

**FILED**

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW MEXICO

UNITED STATES DISTRICT COURT  
SANTA FE, NEW MEXICO

FEB 08 2008

FOREST GUARDIANS, GERALD )  
FORD, and WILLIAM MIDKIFF, )

Plaintiffs, )

vs. )

VILLAGE OF RUIDOSO, a municipal )  
corporation, and CITY OF RUIDOSO )  
DOWNS, a municipal corporation, )

Defendants. )

MATTHEW J. DYKMAN  
CLERK

Civil No. 05-00159-MV/LFG

**CONSENT JUDGMENT**

WHEREAS, after providing notice to Defendants Village of Ruidoso and City of Ruidoso Downs (hereafter collectively referred to as "Ruidoso") pursuant to 33 U.S.C. §1365(b) and 40 C.F.R. §135.2, Plaintiffs Forest Guardians, Gerald Ford, and William Midkiff (hereafter collectively referred to as "Plaintiffs") commenced this action under the Federal Water Pollution Control Act (hereafter "Clean Water Act"), 33 U.S.C. §1251 et seq., by filing the original complaint in this matter on February 11, 2005; and

WHEREAS, the February 11, 2005 complaint in this matter alleges, inter alia, that Ruidoso violated National Pollution Discharge Elimination System (hereafter "NPDES") Permit No. NM0029165 by discharging phosphorus in excess of the phosphorus limitations set forth in the NPDES permit governing operation of the wastewater treatment plant jointly owned and operated by the Defendants and located at 313 Cree Meadows Drive in Lincoln County, New

Mexico (hereafter "Ruidoso WWTP" or "WWTP") on a continuing and on-going basis from January 1, 2004 through August 31, 2004; and

WHEREAS, the Plaintiffs filed a First Amended Complaint in this matter on May 13, 2005 in which they alleged, inter alia, that Ruidoso continued to violate the discharge limitations for phosphorus set forth in NPDES Permit No. NM0029165, and specifically set out the alleged violations of each of these limitations that occurred on a continuous and on-going basis during the period from September 1, 2004 through March 31, 2005; and

WHEREAS, the Plaintiffs' First Amended Complaint in this matter seeks declaratory relief, injunctive relief, civil penalties, attorneys' fees and costs, and other relief; and

WHEREAS, the alleged violations of the phosphorus limitations set forth in NPDES Permit No. NM0029165 continue to this day on a continuous and on-going basis because the Ruidoso WWTP is physically incapable of treating wastewater in such a way that the effluent from the Ruidoso WWTP complies with the phosphorus limitations set forth in NPDES Permit No. NM0029165; and

WHEREAS, the EPA has issued a new NPDES permit for the Ruidoso WWTP which will become effective on September 1, 2007, which new NPDES permit contains the same phosphorus limitations on discharges as NPDES Permit No. NM0029165, and the parties to this lawsuit contemplate that Ruidoso will violate the phosphorus limitations of the new NPDES permit on a continuous and on-going basis upon the effective date of the new NPDES permit and until such time as the new WWTP contemplated in this Consent Judgment is operational; and

WHEREAS, Ruidoso, with the encouragement of the Plaintiffs, investigated the feasibility of implementing a "water quality trading program" pursuant to which Ruidoso would offset the introduction of excess phosphorus (that is, phosphorus in amounts in excess of the

amounts allowed by NPDES Permit No. NM0029165) into the Rio Ruidoso by reducing the mass loading of phosphorus into the Rio Ruidoso from sources other than the Ruidoso WWTP, but concluded that such a "water quality trading program" is infeasible because of the unavailability of sufficient "offset credits;" and

WHEREAS, Ruidoso has agreed that there are ways that it can obtain reductions in the amount of phosphorus content of the sewage entering the WWTP by enacting ordinances limiting the sale, distribution, and use of household and commercial materials containing phosphorus, and will promulgate and enforce such ordinances; and

