IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

WILDEARTH GUARDIANS, Plaintiff, v. UNITED STATES BUREAU OF RECLAMATION and UNITED STATES ARMY CORPS OF ENGINEERS, Federal Defendants.	)	Case No. _____ **COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

INTRODUCTION

1. The Rio Grande originates in the San Juan Mountains of Colorado and travels about 1,900 miles south to the Gulf of Mexico near Brownsville, Texas. During its journey, the river passes through the rocky canyons, deep gorges and wide-open valleys of Colorado, New Mexico and Texas, and serves as the United States' border with Mexico.

2. Flows in the Rio Grande originate from snow melting out of the southern Rocky Mountains in Colorado and northern New Mexico. As the temperatures rise in spring, so do flows in the river creating a pulse of water in the Rio Grande between April and June of each year. Summer monsoonal rainfall also contributes significantly to the flows of the Rio Grande. These highly variable and sometimes considerable snowmelt and rain events throughout the valley help to provide dynamic flows in and sustain this historically perennial river.

3. Along its path, the Rio Grande supports life where it could not have otherwise existed. The river provides unique and varied riverine and riparian communities that sustain a diverse array of plants, fish, and wildlife. For example, the river nourishes and regenerates the

extensive cottonwood and willow forest, or "bosque," that is unique to central New Mexico. The Rio Grande also provides an artery of life to numerous human settlements centered around and adjacent to the banks of the river, including the Pueblos and the cities and towns scattered throughout the valley.

4. The Rio Grande also supports diverse and varied economies throughout the basin. The fertile soils in the floodplain of the river supports agriculture from Pueblo settlements to family farms to commercial agriculture. Communities like Taos rely on the flows and magnificence of the river in its vast gorge to attract tourists and provide recreational opportunities that support the economy of northern New Mexico. Supported by and reminiscent of the historic Rio Grande, the Bosque del Apache National Wildlife Refuge located south of Socorro, New Mexico – one of the crown jewels of the Rio Grande – draws tourists, photographers and bird and wildlife watchers to catch a glimpse of rare migratory birds and interesting wildlife, also while sustaining the broader local economy of Socorro County.

5. The beauty, diversity and iconic nature of the Rio Grande also has inspired and continues to inspire authors, photographers, artists, and filmmakers to showcase its exceptional qualities. The history and cultural values associated with the flows of the Rio Grande valley go far beyond any measurable monetary worth.

6. However, the irreplaceable values of the Rio Grande are increasingly threatened by the operations and activities of Defendants United States Bureau of Reclamation ("Reclamation") and United States Army Corps of Engineers ("Corps"). Together these two federal agencies – collectively referred to in this Complaint as "Federal Defendants" – have significant discretionary authority as to how much water is stored in reservoirs along the Rio Grande, how much water flows in the Rio Grande, when that water flows in the Rio Grande, and

how much water is put to agricultural use in the Rio Grande. To date, the Federal Defendants have exercised and failed to exercise their discretionary authorities in ways that imperil the continued existence of two endangered species that are listed for the protections afforded by the Endangered Species Act ("ESA"): the Rio Grande silvery minnow and the Southwestern willow flycatcher.

7. With this lawsuit, Plaintiff WildEarth Guardians ("Guardians") seeks to protect and restore flows in the Rio Grande and the associated riparian ecosystems it sustains. For far too long, the Federal Defendants' operations and activities in managing the Rio Grande have been unbalanced and have failed to sustain the multitude of values that the river provides. The primary objective of this litigation is to secure the congressionally mandated protections of the ESA to protect and conserve the silvery minnow and the willow flycatcher. A favorable result in this lawsuit will have the secondary and entirely salutary effect of conserving the Rio Grande ecosystem, one of New Mexico's natural treasures, for the use and enjoyment of current and future generations of New Mexicans.

JURISDICTION AND VENUE

8. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question jurisdiction), 28 U.S.C. § 2201 (declaratory judgment), 28 U.S.C. § 2202 (injunctive relief), and 16 U.S.C. § 1540(g) (ESA citizens' suit). As required by the ESA, 16 U.S.C. § 1540(g), Guardians has provided sixty days' notice of intent to sue before bringing this action.

9. Venue is properly vested in this Court pursuant to 16 U.S.C. § 1540(g)(3)(A), as all or part of the ESA violations alleged in this Complaint occurred in the District of New Mexico; and 28 U.S.C. § 1391(e), as a substantial part of the events and omissions giving rise to the claims occurred in this judicial district. Additionally, the Plaintiff and the Federal

Defendants all reside in this judicial district.

PARTIES

10. Plaintiff WILDEARTH GUARDIANS is a non-profit environmental advocacy and conservation organization based in Santa Fe, New Mexico. Guardians has more than 43,000 members and activists. More than 4,000 of these members and activists reside in New Mexico. Guardians and its members are dedicated to protecting and restoring the wildlife, wild places, and wild rivers of the American West.

11. One of Guardians' main endeavors is its "Wild Rivers Program." A specific purpose of this program is to work towards the enhancement and restoration of riverine ecosystems. Amongst other concerns, the organization and its members are concerned about impairment of rivers due to water management activities, point and nonpoint source pollution, and physical modification of river ecosystems through channelization and the construction of levees. Guardians works through administrative appeals, litigation, public outreach, and other efforts to assure that all federal agencies fully comply with the provisions of all pertinent federal environmental laws.

12. For the past twenty years, the focus of Guardians' Wild Rivers Program has been its "Rio Grande: America's Great River" campaign. The purpose of this campaign is to protect and restore the Rio Grande by ensuring that the river has continuous flows and that federal government management policies promote a healthy, ecologically functional Rio Grande that supports diverse native species.

13. Guardians has participated extensively in agency proceedings and other matters relating to the Rio Grande ecosystem broadly, and advocated for the the survival and recovery of the Rio Grande silvery minnow and Southwestern willow flycatcher specifically.

14. Guardians and its members use and enjoy the Rio Grande and its tributaries and adjoining public lands in New Mexico for recreational, scientific, aesthetic, spiritual, commercial, professional, and other purposes and will continue to do so in the future. Guardians and its members derive – or, but for the endangered status of the Rio Grande silvery minnow and Southwestern willow flycatcher, would derive – recreational, scientific, aesthetic, spiritual, commercial, and professional benefits from the existence in the wild of these species through observation, study, photography, and other pursuits.

15. The above-described aesthetic, conservation, recreational, scientific, commercial, professional and other interests of Guardians and its members have been, are being, and, unless the relief prayed for is granted, will continue to be adversely affected and irreparably injured by the failure of the Federal Defendants to comply with their mandatory duties under the ESA. Guardians brings this action on behalf of itself and on behalf of its injured members.

16. Defendant UNITED STATES BUREAU OF RECLAMATION ("Reclamation") is an agency of the United States within the Department of the Interior. As described below in this Complaint, Reclamation owns the water rights and the physical infrastructure of the Middle Rio Grande Project, including but not limited to El Vado Dam and the four diversion structures on the Rio Grande that are used to divert water out of the Rio Grande and onto the irrigated lands lying within the Middle Rio Grande Conservancy District ("MRGCD"). Reclamation maintains discretionary control and management authority over the use of those water rights and physical facilities, and has a mandatory obligation to assure that the use of those water rights and physical facilities complies in all respects with the mandatory requirements of the ESA. Reclamation also

controls the storage and delivery of federal project water[1] in the San Juan-Chama Project, and maintains discretionary control and management authority over the delivery and use of that water. Reclamation has a mandatory obligation to assure that the storage, delivery, and use of that water is consistent with the mandatory requirements of the ESA.

