feeder ditch that could serve the property. Two structures with a combined footprint of approximately 2,050 square feet or .047 acres ($2,050 / 43,560 = .047$) were located on the 0.53-acre lot. A graveled parking area covered approximately 5400 square feet (45×120) or 0.124 acres of the lot ($5400 / 43,560 = 0.124$). Dry vegetation and barren ground covered most of the remainder of the subject land except for a small lawn area behind the residence.

42. Bernalillo County tax records for 1997 and 2005 reflect that the land is classified as residential.
43. The MRGCD 2005 Property Index lists Mr. Vigil as owner and shows no benefited acreage. A notation on the index reflects that a water service charge was assessed for 2005, but the charge had not been paid as of January 6, 2006.
44. The preponderance of the evidence indicates that water was placed to beneficial use on the property consistently and continuously from prior to 1907 through the 1970s. Water has been used periodically for residential irrigation on approximately $1/8^{\text{th}}$ of the property at times and in amounts sufficient to support an administrative determination that a valid water right exists appurtenant to 0.066 acres ($1/8 \times 0.53 = 0.06625$).
45. WRD Exhibit 2 to Hearing No. 04-009, is a March 16, 2006 Memorandum from Alan Cuddy, Hydrology Bureau, which reflects that the projected impacts from the application are within the guidelines for review of water right applications for the Middle Rio Grande Administrative Area (MRGAA) and within the allowable limits recommended by the Hydrology Bureau of the OSE.
46. Partial approval of Application 2 for a diversion of 0.198 afy (3.00×0.066) and consumptive use of 0.1386 afy (2.1×0.066) will not impair existing water rights.
47. Partial approval of Application 2 for a diversion of 0.198 afy and consumptive use of 0.1386 afy will not be contrary to the conservation of water within the state or detrimental to the public welfare of the state.

48. Application 2 should be partially approved for a change in point of diversion and place of use for a diversion of 0.198 afy and consumptive use of 0.1386 afy and should be denied for a diversion of 1.392 afy (1.59 – 0.198) and consumptive use of 0.9744 afy (1.113 – 0.1386).
49. Los Poblanos contends that the State Engineer is estopped from determining that less than the declared rights involved in Applications 1 and 2 are transferable. This contention is based on Mr. Rodriguez's claim that he evaluated and purchased the declared water rights in reliance on past practice of the State Engineer. Mr. Rodriguez's claim is inconsistent with the purchase agreement submitted into evidence as Los Poblanos Exhibit 1, wherein Mr. Rodriguez expressly recognized that all or a part of the rights being purchased might be determined not to be "transferable water rights".
50. The State Engineer evaluates applications concerning the public waters of the state on a case-by-case basis. It would be contrary to the public welfare and sound public policy to preclude the State Engineer from considering factors and data that become available as the science, technology and access to information improves and increases. Mr. Rodriguez's testimony at hearing reflects that he was aware of the OSE's ongoing practice to "widen its determination factors" in evaluating the nature and extent of claimed pre-1907 water rights within the MRGCD. The language employed in the purchase agreement submitted into evidence as Los Poblanos Exhibit 1, and the payment methodology included therein, are presumably a product of said awareness.

ORDER

THEREFORE, IT IS HEREBY ORDERED that Application No. 04724 into RG-69046 filed by Los Poblanos Orchard Homeowner's Association is partially approved, subject to conditions, as follows.

Permittee: Los Poblanos Orchard Homeowner's Association

Permit No.: 04724 into RG-69046

Point of Diversion: Existing Well No. RG-69046 located at a point where X=376,800 feet and Y=1,508,500 feet NMCS.

Amount of Water: Diversion not to exceed 1.4286 afy.
Consumptive use not to exceed 1.00 afy.

Source of Water: Groundwater of the Rio Grande Underground Water Basin.

Priority: Prior to March 19, 1907

Purpose of Use: Community park irrigation

Place of Use: 5.00 acres of land described as within Tract No. 6A6, MRGCD Map 31.

CONDITIONS OF APPROVAL

1. Permit No. 04724 into RG-69046 shall not be exercised to the detriment of valid existing water right or in a manner that is contrary to the conservation of water within the state or detrimental to the public welfare of the State of New Mexico.
2. The total diversion of water under Permit No. 04724 into RG-69046 shall not exceed 1.4286 afy and the total consumptive use shall not exceed 1.00 afy.
3. The water rights appurtenant to the 0.54 acres of land at the move-from location are hereby severed therefrom.
4. Well No. RG-69046 shall be equipped with a totalizing meter of a type and at a location approved by and installed in a manner acceptable to the State Engineer. The Permittee shall provide the make, model, serial number, initial reading, units, multiplier and date of installation of the meter to the State Engineer prior to any

diversion of water under this permit.

5. Records of the amount of water diverted from Well No. RG-69046 shall be submitted to the District 1 Office of the State Engineer in Albuquerque, New Mexico, on or before the 10th day of each month for the preceding calendar month.
6. The Permittee shall utilize the highest and best technology available to ensure conservation of water to the maximum extent practicable.
7. Proof of Application of Water to Beneficial Use shall be filed on or before June 1, 2011.

IT IS FURTHER ORDERED that Application No. 04756 into RG-69046 filed by Los Poblanos Orchard Homeowner's Association is partially approved, subject to conditions, as follows.

Permittee: Los Poblanos Orchard Homeowner's Association

Permit No.: 047564 into RG-69046

Point of Diversion: Existing Well No. RG-69046 located at a point where X=376,800 feet and Y=1,508,500 feet NMCS.

Amount of Water: Diversion not to exceed 0.198 afy.
Consumptive use not to exceed 0.1386 afy.

Source of Water: Groundwater of the Rio Grande Underground Water Basin.

Priority: Prior to March 19, 1907

Purpose of Use: Community park irrigation

Place of Use: 5.00 acres of land described as within Tract No. 6A6, MRGCD Map 31.

CONDITIONS OF APPROVAL

1. Permit No. 04756 into RG-69046 shall not be exercised to the detriment of valid existing water right or in a manner that is contrary to the conservation of water within the state or detrimental to the public welfare of the State of New Mexico.

2. The total diversion of water under Permit No. 04756 into RG-69046 shall not exceed 0.198 afy and the total consumptive use shall not exceed 0.1386 afy.
3. The water rights appurtenant to 0.066 acres of move-from land are severed therefrom.
4. Well No. RG-69046 shall be equipped with a totalizing meter of a type and at a location approved by and installed in a manner acceptable to the State Engineer. The Permittee shall provide the make, model, serial number, initial reading, units, multiplier and date of installation of the meter to the State Engineer prior to any diversion of water under this permit.
5. Records of the amount of water diverted from Well No. RG-69046 shall be submitted to the District 1 Office of the State Engineer in Albuquerque, New Mexico, on or before the 10th day of each month for the preceding calendar month.
6. The Permittee shall utilize the highest and best technology available to ensure conservation of water to the maximum extent practicable.
7. Proof of Application of Water to Beneficial Use shall be filed on or before June 1, 2011.

Respectfully submitted,

Victor Kovach
Hearing Examiner

I ACCEPT AND ADOPT THE REPORT AND RECOMMENDATION OF THE HEARING EXAMINER AS THE DECISION AND ORDER OF THE NEW MEXICO STATE ENGINEER THIS ____ DAY OF _____, 2007.

**JOHN R. D'ANTONIO, JR., P.E.
NEW MEXICO STATE ENGINEER**