Buckman Direct Diversion Project

A joint regional project of the City of Santa Fe and Santa Fe County to build a reliable and sustainable water supply.

MEMORANDUM

Date: August 31, 2012

To: Buckman Direct Diversion Board

From: Rick Carpenter, BDD Project Manager

Subject: Update on the Middle Rio Grande Endangered Species Collaborative Program and Recovery Implementation Plan

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The Middle Rio Grande Endangered Species Collaborative Program (MRGESCP) was started after the litigation in 2002 and 2003 regarding the endangered Rio Grande Silvery Minnow and related water activities of the Rio Grande. Federal, state, tribal and local government agencies along with the major diverters in the Middle Rio Grande basin have been working to avoid the problems that threaten the Minnow's survival and recovery. In 2004 a rider to the federal legislation "Energy and Water Development Appropriations Act" extended the 2003 Biological Opinion for the Minnow through March 16, 2013.

The existing Biological Opinion and resulting Record of Decision for the BDD Project Final Environmental Impact Statement were negotiated against the backdrop of the Minnow dispute and resolution. The current work by the federal and state agencies to develop and implement a replacement to the expiring Minnow Biological Opinion could have important implications for the current and future operations of the BDD Project.

BDD Project staff has been monitoring the work of the MRGESCP over the past eight years. While the BDD Project, City and County of Santa Fe, have not joined the Collaborative Program as signatories, we have participated in meetings and have provided input to the process. We anticipate that the work of the Collaborative Program is coming to an end this fall with a transition from the Collaborative Program to a "Recovery Implementation Program" (RIP) … and a much anticipated new Biological Opinion for the Minnow.

As currently proposed, the RIP will become the permanent compliance program for the Minnow. Water resource activities will be implemented to support the recovery of the Minnow so that it can be downlisted from endangered to threatened, and then removed from the Endangered Species Act listing in the future. The scope of the RIP is broad and will include nearly all water activities in the Middle Rio Grande including the Rio Grande diversions of the BDD Project.

The Interstate Stream Commission, Office of the State Engineer, and Attorney General's Office, recently submitted a document to the Bureau of Reclamation for inclusion in their Biological Assessment. These documents form the basis upon which the US Fish and Wildlife Service will prepare the new Biological Opinion. At issue in recent months have been 3 topics of concern to the State agencies and major water diverters: 1) the scope of coverage of the new Biological Opinion, 2) who will manage the new RIP, and 3) what metrics will be used to measure ESA compliance and success. One other potential issue might be the relationship between groundwater pumping and surface water in the Rio Grande.

The State is scheduled to propose conservation measures by mid-September that will support the coverage that has been requested. The US Fish and Wildlife Service is scheduled to produce a draft Biological Opinion in the coming months that will have important consequences for all water activities in the Middle Rio Grande, including the BDD Project.

Attached to this memo are two cover letters, one from the BOR to the FWS and the other from the State to BOR. Also attached is a report prepared by the UNM Law School regarding the history of the Minnow dispute.

The Rio Grande silvery minnow: Eleven years of litigation

*By Susan Kelly, Director, Utton Transboundary Resources Center, with Summer McKean, student, UNM School of Law**

With two appellate court decisions issued in 2010, lengthy and hard-fought litigation over issues surrounding protection of the Rio Grande silvery minnow under the Endangered Species Act (ESA) has come to an end. On the one hand the 10th Circuit Court of Appeals left the door open for future litigation on right to title to the irrigation storage, diversion and conveyance works of the Middle Rio Grande Project in the Middle Rio Grande Valley. On the other hand, the Court ordered that all prior rulings of the District Court regarding this litigation be vacated. This leaves future litigation very uncertain regarding issues about application of the ESA in the Middle Rio Grande, most importantly the issue of the scope of the Bureau of Reclamation's duty to consult under the ESA regarding use of water supplied to the Middle Rio Grande Conservancy District (MRGCD).