17. Defendant UNITED STATES ARMY CORPS OF ENGINEERS ("Corps") is an agency of the United States within the Department of the Army. The Corps owns, operates, and maintains Abiquiu Dam, Cochiti Dam, and several other smaller water storage facilities along the Middle Rio Grande and the Chama River, which were constructed and/or enlarged and improved in connection with the Middle Rio Grande Project. The Corps maintains discretionary control and management authority over the operation of those dams. The Corps has a mandatory obligation to assure that the operation of those dams complies in all respects with the mandatory requirements of the ESA.

LEGAL BACKGROUND

18. The structure and function of the ESA, 16 U.S.C. § 1531 *et seq.*, are premised on Congress's finding that the biggest threat to the continued survival of threatened and endangered wildlife species is the destruction of their natural habitats. Accordingly, the ESA contains various provisions that are specifically intended to halt the trend of habitat destruction.

19. The expressed purpose of the ESA is "to provide a program for the conservation [of] endangered species and threatened species" and "to provide a means whereby the ecosystems upon which [such] species depend may be conserved." 16 U.S.C. § 1531(b).

20. Pursuant to the ESA, the United States Fish and Wildlife Service ("FWS") has the

[1] Unless specifically limited, the phrase "federal project water" refers collectively to that water which is stored and delivered though the Middle Rio Grande Project and the San Juan-Chama Project.

duty to list imperiled species as threatened or endangered solely on the basis of biological criteria without regard to the economic impact of listing. 16 U.S.C. § 1533(c).

21. After a species is listed as threatened or endangered under the ESA, Section 7(a)(1) of the ESA imposes important obligations on federal agencies to "conserve" such species. 16 U.S.C. § 1536(a)(1). For purposes of ESA compliance, the duty to "conserve" requires that federal agencies use their authorities to assure the survival of threatened and endangered species, to protect their critical habitats, and to promote the recovery of the species to the point at which they no longer require the protections of the ESA.

22. Pursuant to Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), federal agencies have a mandatory substantive duty to "insure that any action . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification" of the species' designated critical habitat.[2]

23. In order to assure that federal agencies comply with their substantive Section

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[2] Hereafter in this Complaint, the statutory phrase "destruction or adverse modification" will be shorted to "adverse modification" or, when contextually appropriate, "adversely modify." The ESA defines "critical habitat" as follows:

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the [Act], on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and
>
> (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the [Act], upon a determination by the Secretary that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5)(A).

7(a)(1) duty to conserve and their substantive Section 7(a)(2) duty to insure against jeopardy or adverse modification of designated critical habitat, Section 7(a)(2) of the ESA mandates a "formal consultation" process which requires all federal agencies to consult with the FWS as to those projects that may adversely affect a listed species or may adversely modify designated critical habitat. 16 U.S.C. § 1536(a)(2). The duties set out in Section 7(a)(2) are known as the "Section 7 procedural duties."

24. The first step in the Section 7(a)(2) formal consultation process is a written request for the initiation of formal consultation from the action agency to the FWS. 16 U.S.C. § 1536(c), 50 C.F.R. § 402.14(c). The phrase "action agency" refers to the federal agency that proposes to implement or provide funding for a project that may adversely affect listed species. This written request includes submission of a Biological Assessment ("BA") prepared by the action agency in which the action agency identifies the action which it proposes to implement and assesses the expected impact of the proposed action on listed species and their designated critical habitats. 16 U.S.C. § 1536(c), 50 C.F.R. §§ 402.12, 402.14.

25. The formal Section 7(a)(2) consultation process, including the FWS's analysis of jeopardy to species and adverse effects to critical habitat, concludes with the issuance of a Biological Opinion ("BiOp") by the FWS.

26. In undertaking its Section 7(a)(2) jeopardy and critical habitat analyses during the course of preparing a BiOp, the FWS must consider how a proposed action affects a species' prospects for *recovery*, as well as its prospects for *survival.* A species' prospects for recovery are adversely affected when an action's impacts reduce the reproduction, numbers, and/or distribution of the species. 50 C.F.R. § 402.02, *National Wildlife Federation v. National Marine Fisheries Service*, 524 F.3d 917, 932 (9th Cir. 2008).

27. Throughout the Section 7(a)(2) formal consultation process – including the development of both the BA and the BiOp – the action agency and the FWS must utilize the "best scientific and commercial data available." 16 U.S.C. § 1536(a)(2), 50 C.F.R. §§ 402.14(f), 402.14(g)(8).

28. In the BiOp that it issues at the conclusion of a formal consultation process, the FWS determines whether a proposed agency action comports with the action agency's Section 7(a)(2) substantive duties. If the FWS finds that a proposed agency action will jeopardize a listed species or adversely modify its designated critical habitat, the FWS formulates a "Reasonable and Prudent Alternative" ("RPA") which avoids that effect.

29. If the FWS makes a determination that a proposed action will jeopardize a species or adversely modify critical habitat and issues an RPA to avoid that effect, the action agency must either implement the RPA or seek relief from the Endangered Species Committee (colloquially known as the "God Squad"). 16 U.S.C. § 1536(e). The Endangered Species Committee is a committee of seven cabinet-level members which has the authority to exempt a federal project from the requirements of Section 7, thereby accelerating a species' decline towards extinction.

30. If an action agency modifies the action which is the subject of a BiOp (as modified by an RPA, if any) in such a way that implementation of the action may affect a listed species or its designated critical habitat in a manner not addressed in the original BiOp, such modification constitutes a violation of the agency's substantive and procedural duties under Section 7(a)(2).

31. During the course of the Section 7(a)(2) formal consultation process, an action agency action is prohibited by Section 7(d) of the ESA from taking any action that would result

in irreversible and irretrievable effects to listed species. 16 U.S.C. § 1536(d).

32. Section 9 of the ESA and its implementing regulations prohibit any person, including any federal agency, from "taking" a listed species. 16 U.S.C. § 1538(a)(1); 50 C.F.R. § 227.21. Taking is defined broadly under the ESA to include harming, harassing, or killing a protected species either directly or by degrading its habitat sufficiently to significantly impair essential behavioral patterns. 16 U.S.C. § 1532(19); 50 C.F.R. § 17.3.

33. To maintain compliance with Section 9, a federal agency may cause the "take" of a listed species incidental to an otherwise lawful activity only after obtaining an Incidental Take Statement ("ITS") from the FWS. 16 U.S.C. §§ 1536(b)(4), 1536(o). The FWS incorporates an ITS into the BiOps that it issues, if it finds that implementation of the action that is the subject of a BiOp (as modified by the RPA, if any) will result in the "incidental take" of individuals of a listed species. 16 U.S.C. § 1536(b)(4).

34. An ITS sets forth the amount of incidental take that is permitted, and that is therefore exempt from the take prohibition of Section 9. *Id.* In every ITS, the FWS specifies the amount of incidental take that is expected to occur as a result of the implementation of the federal action which is the subject of the BiOp. 16 U.S.C. § 1536(b)(4)(C)(i), 50 C.F.R. § 402.14(i)(1)(I). Any take above the amount specified in the ITS constitutes a violation of Section 9.

35. Additionally, if the FWS incorporates an RPA into a BiOp (which the FWS is required to do in those instances when a proposed agency action will result in jeopardy or adverse modification of critical habitat) and the action agency fails to implement the RPA, then the ITS has no legal effect and the action agency may not implement any activity that results in take of a listed species.

