BEFORE THE NEW MEXICO STATE ENGINEER

IN THE MATTER OF THE APPLICATION OF THE CITY OF ALBUQUERQUE FOR PERMIT TO DIVERT SURFACE WATER FROM THE RIO GRANDE FOR MUNICIPAL, INDUSTRIAL, AND RELATED PURPOSES

OSE File No. 4830

PROTEST TO WATER RIGHT APPLICATION

The Alliance for the Rio Grande Heritage, by and through Amigos Bravos, Rio Grande Restoration, Sierra Club, New Mexico Public Interest Research Group and only these entities, and the Socorro Soil and Water Conservation District, John Carangelo, Chairman, in his official capacity and as an individual, and the Assessment Payers Association of the Middle Rio Grande Conservancy District hereby protest Application No. 4830 filed by the City of Albuquerque (City) on May 18, 2001, and amended and refiled on June 26, 2001, for a permit to divert surface water from the Rio Grande for municipal, industrial, and related purposes. The Application and published Notice of Application state that the City proposes to divert approximately 94,000 acre-feet per year on a yearly average with peak diversions of up to 103,000 acre-feet per year. The Application and Notice also state that, generally, the diverted water will be comprised of about fifty percent San Juan-Chama Project water and fifty percent 'native' Rio Grande water.

The granting of this Application will impair existing water rights; will be contrary to the conservation of water within the state; and will be detrimental to the public welfare of the state. The grounds for dismissing, denying, or conditioning approval of this Application include, but are not limited, to the following:

1. **Defects in Application.** The Application does not comply with the provisions of Article 5 Chapter 72 of the New Mexico water statutes and it is defective as to form and content. It should, therefore, be either corrected and refiled by the City or dismissed by the State Engineer for the following reasons:

a. The Application and the Notice of Application failed to identify a specific point of diversion. Instead, the Application merely states that: "All of the water will be diverted from the Rio Grande by one of three diversion alternatives. . . ." These alternative diversion points are possible disjunctive not conjunctive points of diversion.

b. The City's Application does not request a permit to divert and consumptively use 47,000 acre-feet per annum with the proviso that it may submit a plan acceptable to the State Engineer for demonstrating the location, amount, timing and disposition of any water returned directly to the Rio Grande. Only upon the approval of a such a return-flow credit plan could the City increase the diversion of water from 47,000 acre-feet to a maximum of 94,000 acre-feet per annum.

c. Because the City's Application does not request the State Engineer to approve a return-flow credit plan, the City can only reuse its imported water if the treated effluent water resulting from its use of the imported water is recharged into the middle Rio Grande basin aquifer and the City obtains a permit from the State Engineer to construct and operate a storage and recovery project pursuant to the Ground Water Storage and Recovery Act, NMSA 1978, § 72-5A-4 (1999).

d. Proceedings on the City's Application should be stayed until the its pending Application for Permit to Adjust the Appropriation of Underground Waters filed on June

22, 1993, has been acted upon by the State Engineer, or withdrawn by the City. The State Engineer can and should consider the City's use of its existing and applied for groundwater rights before determining whether to approve its Application to divert surface water.

e. The water right priority date claimed by the City of November 24, 1922 is incorrect because this date pre-dates the filing date (June 17, 1955) of the Notice of Intent to Appropriate Water for the San Juan-Chama Project held by the Bureau of Reclamation.

2. Impairment of existing water rights.

a. The City claims consumptive use water rights, not including acquired and "dedicated" surface water rights, totaling approximately 19,000 acre-feet of ground water within the Rio Grande basin. Most of these rights were initiated after the Rio Grande Compact was signed in 1938. The appropriation and consumptive use of 47,000 acre-feet of imported water under the City's application in conjunction with the consumptive use of approximately 19,000 acre-feet of ground water hydrologically connected to the Rio Grande will or may be detrimental to existing surface water rights within the Rio Grande basin above Elephant Butte Reservoir.

b. The surface water supply of the Rio Grande in New Mexico is fully appropriated. Approval of any application to divert native surface water from the Rio Grande will or may result in impairment of existing surface water rights. Surface water diversions in the middle Rio Grande are not administered. Absent such administration, valid existing water rights have no protection against unauthorized appropriations of water.

c. There is great uncertainty surrounding the use of the State Engineer's Albuquerque Basin model to predict streamflow depletions caused by City pumping undertaken in conjunction with proposed surface water diversion. This uncertainty exists because there is no way to calibrate impacts of pumping on streamflow by direct measurement of streamflow depletion and because the model cannot simulate rising groundwater levels that might occur in the Albuquerque area due to decreased groundwater pumping that would result from diversion of surface water. Therefore, this application, if approved, should be conditioned in a manner that would prohibit new diversions of surface water until adequate data and computer models are available to reliably predict hydrologic impacts of the City's surface water and groundwater diversions.

3. **Detriment to the public welfare.**

a. The diversion and consumptive use of 47,000 acre-feet of imported water under the City's Application will or may result in the under-delivery of water by the State of New Mexico to the State of Texas under the Rio Grande Compact.

b. The diversion of 94,000 acre-feet of surface water from the Rio Grande will reduce or adversely impact the aquatic and riparian habitat required for the protection and recovery of endangered species within the Rio Grande basin.

c. The diversion of 94,000 acre-feet with a return to the Rio Grande of treated effluent of 47,000 acre-feet will degrade the quality of water for downstream uses. If the City is allowed to exchange effluent water for native water, the substitute water must be the same quality as the native water.

d. The City's preferred proposed point of diversion is a new dam on the Rio Grande. The City should not be permitted to construct a new diversion dam on the Rio Grande because a new diversion dam will degrade and fragment endangered species habitat, will inhibit upstream migration of the endangered Rio Grande silvery minnow and will entrain endangered fish eggs and larvae.

4. **Contrary to conservation of water**

a. In order to conserve water for maximum beneficial use in the state and to protect and recover endangered species in the Rio Grande basin the Application, if approved, should be conditioned in such a manner that would require the City to utilized treated wastewater effluent to recharge the middle Rio Grande basin aquifer.

b. The City should be required to reduce its future per capita use rate from 175 gallons per day to 150 gallons per by the year 2010 to ensure that the City's water use rate is on parity with other large municipalities in the southwestern United States.

c. The amount of water under the existing City water rights, and its contract right to 47,000 acre-feet of San Juan-Chama Project water, is greater than the amount of water projected to be required by the City during the 40-year planning horizon. The Application, if approved, should limit diversion of water to the amount projected to be needed in the next 40 years.

CONCLUSION

For the reasons stated above, the City's Application for permit to divert an average of 94,000 acre-feet per annum of surface water from the Rio Grande should be dismissed, denied or limited to a maximum possible diversion of 47,000 acre-feet per

annum at the site of an existing diversion dam.

Dated: November 26, 2001.

PETER THOMAS WHITE
Sena Plaza, Suite 50
125 East Palace Avenue
Santa Fe, New Mexico 87501

Attorney for Protestants

CERTIFICATE OF SERVICE

I certify that on November 26, 2001, a copy of this Protest of Water Right Application was mailed to John M. Stomp III, P. E., Manager, Public Works Department, and the attorney for the City of Albuquerque, Susan Kelly, Public Works Department, Post Office Box 1293, Albuquerque, New Mexico 87103.

Peter Thomas White