



February 4, 2014

Via Federal Express or Certified Mail Return Receipt Requested

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U.S. Fish and Wildlife Service
1849 C Street N.W.
Washington, D.C. 20240

Sally Jewell, Secretary of the Interior
U.S. Department of the Interior
1849 C Street, N.W.
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Dr. Benjamin Tuggle, Regional Director
Southwest Regional Office
U.S. Fish and Wildlife Service
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RE: Notice of Intent to Sue the U.S. Fish and Wildlife Service for Violations of the Endangered Species Act in the Middle Rio Grande in New Mexico

Dear Director Ashe, Regional Director Tuggle and Secretary Jewell:

In accordance with the 60-day notice requirement of Section 11(g) of the Endangered Species Act (“ESA” or “Act”), 16 U.S.C. § 1540(g), you are hereby notified that WildEarth Guardians (“Guardians”) intends to bring a civil action against the U.S. Fish and Wildlife Service (“Service”), through the above-named officials, for violating section 7 of the ESA, 16 U.S.C. § 1536 and its implementing regulations, 50 C.F.R. §402 *et seq.*, by failing to insure that the water management, flood control and river maintenance activities of the U.S. Bureau of Reclamation (“Reclamation”), U.S. Army Corps of Engineers (“Corps”) and the related non-federal parties in the middle Rio Grande are not likely to jeopardize the continued existence of the endangered Rio Grande silvery minnow (*Hybognathus amarus*) and/or Southwestern willow flycatcher (*Empidonax traillii extimus*), Pecos sunflower (*Helianthus paradoxus*), interior least tern (*Sternula antillarum*), New Mexico meadow jumping mouse (*Zapus hudsonius luteus*), and/or yellow-billed cuckoo (*Coccyzus americanus*). See 16 U.S.C. § 1536(a)(2).

I. ESA Requirements

In 1973, Congress enacted the Endangered Species Act to provide “a program for the conservation of . . . endangered species and threatened species” and “a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved.” 16 U.S.C. § 1531(b). In enacting the statute, the plain intent of Congress was “to halt and reverse

the trend towards species extinction, whatever the cost.” *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 184, 98 S.Ct. 2279 (1978).

Section 2(c) of the ESA establishes that it is “. . . the policy of Congress that all Federal . . . agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of” the ESA. 16 U.S.C. § 1531(c)(1). To implement this policy, section 7(a)(2) of the ESA requires that each federal agency, in consultation with and with the assistance of the Secretary of the Interior (“Secretary”), insure that any action authorized, funded, or carried out by the agency is not likely to 1) jeopardize the continued existence of any threatened or endangered species or 2) result in the destruction or adverse modification of the critical habitat of such species. 16 U.S.C. § 1536(a)(2). “Action” is broadly defined to mean “all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies” and includes “actions directly or indirectly causing modifications to the land, water, or air.” 50 C.F.R. § 402.02.

For federal actions, the federal agency must request from the Service a determination of whether any listed or proposed species may be present in the area of the agency action. 16 U.S.C. § 1536(c)(1). If listed or proposed species may be present, the federal agency must prepare a “biological assessment” to determine whether the listed species may be affected by the proposed action. *See id.*; 50 C.F.R. § 402.12. If the agency determines that its proposed action “may affect” any listed species or its critical habitat, the agency must engage in “formal consultation” with the Service. 50 C.F.R. § 402.14; *see also*, 51 Fed. Reg. 19,926, 19,949 (June 3, 1986) (explaining that “may affect” broadly includes “[a]ny possible effect, whether beneficial benign, adverse or of an undetermined character”).

The Service must conclude formal consultation with the action agencies within 90 days of the date upon which consultation was initiated. 16 U.S.C. § 1536(b). While that period may be extended “upon mutual agreement of the Secretary and the federal agency, the Secretary must before the close of the 90-day period provide a written statement of 1) the reasons why a longer period is required, 2) the information necessary to complete the consultation and 3) an estimate of the date on which consultation will be completed. 16 U.S.C. § 1536(b)(1)(B)(i).

Upon completion of formal consultation, the Service issues a biological opinion to explain whether the agency action is likely to “jeopardize” any species’ existence. 16 U.S.C. § 1536(a)(2). The biological opinion must include a summary of the information on which it is based and must adequately detail and assess how the proposed action affects listed species. 50 C.F.R. § 402.14(h). If the action is likely to cause jeopardy, then the biological opinion shall specify reasonable and prudent alternatives that avoid jeopardy. *See* 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(h)(3). If the Service concludes that the action or the implementation of reasonable and prudent alternatives will not cause jeopardy in violation of section 7(a)(2), the Service will issue an incidental take statement that specifies “the impact, i.e., the amount or extent, of . . . incidental taking” that may occur. *See* 50 C.F.R. § 402.14(i)(1). The ESA requires

agencies to use the best available science when conducting their analysis. *See* 16 U.S.C. § 1536(a)(2).

However, the responsibility of the Service and the federal agency to consult does not end with the issuance of a biological opinion. Instead, the Service and the action agency retain a duty to reinitiate consultation when: 1) the amount of take specified in the incidental take statement is exceeded, 2) new information reveals that the action may have effects not previously considered, 3) the action is modified in a way not previously considered, or 4) “[i]f a new species is listed or critical habitat designated that may be affected by the identified action.” *See* 50 C.F.R. § 402.16.

