

MINUTES OF THE
THE CITY OF SANTA FE & SANTA FE COUNTY
BUCKMAN DIRECT DIVERSION BOARD MEETING

June 5, 2014

This meeting of the Santa Fe County/City Buckman Direct Diversion Board meeting was called to order by Commissioner Liz Stefanics, Vice Chair, at approximately 4:45 p.m. in the Santa Fe City Council Chambers, 200 Lincoln Avenue, Santa Fe, New Mexico.

Roll was called and the following members were present:

BDD Board Members Present:

Commissioner Liz Stefanics
Ms. Consuelo Bokum
Councilor Carmichael Dominguez
Commissioner Miguel Chavez

Member(s) Excused:

Councilor Joseph Maestas

Others Present:

Nancy Long, BDD Board Consulting Attorney
Shannon Jones, Interim Facility Manager
Stephanie Lopez, BDD Office Manager
Nick Schiavo, City Department of Utilities Directory
Rick Carpenter, City Water Resources and Conservation Manager
Claudia Borchert, County Utilities Director
Teresa Martinez, County Finance Director
Gary Durrant, BDD
Bernardine R. Padilla, BDD
Mackie Romero, BDD
Kyle Harwood, BDD Board Contract Attorney
Pete Maggiore, DOE
Gloria Hidden, Glatfelter Insurance
Twig Segura, Daniels Insurance
Rick Ulibarri, LANL
David Rhodes, DOE

3. APPROVAL OF AGENDA

[Exhibit 1: Agenda]

Mr. Shannon requested the removal of item 7, Report on the June 3, 2014 Fiscal Services Audit Committee, that meeting did not occur. Item 17 contains a typographical error and should read the 3rd amendment to the PSA with Geosystems Analysis.

Commissioner Chavez moved to approve the agenda as amended. Councilor Dominguez seconded and the motion passed by unanimous [4-0] voice vote.

4. APPROVAL OF CONSENT AGENDA

Councilor Dominguez moved to approve the consent agenda as presented. His motion was seconded by Commissioner Chavez and passed by unanimous [4-0] voice vote.

CONSENT AGENDA

14. **Drought, Monsoon and Water Resource Management Update**
15. **Update on 3rd Quarter Financial Statement**
16. **Request for Approval of Amended Support Agency Selection Process Timeline**
17. **Request for Approval of Contract Amendment No. 3 to the Professional Services Agreement for Geosystems Analysis for Unanticipated and Ongoing/Extended Habitat Restoration Efforts for the Total Amount of \$70,171, Exclusive of NMGR**
18. **Request for Approval of Amendment No. 4 to the Agreement with Bradbury Stamm for the BDD Solar Project from 2.016 MW to 1.5 MW**
19. **Request for Approval of Amendment No. 2 to the Professional Services Agreement with Smith Engineering Co. for Unanticipated Extended Construction Management Efforts for the BDD Booster Station 2A Solar Project for the Amount of \$22,522.50, Exclusive of NMGR**
20. **Request for Approval of Budget Adjustment Request to Move \$11,600 to the Correct Line Item for Purchase of New Server**

5. APPROVAL OF MINUTES: April 3, 2014

Councilor Dominguez moved to approve the minutes as published. His motion was seconded by Ms. Bokum and passed by unanimous [4-0] voice vote.

6. MATTERS FROM STAFF

MR. JONES: Madam Vice Chair, I would to bring forward at least three matters from staff. The first one being just a friendly reminder of our ribbon cutting ceremony for the solar project on June 19th. You will get an official invite to that and we'll make sure it's in your calendars.

The second one is that before you there is an update to the BDD operations provided for you. We weren't able to get those in the packet so we made sure you had those.

Number three is – Chairman Maestas has requested, there's a board packet that we had assembled by our legal team for the Board and with that I'm going to turn it over to Kyle Harwood.

COMMISSIONER STEFANICS: Okay, thank you. Mr. Harwood.

KYLE HARWOOD (BDD Board Contract Counsel): Yes, thank you, Commissioner Stefanics. Yes, Chair Maestas asked about the documents relating to the Buckman Direct Diversion project. This was something that we put together a number of years ago and updated it recently because it looks like this in paper [holding up a 5" stack] I have jump drives if you prefer. I have one for him because he's not here today. But if you would like this or this –

COMMISSIONER STEFANICS: Okay, so Board members, Commissioner, what would you prefer jump drive or paper?

COMMISSIONER CHAVEZ: Jump drive definitely.

MS. BOKUM: I want a jump drive.

COUNCILOR DOMINGUEZ: Jump Drive.

COMMISSIONER STEFANICS: And I will take the paper. I'm an old fashioned reader.

COUNCILOR DOMINGUEZ: One of each, huh?

COMMISSIONER STEFANICS: No, just – well, no, sure. Thanks.

COMMISSIONER CHAVEZ: So, Kyle, if I could Madam Chair, Kyle what could we expect? Does this go all the way back – all the historical data?

MR. HARWOOD: It does not go back to the Treaty of Guadalupe Hidalgo in 1848 but it does go back to the beginning of the Board, yes.

COMMISSIONER CHAVEZ: Shame on you – I'm just kidding. Good, I think it will be a good read. I think that a lot of people still have questions, even today, about what it does and what its role is so I think for us to go back and refresh our memory would be good. How much of this will be available to the public? Because I think they're the ones that are more concerned about like what's in the water so I think maybe this will answer some of those questions.

MR. HARWOOD: It may. All of the documents are public documents. Many of them are on the BDD Board website and I think anything that you'd like to direct staff to do in the way of making it available either in paper or electronically I am sure we can accomplish. And, of course, if you any questions we're available to answer questions and Mr. Carpenter will answer all the hard questions you might have about the history of the project.

COMMISSIONER STEFANICS: Thank you, and I'm sure Mr. Carpenter would want to sit and talk with anybody off line if they wish to do so.

Anything else?

MR. JONES: Madam Vice Chair, that is all for matters from the staff.

INFORMATION ITEMS

8. Update on the Hiring Process for BDD Facility Manager

NICK SCHIAVO: (Acting City Public Utilities Department and Water Division Director): Chair, members, the position for the –

COMMISSIONER STEFANICS: Would you introduce yourself for the recorder so she has it in the minutes?

MR. SCHIAVO: I already have. She was very diligent about taking my name and title earlier but we can go through it again if you'd like. Sure, Nick Schiavo, City of Santa Fe.

COMMISSIONER STEFANICS: Thank you.

MR. SCHIAVO: So currently the BDD facility manager position is posted and it's posted as "open until filled." And if you'd like I have a little bit of a history of the different people who have served in that role and what the time frame is. And then I also have some information about the minimum qualification for that position. So I don't know if that's of interest to the Board.

COMMISSIONER STEFANICS: Well, some of the Board members know the history and some don't. Why don't you give us an update of applications, applicants; are there any?

MR. SCHIAVO: Chair, at this point there aren't any and it's been open continuous for the last 10-11 months now. When I took the role as acting public utilities director the week of being brought on last June the then BDD Facility Manager/Acting Director Erika Schwender turned in her letter of resignation. She assured me it was nothing to do with me but she resigned at that point. And that's when we appointed Shannon. So since then we have had it posted. When it comes off after so many months we just put it back on.

COMMISSIONER STEFANICS: And why don't you briefly describe the qualifications for the posting and then we'll go to questions or comments from the Board.

MR. SCHIAVO: Minimum qualifications, you need to have an accredited college degree from university, bachelor's degree in water, wastewater technology, engineering, chemistry, management or related field. A masters in civil environmental or water resources engineering because as preferred or desirable professional engineer's license is preferred but not required and in addition to the four-year degree, you need eight years' of experience in water operations, four of which must include management of the operation and maintenance of a water facility and direct supervision of staff of a water or wastewater treatment facility.

COMMISSIONER STEFANICS: Thank you. Questions, comments. Commissioner.

COMMISSIONER CHAVEZ: When you repost, Nick, are you changing any of the text? Are you moving things around to make it maybe more appealing? I don't know if 10 months is standard for a position like this or not. I'm wondering, is the salary – does the salary match the requirements? You've probably already looked at all of that but would it be worth it to revisit that or not? That's my question.

MR. SCHIAVO: Chair, Board member Chavez, yeah, we have looked at it. There's definitely a couple – in my opinion there's a disconnect between the requirements and the salary that's there. I have a master's degree in civil engineering and I'm a licensed engineer but I would not qualify for this position.

So I think what's being asked for and the pay don't necessarily match. So, also, in my opinion, you can stop me at any point, I think what should be considered is either a) decreasing the requirements, or b) raising the salary. There have been, on occasion people who have applied but don't meet the qualifications. Some that haven't applied, and I've worked with the City Manager, that we felt would not be a good fit.

COMMISSIONER CHAVEZ: Madam Chair, I don't know what our budget is like but I think for myself I would rather hold to the requirements and see if we could offer a higher salary. I don't know if we could do anything with the benefit package or not. I don't know what other incentives we might be able to provide but I

guess if we have to think outside the box I would just pose that as maybe something to consider.

COMMISSIONER STEFANICS: On that point, what is the salary range and what restrictions do we have with the position being under the City?

MR. SCHIAVO: Madam Chair, I don't have the range in front of me, and Shannon, you can help me out, but I believe it tops out somewhere around \$95,000. He's nodding his head so it must be pretty close. It would be, for this type of position, challenging for us to exceed the range, the City.

COMMISSIONER STEFANICS: Because of the City personnel system?

MR. SCHIAVO: Because that's what it's posted at, so we would have to change that range before reposting it. If someone applied today, who met all the qualifications and then came in and said I'd like more money I would have to repost the position because it wouldn't be fair to anyone else who was interested at a higher salary.

COMMISSIONER STEFANICS: thank you. Board Member Bokum.

MS. BOKUM: Yes. So what I'm hearing is that you can't hire – that we could change the range but then we're repost it. Is that right?

MR. SCHIAVO: Yes, Chair, Board Member, we could again, my opinion, two options. a) change the requirements, or b) increase the salary.

MS. BOKUM: And repost it.

MR. SCHIAVO: And repost it.

COMMISSIONER STEFANICS: Councilor, any comments? Okay, we have had this discussion other years and the discussion was that the City did not allow the posting – the salary to be changed. Is there a difference now as opposed to a year or two ago?

MR. SCHIAVO: Chair, I would think the challenge you're going to run into is when you start talking about someone who's managing the facility – not to take anything away from the great job that Shannon's been doing, as opposed to someone like me who's managing 300 people, if you're going to offer that person more money, then I'll rush to go get my operator license so I can apply. So to answer your question, I think it could be increased but I think you'd run into problems with other directors within the City.

COMMISSIONER STEFANICS: Well, that's been my issue over the past years, Board members, is that right now the City is the project manager and it could be an independent, it could be under the County and it could be at a higher salary to reflect some independence and the qualifications. So we've had this discussion, not just today in 2014. I don't know what 2013 discussed but in 12 and 11 we discussed the same thing. And we have had a revolving door, and we are in the process of making some changes or at least having a committee study the future, whether we're changing project manager, whether it's staying the same, whether we're going to start something new. So are there any recommendations or ideas that we want to explore? Or do we want to let everything kind of remain status quo until we have the committee come forward with recommendations? Councilor.

COUNCILOR DOMINGUEZ: thank you, Madam Chair. So I guess just in terms of timing, it's been advertised for about a year?

MR. SCHIAVO: That's correct, Councilor.

COUNCILOR DOMINGUEZ: And where are we at in the last or this most recent phase of advertising.

MR. SCHIAVO: It's currently posted and there are no candidates.

COUNCILOR DOMINGUEZ: And it closes when?

MR. SCHIAVO: It's open until filled.

COUNCILOR DOMINGUEZ: Open till filled. Okay. So I guess if we were to try to give it a time – just to kind of get us to the next phase and say, okay, well, we'll give it another three months, we would have to repost.

MR. SCHIAVO: Councilor, it's currently posted, so I don't know what we could do differently. It's on the City's website and on the BDD website.

COUNCILOR DOMINGUEZ: But I guess in terms of personnel rules and would we have to repost it and say it's not open until filled and it's only posted for three months?

MR. SCHIAVO: I understand your question. We can pull that at any time.

COUNCILOR DOMINGUEZ: So I'm just wondering if we shouldn't do that so that we can get to a point where we are going to have to take, I guess decisive action or some other form of action to get that position filled. And I have no idea if it should be three months or six months or eight weeks or whatever the case may be, so I'll yield the floor.

COMMISSIONER STEFANICS: thank you. Other comments? Yes, Commissioner.

COMMISSIONER CHAVEZ: Well, I guess I'm seeing maybe two parallel tracks of discussion. One is we need to fill this position. The other is I think we pointed out earlier, Commissioner Stefanics, is that we really haven't decided on the model for the BDD. Do we want to use the model that we've been using? Do we want the position that we're talking about now to have more independence and not be so tied to either City or County? I don't think we've really had that discussion and made that decision either. I think ultimately we are going to have to have someone in that position with the qualifications to run the facility, to manage the facility on a day-to-day basis. And so maybe what you're suggesting, Councilor Dominguez, is that we modify the posting. I don't know if we talked about a salary range or not. Maybe we can't do that now. But at least we leave that position posted to see if there are any qualified candidates to be found or not.

COUNCILOR DOMINGUEZ: If I can, Madam Chair.

COMMISSIONER STEFANICS: Yes, Councilor.

COUNCILOR DOMINGUEZ: On that point, that's right. And then during that time if we get someone great that has all the qualifications and is willing to do it for the amount that's been posted as salary range, and during that time also have a discussion about whether or not we want to go more independent or whatever we want it to look like. And I'm just tossing that out there because I think that we could just potentially have this posted forever and not get anywhere. So that all, Madam Chair.

COMMISSIONER STEFANICS: Thank you very much. This item is not noticed for any action but would you put this on the next agenda as a possible action item and so that if the Board wishes to close the item or have further discussion they can and we might continue it on but we might take action. So we appreciate the update this evening. Thank you very much.