WHEREAS, Ruidoso has agreed that it can reduce the amount of phosphorus entering the Rio Ruidoso through the mechanism of groundwater transport by implementing such measures as extending municipal sewer lines into residential areas that are currently served by individual and/or community septic systems and requiring hook-ups to municipal sewage collection systems; and

WHEREAS, Ruidoso agrees that its WWTP will more efficiently be able to remove phosphorus from the influent at its WWTP if it reduces the amount of infiltration and inflow into the sewage collection system for the WWTP so as to reduce the total volume of wastewater treated by the WWTP; and

WHEREAS, Ruidoso agrees that it is in the public interest for it to reduce phosphorus discharges from the Ruidoso WWTP to that amount permitted by NPDES Permit No. NM0029165, but states that it will be physically impossible to so limit the discharge of phosphorus from the Ruidoso WWTP as the existing Ruidoso WWTP is designed; and

WHEREAS, the parties agree that it is in the public interest for Ruidoso to expedite the design, engineering, and construction of a new WWTP that will enable Ruidoso to comply with

the discharge limitations for phosphorus set forth in NPDES Permit No. NM0029165, or the discharge limitations set forth in a superseding NPDES permit issued by the United States Environmental Protection Agency; and

WHEREAS, the parties recognize that Ruidoso has identified and is diligently pursuing possible funding sources for the estimated 35 million dollar cost of the new WWTP from numerous sources, including without limitation the sale of local bonds (for which both Ruidoso communities held successful elections in December 2006), the New Mexico Legislature, the New Mexico Governor, the U.S. Environmental Protection Agency, the U.S. Bureau of Indian Affairs and the U.S. Army Corp of Engineers so as to meet the deadlines of this Consent Judgment; and

WHEREAS, all of the parties to this lawsuit have executed a Partial Settlement Agreement which obligates Ruidoso to undertake certain affirmative actions with respect to the construction of a new WWTP that is designed to reliably comply with the phosphorus limits set forth in any NPDES permit regulating the operation of the new WWTP, including the new NPDES permit which will become effective on September 1, 2007; and

WHEREAS, the district court entered an Order Approving Partial Settlement Agreement on July 24, 2006; and

WHEREAS, at the time that the parties to this lawsuit executed the Partial Settlement Agreement, Ruidoso was becoming aware of the requirements of new nitrogen limitations that would apply to the WWTP; and

WHEREAS, extensive negotiations between Ruidoso and the New Mexico Environment Department ("NMED"), with active participation by the Plaintiffs, were necessary to resolve the nitrogen issues in a May 16, 2007 Settlement Agreement between Ruidoso and NMED; and

WHEREAS, all the parties to this lawsuit agree that certain provisions of the Partial Settlement should be modified in this Consent Judgment to be consistent with the Settlement Agreement between Ruidoso and NMED; and

WHEREAS, all the parties to this lawsuit agree that, upon entry of this Consent Judgment, the Partial Settlement Agreement should be dissolved and superseded by this Consent Judgment in order to define all rights and responsibilities of the parties in one document; and

WHEREAS, the U.S. Department of Justice and the U.S. Environmental Protection Agency have been afforded an opportunity to review this Consent Judgment as required by the Clean Water Act, and do not object to its entry; and

WHEREAS, all the parties to this lawsuit agree that a full and complete settlement of this lawsuit is in the best interest of the parties and the public, and that entry of this Consent Judgment without additional litigation is the best way to resolve this action; and

WHEREAS, all the parties have negotiated the terms of this Consent Judgment in good faith and the Court, by entering this Consent Judgment, finds that the terms negotiated by the parties are fair, reasonable, and in the public interest;

NOW, THEREFORE, with the consent of the parties, IT IS HEREBY ADJUDGED, ORDERED, AND DECREED, as follows:

1. The Court has subject matter jurisdiction over this matter pursuant to 33 U.S.C. §1365(a) (Clean Water Act's citizens' suit provision), and jurisdiction over all parties to this action.
2. Venue is appropriate in this judicial district.
3. The Court has the authority to enter this Consent Judgment, and to enforce this Consent Judgment.