FACTUAL BACKGROUND

I. Listed Species in the Middle Rio Grande and the impacts of Federal Defendants' Middle Rio Grande operations and activities on those species

A. Rio Grande Silvery Minnow *(Hybognathus amarus)*

36. The Rio Grande silvery minnow is a small, relatively heavy-bodied minnow, with small eyes and a small, slightly oblique mouth. Adults reach about 3.5 inches in length. The back, sides, and abdomen of the minnow are silver with a green dorsal stripe. The silvery minnow is pictured here.[3]

37. Preferred habitat for the silvery minnow includes stream margins, side channels, and off-channel pools where water velocities are low or reduced from main channel velocities. Within this habitat, silvery minnows are found in sandy bottom areas with aquatic vegetation and instream debris. The silvery minnow does not tend to occupy stream reaches characterized by straight and narrow channels with rapid flows.

38. The silvery minnow was historically one of the most abundant and widespread aquatic species in the entire Rio Grande, occurring from Espanola, New Mexico, downstream

[3] Photo credit: Aimee Robetson (U.S. Fish & Wildlife Service)

nearly 1,000 miles to the Gulf of Mexico. The silvery minnow also occurred in much of the Pecos River. The silvery minnow has been extirpated from more than 95% of its historical range and today only occupies a 174-mile stretch of the Middle Rio Grande from Cochiti Dam in Sandoval County to the headwaters of the Elephant Butte Reservoir in Socorro County.

39. This 174-mile stretch is fragmented by the four diversion dam structures associated with the Middle Rio Grande Project: the Cochiti, Angostura, Isleta, and San Acacia diversion dams. These structures constitute physical barriers to the upstream passage of silvery minnows.

40. Silvery minnow spawning is triggered by and corresponds with high or peak spring flows in the Middle Rio Grande that historically occurred between March and June as a result of snow melt runoff. Once spawning occurs, the associated peak flows carry the semi-buoyant eggs downstream and the young rear in broad sandy-bottomed reaches of the river.

41. Under natural conditions, some newly hatched fish swim upstream and rear in habitats upstream of the locations where they hatched. However, because diversion dams associated with the Middle Rio Grande Project prevent the species from migrating back upstream once the eggs are hatched downstream, approximately 70% of the entire population of Rio Grande silvery minnow currently exists below the San Acacia Diversion Dam (the furthest downstream of the four diversion dams) in a 58-mile stretch of the Middle Rio Grande.

42. Monitoring data shows that during some periods of the year, almost the entire silvery minnow population exists downstream of the San Acacia Diversion Dam. This is the reach of the Middle Rio Grande which is most susceptible to river drying as a result of the Federal Defendants' water management operations in the Middle Rio Grande.

43. The FWS listed the Rio Grande silvery minnow as an endangered species under

the ESA in 1994 and designated a 157-mile reach of the Middle Rio Grande as critical habitat in 1999. 59 Fed. Reg. 36,988 (July 20, 1994); 64 Fed. Reg. 36,274 (July 6, 1999). The initial rule designating critical habitat for the silvery minnow was vacated by court order in 2000, and a new rule re-designating critical habitat was issued on February 19, 2003. 68 Fed. Reg. 8,088.

44. The FWS listed the silvery minnow as endangered due to, *inter alia*, reductions in stream flow, dewatering of extended lengths of the river channel as a result of diverting river flow for agricultural purposes, alteration of the natural hydrograph by dams and other artificial features, and channelization.

45. In April of 2013, the Middle Rio Grande Endangered Species Collaborative Program (a consortium of 17 federal agencies, state agencies, Pueblos, and the MRGCD which was founded by former U.S. Senator Domenici) released a report analyzing silvery minnow population trends since 1993. The report concludes that the population of silvery minnows in 2012 (the latest data set available at the time that the report was prepared) was lower by an order of magnitude than the population of silvery minnows in 1994 when the species was listed.

46. The authors of the report state that changes in silvery minnow populations "appear to be closely related to the timing, magnitude, and duration of flows during spring and summer."

47. The report's authors note that population monitoring efforts in October of 2012 failed to yield any silvery minnows at all, the first time that such an event had occurred since population monitoring began in February of 1993.

48. In further connection with the declining trend in silvery minnow populations, the report states that "[t]he estimated densities of Rio Grande silvery minnow were significantly lower . . . in 2010, 2011, or 2012 as compared with 2007, 2008, or 2009."

49. Finally, the report's authors conclude that "[t]he extremely low densities of Rio Grande silvery minnow in 2012 appear to indicate that current management efforts (e.g. stocking, salvage, habitat restoration, flow manipulation etc.) are not sufficiently buffering the population against substantial declines" and that "it appears that additional efforts/activities will be required to yield robust self-sustaining populations of Rio Grande silvery minnow in the Middle Rio Grande over time."

50. More recent data, appearing in the March 3, 2014 Salvage Report prepared by the Middle Rio Grande Endangered Species Collaborative Program, shows that the silvery minnow population continued to decline in 2013. The Salvage Report's authors state that "[w]e found fewer [minnows] in 2013 than in any year since 2003." The authors further state the lack of a spring spawning flow and river drying in the early summer of 2013, combined with the already low level of silvery minnows in the river from the preceding year, "resulted in extremely few wild [silvery minnows] collected during 2013 salvage operations" and that this finding "reinforces the severity of the situation."

51. The March 3, 2014 Salvage Report concludes that "[s]alvage data make it apparent that river conditions and management over the last three years cannot support [silvery minnow] recruitment" and that "[i]f no changes to in-stream water availability occur, [silvery minnows] will continue to be fully dependent on hatchery stocking."

52. On May 6, 2013, the FWS issued a "Hydrologic Objective" for the Middle Rio Grande which is its "recommendation for water needed to support a wild silvery minnow population in the Middle Rio Grande . . . and ultimately achieve a self-sustaining population." According to the FWS, the Hydrologic Objective "is based on the best available scientific and commercial information on the relationship between average density of silvery minnows

measured over 20 years and associated hydrologic variables measured during those same years."

53. The Hydrologic Objective acknowledges that physical modifications to the Middle Rio Grande – such as fish passage at diversion dams and increased safe channel capacity – are critical to the survival of the silvery minnow.

54. At the same time, the Hydrologic Objective states that "[w]ater is the key to reproduction, survival, and in an intermittent stream, it is also key to distribution." For this reason, the Hydrologic Objective "is focused on water needs to protect the silvery minnow and improve its status in [the Middle Rio Grande]."

55. Insofar as water needs are concerned, the Hydrologic Objective focuses on two life stages of the silvery minnow: first, reproduction (which is addressed by the "Age 0 Strategy"), and second, survival (which is addressed by the "Age 1+ Strategy").

56. The Age 0 Strategy is intended to induce silvery minnow spawning by providing a spring-time peak flow in the Middle Rio Grande that mimics a natural flow associated with snow melt in timing, magnitude, and duration. The Hydrologic Objective states that "[t]he minimum acceptable Age 0 Strategy would be a discharge of 2,740 cfs [cubic feet per second] for 7 days in May."

57. The Age 1+ Strategy is designed to secure the amount of adult survival necessary to assure that the silvery minnow does not become extinct. The Hydrologic Objective specifies that this requires that there are no more than 63 low flow days (<150 cfs in summer and <300 cfs in winter) at the San Acacia gage each year. Furthermore, the Hydrologic Objective states that as part of the Age 1+ Strategy, the amount of river drying in the Middle Rio Grande should be limited to 40 miles, that the river not be allowed to dry at a rate of greater than 4 miles per day, and that wetted reaches be continually maintained below the San Acacia and Isleta diversion

dams.