9. Update on LANL MOU, Early Notification System

[Exhibit 2: DOE letter dated 3/11/14]

MR. HARWOOD: Thank you, Madam Chair. I apologize that this did not get into the packet. This is the March 11th letter from the Department of Energy signed by Mr. Frank Marcinowski, Deputy Assistant Secretary for Waste Management. He is the individual who came out in 2010 and did sign our Buckman Direct Diversion-Los Alamos National Lab MOU, so this is a response to the resolution that this Board passed back in December, the letters that went out to, frankly, everyone we could think of at the DOE, the congressional delegation, the state roundhouse delegation and others. This was a very positive development in this discussion. As you all, I think know our current MOU expires May 15, 2015.

We are in the last monsoon season for collecting data, this 2014 and the operative portion here is in the third paragraph where Mr. Marcinowski states that he's asked Mr. Peter Maggione and Mr. David Rhodes, both of whom are here this evening, to be his designated representatives in making potential modifications or extensions to the 2010 MOU. I'd like to invite Mr. Maggione and Mr. Rhodes down to address you directly and then after they're done Shannon and I will have some additional comments for your consideration.

COMMISSIONER STEFANICS: Thank you. Thank you for coming to the meeting this evening.

PETE MAGGIORE: You're more than welcome. Madam Chair, members of the Board, my name is Peter Maggione. I'm the Assistant Manager for Environmental Projects for the Department of Energy at the Los Alamos Field Office. With me, somewhere, is David Rhodes. David's a supervisory engineer, senior engineer that I have in the Environmental Projects Office. And I'd like to thank you for the invitation to be here. I'd just like to reaffirm what Kyle just said in that letter, that Mr. Rhodes and I have been designated as representative of Mr. Marcinowski's headquarters to work with Board staff on an extension or new memorandum of agreement.

We had a first – I call it maybe a principals meeting just yesterday with Shannon, Daniela Bulman and Mr. Harwood where we started the process of trying to identify the scope, preliminary discussion on funding and discussion of the schedule. It's Mr. Rhodes' and my intent to try and have something completed by the end of this calendar year using the – going through this monsoon season that Mr. Harwood mentioned with the existing MOU and then having a new MOU in place prior to the next monsoon season in 2015.

So it's our intention to engage the Buckman Board staff in fairly robust technical conversations, to look at the original MOU, look at what worked, what didn't, what work was accomplished that we can check off, what work yet to remain to move forward and I'm optimistic that we can reach agreement. Mr. Rhodes, do you have anything you wanted to add? Okay. We stand for questions or I turn it back over to Mr. Harwood.

COMMISSIONER STEFANICS: Questions for Mr. Maggione or Mr. Rhodes?

COMMISSIONER CHAVEZ: Just a comment. I'm glad that we have all of the paperwork in place to keep the diversion project running. I think that's what we're

depending on into the future. But water quality, again, is one of the questions that comes up time and time again and so as we address whatever we're doing in that area, whatever we're doing to address it as we move forward with those programs that we could get the word out to the public what we're doing, why we're doing it, when we're doing it, just to assure them that it may not be perfect but we're doing everything within our means and maybe a little more to make sure that we do have high quality in the water that we're delivering to our customers.

MR. MAGGIORE: Madam Chair, we're going to that extent. If it would be the Board's pleasure to have either Mr. Rhodes – to have Mr. Rhodes attend future meetings to give updates that would be fine. I recently assumed some additional responsibilities with the Department of Energy. As you may know there's an incident at the WIPP facility that Los Alamos waste drums have been called into question and I'm spending an increasingly larger amount of my time personally addressing that issue and that's why I wanted to introduce Mr. Rhodes and assure the Board that he'll follow through in a diligent manner and you can trust him like you could speaking to me.

COMMISSIONER STEFANICS: Should we laugh or should we be sad?

MR. MAGGIORE: No, you should. You should. Absolutely should. I do.

COMMISSIONER STEFANICS: Okay. Thank you. Anything else, Commissioners, Board members? Okay. Mr. Harwood. Thank you, gentlemen, for being here.

MR. HARWOOD: So we expect the resolution passed back in December directing staff to bring updates to each Board meeting until this matter is resolved or concluded. I just want to remind you that it will continue to stay on the agenda pursuant to that resolution unless you'd like to change that. But we are beginning into a very earnest effort. We had a very engaged discussion recently where we identified a schedule within the end of year deadline that Mr. Maggiore identified. So we have tasks, we have sort of technical meetings as well as what Mr. Maggiore called principals meeting that's actually in my mind adopting a term sheet for what I think what we're thinking now would be a new MOU, instead of an amendment to the existing one. And so we'll be bringing that back to the Board as we go through the process to get direction from you on whether it's going the direction you'd like it to go.

So we're very confident. We've – one of the most important things about the current MOU is it's allowed us to establish a strong relationship working on these issues, not that we don't disagree, but we've had a very positive working relationship. So we're hopeful about the agreement we're going to bring forward to you and that it will address things going past the current deadline and be doing that before the end of the year. And I just reflect on the fact, Commissioner Stefanics, you asked very many tough questions in the spring of 2010 leading to the signing of the current MOU and so we're going to be looking to evaluate how we met those matters that you informed the agreement and how well we've done, and then how to go forward, both on a technical basis and on the relationship basis.

As you may remember, the MOU is divided basically into two parts. One is the early notification system that gives the operators notification that there's stormwater flows so they can turn off the diversion and not divert the sediment from LA Pueblo Canyon with legacy contaminants and then the other major component of the MOU is to collect water quality data in LA Pueblo Canyon and in the Rio Grande to be able to

characterize the relationship of what's coming off the lab and then into the river, which LA Pueblo Canyon confluence with the Rio Grande is three miles upstream from the BDD intake.

So those are the things that we'll be bringing back to you and we've already starting working on some memos to try to put that in context and show you where our discussions with NNSA are going now.

COMMISSIONER STEFANICS: Thank you. Questions? Yes, Commissioner.

COMMISSIONER CHAVEZ: Yes, thank you, Madam Chair. Kyle, all of this discussion, everything that you just spoke to now, and even the resolution and the plan for remediation is all part of the drought, monsoon and water resource management plan, right? I'm thinking that it's all incorporated into that plan as a long-range –

MR. HARWOOD: I don't think of them connected that way, Commissioner, but – I mean they are connected in certain ways. In other words, when the river's low during drought and then there's a storm, that stormwater with legacy contaminants is mixing with a smaller amount of volume in the Rio Grande and so the legacy contaminants can be more pronounced. Is that –

COMMISSIONER CHAVEZ: Right. And then you would have also a higher sediment, right? So do you add all that together?

MR. HARWOOD: So there certainly are physical – how do I say this? There are ways in which the physical systems interact during drought and monsoon, but I think as a matter of interagency agreement and as a matter of regulatory compliance this is a separate agreement with the National Nuclear Safety Administration and the ENS, that's the early notification system, and the water quality sampling we're doing are sort of independent of other regulatory requirements on the facility. It's an overlay that this Board sought in 2007 and 2008 in order to meet the concerns of the public about the uncertainties of LANL legacy contaminants. But in my mind it's physically interconnected in ways but as a regulatory and a governmental agreement matter it's actually a different level. I don't know if that answers your question.

COMMISSIONER CHAVEZ: No, that does it. Thank you.

COMMISSIONER STEFANICS: Thank you. Anything else on this matter? Okay. Thank you. So Kyle, just stay. You have number 10.

10. Update on Wild Earth Guardians Notice of Intent to Sue Regarding Rio Grande Silvery Minnow [*Exhibit 3: Wild Earth Guardian, Supplemental Notice of Intent to Sue...*]

MR. HARWOOD: Again, I apologize; this did not get into the packet. It was my fault. So as this Board knows, the environmental group Wild Earth Guardians filed a notice of intent to sue under the Endangered Species Act citizen supervision last year. They did not subsequently file suit. The way this works is under the ESA a citizens' suit, notice of intent to sue must be formally served on the respective federal agencies and then that citizen or citizen organization in this case must wait 60 days before filing in court and the intent of that 60-day period is to provide a cooling off period, give the agencies notice of the severity of the concern that the citizen group has so that a resolution can be identified prior to litigation.

Wild Earth Guardians did file that last year; they did not then pull the trigger to file suit last year. Then this past January they actually filed four new ones including against the State of Colorado, which is a very new development in this area of Endangered Species Act regulation, because of course there's the Rio Grande Compact that governs the water between the two states and then Texas. They then filed this top letter, which is what we're referring to as the supplemental NOI in early May. Most of this is their exhibits, which are there earlier notices of intent to sue. So it's really only the first four pages that are new.

The first four pages that are new go to some length to focus on the Bureau of Reclamation. The Bureau of Reclamation of course is the agency that manages the San Juan/Chama water, which both the City, the County, and now Las Campanas has a sublease of San Juan/Chama water. So that is a material issue. The Bureau of Reclamation is also the main water supply agency in the Middle Rio Grande. The Army Corps of Engineers, by contrast, is the main flood control agency.

This new supplemental NOI is directed specifically at the Bureau's discretion. There's a recent Ninth Circuit case out of California that was decided in the last couple of months that specifically took the Bureau to task over the scope of their discretion, and so one working theory is they have issued the supplemental NOI to take up some of the concepts that were articulated in that decision so that when and if they decide to file suit they won't – they'll be able to draw a straight line back to these notices, and so there won't be a gap, so to speak, between these notices and what they eventually file.

Sixty days from May 9th is July 8th so I'll be very curious to see whether or not something happens on July 8th. Interestingly, against this backdrop and what I know Rick has been reporting out to the City and the Board regularly about the drought that we're in, we've had a surprising number of minnow improvements and successes in the last month or two. So although we're in a drought stage and no one rainstorm as we know recovers from the long-term, deep drought that we've been in, the minnow is doing remarkably well this year. There was what we call a manufactured minnow flow, spawning spike done several weeks ago. It was in the paper; you may have seen it. It was the federal agencies and some of the other water management agencies like the Middle Rio Grande Conservancy District and ABC Water – Albuquerque Bernalillo County Water Utility Authority – working in concert to release a big slug of water, because what we know is minnows reproduce when there's this slug of water that comes through the system in the spring. There was a great amount of activity and a great number of eggs were collected which becomes part of all the statistical sampling for determining how well the species is doing as a threatened and endangered species.

We had cool weather and then the weather temperature, as many of us know, spiked in the last week or two and so the manufactured spawn came off the Rio Chama system which is where Heron and San Juan/Chama live and where Abiqui Reservoir is and so there was water in those reservoirs to create the manufactured spawning spike two or three weeks ago. Today, tomorrow and through the weekend we're actually going to have a natural spawning spike, which is all the snowpack running off very quickly on the Rio Grande Main Stem which is the system extended into southern Colorado. You have almost record flows coming off, if you can believe it – 8,000 cfs up in southern Colorado. Not all of that makes it past the state line, but a remarkable turn of events.

So several months ago, several months ago last year we were in crisis and we were looking at crisis through the summer and we had a number of challenges with water operations and diversions. Several months ago this year we were anticipating the worst. Hydrology, Mother Nature, the mix of the agencies coming together to be able to do the manufactured spawning spike a couple weeks ago and now this natural spawning spike, the picture suddenly looks much better and as it related directly to BDD operations it now looks like the Middle Rio Grande Conservancy District will be operating at least until the end of June, which means there's enough water in the river to kind of do Buckman Direct Diversion operations. When the river gets very low we go into – we have to do a certain number of things, some of them extraordinary, depending on how low the river flow gets in order to maintain diversions with the water right portfolio that all the partners have at the diversion.

So it looks like we're not going to have some of those problems at least through the end of June and then of course the monsoons are scheduled to show up at 3:00 on July 4th, and so if that in fact happens we should be able to move into the rest of the summer. So I don't know if you have any questions. I know that was a lot of information.

COMMISSIONER STEFANICS: Board members? Questions? I'm sure we'll get updated but our next Board meeting is before the 60-day deadline.

MR. HARWOOD: Just before. I would plan, unless you tell me otherwise, to get you an email whenever the shoe drops, so to speak, so that you have that information.

COMMISSIONER STEFANICS: I think that would be good.

MR. HARWOOD: Okay. Very good.

COMMISSIONER STEFANICS: Thank you very much. Okay, we're now – it's a 5:20. We need to leave this room at 6:00 for another meeting. So let's keep time in mind we have three more informational items and then we have six action items before we go to the public. Okay, Shannon.

4. Update on 2014 Annual Operating Plan

MR. JONES: Madam Chair, members of the Board, the BDD Annual Operating Plan, the primary purpose is just to accumulate the projected water calls from the partners and document those into a plan that is signed by the BDD facility manager and the partners, so this is just being provided to the Board as an informational item to show the projections for 2014, so really that is the intent. If there are any questions, absolutely, I would stand for questions.

COMMISSIONER STEFANICS: So, Mr. Jones, has this already been a signed agreement?

MR. JONES: Madam Chair, that is correct. It is a signed agreement. It is completed. The timeframe is typically to gather that information in October, finalize the plan in December and have the partner sign it and have that to the Board early in the calendar year.

COMMISSIONER STEFANICS: Okay. Thank you. Any questions? Questions? Comments? Okay. Thank you.

5. Update on the BDD Emergency Reserve Fund Policy and the Major Repair and Replacement Fund Policy

MR. JONES: Madam Chair, staff was directed by the Board to bring back both of these policies, so we did provide both policies. They're included in this packet and it's my belief that the main driving question was how was the amount, \$411,000 for the major repair and replacement fund policy calculated, so I've included a table in the memo that shows work that was done in 2010 where they categorized some equipment, assigned life cycles and values. And so that is what derived the \$411,000 annual contributions for this policy, this fund. The only thing staff would add is that as we go through the packet our capitalized and management plan would actually kind of dive into this more. Now with years of operation we would re-evaluate those life cycle costs and the values, so if changes were needed to be made, either increase or decrease in that amount we are expecting that to come forth through our capitalized management plan. And again, I'm available for questions.

