

July 21, 2005

Honorable Jeff Bingaman  
United States Senator  
Attention: Danny Milo  
625 Silver Road, SW Suite 130  
Albuquerque, NM 87102

Dear Senator Bingaman:

As you well know, the protection and restoration of the Rio Grande as the cultural and ecological life blood of New Mexico is a matter of critical importance to our organizations and our members. We write because we are concerned that the water, land and fish and wildlife management agencies that are charged with managing the river are failing to protect the overwhelming public interest in seeing that the Rio Grande and the myriad of fish and wildlife that depend on it are protected.

Though there are many issues that currently concern us, we are writing today about only one: the efforts of the Bureau of Reclamation (Reclamation) and the U.S. Fish and Wildlife Service (FWS or Service) to suppress independent scientific research on the current status and trends of populations of the Southwestern willow flycatchers immediately upstream of and in the headwaters of Elephant Butte Reservoir.

The endangered Southwestern willow flycatcher has been extirpated from much of its historic native riparian habitat in the Southwest, including much of the middle Rio Grande through central New Mexico. The Rio Grande above Elephant Butte is one of the species' last strongholds and includes the single largest population of flycatchers on the river. As Elephant Butte has receded during the drought, this population has expanded downstream and it has likely significantly increased in size.

Over the last year, Dr. Peter Stacey, a research professor with the University of New Mexico, has unsuccessfully attempted to obtain permits from the Bureau of Reclamation for land access and from the Fish and Wildlife Service to analyze the dispersal and genetics of the flycatcher population in the Elephant Butte area. Similar research has been conducted in Arizona on Southwestern willow flycatchers, including research that was conducted in an extremely similar situation where flycatchers nested in riparian habitat within Roosevelt Lake.

Despite the fairly routine nature of and the significant value of this independent research to the conservation and recovery of the Southwestern willow flycatcher, the Bureau of Reclamation recently formally denied Dr. Stacey's research proposal. Incredibly, the agency's basis for the denial is that the research could jeopardize Reclamation's existing Endangered Species Act incidental take authorization because of the potential harm that would occur to the bird when the scientific research is conducted.

At the heart of this spurious denial is one fundamental policy question. Should federal land and water management agencies be able to deny independent research on endangered species by asserting dubious legal responsibility for the incidental harm that occurs to the species when research is conducted? For reasons both specific and general, the answer is a resounding no.

First, Elephant Butte Reservoir is part of the Rio Grande Project. Recent communication with Reclamation demonstrates that the agency has not consulted with the Service on its activities in connection with the Rio Grande Project. Thus, Reclamation has no incidental take authorization for any activities in or around Elephant Butte Reservoir that any flycatcher research could violate.

Assuming, *arguendo*, that Reclamation has some form of incidental take authorization from the Service – authorization that would allow the agency to ensure that its otherwise lawful activities do not run afoul of the ESA’s prohibition on ‘take’ of listed species – that take authorization covers only incidental take that occurs as a result of federal actions. In other words, Reclamation is not responsible for the take caused by another entity such as Dr. Stacey.

In fact, this recent decision deviates from the practice required under the Endangered Species Act, a practice that the Service has generally adhered to, where the Service issues individual take permits directly to independent researchers. The Service may not require researchers to count the take associated with their research activities as a part of the land and/or water management agencies’ take permit(s). At the moment, we are not aware of any other FWS regional office that has vested responsibility for incidental take due to scientific research with the land and/or water management agency.

The Service has never required the land and/or water management agency to be responsible for be responsible for incidental take due to research and for good reason. Giving land and water management agencies the authority to approve or deny permits would enable them to deny permits as a deliberate means of avoiding scientific scrutiny, which is exactly what is being done in this instance.

Moreover, it is the Service that is responsible for interpreting and enforcing the Endangered Species Act as it relates to authorizing take of listed species, whether for scientific research that may further the recovery of the species or for otherwise lawful federal activities that may result in incidental take. It is the Service that has the expertise to conclude whether the species can withstand the cumulative impacts of take from the above activities. Reclamation, quite simply, does not have the expertise or credibility to make these determinations or to implement the ESA.

In our opinions, Reclamation’s denial of Dr. Stacey’s research is nothing more than a bald attempt to suppress science. Though the broader issues concerning the management of Elephant Butte Dam and Reservoir are significant, we believe they will never be resolved adequately until we have gathered sound science about the ecological values that would be affected by proposed water management activities.

The bottom line is that the new FWS policy of either requiring or allowing action agencies to account for take associated with independent research is unethical, irresponsible and perhaps even illegal. The Southwest Region of the FWS is establishing a well earned and bad reputation for manipulating science to serve political ends. We believe the denial of Dr. Stacey's research is another example of just that.

We would appreciate a formal inquiry by you into this matter as we believe that the FWS in New Mexico and the greater Southwest needs to be accountable to a force higher than itself. The fate of both the Rio Grande and independent inquiry and oversight of federal actions are at stake. If you have any questions about this letter please do not hesitate to contact John Horning of Forest Guardians at (505) 988-9126 x153.

Sincerely,

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Forest Guardians

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CC: Mr. Dale Hall, U.S. Fish and Wildlife Service  
Ms. Connie Rupp, U.S. Bureau of Reclamation