The ESA provides for citizen enforcement of the provisions of the Act. To enforce section 7 of the ESA, 16 U.S.C. § 1536(a)(2), “any person may commence a civil suit on his own behalf . . . to enjoin any person, including the United States and any other governmental instrumentality or agency, who is alleged to be in violation of any provision of the this chapter.” 16 U.S.C. §1540(g)(1)(A).

II. Factual Background

- A. Endangered Species Imperiled by Federal Water Management Activities in the Middle Rio Grande
- i. Rio Grande silvery minnow (*Hybognathus amarus*)

The Rio Grande silvery minnow is a “small, relatively heavy-bodied minnow, round to ovate in cross-section, with moderately small eyes and a small, slightly oblique mouth.” *See Rio Grande Silvery Minnow Recovery Plan*, First Revision 2010 (Originally Approved on July 8, 1999) at 5. Adults reach about 4 inches in length and exhibit a light greenish-yellow color. *Id.* The silvery minnow is a “pelagic spawner that produces thousands of semibuoyant, non-adhesive eggs that passively drift while developing.” *Id.* at 6. Reproduction in the silvery minnow is triggered by and corresponds with high or peak spring flows that historically occurred in May or June as a result of snowmelt runoff. *Id.* at 7.

The silvery minnow was historically one of the most abundant and widespread species in the entire Rio Grande, occurring from Espanola, New Mexico to the Gulf of Mexico and in much of the Pecos River. *Id.* at 15. The silvery minnow has been extirpated from more than 95% of its historical range and today only occupies a 174-mile stretch of the river in the middle Rio Grande from Cochiti Dam to Elephant Butte Reservoir.¹ *Id.* at 2.

¹ The silvery minnow was reintroduced into the Rio Grande near Big Bend, Texas in 2008. This population is considered “a nonessential, experimental population under section 10(j) of the ESA (73 FR 74357).” 2010 Recovery Plan at 16.

The Service listed the Rio Grande silvery minnow as endangered under the ESA in 1994 and designated critical habitat for the entire reach of the middle Rio Grande in 1999. *See* 59 Fed. Reg. 36988 (7/20/94); 64 Fed. Reg. 36,274 (7/6/99). The Secretary of the Interior developed a recovery plan for the silvery minnow in 1999 and revised it in 2010. *See* 75 Fed. Reg. 7625 (2/22/10). The recovery plan attributes the decline of the Rio Grande silvery minnow to the “destruction and modification of its habitat due to dewatering and diversion of water, water impoundment, and modification of the river (channelization)” among other factors. 2010 *Recovery Plan* at 2.

Since 2009, lack of high spring runoff combined with summer drying have resulted in a decline of silvery minnow populations.² A 2013 report indicated that the silvery minnow population is at its lowest level since comprehensive surveys began in 1993. *See* Minnow Action Team Report dated May 16, 2013 at 6. The decline in population has resulted from three consecutive years (2011-2013) without a peak flow in the middle Rio Grande to trigger reproduction and significant river drying (one-third of the minnow’s critical habitat in 2012)³ during the irrigation season. In 2012, such conditions resulted in no minnows being discovered in population surveys in October. Similarly, surveys reported only three minnows present in population monitoring conducted in October of 2013. *Id.*

ii. Southwestern willow flycatcher (*Empidonax traillii extimus*)

The Southwestern willow flycatcher is a small migratory bird approximately six inches long, weighing about half an ounce. *See* 2002 *Southwestern Willow Flycatcher Final Recovery Plan* dated August 30, 2002 at 4. “It has a grayish-green back and wings, whitish throat, light grey-olive breast, and pale yellowish belly.” *Id.* The willow flycatcher inhabits the streamside and wetland thickets of New Mexico, Arizona, west Texas, and southern portions of Nevada, Utah, California, and Colorado. *Id.* at 7. The willow flycatcher’s breeding habitat includes “patchy to dense riparian habitats along streams or other wetlands, near or adjacent to surface water or underlain by saturated soil.” *Id.* at 11.

On February 27, 1995, the Service listed the Southwestern willow flycatcher as endangered and designated critical habitat on July 22, 1997. *See* 60 Fed. Reg. 10694 (2/27/95); 62 Fed. Reg. 39129 (7/22/97). At the time of listing, the known flycatcher population was estimated between 300 and 500 pairs. *Id.* In its listing rule, the Service found that the decline of the Southwestern willow flycatcher resulted from loss of habitat, including adverse modifications

² *See* Dudley, Robert K., Adam L. Barkalow, and Steven P. Platania, Spawning Periodicity of Rio Grande Silvery Minnow During 2012 (October 12, 2012) at 38-39 (“The loss of individuals from downstream reaches during river drying events is particularly problematic as these are the areas that most frequently and consistently support the highest densities of Rio Grande silvery minnows”).

³ Approximately 21 percent (37 miles) of the silvery minnow’s critical habitat dried in 2013. *See* 2013 Preliminary Salvage Data of the Service.