COMMISSIONER STEFANICS: Thank you. Questions? I think my concern was whether or not we had a rationale for coming up with that amount and whether it was enough. And whether our finance staff had reviewed it and you indicated they had. So thank you very much.

6. Update on Amendment No.2 to the Professional Services Agreement with Alpha Southwest for repair of raw water pump stations for \$45,284.87 exclusive of NMGR

MR. JONES: Madam Chair, members of the Board, I did want to bring this informational item back to the Board that I did execute an amendment to our professional service agreement with Alpha Southwest for this calendar years. There was a couple developments where there were some repairs to the raw water pump stations that we were executing. Earlier in the year there was a question of whether parts could be obtained – the lead-time on the parts. What happened in this fiscal year, another project required an engineering firm to stamp the plans and we weren't sure if that was going to be able to be accomplished. Towards the end of this year we did have the opportunity where those things did fall in place and so the Buckman Direct Diversion saw this as an opportunity to execute some work now before we went into the peak season.

So that amendment was executed and that work is underway and will be completed before June 30, 2014.

COMMISSIONER STEFANICS: Questions? Yes, Councilor.

COUNCILOR DOMINGUEZ: Madam Chair, so the \$45,000 is the amount that you're talking about in terms of what's been executed?

MR. JONES: Yes. The \$45,000 worth of work will be executed.

COUNCILOR DOMINGUEZ: And the Amendment #1 was \$50,000.

MR. JONES: That is correct.

COUNCILOR DOMINGUEZ: That's \$95,000 total.

MR. JONES: Actually, the total amount – I apologize was actually about \$145,000 exclusive of GRT.

COUNCILOR DOMINGUEZ: Where is that in the memo?

MR. JONES: Madam Chair, members of the Board, it is in the financial contract, the summary of contracts on the bottom line number. That's on page 1 of 2 of the attachment to the agreement. It is not in the memo. Actually, it wasn't totaled but the sums of the projects. I apologize for not totaling that.

COUNCILOR DOMINGUEZ: That's okay. I guess I'm a little confused about the difference – I know what the difference is between the calendar year and the fiscal year, but how it pertains to this amendment.

MR. JONES: This amendment – the information coming back was that we executed the amendment to the contract to get this work done this fiscal year. So while the BDD does require a pump repair contractor be on call, this contract is going to expire. And even though an RFP is being written, I don't anticipate to have that contract back in place to probably September. And because the parts were able to be purchased and on site to do these repairs, we wanted to do that before we went too far into the peak season.

COMMISSIONER STEFANICS: And staff did come and discuss this with me. Did you discuss it with the chair as well?

MR. JONES: Madam Chair, yes, I did.

COMMISSIONER STEFANICS: Okay, so this is something that you want to be apprised of in the future please do let us know. Commissioner, did you have a question or comment?

COMMISSIONER CHAVEZ: No, Councilor Dominguez asked some of the questions I had.

COMMISSIONER STEFANICS: Okay. Anything else on this item? Okay. Thank you.

DISCUSSION AND ACTION ITEMS

21. Request for approval of Professional Services Agreement between Narasimhan Consulting Services and the Buckman Direct Diversion Board for development and implementation of BDD Capital Asset management Plan in the amount of \$205,130.27 inclusive of NMGRT

MR. JONES: Madam Chair, members of the Board, as I was mentioning before earlier is we've been working to get together a capital asset management plan, so we came before the Board and got approval to release an RFP. The RFP was released and we reviewed the proponents. That team was not just BDD staff but both City and County staff sat on that committee. So we looked at the firm. The actual estimated amount that was brought before the Board was about \$250,000 was estimated. So this does come in lower than what our anticipated cost was going to be. So we are asking approval of this agreement.

COMMISSIONER STEFANICS: My first question is I see that there were three applicants. Is that correct?

MR. JONES: Madam Chair, that is correct.

COMMISSIONER STEFANICS: And is the entity selected local?

MR. JONES: Madam Chair, the entity selected is out of Rio Rancho. So it's local to the state.

COMMISSIONER STEFANICS: Okay. Thank you. Questions? What's the pleasure of the Board?

COMMISSIONER CHAVEZ: Move for approval.

COUNCILOR DOMINGUEZ: I'll second.

COMMISSIONER STEFANICS: Okay. There's a motion and a second.

Further discussion?

The motion passed by unanimous [4-0] voice vote.

22. Request for approval to carry forward funding from FY 2013/2014 into FY 2014/2015 for the amount of \$205,130.37 to fund the development of the Capital Asset Management Plan

MR. JONES: Madam Chair, members of the Board, the request does come in this current fiscal year. There is funding available to process this project and we're asking that the funds carry forward and increase the actual budget of next year to fund that.

COMMISSIONER STEFANICS: Yes, Councilor Dominguez.

COUNCILOR DOMINGUEZ: Thank you, Madam Chair. So the \$250,000 was budgeted for that?

MR. JONES: Madam Chair, members of the Board, \$250,000 wasn't budgeted for the project but that amount is available in our professional services line item.

COMMISSIONER STEFANICS: Other questions?

COUNCILOR DOMINGUEZ: So what are we going to do with the difference between that and the contract?

MR. JONES: Madam Chair, members of the Board, any left over funding from the budget, anything actually gets returned back to the partners is either credited to the future expenditures or is credited back to the partners.

COUNCILOR DOMINGUEZ: Okay. I guess the question that I have is, the amount that you have – I'm going to use general fund terms. That's really for professional services. So is it going to go back into professional services or is it just going to go into the "general fund" for the partners? Not that we can't find a way to spend it.

MR. JONES: Madam Chair, members of the Board, it would just directly be returned back to the partners. I think the funding would actually come from the utilities, so anything that's refunded back would either go to the County's utility or the City's utility.

COMMISSIONER STEFANICS: Thank you.

COMMISSIONER CHAVEZ: Move for approval.

COUNCILOR DOMINGUEZ: Second.

COMMISSIONER STEFANICS: Thank you. Is there further discussion? Questions? Comments?

The motion passed by unanimous [4-0] voice vote.

23. Request for approval of Amendment No. 3 to the Professional Services Agreement #11-0533 with Long, Komer and Associates, PA for legal services in the amount of \$100,000.00 exclusive of NMGR

MR. JONES: Madam Chair, members of the Board, as we come to the end of our fiscal year these are contracts put in place to carry us into the next fiscal year. Long, Komer and Associates is the current Board counsel and attorney. So this amendment to carry through the next fiscal would actually be the fourth year of the contract. So we're requesting to amend the contract for next fiscal year.

COMMISSIONER STEFANICS: And so during the next fiscal year we'll be letting an RFP for the following?

MR. JONES: Madam Chair, that is correct.

COMMISSIONER STEFANICS: We would have to do some type of procurement for fiscal year 15/16.

COMMISSIONER STEFANICS: Thank you. Questions? Comments?

COUNCILOR DOMINGUEZ: Move for approval, Madam Chair.

COMMISSIONER CHAVEZ: Second.

COMMISSIONER STEFANICS: There's a motion and a second. Any further discussion?

The motion passed by unanimous [4-0] voice vote.

24. Request for approval of Amendment No. 3 to the Professional Services Agreement #11-0465 with Chavez Security for site security in the amount of \$79,052.53 exclusive of NMGR

MR. JONES: Madam Chair, members of the Board, again, carrying our security services forward in the next fiscal year, we are requesting approval to amend the contract in the amount of \$79,000 for services through December of 2014. Currently staff is putting together an RFP to take this out with a target deadline of October. So the request is actually half the amount budgeted for these services and the termination date is December of 2014. And I would stand for questions.

COMMISSIONER STEFANICS: Questions? Comments? I have one if no one else does. Could you briefly describe specific activity that they've assisted us with in times of emergencies? Like vandalism or storms or anything else?

MR. JONES: Yes. Madam Chair, members of the Board, there hasn't really been any emergencies that they've had to address, which I think really adds to the fact of why security on these sites is so important, it's because really we want it to be a deterrent of things like that. So by not seeing signs of graffiti on our tanks, not having incidents where chains of fences have been cut. So these security officers are on site when BDD staff isn't so they're a night service and weekend service where they patrol that corridor of the river and again, just their presence being there is a deterrent for people to look at vandalizing our sites.

COMMISSIONER STEFANICS: Thank you. Anybody else? If not, is there a motion?

COUNCILOR DOMINGUEZ: I'll move for approval.

COMMISSIONER STEFANICS: Thank you. Is there a second?

COMMISSIONER CHAVEZ: Second.

COMMISSIONER STEFANICS: There's a motion and a second. Any further discussion?

The motion passed by unanimous [4-0] voice vote.

25. Request for approval to contract with American Alternative for BDD insurance policies including real property coverage in the amount of \$132,503.00 exclusive of NMGR

MACKIE ROMERO (BDD Finance Director): Madam Chair, members of the Board, under the current joint powers agreement the Board is required to carry insurance coverage that is separate and apart from its partners' respective policies. The BDD Board currently has an insurance policy with American Alternative with an annual premium of \$127,714 which will expire July 1, 2014. We have contracted with Daniels Insurance to serve as our insurance broker on behalf of the Board. Daniels Insurance contacted eight insurance companies to compare coverage and policy rates. However, one of those companies was able to provide a competitive bid based on expired premiums and the concentration of property values. This company was our current policy carrier who is American Alternative. The proposed annual premium is \$132,503 with a policy effective date of July 1, 2014 to July 1, 2015. This is a four percent increase from our current premium which was due to a four percent increase in property values.

The memos in your packet do describe the proposed coverages and deductibles. George Segura from Daniels Insurance is also available if you have any questions or concerns. Thank you.

COMMISSIONER STEFANICS: Thank you. Mackie or Shannon, do we have any outstanding lawsuits under our old – our current insurance?

MR. JONES: Madam Chair, members of the Board, no. There's no outstanding lawsuits.

COMMISSIONER STEFANICS: That was factored into an assessment of a new policy?

GEORGE SEGURA: Madam Chair, good evening. I'm George Segura with Daniels Insurance. What we do is the last ones, we send in to all the carriers that we approach on behalf of the Board on an annual basis. This year we approached eight carriers. The premiums are a matter of public record as are the losses and what they've come back and said is that they cannot be competitive with what is being provided by American Alternative.

Now, our premium would have remained flat had we not had a four percent increase in property value. So because we had a four percent increase in property value the rate increased by four percent. So we've gone from \$127,000 to \$132,000 for this coming year.

COMMISSIONER STEFANICS: Wow. That's a good point.

MR. SEGURA: I'm sorry?

COMMISSIONER STEFANICS: We're just kibitzing up here. Okay. Thank you. Questions? Commissioner.

COMMISSIONER CHAVEZ: Yes, so Shannon, under coverage, we have a line item that's pretty broad. Equipment. Can you give us some examples of what type of equipment this policy will cover?

MR. JONES: Madam Chair, Commissioner Chavez, really, that associates – if it's not a building and it's not buried in the ground then it's equipment.

COMMISSIONER CHAVEZ: Okay. So then a lot of the distribution lines and things like that would not be covered.

MR. JONES: Madam Chair, members of the Board, that is correct. It does not cover infrastructure.

COMMISSIONER CHAVEZ: Not the infrastructure.

MR. SEGURA: Nor the distribution lines. No, sir.

COMMISSIONER STEFANICS: What about solar?

MR. SEGURA: I'm sorry?

COMMISSIONER STEFANICS: Solar is above ground.

MR. SEGURA: Yes, that is correct.

COMMISSIONER STEFANICS: So it would be covered?

MR. SEGURA: Yes.

COMMISSIONER CHAVEZ: So do we have a policy for the other infrastructure? As a replacement? So what do we do in that case?

MR. JONES: Madam Chair, members of the Board, when it comes to infrastructure replacement, again, that would tie into our capital asset management plan where we have assigned a life cycle. There are different ways to monitor the lifecycle of the pipeline.

COMMISSIONER CHAVEZ: But aside from that, if there was an event that damaged some of the infrastructure there's no way we could make a claim for that repair work? Because I know that we have to have replacement scheduled for most things but in the event that you don't anticipate, what would we do in that case?

MR. JONES: Madam Chair, members of the Board, so we do carry a repair contract with the underground utility contractor. That is also the intent of the emergency reserve fund, in the event that it met that criteria, meaning that it affected service and was over the dollar amount. That's when the emergency reserve fund would be utilized to make that repair.

COMMISSIONER CHAVEZ: Do you think we have enough in that reserve fund to do something substantial if need be?

MR. JONES: Madam Chair, members of the Board, that is a \$2 million fund which I believe for a failure in the infrastructure would be more than enough to cover an event.

COMMISSIONER CHAVEZ: Okay. Thank you, Madam Chair.

COMMISSIONER STEFANICS: Thank you. Any other questions, comments? What's the pleasure of the Board?

COUNCILOR DOMINGUEZ: I'll move for approval.

COMMISSIONER CHAVEZ: Second.

COMMISSIONER STEFANICS: Okay, so there's a motion and a second. Any further discussion?

The motion passed by unanimous [4-0] voice vote.

26. Request for approval of Amendment No. 2 to the agreement with Padilla Industries for required herbicide application associated with habitat restoration efforts for the BDD Project in the amount of \$11,164.44 inclusive of NMGRT

MR. CARPENTER: Thank you, Madam Chair. This amendment is related to the habitat restoration project that is ongoing. We've had some early rains this year and we had an outbreak of noxious weeds that were unexpected and it's imperative that we knock those down as soon as possible, so that's what this is intended to fund.

COMMISSIONER STEFANICS: Thank you. Questions? Comments?

COMMISSIONER CHAVEZ: Well, just a comment, Rick, and maybe it's just me, but you can tell me if I'm too far off. Depending on what kind of herbicide you're using it seems to be a contradiction in habitat restoration, so help me out there a little bit.

