

IN THE MATTER OF THE APPLICATION)	
BY THE VILLAGE OF RUIDOSO FOR)	Hearing No. 08-039
PERMIT TO TEMPORARILY CHANGE)	
THE LOCATION OF WELL AND PLACE)	
AND/OR PURPOSE OF USE OF THE)	OSE File No. H-685
GROUNDWATER WITHIN THE HONDO)	into H-2049 et al. (T)
BASIN IN THE STATE OF NEW MEXICO)	
_____)	

MOTION FOR CLARIFICATION

Protestant Rio Bonito Preserve respectfully requests the Hearing Examiner to clarify the burden of proof and standard of impairment under the New Mexico Water-Use Leasing Act. The grounds for this Motion are as follows:

1. Under OSE Application No. H-685 into H-2049 et al (T), the Applicants seek to temporarily change the point of diversion and place of use of 338.88 acre-feet of ground water. October 28, 2008 Scheduling Order at 1-2.

2. At the October 28, 2008, Scheduling Conference, the Applicants revealed for the first time that “the application is of the type contemplated by the Water-Use Leasing Act, NMSA 1978 §§ 72-6-1 to 72-6-7 (2003).” October 28, 2008 Scheduling Order at 2.

3. Section 72-6-3(A) provides that an “owner may lease to any person all or any part of the water use due him under his water right.”

4. Section 72-6-3(B) provides that a water-use lease “shall not be effective to cumulate water from year to year or to substantially enlarge the use of the water in such manner that it would injure other water users.”

5. Section 72-6-5(A) provides:

The state engineer shall approve the application if the applicant has reasonably shown that his proposed use and location of use is a beneficial use and:

(1) will not impair any existing right to a greater degree than such right is, or would be, impaired by the continued use and location of use by the owner; and

(2) will not be contrary to the conservation of water within the state or detrimental to the public welfare of the state.

WHEREFORE, Rio Bonito respectfully requests the Hearing Examiner to clarify the following issues relating to the burden of proof and standard of impairment under the Water-Use Leasing Act:

A. Whether a water-use lease applicant bears the burden of proving that its proposed lease will not “substantially enlarge the use of the water in such manner that it would injure other water users,” NMSA 1978, § 72-6-3(B);

B. Whether a water-use lease applicant bears the burden of proving that its proposed lease will not “be effective to cumulate water from year to year ... in such manner that it would injure other water users,” NMSA 1978, § 72-6-3(B);

C. Whether the requirement under Section 72-6-5(A)(1), that a water-use lease not “impair any existing right to a greater degree than such right is, or would be, impaired by the continued use and location of use by the owner,” is more protective of existing water rights or otherwise different than the usual “impairment” standard employed under Sections 72-12-3 (D) & (E) (2001), 72-12-7 (1985), 72-12-23(A)(4)(1959), and 72-12-24(A)(4); and

D. Whether the water-use lease applicant’s burden to prove that the proposed lease will “not impair any existing right to a greater degree than such right is, or would

be, impaired by the continued use and location of use by the owner" is separate and distinct from its burden to prove the elements described in paragraphs "A" and "B" above.

Respectfully submitted,

New Mexico Environmental Law Center

By

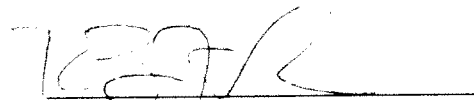


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Certificate of Service

I, Bruce Frederick, certify that on the 16th day of March, 2009, I caused a copy of the foregoing document to be mailed by first class mail to the following persons:

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