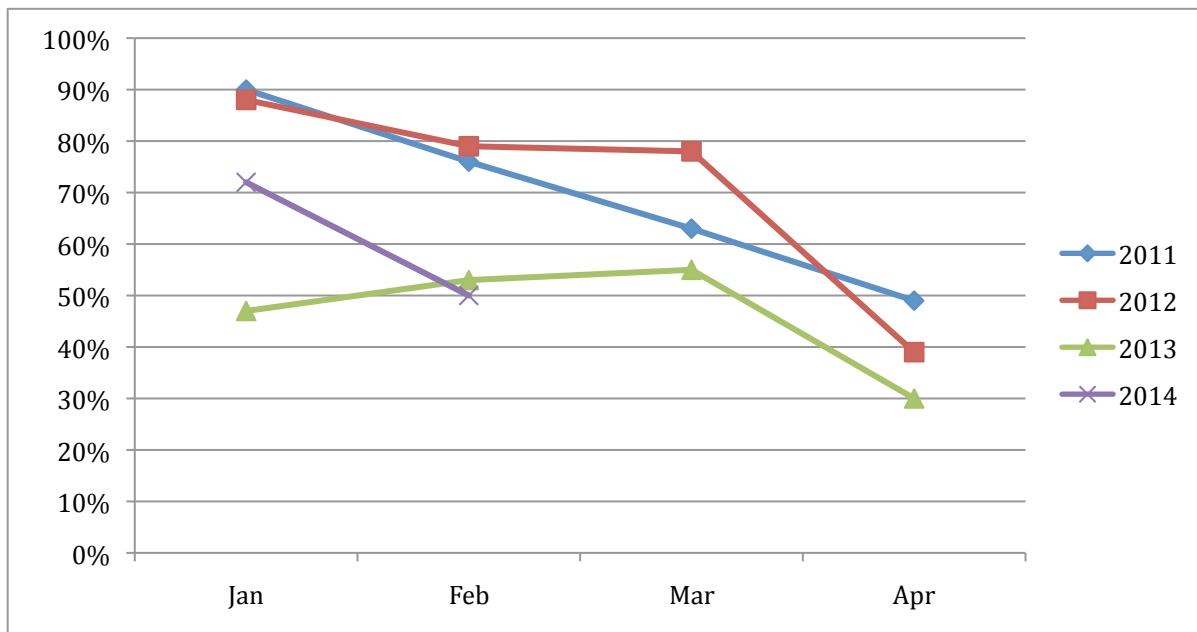
of riparian habitat necessary for the breeding and successful reproduction of the flycatcher as a result of human development, channelization, changes in surface water hydrologic regimes, introduction of alien species, and other activities. *Id.* In 2002, the Secretary of the Interior released a recovery plan setting forth the measures necessary to recover the species. *See* 2002 *Southwestern Willow Flycatcher Final Recovery Plan*.

Over the years, the Service modified its critical habitat designation for the flycatcher on several occasions. *See* 62 Fed. Reg. 44228 (8/20/97) and 70 Fed. Reg. 60886 (10/19/05). In 2013, the Service revised the critical habitat designation for the willow flycatcher to include 112 miles in the middle Rio Grande between the Valencia-Bernalillo county line and the upper part of the Elephant Butte Reservoir in Socorro County, New Mexico. *See* 78 Fed. Reg. 344 (1/3/13).

B. Natural Resources Conservation Service’s 2014 Forecast for the Rio Grande

On January 1, 2014, the Natural Resources Conservation Service (“NRCS”) issued its first set of monthly streamflow forecasts for New Mexico for 2014. *See New Mexico Basin Outlook Report* dated January 1, 2014. The NRCS forecast for January predicts below normal streamflow (72 percent of average) at the Rio Grande at Otowi Bridge (USGS Station No. 08313000); the preliminary forecast for February indicates a drop to 50% of average. Figure 1 demonstrates the NRCS streamflow forecasts at the Rio Grande at Otowi Bridge gauge for the months of January through April and covering the period from 2011 to 2014 (2014 only includes the January and preliminary February forecasts).

**Figure 1. NRCS Streamflow Forecasts
at Rio Grande near Otowi Bridge Gauge 2011-2014**



A clear downward trend exists for the Rio Grande at Otowi forecasts between January and April during the period from 2011 to 2013. While the January 2014 forecast of 72 percent of average is not as dire as the forecast in 2013, it is still well below the forecasted streamflow in 2011 and 2012 (also very dry years in the middle Rio Grande). However, the dramatic drop from 70 percent in January 2014 to 50 percent in February combined with the fact that New Mexico's reservoirs contain little stored water could mean another perilous summer for the Rio Grande silvery minnow and Southwestern willow flycatcher in the middle Rio Grande.

C. Consultation History Concerning Water Management in the Middle Rio Grande

i. 2003 Biological Opinion Issued by the Service

The Service began consulting with Reclamation, the Corps and the non-federal parties⁴ over their water management, river maintenance and flood control activities in the middle Rio Grande in 1996. Over the next seven years, the Service issued three separate biological opinions in 2001, 2002 and 2003 collectively to Reclamation, the Corps and the non-federal parties. Like its biological opinions in 2001 and 2002, the Service's March 17, 2003 biological opinion⁵ ("2003 Biological Opinion") concluded that Reclamation's water and river maintenance operations, the Corps flood control operations, and the related non-federal parties actions "are *likely to jeopardize* the continued existence of the silvery minnow and the flycatcher and adversely modify critical habitat of the silvery minnow."⁶ 2003 Biological Opinion at 84-88 (emphasis added). As a result of its "jeopardy" determination, the Service developed a reasonable and prudent alternative ("RPA"), an incidental take statement ("ITS"), reasonable and prudent measures ("RPMs"), terms and conditions, and conservation recommendations to provide a guide for the water management in the middle Rio Grande over the next decade. *Id.* at 102-110.