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

58. The Southwestern willow flycatcher is a small migratory bird approximately six inches long. It has a grayish-green back and wings, whitish throat, light grey-olive breast, and pale yellowish belly. The willow flycatcher is pictured here.[4]

59. The willow flycatcher inhabits the streamside and wetland thickets of New Mexico and Arizona, and southern portions of Nevada, Utah, and California. River features such as broad floodplains, water, saturated soils, and fine sediments help maintain desirable willow flycatcher streamside habitats for nesting, foraging, migration, dispersal, and shelter.

60. On February 27, 1995, the FWS listed the Southwestern willow flycatcher as an endangered species, and designated critical habitat on July 22, 1997. 60 Fed. Reg. 10,694 (Feb. 27, 1995); 62 Fed. Reg. 39,129 (July 22, 1997). Pursuant to Court order, the FWS has modified

[4] Photo credit: Jim Rorabaugh (U.S. Fish & Wildlife Service)

its critical habitat designation for the willow flycatcher several times since the original designation in 1997 including, most recently, in 2013. 78 Fed. Reg. 344 (Jan. 2, 2013). At the time of listing, the known willow flycatcher population was estimated between 300 and 500 pairs. 60 Fed. Reg. at 10,711.

61. In its listing rule, the FWS found that the decline of the Southwestern willow flycatcher resulted from loss of habitat, including adverse modifications of riparian habitat necessary for the breeding and successful reproduction of the willow flycatcher as a result of human development, channelization, changes in surface water hydrologic regimes, introduction of alien species, and other activities. *Id*. at 10,714.

62. The FWS found that reduced peak flows, channelization, and reduced sediment in the Middle Rio Grande below Cochiti Dam has eliminated thousands of acres of willow flycatcher habitat. The lack of large peak flows combined with channelization causes narrowing of the Rio Grande channel and eliminates overbank flooding, both of which limit development of the backwater habitats necessary for willow flycatcher survival in the Middle Rio Grande. The 235 miles of levees between Cochiti Dam and Elephant Butte Reservoir that have restricted the width of the floodplain and disconnected the river from most of its natural floodplain have further reduced the amount and quality of suitable habitat for the willow flycatcher.

II. Federal Management of the Middle Rio Grande through operations and activities conducted in connection with the Middle Rio Grande Project and the San Juan-Chama Project

63. Federal involvement and control over the Middle Rio Grande and its principal tributary, the Rio Chama, traces back to the period encompassing the 1940s through the 1960s when Congress authorized two water projects under the federal reclamation laws: the Middle Rio Grande Project and the San Juan-Chama Project.

A. The Middle Rio Grande Project

64. Irrigated agriculture in the Middle Rio Grande began with the Pueblos and continued to develop through the early part of the twentieth century with construction of more extensive irrigation systems. By 1920, agricultural production had declined due to frequent flooding and inefficient water delivery from existing irrigations systems.

65. In August of 1925, the MRGCD was formed to address the problems besetting the irrigated farm lands along the Middle Rio Grande. The MRGCD is a political subdivision of the State of New Mexico formed under the New Mexico Conservancy Act of 1923. The MRGCD rehabilitated existing irrigation systems, created a drainage system to return unused water back to the Rio Grande, built levees for flood control, drained waterlogged lands, and initiated construction of the El Vado Dam and Reservoir along the Rio Chama.

66. Notwithstanding the creation of MRGCD in 1925, irrigated agriculture in the Middle Rio Grande continued to be bedeviled by variable river flows, flooding, erosion, and waterlogging of farmlands. As a result, many of the irrigators within the MRGCD ceased to pay their assessments and many agricultural lands were acquired by the MRGCD in lieu of payment of unpaid assessments.

67. By the 1940s, the MRGCD was essentially bankrupt and in default on its bonds. Many of its facilities were also in disrepair, and the MRGCD did not possess the financial resources to make required repairs. Additionally, many of the previously irrigated lands within the MRGCD were no longer irrigable because erosion throughout the Rio Grande system had resulted in serious aggradation (elevation) of the river channel and associated flooding and saturation of previously irrigated lands. These conditions led to pressure for the federal government to take over the MRGCD.

68. In 1947, Reclamation and the Corps completed a comprehensive plan for flood control, rehabilitation of irrigation and drainage facilities, and river channelization works in the Middle Rio Grande Basin. The result was the "Middle Rio Grande Project," which Congress authorized in the 1948 and 1950 Flood Control Acts. *See* Flood Control Act of 1948, Pub. L. 80-858, Title II, Section 201 *et seq*.; Flood Control Act of 1950, Pub. L. 81-516, Title II, Section 204.

69. The Middle Rio Grande Project, as authorized by these Acts, is a federal reclamation project under which Reclamation assumed ownership, control, and authority over all assets and operations of the MRGCD at a time when MRGCD was essentially bankrupt and seeking federal assistance. At the time, MRGCD's assets and operations consisted of water rights; El Vado Dam and Reservoir; four permanent diversions dams; two river canal headings; a canal siphon across the Rio Grande; several hundred miles of irrigation canals, laterals, and drains; 180 miles of riverside levees; and jetties and other flood control works.

70. The Middle Rio Grande Project also provided federal funds to retire all outstanding MRGCD bonds, and expended federal funds to construct, repair, and improve water storage, diversion, and conveyance facilities within the MRGCD system.

71. The respective rights, duties, and obligations of Reclamation and MRGCD with respect to the water and physical facilities of the Middle Rio Grande Project are spelled out in federal reclamation law statutes and in various legal documents, including the Repayment Contract of September 24, 1951 executed by Reclamation and MRGCD and the Transfer and Assignment of Water Rights of May 28, 1963 executed by MRGCD.

72. The 1951 Repayment Contract between Reclamation and MRGCD provides, *inter alia*, that all MRGCD's property interests—including diversion dams, irrigation and drainage

canals, and storage facilities—were conveyed to Reclamation and would remain under Reclamation ownership and control until such time as MRGCD paid off that portion of the cost of the project allocated *and* Congress acts to retransfer property back to MRGCD.

73. The 1951 contract further provides that "any and all [water right] filings made in the name of the District [MRGCD]" are "to be assigned to the United States for beneficial use in the project and for Indian lands in the project area."

74. In 1963, MRGCD executed a Transfer and Assignment of Water Rights in which it stated that it "does grant and convey to the United States" all the surface water rights that it had acquired in the Middle Rio Grande pursuant to New Mexico law.

75. Insofar as MRGCD's water rights are concerned, MRGCD's position is that it obtained rights to the use of waters in the Rio Grande when it was issued a storage permit from the New Mexico State Engineer: Permit No. 1690 which permits the storage of 198,000 acre-feet of Rio Grande basin water in El Vado Reservoir.

76. Also pursuant to the 1951 contract, Reclamation assumed operation and maintenance of all MRGCD facilities. In the 1970s, Reclamation permitted MRGCD to assume operation and maintenance of the irrigation facilities associated with the Middle Rio Grande Project as the United States' agent, other than El Vado Reservoir. Although MRGCD has assumed operation and management of most irrigation facilities associated with the project, the 1951 contract makes clear that it does so as the "agent" of Reclamation and must implement Reclamation's instructions.

77. The legal relationship beween Reclamation and MRGCD was specifically addressed by Reclamation in a letter of July 6, 2000 to Mr. Subhas Shah, Chief Executive Office of MRGCD. In that letter, Mr. Michael Galbadon, Reclamation Area Manager, writes that "[a]s

an agent of the United States operating Federal facilities, [MRGCD] is required to operate all transferred works in compliance with Federal law including the ESA" and "in a way that Pueblo water rights are not adversely affected."