4. The provisions of this Consent Judgment apply to and are binding upon each of the Plaintiffs and each of the Defendants.
5. It is the express purpose of the parties entering into this Consent Judgment that the judgment shall constitute a full and complete settlement of all the claims that the Plaintiffs stated in their First Amended Complaint as well as any other claims that the Plaintiffs could assert related to alleged violations of discharge limitations for phosphorus set forth in NPDES Permit No. NM0029165 and any superseding permit until such time as the new WWTP contemplated by this Consent Judgment is operational at which time the Plaintiffs shall have the right to enforce the phosphorus discharge limitations of Ruidoso's new NPDES permit pursuant to the citizen's suit provision of the CWA if Ruidoso remains out of compliance with the phosphorus limitations at that time.
6. The terms of the Partial Settlement Agreement, approved by the July 24, 2006 Order of this Court, are hereby dissolved and superseded by this Consent Judgment.
7. Ruidoso will immediately proceed with all steps that are necessary and preliminary to the construction of a new WWTP that is designed to reliably comply with a concentration limit of 0.1 mg/L for phosphorus when it is operating at expected load levels over the life of the WWTP. Specifically, the parties agree that Ruidoso will follow the following process with respect to the design and engineering of the new WWTP, and will comply with the milestones set out in this paragraph:
  - a. The new WWTP shall be finally constructed and operable no later than thirty nine months following September 1, 2007, which is the beginning of the construction phase, according to the following chronology;

- i. 3 months for a study and report phase, consisting of further study and detailed planning to review and modify, as appropriate, Ruidoso's initial design concepts to incorporate new nitrogen limits required by NPDES Permit No. NM0029165 and Ruidoso's May 16, 2007 Settlement Agreement with NMED,
  - ii. 10 months for completion of facility design,
  - iii. 2 months for review and approval of facility design by Ruidoso and governmental agencies,
  - iv. 1 month for advertisement of public bids for construction,
  - v. 3 months for opening bids, allowing the selected contractor to comply with all applicable requirements (e.g., obtaining bonds and certificates of insurance) and awarding the construction contract, and
  - vi. 20 months for completion of the construction and the beginning of operation of the facility.
- b. Concerning Paragraph 7.a above, Ruidoso will provide Plaintiffs with quarterly reports, beginning three months after the beginning of the construction phase, describing progress in the previous three months on design and construction of the new WWTP as well as on acquisition of necessary funding. Ruidoso will also provide Plaintiffs with notice of completion of each of the milestones set out in Paragraph 7.a above. The purpose of these progress reports, in addition to providing current

information on the status of the project, is to provide a basis for the parties to explore opportunities for the staging of construction of the new WWTP in a way to achieve water quality benefits in the Rio Ruidoso more quickly than originally planned and to assure that construction of the new WWTP is not delayed beyond the thirty nine month construction phase schedule agreed to by the parties.

- c. Concerning the chronology described in Paragraph 7.a above, the parties agree that failure to meet any of the milestones set out in this paragraph shall constitute a material breach of this Consent Judgment. However, Plaintiffs agree not to seek judicial enforcement of this Consent Judgment or any other judicial remedy until at least 30 days after Ruidoso receives notification in writing from Plaintiffs of a claim that Ruidoso has not met one of the milestones set forth in this paragraph or any other requirement of this Consent Judgment. The parties agree that they shall utilize the 30-day period to make best efforts to resolve such a claim and any other pending issues arising from the Consent Judgment with the assistance of a mediator selected by the parties and paid for by Ruidoso.

8. Ruidoso agrees that for the five years following entry of this Consent Judgment and commencing with the fiscal year 2008/2009, it will encumber funds for approved projects for the restoration of the Rio Ruidoso, its tributaries and associated ecosystems and that within five (5) fiscal years beginning with 2008/2009, Ruidoso shall encumber funds for the implementation of at least \$1,000,000.00 in approved projects. Of the \$1,000,000.00,

Ruidoso agrees to encumber at least \$300,000.00 during the first three years following entry of this Consent Judgment and commencing with the fiscal year 2008/2009.