The RPA detailed a number of actions that, if implemented together, the Service believed would mitigate the significant negative effects on the listed species and alleviate jeopardy. *Id.* at 87-102. Those mandatory actions incorporate: (1) water operations elements, including a spawning spike to cue reproduction in the silvery minnow (Element A), management of available water to create habitat and allow species to persist in less than ideal conditions (Element B), and

⁴ The non-federal parties included the State of New Mexico and the Middle Rio Grande Conservancy District.

⁵ Biological and Conference Opinions on the Effects of Actions Associated with the Programmatic Biological Assessment of the Bureau of Reclamation's Water and River Maintenance Operations, U.S. Army Corps of Engineers' Flood Control Operation, and Related Non-Federal Actions on the Middle Rio Grande, New Mexico (Consultation #2-22-03-F-0129).

⁶ "Jeopardize the continued existence of" means "to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." See 50 C.F.R. § 402.02.

maintenance of minimum flows in the river during certain times of the year depending on the hydrologic conditions that year (Elements E to N); (2) habitat improvement elements, including restoring river connectivity to allow upstream movement of silvery minnow throughout the middle Rio Grande (Element R), creating riparian habitat and low velocity in-channel aquatic habitat throughout the action area (Element S), increasing the safe channel capacity of the river near San Marcial to allow for essential flooding flows (Element U), and completing the Cochiti environmental baseline study and investigating feasibility of sediment transport from Cochiti Lake (Element W); (3) water quality elements, and (4) reporting elements, among other requirements. *Id.*

In addition to the RPA, the original ITS included in the 2003 Biological Opinion provided the estimated number of silvery minnows and flycatcher territories the agencies could “take” without causing “jeopardy” to the species. *Id.* at 102-105. On August 15, 2005, the Service amended the 2003 Biological Opinion to allow for “take” to be estimated for the silvery minnow on an annual basis (April 1 to March 31). *See* Letter of the Service dated June 15, 2006 (“2006 Amendment”). The Service calculates the level of take each year as a proportion of the 38,000 minnows originally included in the ITS. *Id.* at 3. By April 1 of each year, the Service must transmit a letter to Reclamation, the Corps and the non-federal parties specifying the estimated take for the year. *Id.* at 2.

As required by 50 C.F.R. §402.14(i), the Service specifically integrated the RPA’s requirements into the both the original ITS and the ITS as modified by the 2006 Amendment. The ITS in the 2003 Biological Opinion provides that “[t]he Service has developed the following incidental take statement *based on the premise that the RPA will be implemented.*” *See* 2003 Biological Opinion at 103 (emphasis added). The original ITS also declared that “this level of anticipated take is not likely to result in jeopardy to the silvery minnow [and flycatcher] *when the RPA is implemented.*” *Id.* at 104-105 (emphasis added). The ITS in the 2006 amendment provides “[t]he Service has determined that the level of take in this amended ITS is not likely to result in jeopardy to the silvery minnow *with implementation of the [RPA]*”. 2006 Amendment at 3. Therefore, the exception to the “take” prohibition in the ESA provided in the ITS for the 2003 Biological Opinion as amended assumes implementation of the RPA by Reclamation, the Corps and non-federal agencies in the middle Rio Grande. Thus, the failure by Reclamation, the Corps and the non-federal agencies to implement the RPA invalidates the coverage provided by the ITS and opens the agencies to “take” liability under section 9 of the ESA.

ii. Reinitiation of Consultation Upon Expiration of the Biological Opinion

The 2003 Biological Opinion remained valid for a 10-year term ending on February 28, 2013. *Id.* at 110. However, the 2003 Biological Opinion contains a specific provision that appears to provide a unique opportunity for the agencies to ensure continued compliance with the ESA upon reinitiation of consultation. *Id.* The *Reinitiation Notice* provision provides “[c]onsultation must be reinitiated prior to the expiration of this biological opinion to ensure continued compliance with sections 7 and 9 of the ESA.” *Id.* While the validity of this extension

under the ESA is questionable, any potential coverage that stems from reinitiation of consultation must be linked to compliance with the RPA in the 2003 Biological Opinion and associated ITS.

On February 22, 2013 (prior to the expiration of the 2003 Biological Opinion), the Service reinitiated consultation with Reclamation and the non-federal parties (Consultation #02ENNM00-2013-F-0033), the Corps (Consultation #02ENNM00-2013-F-0034) and the Bosque del Apache National Wildlife Refuge (Consultation #02ENNM00-2013-F-0035) concerning the effects of their proposed water management, river maintenance and flood control activities on the silvery minnow and willow flycatcher. *Id.* During the 2013 irrigation season, Reclamation and the non-federal parties operated pursuant to this so-called “extension” of the 2003 Biological Opinion and RPA. In correspondence with Reclamation at the beginning of the irrigation season, the Service emphasized that “[d]uring this interim period before new biological opinions are issued, *compliance with the 2003 BO remains necessary to alleviate jeopardy to the listed species and adverse modification to designated critical habitat.*” See April 2, 2013 Letter from the Service transmitting 2013 ITS at 1 (emphasis added).