78. As part of the Middle Rio Grande Project, Congress also authorized the Corps to construct flood control reservoirs and levees for flood protection. Pursuant to that authorization, the Corps built, currently owns, and is responsible for maintaining and operating, the following dams and reservoirs: Abiquiu, Cochiti, Galisteo, and Jemez Canyon.

79. Abiquiu Dam and Reservoir are located on the Rio Chama about 32 river-miles upstream from its confluence with the Rio Grande. Abiquiu Dam was constructed by the Corps as part of its flood and sediment control project for the Middle Rio Grande, which was jointly studied and proposed with Reclamation as part of the Middle Rio Grande Project, and approved by Congress in the 1948 and 1950 Flood Control Acts. Abiquiu Dam is owned, operated, and maintained by the Corps, which controls water storage and releases pursuant to federal statutory and other requirements.

80. Cochiti Dam and Reservoir are located on the Rio Grande about 50 miles north of Albuquerque, within Cochiti Pueblo's territorial jurisdiction. The Flood Control Act of 1960 (Public Law 86-645) authorized the Corps to construct Cochiti Dam for flood and sediment control on the main stem of the Rio Grande. The Corps continues to own, operate, and maintain Cochiti Dam and associated facilities; and controls water storage and releases pursuant to federal statutory and other requirements.

81. In addition to Cochiti Dam, the Corps has constructed, currently owns, operates, maintains, and controls several smaller storage facilities on the Middle Rio Grande system, including Galisteo Dam on Galisteo Creek, about 12 miles upstream of its confluence with the

Rio Grande; and Jemez Canyon Dam and Reservoir, on the Jemez River about 3 miles upstream of its confluence with the Rio Grande some 22 miles north of Albuquerque.

82. The Federal Defendants continue to have significant operational control over all water operations in the Middle Rio Grande.

83. For example, Reclamation has provided, and continues to provide, substantial funding for operation and maintenance costs relating to the Middle Rio Grande Project. Estimates of Reclamation's financial contribution to the operation and maintenance of the Middle Rio Grande Project total around $10 million annually.

84. From the time that federal government involvement in the Middle Rio Grande Project began until 2010, the federal government expended more than $231 million dollars of federal funds on the Middle Rio Grande Project.

85. The Ninth Circuit Court of Appeals, in a historical review of federal reclamation projects such as the Middle Rio Grande Project, has characterized such projects as a "vast federal subsidy." *Peterson v. U.S. Department of the Interior*, 899 F.2d 799, 804 (9th Cir. 1990).

86. Given the significant federal financial subsidy provided by the federal government to irrigators who use the waters associated with federal reclamation projects, and in light of the significant federal role in the development of those waters and related storage and delivery facilities, the federal government retains a substantial amount of control over the manner in which that water is distributed: "It is not there for the taking (by the landowner subject to state law), but for the giving by the United States. The terms upon which it can be put to use, and the manner in which rights to continued use can be acquired, are for the United States to fix." *Israel v. Morton*, 549 F.2d 128, 132-33 (9th Cir. 1977).

B. The San Juan-Chama Project

87. In 1962, Congress authorized the San Juan-Chama Project by amending the Colorado River Storage Project Act to allow diversion of a portion of New Mexico's water from the San Juan River into the Rio Grande through an inter-basin transfer of water from the Colorado River basin to the Rio Grande basin. *See* Pub. L. 87-483, Section 8 *et seq*. Reclamation stores San Juan-Chama water in a project pool at Heron Reservoir. San Juan-Chama water must be beneficially used in New Mexico. Therefore, none of this water may be used to meet New Mexico's obligations to Texas under the Rio Grande Compact.

88. In planning the San Juan-Chama Project, Reclamation calculated that the expected "firm-yield" of water to be supplied by the Project is 101,800 acre-feet annually. The various parties which contracted to receive an allocation of the annual water supply (including the Albuquerque Bernalillo County Water Utility Authority and MRGCD) did not receive any right to a fixed amount of water in any given year. Rather, each contracting party was granted a contractual right to receive a proportionate share of the water available from the project in any given year to be used for a specifically defined purpose.

89. As an example, MRGCD was granted a contractual right to the use of 20,900 acre-feet annually of the firm yield amount "as an irrigation water supply."

90. In years when the available water supply is lower than the anticipated firm-yield, then all parties which have contracted for the use of San Juan-Chama Project water share proportionally in that shortage, in proportion to their respective allocations from the firm-yield.

91. In connection with the actual amount of water to be delivered to a contractor in any given year, MRGCD's June 25, 1963 contract with Reclamation states as follows: "During periods of scarcity when the actual available water supply may be less than the estimated firm

yield, [MRGCD] shall share in the available water supply in the ratio that allocations [to the various contracting parties] bear to the estimated firm yield." That is, MRGCD could expect to receive 20,900/101,800 [20.55%] of the available water supply.

92. Heron Reservoir was constructed using federal funds authorized for the San Juan-Chama Project and is owned and operated by the United States, through Reclamation.

III. Reclamation's and the Corps' history of ESA Section 7(a)(2) consultations with respect to their operations and activities in the Middle Rio Grande

93. Even though the silvery minnow was listed as an endangered species in 1994 and the willow flycatcher was listed as an endangered species in 1995, Federal Defendants failed to complete a formal Section 7(a)(2) consultation with the FWS for a number of years. During this period of time, Federal Defendants' operation of federal storage and diversion facilities in the Middle Rio Grande resulted in significant impacts to both species.

94. For example, significant stretches of the Middle Rio Grande were dewatered in 1996, 1998, and 1999. These river drying events resulted in silvery minnow mortality, imperilling the species and bringing it closer to extinction.

95. In April of 1996, Federal Defendants allowed MRGCD to divert all water flowing in the Middle Rio Grande. Significant river drying resulted, and the population of silvery minnows plummeted as the drying killed approximately 50% of the species' existing population.

96. To remedy the Federal Defendants' foot-dragging with respect to its Section 7(a)(2) obligations, WildEarth Guardians commenced a lawsuit against Federal Defendants in November of 1999 in the United States District Court for the District of New Mexico in which it alleged that Federal Defendants were in violation of both their substantive and procedural duties

under Section 7(a)(2).[5]

97. Subsequent to the filing of the 1999 lawsuit, Reclamation and the Corps commenced a Section 7(a)(2) consultation assessing the impacts of their Middle Rio Grande operations on ESA-listed species. This consultation – which was the first Section 7(a)(2) consultation conducted with respect to the Middle Rio Grande operations – culminated in FWS's issuance of a BiOp on June 29, 2001.

98. The June 29, 2001 BiOp concluded that the Federal Defendants' Middle Rio Grande operations jeopardized the continued existence of both the silvery minnow and the willow flycatcher. As there was no designated critical habitat for either of those two species at the time that the BiOp was issued, the June 29, 2001 BiOp did not make any findings in connection with the effect of the Federal Defendants' Middle Rio Grande operations on such habitat.

99. While the June 29, 2001 BiOp was a step forward in conservation efforts directed at the silvery minnow and the willow flycatcher, the Section 7(a)(2) consultation which concluded with issuance of that BiOp was impermissibly narrow in scope as the BiOp did not assess the cumulative impacts of all of the Federal Defendants' discretionary actions in the Middle Rio Grande.