9. It is understood that the funding for projects approved by the Rio Ruidoso Restoration Committee ("RRRC"), which shall be established pursuant to the terms of Paragraph 13 below in this Consent Judgment, may be in actual dollars or in-kind services that are used or provided during the course of construction or implementation of an approved project. The parties will agree on a reasonable method for valuing in-kind services for credit toward the required commitment of funds for approved projects.
10. It is further understood and agreed that "Ruidoso" controls an additional quasi-governmental entity known as the Joint Use Board ("JUB"), which was formed by a Joint Powers Agreement by the two (2) entities making up "Ruidoso", and that the funding referred to herein shall include funding from the JUB.
11. Specifically, the parties agree that Ruidoso shall provide funding for river restoration projects as follows:
  - a. Within the three months following entry of this judgment, Ruidoso shall formally create a "River Restoration and Enhancement Project" (hereafter "Project") line item within the budget of each the three governmental entities (i.e., Ruidoso and the JUB), and each shall make an initial budgetary adjustment to establish an operations fund within each of the above-referenced budget line items.
  - b. Commencing with the 2008/2009 fiscal year, and continuing for the four (4) years thereafter, Ruidoso shall establish an annual operating budget for Projects to be pursued during the fiscal year.

- c. The budget figures and the Projects shall be established by Ruidoso with the approval of the Rio Ruidoso Restoration Committee ("RRRC") established pursuant to the terms of Paragraph 13 herein below.
- 12. The parties agree that the funds in the Project account are to be expended on projects that will restore and protect the Ruidoso River, its tributaries and associated ecosystems and biological habitats. The projects contemplated by this Consent Judgment are those projects which (a) directly or indirectly, result in an improvement to the physical condition of the Ruidoso River, its tributaries and associated ecosystems upstream and/or downstream from the WWTP, (b) provide for enhanced water-based recreational opportunities in the Ruidoso River, its tributaries and associated ecosystems upstream and/or downstream from the WWTP, or (c) protect natural conditions in the Ruidoso River, its tributaries and associated ecosystems upstream and/or downstream from the WWTP that are essential to healthy wildlife, recreational opportunities, and other established beneficial uses of the waters of the Ruidoso River.
- 13. The parties agree that they will create a committee -- the RRRC described in Paragraph 9 above -- to carry out the objectives of this judgment. All Projects, budgets and funding proposed by Ruidoso during the term of this judgment shall be subject to the approval of the RRRC. Further, the RRRC is authorized to propose additional projects and help Ruidoso secure additional funding should it have the opportunity and/or desire.
  - a. Within the month following entry of this judgment, the Plaintiffs collectively shall name two individuals and the Defendants collectively shall name two individuals to serve as members on the RRRC.

- b. Within three months of entry of this judgment, the four individuals designated pursuant to Paragraph 13(a) above shall obtain a commitment from an individual to serve as the 5<sup>th</sup> member of the RRRC. That individual must be a fisheries biologist employed by the New Mexico Game and Fish Department acceptable to the parties or, if such an employee is not available, another employee of the Game and Fish Department or an employee of NMED's Surface Water Quality Bureau acceptable to all of the members of the RRRC.
- c. Each member so appointed shall be entitled to one (1) vote.
- d. Any member may be replaced at any time by the formal appointment of a new member by the respective body having said power of appointment.
- e. The purpose of the RRRC shall be to give its approval to Ruidoso on proposed budgets, funding and Projects for the RRRC and to propose such projects as the Committee feels will best fulfill the objectives of the Project.
- f. The parties agree that Project funds may not be expended to comply with any requirement of law – whether imposed by state or federal statute or regulation, or by any judicial or administrative order other than this Consent Judgment – that exists independently of the requirements of this Consent Judgment. Project funds shall be used for the restoration and enhancement of the Ruidoso River, its tributaries and associated ecosystems, and shall not be used to fund Ruidoso's compliance with any legal obligations that exist independently of this Consent Judgment.