To date, and far beyond the ESA’s deadline for completion of consultation, the Service continues to consult with Reclamation, the non-federal parties and the Bosque del Apache National Wildlife Refuge (“Refuge”) regarding their activities in the middle Rio Grande. Until recently, it appeared the Service anticipated issuing a new biological opinion (to Reclamation and the non-federal parties, the Corps and the Refuge) before the 2014 irrigation season commences on March 1. However, on November 26, 2013, the Corps withdrew from consultation with the Service creating delay and uncertainty regarding the future of a new biological opinion for the middle Rio Grande.

iii. 2013 Modifications of 2003 Biological Opinion RPA

In November of 2012, the Service requested the Middle Rio Grande Endangered Species Collaborative Program (“Collaborative Program”) develop options for managing water “for the persistence of endangered species during the upcoming irrigation season, given the severity of the drought and the poor population status of the Rio Grande silvery minnow.” See May 31, 2013 Memorandum of the Service. The Collaborative Program formed the minnow action team⁷ and it began meeting regularly to determine potential water management options. *Id.*

⁷ The minnow action team consists of representatives of the New Mexico Interstate Stream Commission, the Middle Rio Grande Conservancy District, Albuquerque-Bernalillo County Water Utility Authority, City of Albuquerque Bio Park, New Mexico Department of Game and Fish, Santa Ana Pueblo, the Service, Reclamation, Bosque del Apache National Wildlife Refuge and the Corps. 2013 *Minnow Action Team Report* at 3.

On April 2, 2013, the Service provided its annual ITS to Reclamation and the Corps setting forth the Service's "determination of flow targets and estimated incidental take for the 2013 irrigation season, pursuant to the Service's March 17, 2003, Biological Opinion" ("2013 ITS"). *See* 2013 ITS at 1. The Service notified the agencies that the dry year flow targets (RPA Elements E through G) of the 2003 Biological Opinion remained in effect requiring the agencies to (1) provide continuous flows from Cochiti dam to Elephant Butte from November 16 to June 15 (Element E); (2) provide year-round continuous flows from Cochiti dam to Isleta diversion dam with a minimum flow of 100 cubic feet per second ("cfs") at the Central gauge;⁸ and (3) pump from the low flow conveyance canal to manage river drying below San Acacia diversion dam for the benefit of the flycatchers. *Id.* at 1-2.

In addition, the Service set out the amount of permitted "take" due to channel drying for the 2013 irrigation season using the formulas established in amendment to the 2003 Biological Opinion. *Id.* at 2. The Service permitted take of 2,746 minnows and clarified that "[i]f observed mortality (the number of dead silvery minnows found) exceeds 55 individuals (2,746 divided by 50), the level of anticipated take will have been exceeded." *Id.* The Service's take limit was the lowest it had ever been due to the fact that in the fall of 2012 population surveys discovered no minnows.

On May 16, 2013, the minnow action team presented a proposal for "emergency measures" to the Executive Committee of the Collaborative Program. *See* Minnow Action Team Report dated May 16, 2013. These "emergency actions" included the elimination of the minimum flow requirement of 100 cfs at the Central gauge (Element F of the RPA) in exchange for maintaining some suitable habitat in each reach of the middle Rio Grande (Angostura, Isleta and San Acacia reaches). *Id.* The minnow action team estimated that—without implementation of the "emergency measures"—Reclamation would exhaust its "supplemental water" to maintain the minimum flow requirements by June 15th. *Id.* However, implementing the "emergency measures" would require an amendment to the RPA of the 2003 Biological Opinion. The minimum flow requirements serve as one of the key features in the RPA that avoids jeopardy to the silvery minnow and willow flycatcher. Notwithstanding this fact, the Executive Committee unanimously endorsed these measures.

On May 23, 2013, Reclamation notified the Service that due to drought conditions in the middle Rio Grande it did not believe it could comply with the dry year flow targets required by the RPA in the 2003 Biological Opinion and anticipated that the "take" limit set out in the ITS for 2013 would be exceeded. Reclamation proposed implementing the minnow action team's "emergency actions" for the 2013 irrigation season and requested the Service's approval.

⁸ The "Central gauge" is also known as the USGS Station No. 08330000, Rio Grande at Albuquerque, New Mexico located in Bernalillo County, New Mexico.

On May 31, 2013, in a somewhat cryptic memorandum, the Service appears to endorse implementation of the emergency drought measures proposed by Reclamation. The Service confirmed its understanding in the following paragraph:

As such, we understand that MRG flows are scheduled to be ramped down beginning June 1, 2013, with a goal of conserving water to maintain specific refugial habitats for the silvery minnow in the Angostura, Isleta, San Acacia Reaches, and in the Temp Channel. We understand that utilizing MRGCD infrastructure to route water around the Isleta Reach is paramount to the success of this strategy. The Service confirms that starting river recession between May 25 and June 5, 2013, is within the dates contemplated by the MAT and reflected in their recommendations. The Service believes that action you are taking will have the best possible outcome for the Rio Grande silvery minnow, Southwestern willow flycatcher, and the New Mexico jumping mouse given the severe circumstances associated with the 2013 drought.

May 31, 2013 Memorandum of the Service at 2.

The Service did not explicitly waive the minimum flow requirements in RPA Element F of the 2003 Biological Opinion, but allowed the “emergency measures” to be implemented without any further instruction as to whether or under what conditions the normal operations would resume as hydrologic conditions changed or the impact of such operation on the level of take specified in the 2013 ITS. This action or inaction by the Service is contrary to the clear statement in its 2013 ITS that “[d]uring this interim period before new biological opinions are issued, *compliance with the 2003 BO remains necessary to alleviate jeopardy to the listed species and adverse modification to designated critical habitat.*” See 2013 ITS at 1 (emphasis added).

According to its 2013 salvage data, the Service reported 234 dead minnows during the 2013 irrigations season; 230 of the deaths occurred prior to July 1, 2013. The permitted take specified in the 2013 ITS (observed mortality of 55 individuals) was exceeded by 179 silvery minnows (4 times the permitted take). Neither Reclamation nor the Service reinitiated consultation specifically to address Reclamations violation of the level of take set out in the 2013 ITS.