100. Accordingly, Guardians filed an amended complaint in July of 2001, in which it realleged its claims against Federal Defendants. In this pleading (styled as the Second Amended Complaint), Guardians alleged that Reclamation and Corps had impermissibly failed to consult

[5] At the time that this lawsuit was commenced, WildEarth Guardians was known by its former name "Forest Guardians." The lead plaintiff in the 1999 lawsuit was the Rio Grande Silvery Minnow and WildEarth Guardians was also joined by a number of its conservation partners as co-plaintiffs in that lawsuit. The lawsuit was styled *Rio Grande Silvery Minnow, et al. v. Martinez*, Civil No. 99-1320-JAP/RHS.

over key elements of their Middle Rio Grande operations, including their discretionary decisions (a) not to reduce water deliveries to MRGCD, (b) not to utilize the Corps' discretionary authority over reservoir management, (c) not to use a portion of San Juan-Chama water stored in Heron for the silvery minnow, and (d) not to invoke discretionary clauses of the San Juan-Chama contracts for purposes of reallocating water to the minnow, if necessary.

101. In a decision of April 19, 2002, (now Senior) Judge James A. Parker of the United States District Court for the District of New Mexico issued a decision resolving Guardians' claims concerning the required scope of Section 7(a)(2) consultations. *Rio Grande Silvery Minnow v. Keys*, 469 F.Supp. 2d 973 (D.N.M. 2002) *affirmed Rio Grande Silvery Minnow v. Keys*, 333 F.3d 1109 (10th Cir. 2003) and *vacated as moot Rio Grande Silvery Minnow v. Keys*, 355 F.3d 1215 (10th Cir. 2004).

102. In the April 19, 2002 decision, Judge Parker ruled in favor of Guardians on its claims concerning the scope of Reclamation's discretionary authority over the operation of federal facilities in the Middle Rio Grande and, relatedly, the required scope of Reclamation's procedural Section 7(a)(2) obligations. Specifically, Judge Parker ruled that Reclamation has the discretionary authority to reduce water deliveries to MRGCD pursuant to (1) the "shortage clause" of the 1951 repayment contract for the Middle Rio Grande Project, (2) the authorizing legislation for the San Juan-Chama Project and contracts for the use of that water, and (3) Reclamation's duty to limit water deliveries to MRGCD to the amount of water that is beneficially applied to irrigation within the MRGCD. Accordingly, Judge Parker ordered that Reclamation had a duty to broaden the scope of its Section 7(a)(2) consultation with FWS to conform with the scope of its discretionary authority.

103. In the April 19, 2002 decision, Judge Parker ruled against Guardians on its claims

that the Corps has the discretionary authority to re-operate those dams that it owns and operates in connection with the Middle Rio Grande Project, and that it has a mandatory duty under Section 7(a)(2) to consult with the FWS as the effects of those operations on the silvery minnow and the willow flycatcher.

104. To comply with Judge Parker's April 19, 2002 decision, Reclamation commenced an expanded Section 7(a)(2) consultation with FWS in August of 2002. However, in the interim period between issuance of the April 19, 2002 decision and commencement of the expanded Section 7(a)(2) consultation in August of 2002, Reclamation released nearly all of the contracted water under the Middle Rio Grande Project and the San Juan-Chama Project.

105. According to Judge Parker, the release of this water in 2002 created a crisis that "could have been avoided if the Federal Defendants, especially [Reclamation], had properly performed their statutory duties." *Rio Grande Silvery Minnow v. Keys*, 356 F.Supp.2d 1222, 1225-26 (D.N.M. 2002) *vacated as moot Rio Grande Silvery Minnow v. Keys*, 355 F.3d 1215 (10th Cir. 2004). Judge Parker further found as follows:

> By the time the April 19, 2002 Memorandum Opinion and Order was filed, [Reclamation] knew or should have known that it was facing potentially disastrous drought conditions in 2002 and that it would run out of voluntarily acquired supplemental water for the minnow sufficient to meet the flow requirements in the June 29, 2001 [BiOp]. Yet it failed to request consultation until August 2002.

356 F.Supp.2d at 1226.

106. To prevent the 2002 crisis from developing into an extinction event, Judge Parker ordered [Reclamation] to assure specifically defined minimum flows in certain reaches of the Middle Rio Grande for the remainder of 2002. 356 F.Supp.2d at 1237. Judge Parker determined that, if necessary to meet the stated flow requirements, Reclamation had an obligation to release

San Juan-Chama Project water from Heron Reservoir and to compensate those whose contractual rights to water were impaired by Reclamation's releases. *Id.*

107. The United States Court of Appeals for the Tenth Circuit affirmed Judge Parker's April 19, 2002 decision in a decision of June 12, 2003. *Rio Grande Silvery Minnow v. Keys*, 333 F.3d 1109 (10th Cir. 2003) *vacated as moot Rio Grande Silvery Minnow v. Keys*, 355 F.3d 1215 (10th Cir. 2004).

108. Reclamation re-initiated consultation on its Middle Rio Grande discretionary actions in order to comply with Judge Parker's April 19, 2002 decision. As part of this effort, Reclamation prepared a new BA which it submitted to the FWS in February of 2003. The February 2003 BA expanded the scope of the Section 7(a)(2) consultation to include an assessment of Reclamation's discretionary authority to reduce water deliveries to MRGCD.

109. The re-initiated and expanded Section 7(a)(2) consultation culminated in FWS's issuance of a new BiOp on March 17, 2003 which covered the Federal Defendant's Middle Rio Grande operations for the period 2003-2013.

110. Like the June 29, 2001 BiOp which preceded it, the March 17, 2003 BiOp concluded that the Federal Defendants' operations in the Middle Rio Grande jeopardized the continued existence of the silvery minnow and the willow flycatcher. By the time that the March 17, 2003 BiOp was issued, however, critical habitat had been designated for the silvery minnow and that BiOp determined that the Federal Defendants' Middle Rio Grande operations would adversely modify this critical habitat.

111. As required by the ESA, the March 17, 2003 BiOp contained an RPA which was intended to mitigate the significant adverse effects of the Federal Defendants' Middle Rio Grande operations, to alleviate the threat of jeopardy, and to avoid the adverse modification of

designated critical habitat. The RPA contained various elements including requirements for modified water operations which guaranteed continuous minimum flows in certain reaches of the minnow's habitat and requirements for physical modifications to the federal facilities in the Middle Rio Grande such as fish passages at the diversion structures.

112. Since the March 17, 2003 BiOp contemplated that the Federal Defendants' continued operations in the Middle Rio Grande would result in the incidental take of silvery minnows and willow flycatchers, that BiOp also included an ITS which provided a narrow exemption from the ESA's general Section 9 prohibition on "take." Take limits for the silvery minnow are set annually by FWS, which determines the maximum number of silvery minnows that may be incidentally taken by the Federal Defendants' Middle Rio Grande operations without violating Section 9.

113. In an appropriations act of 2004, Congress joined the on-going dispute as to Guardians' efforts to secure conditions necessary for a healthy ecosystem in the Middle Rio Grande. Specifically, Congress enacted what is colloquially known as the "minnow rider." With the minnow rider, Congress stated that Federal Defendants' "compl[iance] with the [RPA] and the incidental take limits defined in the [BiOp] released by the [FWS] dated March 17, 2003" would "fully meet all requirements of the [ESA] . . . for the conservation of the Rio Grande Silvery Minnow and the Southwestern Willow Flycatcher on the Middle Rio Grande in New Mexico."

114. The minnow rider addressed the Federal Defendants' obligations with respect to San Juan-Chama Project water separately. In connection with San Juan-Chama Project water, the minnow rider states that Reclamation "may not use [its] discretion, if any" to restrict water deliveries to contracting parties "to meet the requirements of the [ESA]" except in those

circumstances where "such water is acquired or otherwise made available from a willing seller or lessor and the use is in compliance with the laws of the State of New Mexico."