MR. CARPENTER: That's actually a good question. The herbicide that will be used is intended to be effective on broad-leafed weeds. The habitat that's been installed are trees and shrubs, waxier leaves, and it's just a different kind of herbicide that would be effective on that. In addition to that it's targeted spraying so there wouldn't be any drift on the installed trees and shrubs.

COMMISSIONER CHAVEZ: So it's just confined to that root system itself then? Of the noxious weeds that you're trying to eradicate?

MR. CARPENTER: That's correct. It's a systemic herbicide, so you spray the weeds and it travels systemically through the plant and kills the weed stems and the roots as well.

COMMISSIONER CHAVEZ: And doesn't migrate anywhere else.

MR. CARPENTER: No. It breaks down.

COMMISSIONER CHAVEZ: We'll trust you.

MR. CARPENTER: It's an approved herbicide in accord with the Forest Service environmental NEPA document that was done a year ago.

COMMISSIONER CHAVEZ: Okay. That's all I had, Madam Chair, but I guess I'll go ahead and move for approval.

COUNCILOR DOMINGUEZ: I'll second.

COMMISSIONER STEFANICS: Okay. There's a motion and a second. Any further discussion?

The motion passed by unanimous [4-0] voice vote.

MATTERS FROM THE PUBLIC

COMMISSIONER STEFANICS: We now are going to matters from the public but I'd like to ask one question first. Is anybody – are any of the Board members not going to be present on July 3rd, our next meeting? So we can know in advance. So I'll ask that question one more time at the end.

We are now at the point, matters from the public. Is there anyone from the public that would like to make a comment about any item?

Thank you, that section is closed.

MATTERS FROM THE BOARD

COMMISSIONER STEFANICS: Any matters from the Board?

COMMISSIONER CHAVEZ: Madam Chair, do you want to talk about the meeting date of July 3rd?

COMMISSIONER STEFANICS: Yes. Councilor Dominguez?

COUNCILOR DOMINGUEZ: I'll be here.

COMMISSIONER STEFANICS: Okay, thank you.

MS. BOKUM: I'll be here.

COMMISSIONER CHAVEZ: I'll be here also.

COMMISSIONER STEFANICS: And I will too. So it looks like we'll be fine for July 3rd. Great. Anything else from the Board? Anything that staff missed?

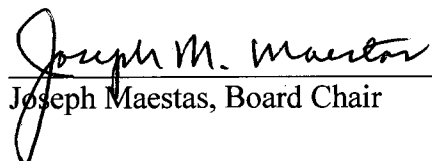
MR. JONES: Madam Chair, that is it.

NEXT MEETING: July 3, 2014

ADJOURNMENT

Having completed the agenda, Chair Stefanics declared this meeting adjourned at approximately 5:45 p.m.

Approved by:


Joseph Maestas, Board Chair

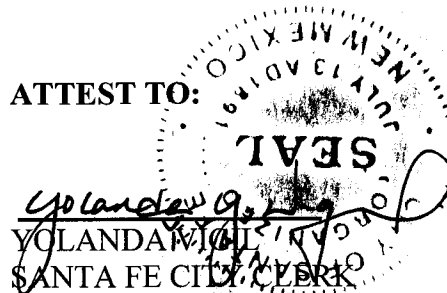
Respectfully submitted:

Karen Farrell, Wordswork

FILED BY:

GERALDINE SALAZAR
SANTA FE COUNTY CLERK

ATTEST TO:


YOLANDA M. GARCIA
SANTA FE CITY CLERK



CITY CLERK'S OFFICE

DATE 5/30/14 TIME 8:10a

SERVED BY Wesley H. Lopez

RECEIVED BY [Signature]

**AMENDED
AGENDA**

**The City of Santa Fe
And
Santa Fe County**

Buckman Direct Diversion Board Meeting

**THURSDAY, JUNE 5, 2014
4:30 PM
CITY HALL
CITY COUNCIL CHAMBERS
200 LINCOLN**

1. CALL TO ORDER
2. ROLL CALL
3. APPROVAL OF AGENDA
4. APPROVAL OF CONSENT AGENDA
5. APPROVAL OF MINUTES FROM THE APRIL 3, 2014
BUCKMAN DIRECT DIVERSION BOARD MEETING
6. MATTERS FROM STAFF
7. REPORT ON JUNE 3, 2014 FISCAL SERVICES AUDIT
COMMITTEE

INFORMATIONAL ITEMS

8. Update on the Hiring Process for the BDD Facility Manager. (Nck Schiavo) **VERBAL**
9. Update on LANL MOU Early Notification System. (Shannon Jones/Kyle Harwood/NNSA/DOE) **VERBAL**
10. Update on Wild Earth Guardians Notice of Intent to Sue regarding the Rio Grande Silvery Minnow. (Kyle Harwood) **VERBAL**
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CONSENT AGENDA

14. Drought, Monsoon and Water Resource Management Update. (Rick Carpenter)
15. Update on 3rd Quarter Financial Statement. (Mackie Romero)
16. Request for approval of amended Support Agency Selection Process Timeline. (Shannon Jones)
17. Request for approval of contract Amendment No. 2 to the Professional Services for Geosystems Analysis for unanticipated and on-going/extended habitat restoration efforts for the total amount of \$70,171.00 exclusive of NMGR. (Rick Carpenter)
18. Request for approval of Amendment No. 4 to the agreement with Bradbury Stamm for the BDD Solar Project at Booster Station 2A to decrease the size of the project from 2.016 MW to 1.5 MW. (Rick Carpenter)
19. Request for approval of Amendment No.2 to the Professional Services Agreement with Smith Engineering Co. for unanticipated extended construction management efforts for the BDD Booster Station 2A Solar Project for the amount of \$22,522.50 exclusive of NMGR. (Rick Carpenter)

20. Request for approval of Budget Adjustment Request to move \$11,600.00 to the correct line item for purchase of new server. (Mackie Romero)

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MATTERS FROM THE PUBLIC

MATTERS FROM THE BOARD

NEXT MEETING: July 3, 2014

ADJOURN

**PERSONS WITH DISABILITIES IN NEED OF ACCOMODATIONS,
CONTACT THE CITY CLERK'S OFFICE AT 505-955-6520, FIVE (5)
WORKING DAYS PRIOR TO THE MEETING DATE.**



CITY CLERK'S OFFICE

DATE 5/28/14 TIME 10:35 AM

SERVED BY [Signature]

RECEIVED BY [Signature]

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NEXT MEETING: July 3, 2014

ADJOURN

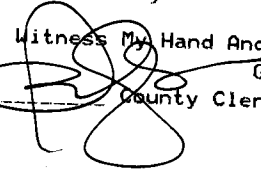
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2014 AUG 20 08:29:49 AM
RECORDED
2014

COUNTY OF SANTA FE)
STATE OF NEW MEXICO) ss

BUCKMAN DIRECT DIV MIN
PAGES: 67

I Hereby Certify That This Instrument Was Filed for
Record On The 20TH Day Of August, 2014 at 08:29:49 AM
And Was Duly Recorded as Instrument # 1743993
Of The Records Of Santa Fe County

Deputy Maxwell  Witness My Hand And Seal Of Office
Geraldine Salazar
County Clerk, Santa Fe, NM





CITY CLERK'S OFFICE

5/30/14

1171

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ED BY



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22. Request for approval to carry forward funding from FY 2013/2014 into FY 2014/2015 for the amount of \$205,130.37 to fund the development of the Capital Asset Management Plan. (Shannon Jones)
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24. Request for approval of Amendment No. 3 to the Professional Services Agreement #11-0465 with Chavez Security for site security in the amount of \$79,052.53 exclusive of NMGR. (Shannon Jones)
25. Request for approval to contract with American Alternative for BDD insurance policies including real property coverage in the amount of \$132,503.00 exclusive of NMGR. (Mackie Romero and George Segura)
26. Request for approval of Amendment No. 2 to the agreement with Padilla Industries for required herbicide application associated with habitat restoration efforts for the BDD Project in the amount of \$11,164.44 inclusive of NMGR. (Rick Carpenter)

MATTERS FROM THE PUBLIC

MATTERS FROM THE BOARD

NEXT MEETING: July 3, 2014

ADJOURN

**PERSONS WITH DISABILITIES IN NEED OF ACCOMODATIONS,
CONTACT THE CITY CLERK'S OFFICE AT 505-955-6520, FIVE (5)
WORKING DAYS PRIOR TO THE MEETING DATE.**



Department of Energy
Washington, DC 20585



March 11, 2014

Mr. Shannon Jones
Interim Buckman Direct Diversion Facility Manager
Sangre de Cristo Water Division
City of Santa Fe
P.O. Box 909
Santa Fe, New Mexico 87504

Dear Mr. Jones:

Thank you for your February 10 letters to Mr. David Huizenga and myself regarding the Buckman Direct Diversion (BDD) Board Resolution 2013-3: *A Resolution Requesting the Amendment and Extension of the Memorandum of Understanding Between the U.S. Department of Energy and the Buckman Direct Diversion Board Regarding Water Quality Monitoring*. My Office shares your interest in ensuring the water quality of the Santa Fe region and Rio Grande.

The Department of Energy (DOE) appreciates the interest the BDD Board has in continuing our relationship to ensure the continued protection of the drinking water source for the communities surrounding the Los Alamos National Laboratory (LANL). DOE is committed to continuing our environmental remediation activities and believes the 2010 Memorandum of Understanding (MOU) facilitated a good working relationship between the organizations.

The storm events of September 2013 impacted some of the LANL infrastructure the BDD Board relied on to monitor water quality. I have asked Mr. Peter Maggiore, Assistant Manager, and Mr. David Rhodes, Supervisor Environmental Remediation both from the Los Alamos Field Office, to be my designated representatives in making potential modifications or extensions to the 2010 MOU. You can reach Mr. Maggiore, at (505) 665-5025 or Mr. Rhodes, at (505) 665-5325.

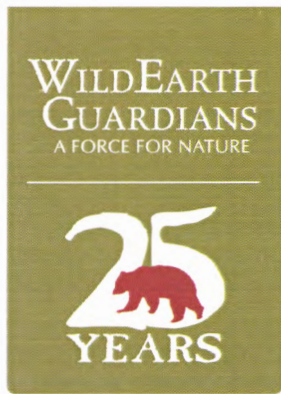
We look forward to the DOE's continued working relationship with your organization in ensuring the environmental protection of the critical water supplies to the Santa Fe region and the Rio Grande.

Sincerely,

Frank Marcinowski
Deputy Assistant Secretary for
Waste Management

cc: Peter Maggiore, LASO
Kimberly Lebak, LASO
David Rhodes, LASO





May 9, 2014

***Via Federal Express or
Certified Mail Return Receipt Requested***

Lowell Pimley, Acting Commissioner
U.S. Bureau of Reclamation
Department of the Interior
1849 C Street N.W.
Washington, D.C. 20240-0001

Mike Hamman, Area Manager
U.S. Bureau of Reclamation
Albuquerque Area Office
555 Broadway NE, Suite 100
Albuquerque NM 87102-2352

Sally Jewell, Secretary of the Interior
U.S. Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

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

Dr. Benjamin Tuggle, Regional Director
Southwest Regional Office
U.S. Fish and Wildlife Service
500 Gold Avenue SW
Albuquerque, NM 87102

**RE: Supplemental Notice of Intent to Sue the Bureau of Reclamation for
Violations of the Endangered Species Act Related to its Water Management
and River Maintenance Activities in the Middle Rio Grande Basin in New
Mexico**

Dear Commissioner Pimley, Area Manager Hamman, Secretary Jewell, Director Ashe and
Regional Director Tuggle:

Pursuant to the 60-day notice requirement of the Endangered Species Act ("ESA"), 16 U.S.C. § 1540(g), WildEarth Guardians ("Guardians") provided you with notices of its intent to bring suit against the U.S. Bureau of Reclamation, through the above named officials, (collectively "Bureau") for violations of the ESA. These notices were submitted to you on May 13, 2013 and February 4, 2014, and the two 60-day notices – taken together – indicate that Guardians' planned citizen's suit against you will allege violations of Section 7(a)(2), Section 7(d), and Section 9 of the ESA in connection with the Bureau's water management and river maintenance activities in the middle Rio Grande. 16 U.S.C. §§ 1536(a)(1), 1536(a)(2), 1536(d), 1538.

This 60-day notice is supplemental to the notices of May 13, 2013 and February 4, 2014, and provides you with notices of Guardians' intent to bring additional claims against you for procedural and substantive violations of Section 7(a)(2) and Section 9 of the ESA in connection with your water management and river maintenance activities in the middle Rio Grande. This notice does not supercede the 60-day notices of May 13, 2013 and February 4, 2014. Rather, the ESA citizen's suit which Guardians intends to commence 60 days after the submission of this notice will allege the causes of action described in this notice, as well as causes of action described in each of those two previous notices. Accordingly, all of the intended claims previously described in the May 13, 2013 and February 4, 2014 notices – and the factual and legal bases for those claims – are incorporated herein by reference and a copy of each of those two previous notices is attached hereto.

A. Additional procedural Section 7(a)(2) claim against the Bureau

The Bureau is currently engaged in a Section 7(a)(2) consultation with the U.S. Fish and Wildlife Service ("FWS") as to the impact of certain activities on the Rio Grande silvery minnow ("minnow") and the Southwestern willow flycatcher ("flycatcher"). In the Bureau's Amended Joint Biological Assessment ("BA") of January 2013, the Bureau describes the Bureau actions, which are the subject of the on-going consultation. See BA at pp. 33-41. Based on this notice, it is clear that the Bureau has failed to commence a Section 7(a)(2) consultation with the FWS on the full range of its discretionary authorities in the middle Rio Grande.