The Rio Grande silvery minnow (minnow) was historically one of the most abundant species of fish in the Rio Grande watershed system, and because of the imminent threat of extinction, was listed as an endangered species under the Endangered Species Act (ESA) in 1994.[1] At the time of its listing, the minnow had been eliminated from 95% of its historical habitat, and the majority of the minnows remaining were confined to the lowest 60 miles of the Middle Rio Grande, between the San Acacia and Elephant Butte dams.[2] The habitat of the southwestern willow flycatcher, a small migratory bird that nests in several areas along the Middle Rio Grande, has also been adversely affected by changes to the flow regime of the river. The flycatcher was placed on the endangered species list in 1995.[3]

1996 was the first year of significant drought in the Middle Valley in several decades. The entire river flow was diverted at San Acacia for irrigation use in the MRGCD late in the summer with large associated minnow kill. The Bureau of Reclamation initiated the San Juan-Chama supplemental water operations program. San-Juan Chama Project water was used for irrigation, and native flows were by-passed to remain in the river to help maintain wetted habitat for the minnow.

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* Amy Haas, general counsel of the NM Interstate Stream Commission and Kevin Flanigan, Interstate Stream Commission provided valuable comments on this paper, but the authors are responsible for the contents; law students Ignacio Gallegos and Zach Jones provided research assistance in 2005.

[1] 59 FR 36995, July 20, 1994, codified in 50 CFR §17.11.

[2] Ibid.

[3] Endangered and Threatened Species: The Southwest Willow Flycatcher; Final Rule, U.S. Fish and Wildlife Service, Federal Register, Volume 60 #38 (1995).

1999 Drought conditions worsened from 1996 to 1999. To prevent the extinction of the minnow, the Department of Interior issued the first Rio Grande silvery minnow Recovery Plan in 1999. Under court order, the U.S. Fish and Wildlife Service (FWS) Regional Director accepted the plan, and critical habitat was designated for the minnow consisting of 163 miles of the mainstem Rio Grande in New Mexico from Cochiti Dam on the north to Elephant Butte Reservoir in the south.[4] A subsequent challenge to the designation was brought to court under the case *MRGCD v. Babbitt*, 206 F. Supp. 2d 1156 (D. NM 2000). The district court required the FWS to conduct an Environmental Impact Statement (EIS) for the critical habitat designation. This ruling was upheld in the 10th Circuit Court of Appeals in *MRGCD v. Norton*, 294 F.3d 1220 (2002).

In November of 1999, environmental groups opposed the Bureau of Reclamation's and Army Corps of Engineers' failure to complete consultation with the FWS over Middle Rio Grande water operations. Environmental groups filed their lawsuit under the name *Rio Grande Silvery Minnow et al. v. Keys* and the case was assigned to Judge Parker. The southwestern willow flycatcher was included as a plaintiff. The lawsuit named the Bureau of Reclamation (BOR) and the U.S. Army Corps of Engineers (Corps) as defendants due to their role in the diversion and storage of Rio Grande water. The claim of the environmental groups was that the failure of the federal defendants to consult with the FWS as required by the ESA jeopardized the existence of the minnow.

Other water claimants in the Middle Rio Grande – the City of Albuquerque, the Middle Rio Grande Conservancy District (MRGCD), and the Rio Chama Acequia Association – intervened in opposition to the plaintiffs' position.[5] The State of New Mexico intervened for the reason that the disposition of the case would have a direct impact on the State Engineer's ability to supervise the appropriation and distribution of the waters of the Rio Grande. The water sources subject to the litigation are claimed for other uses. The San Juan-Chama Project water in Heron Reservoir is under contract to many different municipalities and other water users, primarily the City of Albuquerque and the MRGCD, for municipal and irrigation purposes. Native Rio Grande flows are used by Middle Rio Grande irrigators, other water users, and by the State of New Mexico to meet its obligations under the Rio Grande Compact, which requires delivery of a certain amount of water each year to Elephant Butte Reservoir to be used downstream in southern New Mexico and Texas.[6]

2000 Court-ordered mediation in the summer of 2000 resulted in two Agreed Orders[7] that prevented drying of the lower sections of the river in the Middle Valley believed to hold the highest numbers of minnows. Under those agreements, the City of Albuquerque, and to a much lesser extent, the MRGCD, were paid to provide water for the minnow. At the time, Abiquiu Reservoir was nearly full and Albuquerque had no place and no

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[4] 64 FR 36274, July 6, 1999.