115. Congress's enactment of the minnow rider terminated all pending litigation over the Federal Defendants' compliance with the ESA, and led to the Tenth Circuit's decision to vacate Judge Parker's April 19, 2002 decision and the Tenth Circuit's June 12, 2003 decision affirming Judge Parker's decision. *Rio Grande Silvery Minnow v. Keys*, 355 F.3d 1215 (10th Cir. 2004).

B. Reclamation's and the Corps' non-compliance with the RPA and the ITS of the 2003 BiOp

116. In the ensuing years, Federal Defendants developed a pattern and practice of continuing violations of the 2003 BiOp's RPA and ITS, all to the detriment of the silvery minnow and the willow flycathcer.

117. For example, Federal Defendants violated Elements E and F of the RPA which require continuous river flows through various segments of the Middle Rio Grande, even though the FWS had stated in the 2003 BiOp that those flows were "essential to provide a sufficient amount of habitat to support these silvery minnows and ensure that the primary constituent elements of their critical habitat are available to sustain them." Specifically, Federal Defendants impermissibly allowed stretches of the Rio Grande to dry in 2003, 2004, 2006, 2011, and 2013, and violated the Central Gage flow requirements in 2013.

118. Another significant violation of the 2003 BiOp's RPA was Federal Defendants' failure to provide for sufficient water to create a spawning spike in the spring of 2011, 2012, and 2013. This failure constitutes a violation of RPA Element A.

119. Additional violations of the various components of the RPA incorporated into the

2003 BiOp include (1) failure to provide fish passage at the San Acacia and Isleta Diversion Dams (RPA Element R) and (2) failure to implement habitat restoration projects in the southern portion of the Middle Rio Grande (RPA Element S), and (3) failure to modify the San Marcial railroad bridge (RPA Element U).

120. Federal Defendants have also violated the 2003 BiOp's ITS. In 2013, the FWS determined that Federal Defendants could incidentally take a maximum of 2,746 silvery minnows during the 2013 irrigation season (April 1, 2013 - March 30, 2014) without violating Section 9. However, the March 3, 2014 Salvage Report for the 2013 irrigation season determined that Federal Defendants' Middle Rio Grande operations caused the death of 11,800 minnows, over 400% of the permitted amount.

121. Additionally, the ITS expressly states that it is "based on the premise that the RPA will be implemented." As discussed above, Federal Defendants have violated the RPA in many respects since the 2003 BiOp was issued.

122. Since Federal Dendants have violated the 2003 BiOp's ITS by exceeding the amount of permitted take and by not complying with the RPA, they are not exempt from Section 9's prohibition on the take of ESA-listed species and their taking of silvery minnows constitutes a violation of Section 9.

123. The Federal Defendants' operation of federal facilities on the Middle Rio Grande – including storage, release, and diversion decisions – has diverged in significant respects from the operations which the FWS has determined are necessary to avoid extinction of the silvery minnow in its Hydrologic Objective.

124. From 2003 to present, management of the Rio Grande under the 2003 BiOp allowed two-thirds of the silvery minnow's and willow flycatcher's critical habitat (over 100

miles of the 174 miles in the Middle Rio Grande) to go dry between June 15 and October 31. Further, that portion of the river allowed to dry has consistently been found to support the highest population of silvery minnows and willow flycatchers in the Middle Rio Grande.

125. As discussed above, two reports prepared by the Middle Rio Grande Endangered Species Collaborative Program have determined that the silvery minnow is now critically imperiled and that the Federal Defendants' current conservation efforts are inadequate to stop the precipitous decline of the species towards extinction.

C. **Expiration of the 2003 BiOp & re-initiation of Section 7(a)(2) consultation**

126. By its terms, the 2003 BiOp extended through February 28, 2013. However, the 2003 BiOp states that any coverage provided by that BiOp (such coverage being contingent on the Federal Defendants' compliance with the RPA and the ITS) would be extended if the Federal Defendants timely commenced a new Section 7(a)(2) consultation prior to February 28, 2013.

127. In order to commence a new Section 7(a)(2) consultation in contemplation of the expiration of the 2003 BiOp, Reclamation submitted a BA to the FWS as to the effects of its operations and activities in the Middle Rio Grande on January 16, 2013.

128. However, the scope of the action that Reclamation submitted for consultation was impermissibly narrow. As it had done in the BAs which it had submitted to the FWS prior to Judge Parker's April 19, 2002 decision, Reclamation disavowed the significant extent of discretionary authority which it has over water operations and deliveries in the Middle Rio Grande.

129. The on-going Section 7(a)(2) consultation commenced by Reclamation in February of 2013 is inconsistent with Judge Parker's analysis of Reclamation's discretionary authorities in the Middle Rio Grande as set forth in his April 19, 2002 decision which analysis

was affirmed by the Tenth Circuit in its June 12, 2003 decision.

130. In order to commence a new Section 7(a)(2) consultation in contemplation of the expiration of the 2003 BiOp, the Corps submitted a series of BAs to the FWS as to the effects of its operations and activities in the Middle Rio Grande. The last such BA was submitted to the FWS on February 15, 2013.

131. However, the Corps withdrew its BA and withdrew from Section 7(a)(2) consultation on November 26, 2013. Accordingly, the Corps is not now in Section 7(a)(2) consultation with the FWS.

IV. Discretionary authorities of Reclamation and the Corps in the Middle Rio Grande

A. Reclamation discretion

132. Reclamation retains significant discretionary authority and control over water operations in the Middle Rio Grande. These discretionary authorities stem from both Reclamation's development of the Middle Rio Grande Project and Reclamation's development of the San Juan-Chama Project.

133. Some of Reclamation's discretionary authorities, which must be assessed in the context of a Section 7(a)(2) consultation with the FWS, were addressed by Judge Parker in his decision of April 19, 2002.

134. For example, Reclamation has the discretionary authority to reduce water deliveries to MRGCD under the shortage clause of the 1951 repayment contract for the Middle Rio Grande Project and the shortage clauses incorporated into annual contracts for the delivery of San Juan-Chama Project water. Reclamation's discretionary authority to reduce water deliveries on the basis of these shortage clauses must be assessed within the scope of the on-going Section 7(a)(2) consultation. However, the on-going Section 7(a)(2) consultation between

Reclamation and the FWS does not address this discretionary authority.

135. Additionally, Judge Parker found in his April 19, 2002 decision that Reclamation "has a statutory duty to determine whether overuse [of federal project water] is occurring" on irrigated lands within MRGCD, and to limit deliveries of federal project water for irrigation purposes to that amount which is reasonably needed for beneficial use. Reclamation must include its discretionary authority to limit the delivery of water to MRGCD to the "beneficial use" amount in its on-going Section 7(a)(2) consultation with the FWS. The on-going Section 7(a)(2) consultation between Reclamation and the FWS does not address this discretionary authority.

136. Upon information and belief, Reclamation has failed to conduct an analysis as to whether or not MRGCD is "overusing" federal project water on its irrigated lands.

137. Reclamation has additional discretionary authorities over the use of federal project water which were not addressed by Judge Parker in his April 19, 2002 decision, and these discretionary authorities must also be included within the scope of the on-going Section 7(a)(2) consultation with FWS.

138. As examples, under federal reclamation law and the 1951 repayment contract for the Middle Rio Grande Project, Reclamation retains the discretionary authority: (1) to disapprove and/or to place conditions on any use of Middle Rio Grande Project water outside the geographical boundaries of MRGCD, (2) to disapprove and/or to place conditions on transfers of Middle Rio Grande Project water, and (3) to disapprove and/or to place conditions on MRGCD's operation of its so-called "Water Bank." The on-going Section 7(a)(2) consultation between Reclamation and the FWS must also address these discretionary authorities.