First, the Bureau's on-going consultation with the FWS does not include the Bureau's discretionary authority to re-operate dams and diversion structures in the middle Rio Grande for the benefit of the minnow and the flycatcher. Relatedly, the Bureau's on-going consultation with the FWS does not include the Bureau's authority to reduce water deliveries to the Middle Rio Grande Conservancy District ("MRGCD") for the benefit of the minnow and the flycatcher.

As you know, the discretionary authorities discussed in the preceding paragraph – which are notably omitted from the BA which arbitrarily "cabins" the on-going consultation to an unreasonably narrow subset of the Bureau's discretionary authorities – were assessed by the Solicitor of the Department of the Interior in 2000 and the subject of the Solicitor's memoranda of June 19, 2000 and July 6, 2000. In those memoranda, the Solicitor stated that the Bureau was required to engage in a Section 7(a)(2) consultation as to the operation of the facilities that MRGCD had transferred to the Bureau as part of the Middle Rio Grande Project, as well as subsequently constructed facilities. The Solicitor specifically determined that the Bureau has the discretionary authority – and the affirmative duty under the ESA – to bypass flows that would otherwise be used by MRGCD for the benefit of the minnow and the flycatcher. The source of this discretionary authority is federal reclamation law and Bureau contracts with MRGCD.

Subsequent decisions of the United States District Court for the District of New Mexico and the United States Tenth Circuit Court of Appeals confirmed the fact that the Bureau, indeed, possesses the discretionary authority to operate dams and diversion structures on the middle Rio Grande for the benefit of the minnow and the flycatcher, even if the exercise of this discretionary authority reduces flows to MRGCD. Rio Grande Silver Minnow v. Keys, 469 F.Supp.2d 973

(D.N.M. 2002), Rio Grande Silvery Minnow v. Keyes, 333 F.3d 1109 (10th Cir. 2003). While those two decisions were vacated by a subsequent decision of the Tenth Circuit, Rio Grande Silvery Minnow v. Keyes, 601 F.3d 1096 (10th Cir. 2010), that vacatur did not alter in any way, shape, or form the nature and the extent of the Bureau's discretionary authority with respect to the operation of dams and diversion structures in the middle Rio Grande.

Second, the Bureau's on-going consultation with the FWS does not include the Bureau's discretionary authority and statutory duty to limit water deliveries to MRGCD to an amount that can be beneficially used. The exercise of this authority and duty is essential to the conservation and recovery of the minnow and the flycatcher, and to the integrity of their respective designated critical habitats. As with the Bureau's authority to operate dams and diversion structures for the benefit of the minnow and the flycatcher, the Bureau's authority to limit water deliveries to MRGCD to the amount that can be beneficially used was specifically addressed and confirmed by the United States District Court for New Mexico and the United State Court of Appeals for the Tenth Circuit in the above cited decisions.

In light of the Bureau's failure to consult with the FWS on the full scope of its discretionary authorities in connection with middle Rio Grande facilities, as described above, the Bureau is in violation of Section 7(a)(2) of the ESA.

B. Additional substantive Section 7(a)(2) claim against the Bureau

The 60-day notice of February 4, 2014 provides notice of Guardians' intent to include a substantive Section 7(a)(2) action against the Bureau, as a result of Bureau actions in the middle Rio Grande which jeopardize the continued existence of the minnow and the flycatcher, and which adversely modify and/or destroy the designated critical habitats of the minnow and the flycatcher.

With this supplemental notice, WildEarth Guardians also provides you with notice of its intent to incorporate into its contemplated citizen's suit a claim that the Bureau's action in the middle Rio Grande constitute a substantive violation of Section 7(a)(2) because they are not based on the best available scientific information. As you know, the FWS released a document entitled Hydrologic Objective on May 3, 2013. This document expressly states that the hydrologic strategy described therein constitutes the best available science concerning the hydrologic conditions needed for the minnow's survival. It is plainly apparent that the Bureau's planned operations for the irrigation season of 2014 will deviate significantly from the FWS's Hydrologic Objective. Specifically, the Bureau will fail to fully implement both the Age 0 Strategy and the Age 1+ Strategy of that document.

Because the Bureau's operations of dams and diversion structures in the middle Rio Grande during 2014 are not based on the best available science – and deviate from that science in significant ways that imperil the continued existence of the minnow – Guardians intends to allege that the Bureau is in substantive violation of Section 7(a)(2).

C. Additional Section 9 claim against the Bureau

The previous 60-day notices provide notice of Guardians' intent to allege a Section 9 violation in its contemplated citizen's suit against the Bureau. With this supplemental 60-day notice, Guardians hereby provides you notice that it will also claim that the Bureau has no Section 9 coverage for incidental take of minnows at the current time because it has failed to commence a consultation with the FWS as to the full scope of its discretionary authorities as described above in this notice letter. Since the on-going Section 7(a)(2) consultation is arbitrarily and impermissibly narrow in scope, there is no valid and existing Incidental Take Statement that exempts the Bureau from the ESA's prohibition on the take of ESA-listed species.

If you believe that 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 number or e-mail address listed below.

Sincerely,



Digitally signed by Jen Pelz
DN: cn=Jen Pelz, o=WildEarth Guardians,
ou=Wild Rivers Program Director,
email=jpelz@wildearthguardians.org, c=US
Date: 2014.05.09 16:32:54 -06'00'

Jen Pelz
Wild Rivers Program Director
WildEarth Guardians
516 Alto Street
Santa Fe, NM 87501
jpelz@wildearthguardians.org
(303) 884-2702



February 4, 2014

***Via Federal Express or
Certified Mail Return Receipt Requested***

Michael L. Connor, Commissioner
U.S. Bureau of Reclamation
Department of the Interior
1849 C Street N.W.
Washington, D.C. 20240-0001

Mike Hamman, Area Manager
U.S. Bureau of Reclamation
Albuquerque Area Office
555 Broadway NE, Suite 100
Albuquerque NM 87102-2352

Sally Jewell, Secretary of the Interior
U.S. Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

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

Dr. Benjamin Tuggle, Regional Director
Southwest Regional Office
U.S. Fish and Wildlife Service
500 Gold Avenue SW
Albuquerque, NM 87102

**RE: Notice of Intent to Sue the U.S. Bureau of Reclamation for Violations of the
Endangered Species Act Related to its Water Management and River Maintenance
Activities in the Middle Rio Grande Basin in New Mexico**

Dear Commissioner Connor, Area Manager Hamman, Secretary Jewell, Director Ashe and
Regional Director Tuggle:

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. Bureau of Reclamation ("Reclamation"), through the above-named officials, for violating sections 7 and 9 of the ESA, 16 U.S.C. § 1536 and 1538 and its implementing regulations, 50 C.F.R. § 402 *et seq.*: (1) by failing to ensure that Reclamation's water management and river maintenance activities are not likely to jeopardize the continued existence of the Rio Grande silvery minnow (*Hybognathus amarus*), 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*) or result in the destruction or adverse modification of the silvery minnow and willow flycatchers' designated critical habitat; (2) by making irreversible or irretrievable commitment(s) of resources foreclosing the formulation or implementation of any reasonable and prudent alternative measures; (3) by causing ongoing and imminent future "take" without a permit authorized by law of the endangered silvery minnow and willow flycatcher; and (4) by causing ongoing and future imminent "take" without a permit authorized by law of the endangered silvery minnow and willow flycatcher by destroying or adversely modifying their designated critical habitat as defined in 50 C.F.R. § 402.02. *See* 16 U.S.C. §§ 1536(a)(2), 1536(d) and 1538(g).

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, including Reclamation, consult with the U.S. Fish and Wildlife Service ("Service") to 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").

After 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.¹ 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, an agency’s consultation duties do not end with the issuance of a biological opinion. Instead, an agency must 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.

After consultation is initiated (or reinitiated pursuant to one of the triggers set forth in the paragraph immediately preceding), ESA section 7(d) prohibits the agency or any permittee from “mak[ing] any irreversible or irretrievable commitment of resources” toward a project that would “foreclos[e] the formulation or implementation of any reasonable and prudent alternative measures.” 16 U.S.C. § 1536(d). The section 7(d) prohibition “is in force during the consultation process and continues until the requirements of section 7(a)(2) are satisfied.” 50 C.F.R. § 402.09.

Additionally, section 9 of the ESA prohibits the “take” of all listed endangered species. 16 U.S.C. § 1538(a)(1)(B). The term “take” means “to harass, harm, . . . wound, kill, trap, [or] capture” an endangered species.² *Id.* § 1532(19). “Congress intended to define ‘take’ in the ‘broadest possible manner to include every conceivable way’ in which any person could harm or kill wildlife.” See *Aransas Project v. Shaw*, 930 F.Supp.2d 716, 726 (S.D. Texas 2013).

It is also unlawful for any “person” to “cause [an ESA violation] to be committed,” and thus the ESA prohibits a governmental agency from authorizing any activity resulting in take. See 16 U.S.C. § 1538(g); *see also, e.g., Strahan v. Cox*, 127 F.3d 155, 163 (1st Cir. 1997). Without a valid biological opinion and an incidental take statement from the Service covering the

¹ *Bennett v. Spear*, 520 U.S. 154, 170, 117 S. Ct. 1154, 1165, (1997) (a biological opinion may be advisory in nature, but the agency disregards “at its own peril”).

² “Harass” means “an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering.” 50 C.F.R. § 17.3. “Harm” means “an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.” *Id.*

activity's take of an endangered species, an action agency is not authorized to "take" or jeopardize *any* members of that species.

The ESA provides for citizen enforcement of the provisions of the Act. To enforce sections 7 and 9 of the ESA, 16 U.S.C. § 1536(a)(2), (d) and 1538(g), "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 Reclamation's 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.³ *Id.* at 2.

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.

³ 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.

Since 2009, lack of high spring runoff combined with summer drying have resulted in a decline of silvery minnow populations.⁴ 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)⁵ 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 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

⁴ *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").

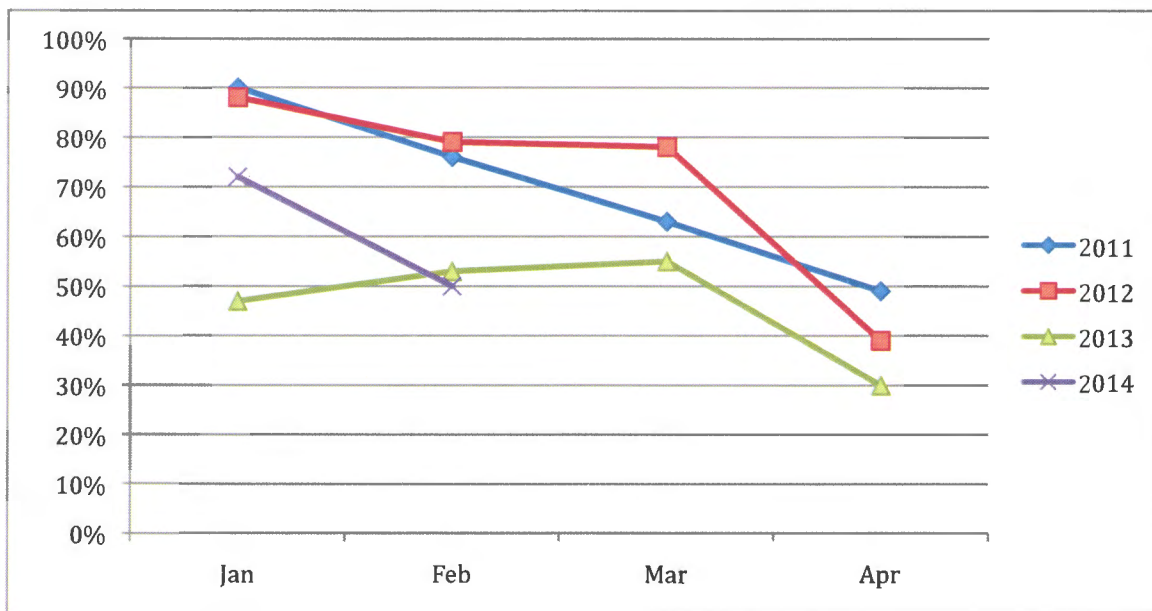
⁵ Approximately 21 percent (37 miles) of the silvery minnow's critical habitat dried in 2013. *See* 2013 Preliminary Salvage Data of the Service.

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. Reclamation's Consultation History in the Middle Rio Grande

i. 2003 Biological Opinion Issued by the Service

Reclamation began consulting with the Service over its water management and river maintenance 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 U.S. Army Corps of Engineers ("Corps") and the non-federal parties.⁶ Like its biological opinions in 2001 and 2002, the Service's March 17, 2003 biological opinion⁷ ("2003 Biological Opinion") concluded that Reclamation's water and river maintenance operations and the related actions of the non-federal parties "are *likely to jeopardize* the continued existence of the silvery minnow and the flycatcher and adversely modify critical habitat of the silvery minnow."⁸ 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 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 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.*

⁶ The non-federal parties included the State of New Mexico and the Middle Rio Grande Conservancy District.

⁷ 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).

⁸ "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.

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 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 “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 and other federal and non-federal agencies in the middle Rio Grande. Thus, failed implementation of the RPA by Reclamation and other agencies 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 2003 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 the associated ITS. As when the 2003 Biological Opinion was current, it can only shield the agencies from ESA liability when the agencies are actually complying with the RPA which was developed to ensure the activities of Reclamation, the Corps and the non-federal parties do not jeopardize the continued existence of the species.

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) concerning the effects of its proposed water management and river maintenance activities on the listed species.⁹ *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 of the Service transmitting 2013 ITS at 1 (emphasis added).

To date, the Service continues to consult with Reclamation and the non-federal parties regarding their activities in the middle Rio Grande.¹⁰ Until recently, the Service anticipated issuing a new biological opinion to Reclamation and the non-federal parties, the Corps and the Bosque del Apache National Wildlife 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 team¹¹ and it began meeting regularly to determine potential water management options for 2013. *Id.*

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 near

⁹ On the same day, the Service also reinitiated consultation with the Corps (Consultation #02ENNM00-2013-F-0034) and the Bosque del Apache National Wildlife Refuge (Consultation #02ENNM00-2013-F-0035).