To summarize, the 2003 Biological Opinion expired by its own terms on February 28, 2013. Upon its expiration, any ITS permitting take incidental to the proposed action also became invalid. Thus, Reclamation, the Corps and the non-federal parties have been operating at their own peril in continuing the agencies’ water management, river maintenance and flood control operations as described in the 2003 Biological Opinion and subject to liability under sections 7 and 9 of the ESA. Even assuming the *Reinitiation Notice* provision of the 2003 Biological Opinion extended the opinion past its expiration, the 2003 Biological Opinion and its ITS have been invalidated by: 1) the widespread non-compliance of Reclamation, the Corps and the non-

federal agencies with the RPA required by section 7(a)(2) of the ESA to prevent jeopardy to the minnow and flycatcher; 2) Reclamation and the non-federal parties exceeding the level of take specified in its 2013 ITS; 3) Reclamation's failure to implement the RPMs and non-discretionary term and conditions of the ITS; and 4) the ongoing failure of the action agencies and the Service to reinitiate consultation upon Reclamation and the non-federal agencies exceeded the permitted level of take in the ITS, modified an essential element of the RPA in a way not previously considered by the 2003 Biological Opinion, and the Service's revision to the critical habitat of the flycatcher. Therefore, until the Service issues a new biological opinion, Reclamation and the non-federal agencies remain without a valid permit to take any individual silvery minnow or willow flycatcher during the 2014 irrigation season.

III. The Service's Acquiescence to the "Emergency Measures" Requested by Reclamation in 2013 to Modify the RPA Violates the ESA

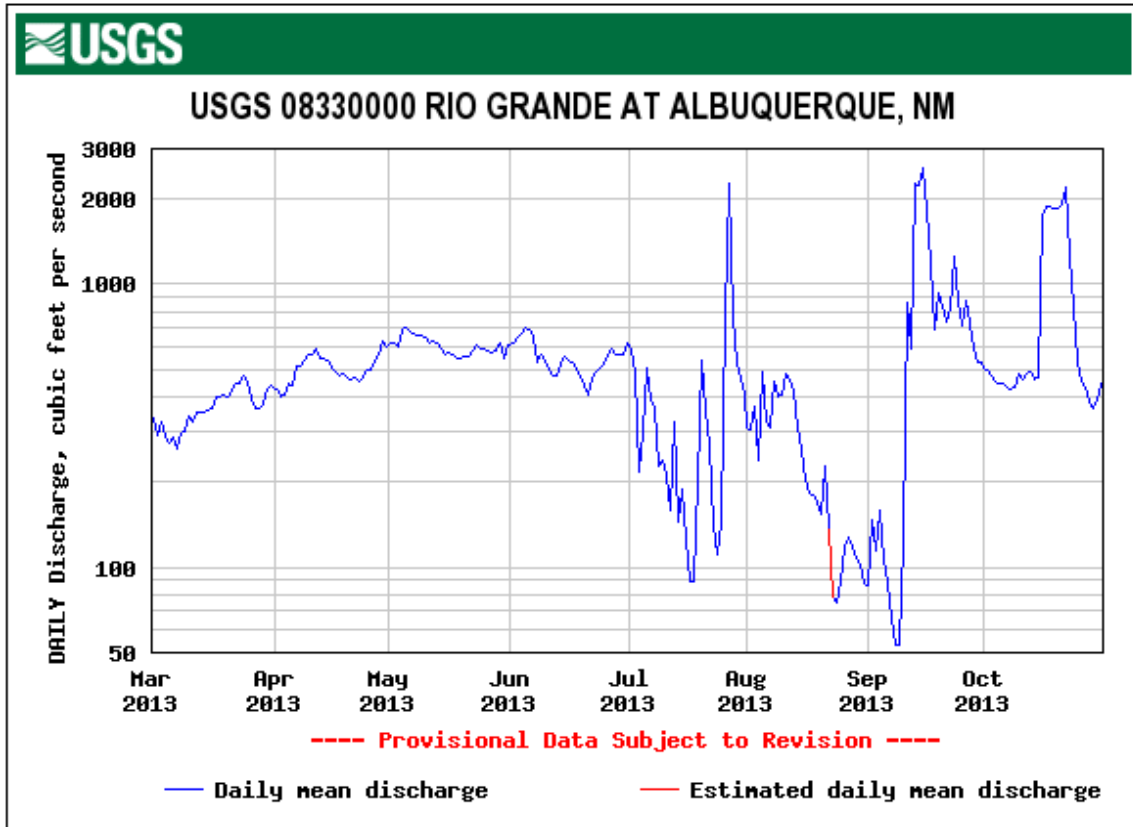
The Service cannot approve ad hoc modifications of the RPA detailed in the 2003 Biological Opinion without insuring that the modification will not jeopardize the continued existence of the species.⁹ *See* 16 U.S.C. § 1536(a)(2). In 2013, the Service clearly specified that under the so-called extension of the 2003 Biological Opinion and until it issued a new biological opinion that "*compliance with the 2003 BO remains necessary to alleviate jeopardy to the listed species and adverse modification to designated critical habitat.*" *See* 2013 ITS at 1 (emphasis added). However, a few months after the 2013 ITS was issued, the Service appeared to approve a significant modification of Element F of the RPA to the 2003 Biological Opinion waiving the minimum flow requirements at the Central gauge for the remainder of the irrigation season. Further, the Service failed to reinitiate a specific consultation with Reclamation and the non-federal agencies when it became clear on July 1, 2013 that the level of take in the 2013 ITS had been exceeded.