139. Reclamation acknowledges that the cumulative effect of the significant transfers

of federal project water from MRGCD to areas outside the geographical boundaries of the MRGCD imperils the silvery minnow, and threatens other serious consequences including a failure to meet delivery obligations under the Rio Grande Compact and a failure to comply with federal trust obligations to the Middle Rio Grande Pueblos. Nonetheless, Reclamation has failed to exercise its discretionary authority to disapprove and/or to place conditions on such transfers.

140. Reclamation has also entirely failed to exercise its discretionary authority over operation of MRGCD's Water Bank. Reclamation's failure to exercise this discretionary authority has resulted in an unbalanced utilization of the water in the Middle Rio Grande which impairs the ability of the Middle Rio Grande Pueblos to store water in the spring of each year and which also impairs many and various non-consumptive uses of the river. For example, Reclamation's failure to exercise its discretionary authority over Water Bank operations results in additional depletions from the Middle Rio Grande which are harmful to the silvery minnow's survival and recovery.

B. Corps Discretion

141. The Corps operates and maintains each of its reservoirs and associated facilities pursuant to the operating criteria set forth in P.L. 86-645. These criteria generally limit the Corps' discretion in storage and release of water from the reservoirs. However, the Corps retains some flexibility in its reservoir operations in the Middle Rio Grande.

142. The Corps' Water Control Manuals specifically provide discretionary authority for the Corps to "deviate" from normal reservoir operations in certain circumstances. For example, the Corps' Water Control Manual for Cochiti Lake provides that the Corps' may modify its operations through "planned deviations" approved by the Southwest Director.

143. The Corps has exercised its authority to deviate from normal reservoir operations

in the Middle Rio Grande on several occasions in the past to provide flows downstream of Cochiti Dam to benefit the silvery minnow and willow flycatcher. In 2007 and again from 2009-2013, the Corps planned to deviate from its water control plan for Cochiti Lake to provide a spawning and/or overbanking peak flows below Cochiti Lake.

144. The Corps actually modified its operations in 2007 and again in 2010 by storing spring flows in Cochiti for a limited period of time so that a larger peak flow more closely conforming to natural conditions could be released several weeks later. The Corps produced environmental assessments in 2007 and 2009 evaluating the effects of these planned deviations. The 2007 and 2010 deviations resulted in significant benefits to the silvery minnow.

CLAIMS FOR RELIEF

First Claim for Relief
Violation of the substantive requirements of ESA Section 7(a)(2) by Reclamation

145. Each and every allegation set forth in this complaint is incorporated herein by reference.

146. As set out herein, Reclamation's operations and activities in the Middle Rio Grande result in jeopardy to the Rio Grande silvery minnow and the Southwestern willow flycatcher, and also result in the adverse modification and/or destruction of the species' designated critical habitats, all in violation of the substantive requirements of ESA Section 7(a)(2)

Second Claim for Relief
Violation of the procedural requirements of ESA Section 7(a)(2) by Reclamation

147. Each and every allegation set forth in this complaint is incorporated herein by reference.

148. As set out herein, Reclamation's failure to consult with the FWS as to the full extent of its discretionary authorities over operations and activities in the Middle Rio Grande, including but not limited to its authority to reduce water deliveries to MRGCD when needed to assure compliance with the ESA, constitutes a violation of the procedural requirements of ESA Section 7(a)(2).

Third Claim for Relief
Violation of of ESA § 7(d) by Reclamation

149. Each and every allegation set forth in this complaint is incorporated herein by reference.

150. As set out herein, Reclamation's operations and activities in the Middle Rio Grande during the on-going ESA Section 7(a)(2) consultation with the FWS cause irreversible and irretrievable effects on the Rio Grande silvery minnow and Southwestern willow flycatcher in violation of ESA Section 7(d).

Fourth Claim for Relief
Violation of the take prohibition of ESA § 9 by Reclamation

151. Each and every allegation set forth in this complaint is incorporated herein by reference.

152. As set out herein, Reclamation's operations and activities in the Middle Rio Grande have caused, and continue to cause, the incidental take of Rio Grande silvery minnows in violation of ESA Section 9.

Fifth Claim for Relief
Violation of the substantive requirements of ESA § 7(a)(2) by the Corps

153. Each and every allegation set forth in this complaint is incorporated herein by reference.

154. As set out herein, the Corps' operations and activities in the Middle Rio Grande result in jeopardy to the Rio Grande silvery minnow and the Southwestern willow flycatcher, and also result in the adverse modification and/or destruction of the species' designated critical habitats, all in violation of the substantive requirements of ESA Section 7(a)(2)

Sixth Claim for Relief
Violation of the procedural requirements of ESA § 7(a)(2) by the Corps

155. Each and every allegation set forth in this complaint is incorporated herein by reference.

156. As set out herein, the Corps' failure to consult with the FWS as to the full extent of its discretionary authorities over operations and activities in the Middle Rio Grande constitutes a violation of the procedural requirements of ESA Section 7(a)(2).

Seventh Claim for Relief
Violation of the take prohibition of ESA § 9 by the Corps

157. Each and every allegation set forth in this complaint is incorporated herein by reference.

158. As set out herein, the Corps' operations and activities in the Middle Rio Grande have caused, and continue to cause, the incidental take of Rio Grande silvery minnows in violation of ESA Section 9.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff WILDEARTH GUARDIANS respectfully requests that this Court:

A. Declare that Reclamation and the Corps are violating their substantive duties under ESA Section 7(a)(2) by jeopardizing the silvery minnow and/or willow flycatcher, and by adversely modifying and/or destroying the species' designated

critical habitats;

B. Declare that Reclamation and the Corps are violating their procedural duties under ESA Section 7(a)(2) by failing to consult with the FWS on all aspects of their discretionary authority and decision-making concerning water operations and related management actions on the Middle Rio Grande;

C. Declare that Reclamation is violating ESA Section 7(d) by taking actions which have irreversible and irretrievable effects on the silvery minnow and/or the willow flycatcher during the course of its ongoing consultation with the FWS;

D. Declare that Reclamation and the Corps are violating ESA Section 9 by having caused, and by continuing to cause, unlawful "take" of silvery minnows;

E. Order Reclamation and the Corps to take all steps within their discretionary authority necessary to avoid jeopardy to the silvery minnow and willow flycatcher and adverse modification and/or destruction of their designated critical habitats, as required by ESA Section 7(a)(2), taking into account federal trust responsibilities to the Middle Rio Grande Pueblos;

F. Order Reclamation and the Corps to complete a comprehensive consultation with the FWS on the effects of the full range of their discretionary authority as required by ESA Section 7(a)(2) on an expedited basis;

G. Enter such temporary, preliminary, or permanent injunctive relief as specifically prayed for by WILDEARTH GUARDIANS hereinafter in a manner which is consistent with the federal government's trust responsibility to the Middle Rio Grande Pueblos;

H. Award WILDEARTH GUARDIANS its reasonable fees, costs, expenses, and

disbursements, including attorneys fees, associated with this litigation pursuant to the ESA; and

I. Grant such additional and further relief as the Court may deem just and appropriate.

Respectfully submitted this 24th day of July 2014.

/s/ Samantha Ruscavage-Barz
WildEarth Guardians
516 Alto Street
Santa Fe, NM 87501
Tel: (505) 401-4180
sruscavagebarz@wildearthguardians.org

/s/ Steven Sugarman
347 County Road 55A
Cerrillos, NM 87010
Tel: (505) 672-5082
stevensugarman@hotmail.com

Attorneys for Plaintiff WildEarth Guardians