¹⁰ The Service also continues to consult with the Bosque del Apache National Wildlife Refuge.

¹¹ 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.

Albuquerque;¹² 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 the 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 estimate 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 requirements 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”—utilizing Reclamation’s “supplemental water” to maintain the minimum flow requirements would exhaust the supply 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” estimate 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.

On May 31, 2013, in a somewhat cryptic memorandum, the Service appeared 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

¹² The “Central gauge” is also known as the USGS Station No. 08330000, Rio Grande at Albuquerque, New Mexico located in Bernalillo County, New Mexico.

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 does not shield Reclamation from its responsibility to prevent jeopardy to the silvery minnow or from liability for its violations of section 9 of the ESA.

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. Reclamation exceeded the permitted take in the 2013 ITS (observed mortality of 55 individuals) 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.

III. Reclamation’s Water Management and River Maintenance Activities are Subject to Liability under Section 7 and 9 of the ESA

As discussed above, 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 is operating at its own peril in continuing the agency’s water management and river maintenance 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) Reclamation’s ongoing failure to implement the RPA required by section 7(a)(2) of the ESA to prevent jeopardy to the minnow and flycatcher; 2) Reclamation’s failure in 2013 to comply with the level of take specified in its ITS or reinitiate consultation with the Service; 3) Reclamation’s ongoing failure to implement the RPMs and non-discretionary term and conditions of the ITS; and 4) Reclamation’s ongoing failure to reinitiate consultation with the Service upon a) exceeding the permitted level of take in the ITS, b) modifying an essential element of the RPA in a way not previously considered by the 2003 Biological Opinion, and c) the Service’s revision to the critical habitat of the flycatcher. Therefore, until the Service issues a new biological opinion, Reclamation remains without a valid permit to take any individual silvery minnow or willow flycatcher during the 2014 irrigation season.

A. Failure to Implement the RPA

Since 2003, Reclamation has failed to implement the RPA in numerous significant ways, including: (1) failing to remove or modify dams that fragment river habitat and limit water management opportunities that would benefit the species; (2) failing to implement restoration activities throughout the middle Rio Grande in a manner that is geographically dispersed throughout the action area; (3) violating certain flow requirements that serve to ensure habitat for the silvery minnow and flycatcher within critical reaches of the middle Rio Grande; and (4) failing to provide one-time increase in flows to cue successful spawning in the silvery minnow.¹³ In addition to these ongoing violations of the 2003 Biological Opinion, it is anticipated that Reclamation will commit future violations of these flow provisions during the 2014 irrigation season and beyond. *See* 2014 Rio Grande NRCS forecast, above.

The specific ongoing and potential future violations by Reclamation and the non-federal entities that undermine the validity of the 2003 Biological Opinion are described in more detail below:

i. Failure to Provide Fish Passage at the San Acacia and Isleta Diversion Dams

Reclamation failed to comply with its mandatory duty under the 2003 Biological Opinion to complete fish passage at the San Acacia diversion dam by 2008 and at Isleta diversion dam by 2013 (RPA Element R). 2003 Biological Opinion at 96. The silvery minnow recovery plan and the Biological Opinion both discuss the importance of habitat connectivity to the survival and recovery of the silvery minnow. For example, the 2003 Biological Opinion provides:

The San Acacia and Isleta Diversion Dams are barriers (total or partial) to upstream fish movement. The natural drift of eggs and larvae downstream and over these diversion dams and the inability of adults to recolonize upstream areas effectively fragments and isolates populations in lower river reaches. By providing a mechanism for adults to move upstream without the aid of capture and relocation, we believe significant benefits to the survival of the populations can occur.

Id. at 89. Furthermore, fish passage is listed as a recovery task in the original and updated silvery minnow recovery plans (USFWS 1999, updated 2010). The silvery minnow recovery plan provides in section 2.1.2 as follows:

¹³ Although not detailed in this notice, the Corps has also failed to implement key features of the 2003 Biological Opinion RPA, including its failure to initiate construction on realignment of the San Marcial Railroad Bridge by the September 30, 2008 deadline (Element U of the RPA) and failure to complete the Cochiti baseline study by the deadline of December 31, 2007 (Element W) (although, the study was finally completed in October 2013).

Provide for fish passage at irrigation diversion structures.

Rio Grande silvery minnow eggs and larvae move downstream, potentially stranding fish below barriers (diversion structures). Promoting the ability of Rio Grande silvery minnows to independently disperse between sub-reaches can increase reproduction among sub-populations, thereby increasing effective population size and maximizing the retention of genetic diversity.

The successful design and implementation of fish passage structures (or other diversion facilities that do not block upstream dispersal) could allow Rio Grande silvery minnow to repopulate areas where they were spawned.

Notably in its 2010 recovery plan, the Service rejected the use of “capture and transport” as a suitable interim measure for repopulating upstream reaches.

No factual dispute exists regarding whether fish passage has been completed at the San Acacia or Isleta Diversion Dams by 2008 and 2013, respectively. Reclamation admits its failure to remove or provide fish passage at either of the dams that segment the middle Rio Grande and that the agency continues to violate Element R of the RPA.

ii. Failure to Include Habitat Restoration Projects in the Southern Portion of the Middle Rio Grande

The 2003 Biological Opinion assumed that Reclamation would implement habitat restoration projects throughout the middle Rio Grande “to increase backwaters and oxbows, widen the river channel, and/or lower river banks to produce shallow water habitats, overbank flooding, and regenerating stands of willows and cottonwood to benefit the silvery minnow, the flycatcher, or their habitats.” *See* 2003 Biological Opinion (RPA Element S) at 96-7. Though the 2003 Biological Opinion recognizes that the initial emphasis would be on projects in the northern portion of the middle Rio Grande the Biological Opinion explicitly says that, “restoration will be distributed throughout the action area.” *Id.* at 97. The action area includes the portion of the middle Rio Grande below San Acacia diversion dam. Unfortunately, Reclamation completed only minimal, if any, habitat restoration meeting this definition in the southern portion of the action area. Though the de facto abandonment of the lower reaches by Reclamation, including especially the reach below San Acacia diversion dam, may have been approved for water management that was not the case for restoration projects and activities. As of the date of this notice, Reclamation continues to violate Element S of the 2003 Biological Opinion RPA.

iii. Failure to Provide Continuous River Flows in Middle Rio Grande

In addition to restoring habitat and maintaining river connectivity, the Service included water operations elements in the RPA and found such elements to be essential to preventing

jeopardy to the silvery minnow and willow flycatcher. *Id.* at 93. In dry years,¹⁴ RPA Element E requires Reclamation provide continuous river flows from Cochiti dam to the southern boundary of silvery minnow critical habitat just above Elephant Butte reservoir from November 16 to June 15 of each year. *Id.* at 92. Furthermore, RPA Element F requires Reclamation maintain year-round river flows between Cochiti dam and the Isleta diversion dam with a minimum flow of 100 cfs at the Central gauge. *Id.* at 93.

RPA Elements E and F are at the heart of the 2003 Biological Opinion. Continuous river flows prove important for providing “at least a minimal amount of habitat for adult and juvenile silvery minnows through the summer months and will help to alleviate jeopardy,” and similarly for flycatchers “the presence of surface water is considered one of the most important factors in determining suitable breeding sites.” *Id.* at 93. The Service found it “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.” *Id.* “River drying causes direct mortality to silvery minnow when the pools which they are trapped dry.” 2006 Amendment at 5. In addition, due to the short life cycle of the silvery minnow, any decreased reproductive success over consecutive years can reduce populations to dangerously low levels. *Id.*

In 2003, 2004, 2006, 2011 and 2013, Reclamation and the other action agencies violated RPA Elements E and/or F on several occasions. For example, continuous river flows in the San Acacia reach ceased from May 22 to 27, 2006 over a 4.7 mile stretch of the river killing 38 minnows and resulting in the relocation of an additional 4,220 minnows. 2006 Amendment at 5. On April 22 to 25, 2011, an 8-mile reach within the Bosque del Apache National Wildlife Refuge dried killing 527 minnows. *See 2011 Report to Rio Grande Compact Commission by Reclamation* at 38. Both these events constitute violations of RPA Element E and resulted in the collective mortality of over 550 minnows.

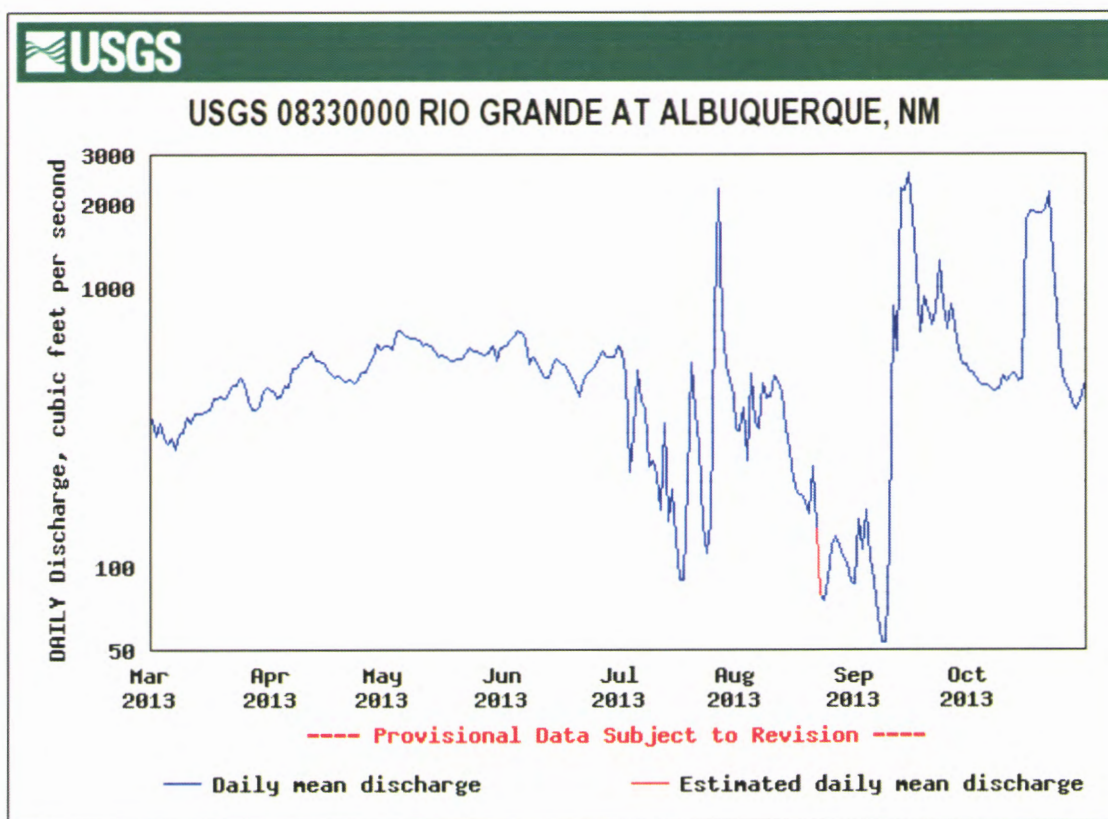
Likewise, Reclamation violated RPA Element F by failing to maintain a minimum flow of 100 cfs at the Central gauge on at least eleven separate days in 2013.¹⁵ *See Table 1*, attached hereto. *Figure 2*, on the next page, shows the streamflow data from the Central gauge from March to October 2013.¹⁶

¹⁴ Dry years are defined as those years where NRCS’s April 1 Streamflow Forecast at Otowi Gauge is less than 80% of average or when Rio Grande Compact Article VII restrictions are in effect (i.e. when there is less than 400,000 acre-feet of usable water in project storage). Average is defined as the average streamflow at Otowi Gauge for 30-year period from 1971 to 2000.

¹⁵ The Central Gauge fell below 100 cfs on July 17 and 18; August 23, 24, 25 and 31; September 1, 6, 7, 8 and 9, 2013 in violation of RPA Element F of the 2003 Biological Opinion.

¹⁶ *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**



Over the past decade, Reclamation has committed violations of RPA Elements E and F on several occasions causing mortality to hundreds of silvery minnow in the Rio Grande. Last year, Reclamation failed to implement the flow requirements in the RPA (under the guise of a waiver by the Service) resulting in numerous violations of RPA Element F and causing the death of over 230 silvery minnows in the month of June. Thus, Based on the projected streamflow for the 2014 irrigation season (similar to those experienced in 2006, 2011 and 2013), future violations of one or both of these mandatory flow requirements by Reclamation are imminent.

iv. Failure to Provide Spawning Spike

From 2011 to 2013, Reclamation and the Corps failed to provide the one-time increase in flows to cue spawning as required by RPA Element A. 2003 Biological Opinion at 91. Due to the Corps' position refusing to "deviate" its operations at Cochiti dam and the uncertainty of flows in April and May 2014, it is reasonably likely that a peak flow will not be generated in the middle Rio Grande again this year. If that occurs, 2014 will be the fourth consecutive year without spawning by the silvery minnow.

A peak flow—as occurred historically in May or June—is another essential component necessary for the survival and recovery of the silvery minnow and willow flycatcher. Such increased flows in the spring induce reproduction in the silvery minnow and creates nesting habitat for the willow flycatchers in flooded areas. *Id.* The Service recognized the importance of such peak flows and included a mandatory requirement that between April 15 and June 15 of each year, the action agencies “shall provide a one-time increase in flows (spawning spike).” *Id.* at 91. The Service emphasized in the 2003 Biological Opinion that “due to the short life cycle of the silvery minnow, any decreased reproductive success over consecutive years can reduce populations to dangerously low levels.” *Id.* at 93. Reclamation has violated and continues to violate RPA Element A of the 2003 Biological Opinion and it is reasonably imminent that the same violation will occur in the spring of 2014 and beyond.