- g. The five (5) members of the RRRC shall meet as necessary with Ruidoso to consider such proposed budgets, funding and projects.
- h. It is understood and agreed that no project or the funding of same shall qualify as a project under the requirements set forth herein unless same receives a majority vote of the RRRC.
- i. The parties understand that it is of particular concern to the United States that negotiated Consent Judgments not permit plaintiffs to benefit financially from implementation of the Judgment, or otherwise give any appearance of self-dealing or other impropriety. In this case, the United States has expressed concern that plaintiffs might benefit financially from implementation of the projects selected by the RRRC and funded by the Defendants Village of Ruidoso and City of Ruidoso Downs. To address the United States' concern, the plaintiffs hereby represent that they will not seek or accept any financial remuneration whatsoever for their participation on the RRRC or for their participation in any river restoration project approved by the RRRC. This prohibition on financial participation in RRRC-approved projects shall bind the plaintiffs themselves, and the officers, employees, and agents of Plaintiff Forest Guardians.
- j. The parties jointly obligate themselves to instruct the members of the RRRC to write a letter to the Court and the U.S. Department of Justice within two weeks of the RRRC's first meeting stating as follows: (1) that they have read this Consent Judgment concluding this case, (2) that they will ensure that all projects funded pursuant to this Consent Judgment serve the purposes specified in the Judgment, and (3) that they will submit a letter to the Court, the U.S. Department of Justice,

and the parties describing the projects that are approved pursuant to this Consent Judgment.

14. Recognizing that the expenditure of one million (\$1,000,000.00) dollars as provided for above constitutes a significant financial commitment to the health of the Ruidoso River, within one month of the entry of this Consent Judgment, Ruidoso shall pay the additional sum of \$1,000.00 to the United States Treasury, in the manner prescribed by the United States Department of Justice, as a nominal civil penalty for the violations alleged in the First Amended Complaint. Proof of payment shall be provided to the Plaintiffs' counsel at the same time that the payment is made.
15. Unless otherwise specified elsewhere in this Consent Judgment, whenever a report, document or other communication is required to be forwarded by one party to another, or from one or both parties or the RRRC to the U.S. Department of Justice, it shall be directed to the individuals, or their successors, specified below at the addresses given, unless these individuals or their successors give notice in writing to the other party that another individual has been designated to receive the communication:

Plaintiffs:

Executive Director  
Forest Guardians  
312 Montezuma Ave.  
Santa Fe, NM 87501

William S. Midkiff  
2814 Sudderth, PMB 162  
Ruidoso, NM 88345

Gerald Ford  
c/o Kelly Cassels  
Sanders, Bruin, Coll & Worley  
P.O. Box 550  
Roswell, NM 88202-0550

Steven Sugarman  
Belin & Sugarman  
618 Paseo de Peralta  
Santa Fe, NM 87501

Village of Ruidoso:

Lonnie R. Nunley, Mayor  
Village of Ruidoso  
313 Cree Meadows Drive  
Ruidoso, NM 88345

Dan Higgins, Manager  
Village of Ruidoso  
313 Cree Meadows Drive  
Ruidoso, NM 88345

Irma Devine, Clerk  
Village of Ruidoso  
313 Cree Meadows Drive  
Ruidoso, NM 88345

City of Ruidoso Downs:

Bob A. Miller, Mayor  
City of Ruidoso Downs  
P.O. Box 348  
122 Downs Drive  
Ruidoso Downs, NM 88346

John Waters, Manager  
City of Ruidoso Downs  
P.O. Box 348  
122 Downs Drive  
Ruidoso Downs, NM 88346

Carol Virden, Clerk  
City of Ruidoso Downs  
P.O. Box 348  
122 Downs Drive  
Ruidoso Downs, NM 88346

U.S. Dept. of Justice:      Stacy Stoller, Attorney  
   Law & Policy Section  
   Environment & Natural Resources Division  
   U.S. Dept. of Justice  
   P.O. Box 4390  
   Ben Franklin Station  
   Washington, DC 20044-4390