The Service failed to meet its substantive obligation under section 7(a)(2) of the ESA to insure that the modification to the RPA—removing the minimum flow requirements at the Central gauge—would not jeopardize the silvery minnow or willow flycatcher. The May 31, 2013 Memorandum of the Service was unclear regarding what activities it authorized and did not provide any conditions under which the waiver might be lifted. For example, once Reclamation was given approval to violate RPA Element F, the flows at the Central gauge dropped below 100 cfs on at least eleven separate days in 2013. *See* Table 1, attached hereto and Figure 2, on the next page, showing the streamflow data from the Central gauge from March to October 2013.¹⁰

⁹ Even if the action agencies were consulting with the Service at that time in order to develop a new biological opinion, the Service still retains a substantive duty under section 7(a)(2) to prevent jeopardy to the species in the short term. The Service has failed to fulfill this duty during the irrigation season in 2013.

¹⁰ *See* http://nwis.waterdata.usgs.gov/nm/nwis/uv?cb_00060=on&format=gif_default&period=&begin_date=2013-03-01&end_date=2013-10-31&site_no=08330000.

**Figure 2. USGS Streamflow Data
at Central Gauge from March to October 2013**



Even after it began to rain in the middle Rio Grande in 2013, Reclamation and the non-federal agencies continued to operate under the “emergency measures” and not meeting the minimum flow requirement at the Central gauge. During at least one point in the summer, the Middle Rio Grande Conservancy District was operating its water bank (the most junior water users in the basin) when these “emergency measures” were still operational. The Service failed to fulfill its duty to insure no jeopardy would result to the silvery minnow. Further, as a result of Reclamation’s water operations in 2013, 234 minnows were killed due to river drying in excess of the 55 observed mortality threshold set by the Service. In addition, the Service did not immediately reinitiate consultation with Reclamation and the non-federal agencies as required by 50 C.F.R. § 402.14(i)(4) and 402.16(a) once it became clear that the specified level of take had been exceeded.

It should be emphasized that by allowing Reclamation and the non-federal agencies to modify the minimum flow requirements of the RPA in the 2003 Biological Opinion in 2013 and

exceed the specified take limit in the 2013 ITS, the Service compounded and approved of the already widespread non-compliance with the RPA and the 2003 Biological Opinion.¹¹

IV. Violations of Section 7 of the ESA

Guardians hereby puts the Service on notice that it will promptly seek judicial relief if the agency fails to remedy the ongoing and imminent future violations of the ESA. 16 U.S.C. §§ 1536(a)(2).

Guardians hereby puts the Service on notice that it is violating section 7 of the ESA, 16 U.S.C. § 1536(a)(2), and its implementing regulations, 50 C.F.R. § 402 *et seq.*, by: 1) failing to insure that the ongoing actions of Reclamation, the Corps and non-federal agencies in the middle Rio Grande are not likely to jeopardize the continued existence of the silvery minnow, willow flycatcher or other listed or proposed species; and 2) failing to insure that the ongoing actions of Reclamation, the Corps and non-federal agencies in the middle Rio Grande are not likely to result in the destruction or adverse modification of the designated critical habitat of the silvery minnow and/or willow flycatcher. 16 U.S.C. § 1536(a)(2).

Guardians hereby puts the Service on notice that its is violating section 7(b) of the ESA, 16 U.S.C. § 1536(b) by failing to conclude formal consultation with Reclamation, the non-federal agencies and the Refuge with in 90 days of February 22, 2013, and failing to specify a date when consultation will be completed if the parties mutually agreed to a different period.

Guardians hereby puts the Service on notice that it is violating 50 C.F.R. § 402.14(i)(4) and 402.16(a) by failing to immediately reinitiate consultation upon learning that Reclamation and the non-federal agencies exceeded the level of take specified in the 2013 ITS.

Guardians hereby puts the Service on notice that it is violating 50 C.F.R. § 402.16(c) and (d), respectively by: 1) failing to reinitiate consultation with Reclamation for modifying an essential element of the RPA (Element F) to the 2003 Biological Opinion in a way that was not previously considered by the Service; and 2) failing to conduct a separate consultation or incorporate into their ongoing consultation an analysis of its revised critical habitat designation for the Southwestern willow flycatcher.

¹¹ Reclamation, the Corps, and the non-federal agencies have failed to comply with the following RPA elements of the 2003 Biological Opinion over the past decade: Element A (one-time increase in flows to create spawning spike); Elements E and F (year-round and minimum flows requirement); Element R (fish passage at San Acacia and Isleta diversion dams); Element S (habitat restoration projects throughout the middle Rio Grande); Element U (realignment of San Marcial railroad bridge); and Element W (study of sediment transport), among others. *See also* the Notice of Intent to Sue of WildEarth Guardians dated February 4, 2013, incorporated herein by this reference.

V. Noticing Party

WildEarth Guardians is a non-profit, public interest, environmental advocacy, and conservation organization. Guardians' mission is to protect and restore wildlife, wild rivers, and wild places in the American West. Guardians has over 43,000 members and activists, many of whom live, work, and recreate in areas affected by the ESA violations described herein. Guardians and its members have a substantial interest in the conservation and recovery of the Rio Grande silvery minnow, Southwestern willow flycatcher, and other listed species in the middle Rio Grande and are adversely affected by the State of Colorado's failure to protect the listed species and their habitat in compliance with the ESA.