B. Failure to Comply with the Level of Take Specified in the 2013 ITS

Reclamation also failed to stay within the level of take specified by the Service in its 2013 ITS. The Service permitted the take of 2,746 minnows in 2013 with an “observed mortality” of 55 individuals. 2013 ITS at 2. As of July 1, 2013, the Service reported 230 dead minnows as a result of river drying, exceeding the 2013 ITS threshold by 179 minnows (4 times the permitted level of take). Reclamation did not specifically reinitiate consultation with the Service at that time as required by the ESA and its implementing regulations.

C. Failure to Implement Non-Discretionary Terms and Conditions in the ITS

In addition to Reclamation’s failure to implement the RPA and violations of its ITS by exceeding the specified level of take, Reclamation also failed to take the necessary actions to minimize the take of silvery minnows as detailed in the ITS. The ITS provides: “the Service believes the following RPMs are necessary and appropriate to minimize impacts of incidental take of the silvery minnow.” *Id.* at 105. Further, the Service provides “these terms and conditions [implementing the RPMs] are non-discretionary.” *Id.* Therefore, compliance with the terms and conditions “must be achieved in order to be exempt from the prohibitions of section 9 of the ESA.”

First, the ITS specifies in RPM 1 “[a]ction agencies and parties to the consultation shall minimize the take of silvery minnows within the Rio Grande.” *Id.* at 105. Term and condition 1.1 requires Reclamation to “[r]amp down river flows as slowly as possible during the time periods set forth in the RPA to minimize intermittency. Even under worst conditions, every effort shall be made to ensure that no more than 4 miles of river dry per day . . .” *Id.* at 106. Reclamation’s implementation of the minnow action team’s recommendations—to conserve supplemental water—is directly contrary to the mandate of term and condition 1.1. Once flows were “ramped down” on June 1, the river began drying. As of July 1, 2013, 37-miles of the river dried and 230 dead minnows were collected by the Service during its salvage operations. *See Preliminary Data for 2013 Salvage Report* by the Service. Reclamation violated RPM 1 of the 2003 Biological Opinion by taking actions in 2013 that increased river drying and caused take of silvery minnow in excess of its ITS.

Second, RPM 3 provides “[a]ction agencies and parties to the consultation shall minimize the take of silvery minnows and flycatcher from a lack of water availability due to the proposed action.” *Id.* at 105. To implement this provision, terms and conditions 3.1 and 3.2 must be implemented. *Id.* at 106. Term 3.1 requires Reclamation to “continue to seek and release supplemental water from all available sources.” *Id.* at 107. Term 3.2 mandates Reclamation “[d]evelop a plan for acquiring water from willing leasers or sellers to provide supplemental water for the benefit of the species.” *Id.* Reclamation is directed to complete the plan within 18 months from the date of issuance of the 2003 Biological Opinion. *Id.*

As recognized in the 2003 Biological Opinion, river flows prove a crucial factor for survival and recovery of the silvery minnow and willow flycatcher. RPM 3 emphasizes the importance of reallocating water from historic uses back to the river to provide habitat for the listed species. The Service even provided a conservation recommendation suggesting one method for acquiring water (i.e. development of an agricultural forbearance program that could provide additional water for the to benefit the species). *See Id.* at 108 (Conservation Measures 7). While Reclamation secures water each year from San Juan-Chama contractors to benefit the species, the agency has failed to seek supplemental water from *all available sources* as required by the terms and conditions of the ITS. *Id.* at 107 (emphasis added). All available sources includes seeking water from or developing an agricultural water leasing program in the middle Rio Grande. Reclamation fails to comply with the terms and conditions required for the implementation of RPM 3. The ITS cannot protect Reclamation from liability under section 9 if the RPMs and the non-discretionary terms and conditions are not fully implemented.

D. Failure to Reinitiate Consultation

As required by 50 C.F.R. § 402.16, the 2003 Biological Opinion provides that Reclamation must 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. Since the Service reinitiated consultation with Reclamation on February 22, 2013, nearly all of these triggers to reconsultation have occurred. First, as of July 1, 2013, Reclamation exceeded the limit of 55 minnows (observed mortality) specified in the 2013 ITS. Second, Reclamation modified an essential element of the RPA (Element F) to the 2003 Biological Opinion in a way that was not previously considered by the Service. Finally, in January of 2013 (just before consultation was reinitiated), the Service also revised its critical habitat designation for the Southwestern willow flycatcher.

Reclamation’s failure to reinitiate consultation pursuant to at least three separate instances related to its implementation of the 2003 Biological Opinion violates 50 C.F.R. § 402.16. Despite the unique circumstances under which Reclamation claims the 2003 Biological Opinion was extended, its obligation remains to reinitiate consultation upon the triggers set forth in the implementing regulations of the ESA. *See* 50 C.F.R. §402.16(a)-(d). Further, it is

important to note that “[w]hen reinitiation of consultation is required, the original biological opinion loses its validity, as does its accompanying incidental take statement, which then no longer shields the action agency from penalties for takings.” *See Center for Biological Diversity v. U.S. Bureau of Land Management*, 698 F.3d 1101, 1037 (9th Cir. 2012).

IV. Violations of the ESA

Guardians hereby puts Reclamation on notice that it will promptly seek judicial relief if Reclamation fails to remedy the ongoing and imminent future¹⁷ violations of the ESA and its implementing regulations. 16 U.S.C. §§ 1536(a)(2), (d) and 1538(g).

A. Violations of Section 7(a)(2) of the ESA

Guardians hereby puts Reclamation on notice that the agency is violating section 7(a)(2) 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 Reclamation’s ongoing and future actions 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 Reclamation’s ongoing and future actions 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).

B. Violations of Section 7(d) of the ESA

Guardians hereby provides notice that Reclamation has violated and continues to violate section 7(d) of the ESA, 16 U.S.C. § 1536(d), by making irreversible or irretrievable commitment(s) of resources which have the effect of foreclosing the formulation of implementation of any reasonable and prudent alternatives which would avoid violating ESA subsection 7(a)(2), 16 U.S.C. § 1536(a)(2).

C. Violations of Section 9 of the ESA

Guardians hereby provides notice that Reclamation is violating section 9 of the ESA, 16 U.S.C. § 1538(g), and its implementing regulations by causing ongoing and imminent future “take” without a permit authorized by law of the endangered Rio Grande silvery minnow and/or Southwestern willow flycatcher as the result of Reclamation’s water management and river maintenance activities in the middle Rio Grande.

¹⁷ *See Colorado Environmental Coalition v. Office of Legacy Management*, 819 F.Supp.2d 1193, 1220 (D. Colo. 2011) (finding Plaintiff’s pre-suit notice under the ESA was effective as to future agency actions, where the letter contained sufficient description of the challenged activities, some of which occurred after the notice letter was sent).

Guardians hereby provides notice that Reclamation is violating section 9 of the ESA, 16 U.S.C. § 1538(g), and its implementing regulations by causing ongoing and imminent future “take” without a permit authorized by law of the endangered Rio Grande silvery minnow and/or Southwestern willow flycatcher by destroying or adversely modifying critical habitat of the listed species as defined in 50 C.F.R. § 402.02.

D. Violations of ESA’s Implementing Regulations

Guardians hereby puts Reclamation on notice that the agency is violating 50 C.F.R. § 402.14(i)(4) and 402.16 by failing to immediately reinitiate consultation upon exceeding the level of take specified in the 2013 ITS.

Guardians hereby puts Reclamation on notice that the agency is violating 50 C.F.R. § 402.16 by 1) failing to reinitiate consultation with the Service 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 reinitiate consultation or to incorporate in their ongoing consultation with the Service an analysis of the revised critical habitat designation for the Southwestern willow flycatcher.

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’s citizen suit provision, 16 U.S.C. § 1540(g), is to encourage discussions among parties in order to avoid potential litigation. We encourage Reclamation 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,

Commissioner, Michael L. Conner, *et. al.*
February 4, 2014

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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 |



May 13, 2013

Via Electronic Mail, Federal Express and/or Certified Mail, Return Receipt Requested

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RE: Notice of Intent to Sue for Violations of the Endangered Species Act on the Middle Rio Grande

Dear Gentilepersons:

In accordance with the 60-day notice requirement of Section 11(g) of the Endangered Species Act ("ESA"), 16 U.S.C. § 1540(g), you are hereby notified that WildEarth Guardians and other interested parties intend to bring a civil action against the U.S. Bureau of Reclamation ("Reclamation") and the U.S. Army Corps of Engineers ("Corps") for ongoing and future violations of the ESA, 16 U.S.C. § 1531 *et seq.* and its implementing regulations, 50 C.F.R. § 402 *et seq.* in connection with the agencies failure to implement the reasonable and prudent alternative ("RPA") set forth by the U.S. Fish and Wildlife Service ("Service") in the Biological

and Conference Opinions on the Effects of Actions Associated with the Programmatic Biological Assessment of Bureau of Reclamation's Water and River Maintenance Operations, Army Corps of Engineers' Flood Control Operation, and Related Non-Federal Action on the Middle Rio Grande dated March 17, 2003 ("2003 BO"). The 2003 BO contemplated that all elements of the RPA, if implemented collectively, would alleviate jeopardy to the Rio Grande silvery minnow and the Southwestern willow flycatcher and adverse modification to the silvery minnow critical habitat; however, despite the mandates in the 2003 BO, the agencies continue to carry out their water operations and maintenance activities to the detriment of the listed species and in violation of the ESA.

As you know over the past decade, WildEarth Guardians has made a concerted effort to develop constructive collaborative solutions with the federal and non-federal stakeholders on the Middle Rio Grande. We are very concerned about the health of the river throughout the Middle Rio Grande and the species that rely upon it for their survival. WildEarth Guardians is actively working to secure storage space for environmental water in Abiquiu Reservoir and develop a pilot water-leasing program to secure forbearance of agricultural water in times of drought for use in maintaining flows in the river. By filing this notice, we do not want to foreclose these efforts or add barriers to their completion. However, due to the absence of progress in implementing long-overdue solutions combined with the severe drought in the Middle Rio Grande, we are very concerned that your agencies will not be able to maintain river flows and other conditions that are necessary for the survival of the listed species. In addition, we believe that the past decade of failures by your agencies to comply with the RPA elements contained in the 2003 BO is significant and not only jeopardizes the species, but also undermines our ability to trust in the outcome of the agencies' current consultation with the Service. We encourage Reclamation and the Service to take adequate measures to protect the species. However, we are compelled by the notice requirement in the ESA to notify you of our intent to sue over the ESA violations described herein, unless you act to redress these violations of law within the next 60 days or inform us in writing of reasonably prompt plans to do so.

I. The 2003 Biological Opinion on the Middle Rio Grande

The March 17, 2003 Biological Opinion was the result of a somewhat complicated ESA consultation history in the Middle Rio Grande. *See* 2003 BO at 4-5. The 2003 BO was amended on June 15, 2006 ("2006 Amendment"), to reflect the designation of critical habitat for the flycatcher, modify the Incidental Take Statement, amend the reasonable and prudent measure 1.1 and evaluate the effects of river drying on the minnow that occurred over a five-mile reach between May 22-27, 2006 in violation of the RPA. On January 3, 2013, the Service designated revised critical habitat for the Southwestern willow flycatcher. *See* 78 Fed. Reg. 344 (2013). The 2003 BO as amended was in effect for a 10-year term ending on February 28, 2013. *Id.* at 110. On February 25, 2013, the Service reinitiated consultation with Reclamation and the Corps regarding the effects of their proposed water management activities on the listed species. *Id.* This consultation is ongoing and is not expected to result in a new BO until after the 2013 irrigation season.

Over the past decade, the 2003 BO has served as a critical guide to water management and habitat restoration activities throughout the Middle Rio Grande in order to benefit and recover the Rio Grande silvery minnow and Southwestern willow flycatcher. The 2003 BO is programmatic in scope and evaluates the impacts of federal and related non-federal water management, river maintenance and flood control operations on the listed species. *Id.* at 5-20. The Service concluded in its 2003 BO that the agencies water management activities “are likely to jeopardize the continued existence of the silvery minnow and the flycatcher and adversely modify critical habitat of the silvery minnow.” *Id.* at 84-88 (emphasis added). The Service admits in its 2003 BO that “[w]ithout creative, intensive, and focused management, these impacts could result in the extinction of the silvery minnow and a significant reduction of the potential to recover the flycatcher.” *Id.* at 88.

As a result of its “jeopardy” determination, the Service developed the RPA to the 2003 BO, including an Incidental Take Statement, Reasonable and Prudent Measures, and Conservation Recommendations. *Id.* at 87-111. The purpose of the RPA was to detail a number of actions that, if implemented together, would mitigate the significant negative effects on the listed species and alleviate jeopardy. *Id.* at 88. Those mandatory actions include: (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 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.* at 87-102.

These RPA requirements also are incorporated into the Incidental Take Statement issued by the Service. In fact, the Incidental Take Statement (both in the 2003 BO and the subsequent 2006 Amendment) specifically provides that the Incidental Take Statement is “based on the premise that the RPA will be implemented.” *Id.* at 103. Furthermore, the Incidental Take Statement in the 2006 Amendment provides “[i]n the accompanying biological opinion and when this ITS was amended on August 15, 2005, the Service determined that this level of anticipated take is not likely to result in jeopardy to the silvery minnow when the RPA is implemented.” 2006 Amended ITS at 5 (emphasis added). Therefore, the exception to the “take” prohibition in the ESA provided in the Incidental Take Statement relies upon your agencies implementation of the RPA.