16. Pursuant to the citizens' suit provision of the Clean Water Act, 33 U.S.C. §1365(d), Ruidoso agrees that, in addition to the above-referenced sums, it will pay the Plaintiffs for the reasonable costs and attorneys' fees that they have incurred in the prosecution of this action. In the two months following entry of this Consent Judgment, the parties shall endeavor to reach an agreement on the appropriate amount of costs and fees to be paid. If, at the conclusion of that two month period, the parties have been unable to agree on an appropriate amount, then the parties shall have a period of twenty-one days in which to file separate motions or a joint motion for a settlement conference before the United States Magistrate Judge. If such motion or motions are not filed or are denied, or if the parties have been unable to agree on an appropriate amount at a settlement conference, the Plaintiffs shall then have a period of twenty-one days in which to file an appropriate motion for costs and fees with the Court. If the parties reach agreement on the appropriate amount of fees and costs to be paid, they shall memorialize that agreement in a Consent Judgment Supplement, and the agreement shall not become effective until this Court enters the Consent Judgment Supplement after an opportunity for review by the U.S. Department of Justice and the U.S. Environmental Protection Agency as required by 33 U.S.C. §1365(c)(3).
17. The parties further agree that the Plaintiffs will be entitled to their attorneys fees and costs in the event that such fees and costs are incurred in the enforcement of any of the

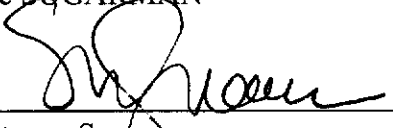
milestones set out in Paragraph 7 or any other obligation imposed by this Consent Judgment.

18. The parties recognize that no Consent Judgment can be entered in a Clean Water Act citizen suit in which the United States is not a party prior to 45 days following receipt of a copy of the proposed Consent Judgment by the U.S. Attorney General and the Administrator of the U.S. Environmental Protection Agency pursuant to 33 U.S.C. §1365(c)(3). Therefore, upon the signing of this Consent Judgment by the parties, counsel for the Plaintiffs shall serve copies of the same upon the U.S. Attorney General and the Administrator.
19. This Consent Judgment, and the various obligations set forth in this Consent Judgment, shall take effect on the date it is entered by the Court.
20. The material terms of this Consent Judgment shall not be changed, revised, or modified except by a written instrument signed by the parties, and such changes, revisions, or modifications shall not take effect unless and until approved by the Court. Any non-material modifications of this Consent Judgment shall be in writing and signed by the parties.
21. If for any reason the Court should decline to approve this Consent Judgment in the form presented, the parties agree to continue negotiations in good faith and attempt to cure any objections raised by the Court to entering this Consent Judgment. In the event that this Consent Judgment is not approved, the parties agree that the terms and conditions of the Partial Settlement Agreement, as modified by Paragraph 7 of this Consent Judgment, shall continue to bind the parties.

*Maignan*  
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

BELIN & SUGARMAN

By:   
Steven Sugarman  
618 Paseo de Penalta  
Santa Fe, New Mexico 87501  
(505) 983-1700

Date: 2/1/08

*Attorneys for Plaintiffs Forest Guardians,  
Gerald Ford, and William Midkiff*

VILLAGE OF RUIDOSO

By:   
Lonnie R. Nunley, Mayor

Date: 1/29/08

(SEAL)  
ATTEST:

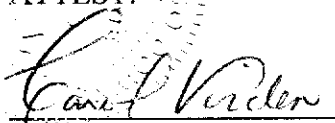
  
Irma Devine, Village Clerk

CITY OF RUIDOSO DOWNS


By:   
Bob A. Miller, Mayor

Date: 01/29/08

(SEAL)  
ATTEST:

  
Carol Virden, City Clerk

MONTGOMERY & ANDREWS, P.A.

By:   
Edmund H. Kendrick  
Post Office Box 2307  
Santa Fe, New Mexico 87504-2307  
(505) 982-3873

Date: 1/31/08

*Attorneys for Defendants Village of Ruidoso  
and City of Ruidoso Downs*