The name, address and telephone number of the party giving this notice is as follows:

WildEarth Guardians
516 Alto Street
Santa Fe, New Mexico 87501
(303) 884-2702
jpelz@wildearthguardians.org

VI. Conclusion

One of the purposes of the Endangered Species Act citizen suit provision, 16 U.S.C. § 1540(g), is to encourage discussions among parties in order to avoid potential litigation. We encourage the Service to seriously consider the concerns detailed in this notice and ask that you discuss the steps the agency may taken going forward to remedy these legal violations. However, if the aforementioned violations of the ESA are not remedied within 60 days of the date of this letter, we intend to file a citizen's suit in federal court seeking preliminary and permanent injunctive relief, declaratory relief, and attorneys' fees and costs concerning these violations.

If you believe any of the above information is incorrect, have any additional information that might help avoid litigation, or wish to discuss this matter further, please feel free to contact me at the phone or email address listed below.

Sincerely,

Jen Pelz
Wild Rivers Program Director
jpelz@wildearthguardians.org
303-884-2702

Table 1.
Rio Grande at Albuquerque, NM
Station No. 08330000

Daily Mean Discharge, cubic feet per second

DATE	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct
	2013	2013	2013	2013	2013	2013	2013	2013
1	335 ^P	435 ^P	617 ^P	612 ^P	620 ^P	310 ^P	86 ^P	507 ^P
2	294 ^P	428 ^P	617 ^P	617 ^P	579 ^P	306 ^P	146 ^P	497 ^P
3	327 ^P	400 ^P	604 ^P	651 ^P	484 ^P	371 ^P	115 ^P	476 ^P
4	286 ^P	407 ^P	691 ^P	669 ^P	218 ^P	239 ^P	158 ^P	454 ^P
5	274 ^P	447 ^P	697 ^P	705 ^P	300 ^P	492 ^P	106 ^P	444 ^P
6	286 ^P	436 ^P	682 ^P	696 ^P	504 ^P	326 ^P	88 ^P	446 ^P
7	262 ^P	514 ^P	669 ^P	652 ^P	388 ^P	312 ^P	66 ^P	433 ^P
8	297 ^P	514 ^P	662 ^P	529 ^P	363 ^P	451 ^P	53 ^P	424 ^P
9	301 ^P	537 ^P	663 ^P	564 ^P	229 ^P	397 ^P	53 ^P	431 ^P
10	344 ^P	561 ^P	651 ^P	527 ^P	240 ^P	403 ^P	123 ^P	483 ^P
11	326 ^P	560 ^P	624 ^P	494 ^P	209 ^P	479 ^P	856 ^P	463 ^P
12	351 ^P	589 ^P	631 ^P	478 ^P	160 ^P	458 ^P	593 ^P	480 ^P
13	354 ^P	549 ^P	620 ^P	477 ^P	326 ^P	418 ^P	2,260 ^P	491 ^P
14	353 ^P	543 ^P	589 ^P	524 ^P	145 ^P	313 ^P	2,250 ^P	459 ^P
15	358 ^P	542 ^P	565 ^P	554 ^P	189 ^P	258 ^P	2,590 ^P	464 ^P
16	361 ^P	504 ^P	573 ^P	538 ^P	126 ^P	205 ^P	1,810 ^P	1,730 ^P
17	401 ^P	486 ^P	561 ^P	532 ^P	89 ^P	184 ^P	1,180 ^P	1,870 ^P
18	401 ^P	472 ^P	543 ^P	499 ^P	89 ^P	180 ^P	688 ^P	1,870 ^P
19	404 ^P	481 ^P	550 ^P	477 ^P	201 ^P	170 ^P	933 ^P	1,850 ^P
20	399 ^P	469 ^P	555 ^P	438 ^P	535 ^P	155 ^P	836 ^P	1,850 ^P
21	421 ^P	461 ^P	554 ^P	408 ^P	358 ^P	227 ^P	741 ^P	1,920 ^P
22	446 ^P	464 ^P	583 ^P	457 ^P	269 ^P	135 ^{e P}	819 ^P	2,190 ^P
23	448 ^P	456 ^P	608 ^P	491 ^P	139 ^P	78 ^{e P}	1,260 ^P	1,250 ^P
24	472 ^P	465 ^P	589 ^P	507 ^P	111 ^P	75 ^P	856 ^P	835 ^P
25	449 ^P	499 ^P	590 ^P	519 ^P	143 ^P	89 ^P	716 ^P	532 ^P
26	391 ^P	500 ^P	580 ^P	568 ^P	773 ^P	118 ^P	875 ^P	456 ^P
27	361 ^P	537 ^P	577 ^P	592 ^P	2,270 ^P	128 ^P	719 ^P	429 ^P
28	362 ^P	565 ^P	580 ^P	564 ^P	758 ^P	118 ^P	594 ^P	382 ^P
29	377 ^P	628 ^P	620 ^P	568 ^P	519 ^P	107 ^P	533 ^P	363 ^P
30	423 ^P	603 ^P	545 ^P	565 ^P	470 ^P	102 ^P	527 ^P	385 ^P
31	442 ^P		606 ^P		404 ^P	88 ^P		446 ^P
COUNT	31	30	31	30	31	31	30	31
MAX	472	628	697	705	2,270	492	2,590	2,190
MIN	262	400	543	408	89	75	53	363