II. Failure to Implement the Biological Opinion

Reclamation and the Corps have failed to implement the RPA in numerous significant ways, including: (1) by failing to remove or modify dams and bridges that fragment river habitat and limit water management opportunities that would benefit the species; (2) by failing to implement restoration activities throughout the Middle Rio Grande in a manner that is geographically dispersed throughout the action area; (3) by violating certain flow requirements that serve to ensure habitat for the silvery minnow and flycatcher within critical reaches of the Middle Rio Grande and (4) by failing to provide one-time increase in flows to cue successful spawning in the silvery minnow. In addition to the ongoing violations of the 2003 BO, it is anticipated that Reclamation and the Corps will commit future violations of these flow provisions during the 2013 irrigation season. These water operations elements are necessary to ensure successful reproduction and survival during dry years and are at the center of the 2003 BO RPA.

The specific violations that Reclamation, the Corps and the non-federal entities are engaged in that undermine the 2003 BO are described in more detail below:

A. Failure to Provide Fish Passage at the San Acacia and Isleta Diversion Dams

Reclamation has not complied with its mandatory duty under the 2003 BO to complete fish passage at the San Acacia Diversion Dam by 2008 and at Isleta Diversion Dam by 2013 (Element R). *Id.* at 96. The silvery minnow recovery plan and the programmatic BO both discuss the importance of habitat connectivity to the survival and recovery of the Rio Grande silvery minnow. For example, the 2003 BO provides:

The San Acacia and Isleta Diversion Dams are barriers (total or partial) to upstream fish movement. The natural drift of eggs and larvae downstream and over these diversion dams and the inability of adults to recolonize upstream areas effectively fragments and isolates populations in lower river reaches. By providing a mechanism for adults to move upstream without the aid of capture and relocation, we believe significant benefits to the survival of the populations can occur.

Id. at 89. Furthermore, fish passage is listed as a recovery task in the original and updated Rio Grande silvery minnow recovery plans (USFWS 1999, updated 2010). The RGSM Recovery Plan provides in section 2.1.2 as follows:

Provide for fish passage at irrigation diversion structures.

Rio Grande silvery minnow eggs and larvae move downstream, potentially stranding fish below barriers (diversion structures). Promoting the ability of Rio Grande silvery minnows to independently disperse between sub-reaches can

increase reproduction among sub-populations, thereby increasing effective population size and maximizing the retention of genetic diversity.

The successful design and implementation of fish passage structures (or other diversion facilities that do not block upstream dispersal) could allow Rio Grande silvery minnow to repopulate areas where they were spawned.

It should be noted that in updating the recovery plan in 2010, the Service specifically excluded the prior provision regarding capture and transport as a suitable interim measure for repopulating upstream reaches.

There is no factual dispute regarding whether fish passage has been completed at the San Acacia or Isleta Diversion Dams by 2008 and 2013, respectively. It most clearly has not. Reclamation and the Corps have disregarded the mandate in Element R of the RPA specifically designed by the Service to aide in alleviating jeopardy to the listed species. As of the date of this notice, Reclamation and the Corps are committing an ongoing violation of Element R of the 2003 BO RPA.

B. Failure to Remove and Realign the San Marcial Railroad Bridge

Reclamation and the Corps have failed to initiate construction on realignment of the San Marcial Railroad Bridge by the mandatory deadline of September 30, 2008 as required by Element U of the RPA. *Id.* at 98. Such realignment is necessary to increase the safe channel capacity within this lower reach of the Middle Rio Grande. The Railroad Bridge currently serves as an impediment to safely passing necessary flood flows used “to maintain [and] improve the quality and quantity of habitat available for the silvery minnow and flycatcher.” *Id.* at 99.

The Corps did not initiate construction on realignment of the railroad bridge in 2008. On January 22, 2007, the Corps admitted that it would not meet the deadline set in the RPA and set forth a new deadline of September 30, 2010. That amended deadline was also not met. In the 2011 RPA Status Report, it is indicated that construction was to begin on December 31, 2010. This deadline was also not met. As of the date of this notice, construction has not been initiated on the realignment of the San Marcial Railroad Bridge and it remains in the exact place it was when the 2003 BO was first issued. As of the date of this notice, Reclamation and the Corps are committing an ongoing violation of Element U of the 2003 BO RPA.

C. Failure to Include Habitat Restoration Projects in the Southern Portion of the Middle Rio Grande

The 2003 BO assumed that Reclamation and the Corps (in consultation and coordination with the Service and appropriate Pueblos) would implement habitat restoration projects throughout the Middle Rio Grande “to increase backwaters and oxbows, widen the river channel, and/or lower river banks to produce shallow water habitats, overbank flooding, and regenerating stands of willows and cottonwood to benefit the silvery minnow, the flycatcher, or their

habitats.” See 2003 BO RPA (Element S) at 96-7. Though the 2003 BO recognizes that the initial emphasis would be on projects in the northern portion of the Middle Rio Grande the BO explicitly says that, “restoration will be distributed throughout the action area.” *Id.* at 97. This includes the portion of the Middle Rio Grande below San Acacia diversion dam. Unfortunately there has been no restoration meeting this definition in the southern portion of the action area. Though the de facto abandonment of the lower reaches by your agencies, including especially the reach below San Acacia diversion dam, may have been approved for water management that was not the case for restoration projects and activities. As of the date of this notice, Reclamation and the Corps are committing an ongoing violation of Element S of the 2003 BO RPA.

D. Failure to Complete the Cochiti Baseline Study

Element W of the 2003 BO RPA requires the Corps to “complete an environmental baseline study and investigate the feasibility of transporting sediment from Cochiti Lake” by December 31, 2007. *Id.* at 98. Sediment is vital for the restoration of the Rio Grande’s aquatic ecosystems and riparian floodplains and in the absence of the natural levels of sediment the Rio Grande continues to degrade, lose aquatic habitat diversity and become more disconnected from its floodplain. Though the Corps has made some progress in implementing this provision of the 2003 BO it has not yet completed a baseline study that would help determine if sediment from the Cochiti Reservoir and its delta can be safely transported to the Middle Rio Grande. Without sediment the operation of Cochiti Reservoir will continue to jeopardize the Southwest willow flycatcher and the Rio Grande silvery minnow and adversely modify critical habitat of the listed species. As of the date of this notice, the Corps is committing an ongoing violation of Element W of the 2003 BO RPA.

E. Failure to Provide Continuous River Flow in Middle Rio Grande

In dry years¹, RPA Element E requires Reclamation and the Corps provide continuous river flows from Cochiti Dam to the southern boundary of silvery minnow critical habitat from November 16 to June 15 of each year. *Id.* at 92. Furthermore, RPA Element F requires that year-round river flows must be maintained between Cochiti Diversion Dam and the Isleta Diversion Dam with a minimum flow of 100 cubic feet per second (“cfs”) at the Central Bridge gage near downtown Albuquerque. *Id.* at 93. RPA Element E and F have been violated at least several times in the past decade in 2003, 2004, 2006 and 2011. For example, continuous river flows in the San Acacia reach ceased from May 22 to 27, 2006 over a 4.7 mile stretch of the river and from April 22 to 25, 2011 over an 8 mile reach with the Bosque del Apache National Wildlife Refuge. Based on the drought conditions this year, similar to those experienced in 2006 and 2011, Reclamation anticipates violating one or both of these mandatory flow requirements this upcoming summer.

¹ Dry years are defined as those years where Natural Resources Conservation Service’s April 1 Streamflow Forecast at Otowi Gage is less than 80% of average. Average is defined as the average streamflow at Otowi Gage for 30-year period from 1971 to 2000.

RPA Elements E and F are at the heart of the 2003 BO. River connectivity in the Cochiti and Angostura reaches is important for providing “at least a minimal amount of habitat for adult and juvenile silvery minnows through the summer months and will help to alleviate jeopardy,” and similarly for flycatchers “the presence of surface water is considered one of the most important factors in determining suitable breeding sites.” *Id.* at 93. “River drying causes direct mortality to silvery minnow when the pools which they are trapped dry.” 2006 Amendment at 5. In addition, due to the short life cycle of the silvery minnow, any decreased reproductive success over consecutive years can reduce populations to dangerously low levels. *Id.* The past two years (2011 and 2012) were extremely dry years (April 1 forecasts about 45% of average) and as a result minnow populations have been declining. The 2013 forecast as of April 1 (30% of average) was even dryer than the forecasts for the past two years. Reclamation has expressed real concern that there is not enough supplemental water available to meet these flow requirements and that there is an imminent threat that substantial drying or dangerously low flows will occur in the river including in reaches that typically have water throughout the season. As of the date of this notice, violations of Elements E and F in the 2003 BO RPA have already occurred and there is a reasonable likelihood of potential future violations of these flow elements this summer.

F. Failure to Provide Spawning Spike

Reclamation and the Corps have failed to provide the one-time increase in flows to cue spawning as required by RPA Element A in 2011 and 2012. 2003 BO at 91. As of the date of this notice, Reclamation and the Corps have failed to provide a spawning spike for the silvery minnows in 2013. This release of water for spawning is another important mandatory requirement of the 2003 BO. The release of increased flows in the spring to create a peak in the hydrograph are necessary to induce spawning in the silvery minnow, which is a key to its reproductive success and plays a huge role in maintaining an adequate population. *Id.* Such peak flows are also important to create habitat for the flycatcher. The spawning spike has not yet occurred this spring and it is not anticipated that any spike will occur before June 15, 2013 to the detriment of the minnow and in violation of Element A of the 2003 BO RPA.

WildEarth Guardians is very disappointed that in the ten years since the 2003 BO was issued, Reclamation and the Corps have not followed through on their commitments to restore river connectivity, complete habitat restoration in the lower reaches of the Middle Rio Grande, and maintain flows for the benefit of the listed species. Taken together, the failure by Reclamation and the Corps to timely implement the RPA represents widespread non-compliance with the 2003 BO. This agency-wide failure to implement key provisions of the RPA over the past decade as well as the anticipated violations this summer overwhelmingly shows that the assumptions set forth in the 2003 BO are no longer valid. As the facts above demonstrate, Reclamation and the Corps can no longer reasonably assure that protections for the Rio Grande silvery minnow and the Southwest willow flycatcher required in the RPA are being implemented and thus the Services determination of “no jeopardy” with implementation of the RPA are no longer valid.

III. Notice of Ongoing and Future ESA Violations

WildEarth Guardians hereby puts Reclamation and the Corps on notice that it will promptly seek judicial review under the ESA if the agencies fail to remedy the ongoing and future² non-compliance with regard to the RPA contained in the 2003 BO as detailed above.

WildEarth Guardians is concerned that the ongoing consultation initiated by the Service on February 25, 2013 will not be timely, adequate, or completed in a manner that would meaningfully prevent “jeopardy” to the Rio Grande silvery minnow and Southwestern willow flycatcher for the remainder of 2013 drought in the Middle Rio Grande.

WildEarth Guardians hereby provides notice that Reclamation and the Corps must incorporate in their ongoing consultation with the Service an analysis of the revised critical habitat designation for the Southwestern willow flycatcher issued on January 3, 2013 as required by 16 U.S.C. § 1536 and its implementing regulations, 50 C.F.R. § 402.16(d) (2013).

WildEarth Guardians hereby provides notice that Reclamation and the Corps have violated and are continuing to violate ESA Section 7(d), 16 U.S.C. § 1536(d), by making irreversible or irretrievable commitment(s) of resources which have the effect of foreclosing the formulation or implementation of any reasonable and prudent alternatives which would not violate ESA subsection 7(a)(2), 16 U.S.C. § 1536(a)(2).

WildEarth Guardians hereby provides notice that Reclamation and the Corps are violating Section 9 of the ESA, 16 U.S.C. § 1538, and its implementing regulations by causing ongoing and imminent future “take” of the endangered silvery minnow and flycatcher as direct result of implementing their water management, river maintenance, flood control operations and other activities in the Middle Rio Grande without a permit authorized by law.

WildEarth Guardians hereby provides notice that Reclamation and the Corps are violating Section 9 of the ESA, 16 U.S.C. § 1538, and its implementing regulations by causing ongoing and imminent future “take” of the endangered silvery minnow and flycatcher by destroying or adversely modifying critical habitat of the listed species as defined in 50 C.F.R. § 402.02, without a permit authorized by law.

² See *Colorado Environmental Coalition v. Office of Legacy Management*, 819 F.Supp.2d 1193, 1220 (D.Colo. 2011) (finding Plaintiff’s pre-suit notice under the ESA was effective as to future agency actions, where the letter contained a sufficient description of the challenged activities, some of which occurred after the notice letter was sent).

WildEarth Guardians hereby provides notice that Reclamation and Corps are violating Section 9 of the ESA, 16 U.S.C. § 1538, and its implementing regulations by causing ongoing and imminent future "take" of the endangered Rio Grande silvery minnow and Southwestern willow flycatcher as a direct result of their water management, river maintenance, flood control operations, and other activities with respect to the Middle Rio Grande. Such "take" is unlawful and not authorized by law based on the failure of Reclamation and the Corps to implement the RPA in the 2003 BO. Implementation of the RPA is critical premise upon which the Incidental Take Statement is based.

Moreover, there is a reasonable likelihood of further unauthorized "take" of silvery minnow which could exceeds the levels of "take" specified in the Incidental Take Statement.

IV. Contact Information

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
(505) 988-9126

V. Conclusion

One of the purposes of the ESA citizen suit provision, 16 U.S.C. § 1540(g), is to encourage discussions among parties in order to avoid potential litigation. This is precisely our intent in providing this notice. We encourage Reclamation and the Corps to seriously consider the concerns detailed in this notice and ask that the agencies discuss the steps that may taken going forward to remedy these legal violations. We would like to continue our ongoing dialogue with the agencies with the hope that this notice can catalyze swift action to not only avert the crises that the species are potentially facing this summer but also to make firm new commitments to mandatory conservation actions for the species. We prefer to avoid litigation if possible. However, if the aforementioned violations of the ESA are not remedied within 60 days of the date of this letter or discussions regarding other potential remedies are not initiated, we intend to file a citizen suit seeking preliminary and permanent injunctive relief, as well as attorneys fees and costs.

Secretary Sally Jewell, et. al.
May 13, 2013

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

Sincerely,

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