[5] Rio Grande Silvery Minnow v. Keys, et al., CIV 99-1320-JP/KBM.

[6] Rio Grande Compact, 53 Stat. 785 (1939); *reprinted at* N.M. Stat. Ann. §72-15-23 (1978).

[7] See Rio Grande Silvery Minnow v. Keys, et al., CIV 99-1320-JP/KBM (Docket Numbers 117 and 150).

immediate need for its San Juan-Chama Project water. Almost 200,000 acre-feet of San Juan-Chama water was used to maintain continuous flow down to Elephant Butte in 2000.[8] At that time, there were virtually no minnows in captivity. The Agreed Orders set in motion various actions by the parties to greatly increase captive population.[9] The minnow survived the 2000 drought summer.

2001 Completion of consultation resulted in the issuance of a Biological Opinion (BO) by the FWS in June of 2001,[10] which was subsequently challenged by the plaintiffs. They sought to require that the BOR exercise discretion to utilize San Juan-Chama water from Heron Reservoir and curtail deliveries of water to the San Juan-Chama contractors to meet the minimum flows required for the minnow. They also sought curtailment of native Rio Grande water deliveries to irrigators, primarily in the MRGCD.[11]

2002 The federal district court ruled in April 2002,[12] upholding the 2001 BO but also holding that the BOR had discretion over use of both San Juan-Chama (SJC) and native water in the Middle Rio Grande Project for ESA purposes while the Corps did not have such discretion over its operations.[13] While the litigation continued, the State took measures to avoid a crisis. A Conservation Water Agreement executed between the State of New Mexico and the United States of America provided for up to 100,000 acre-feet of Rio Grande Compact delivery water for species use and established a temporary Conservation Pool in Abiquiu and Jemez Canyon Reservoirs.[14] The Rio Grande Compact Commission, by unanimous resolution in accordance with PL 86-645, provided its advice and consent to a deviation of normal operations of Abiquiu and Jemez Canyon Reservoirs to allow for Conservation Pool operations.

Significant drought in 2002 resulted in reinitiating consultation and issuance by FWS of a second BO in September 2002.[15] Negotiations among the parties broke down and the environmental plaintiffs filed for emergency injunctive relief to seek release of a limited

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[8] Information provided by the Interstate Stream Commission.

[9] "Water Management in the Middle Rio Grande," Belin, Aletta, NM State Bar Bulletin, October 2, 2003, Volume 42, at 211.

[10] Endangered Species Act – Section 7 Consultation Biological Opinion. Programmatic Biological Opinion on the Effects of Actions Associated with the U.S. Bureau of Reclamation's, U.S. Army Corps of Engineers', and Non-Federal Entities' Discretionary Actions Related to Water Management on the Middle Rio Grande, New Mexico. Consultation conducted by Fish & Wildlife Service, Albuquerque, N.M., June 29, 2001.

[11] Rio Grande Silvery Minnow v. Keys, et al., CIV 99-1320-JP/KBM, April 2002, Memorandum Opinion and Order.

[12] Ibid.

[13] Ibid at pages 49, 33, and 41 respectively.

[14] Conservation Water Agreement, June 29, 2001, between the State of New Mexico, U.S. Dept. of Interior and the U.S. Army Corps of Engineers.

[15] Endangered Species Act – Section 7 Consultation Biological Opinion. Biological Opinion and Conference Report on U.S. Bureau of Reclamation's Amended Water Management Operations on the Middle Rio Grande through December 31, 2002. Consultation conducted by Fish & Wildlife Services, Albuquerque, N.M., September 12, 2002.

amount of SJC water from Heron Reservoir in order to comply with the June 29, 2001 BO and avoid massive drying in the Middle Rio Grande.[16] A hearing was held immediately and the court subsequently ruled in favor of the plaintiffs that the September 2002 BO was arbitrary and capricious. However, the Court imposed its own interim flow standards, allowing the U.S. to meet lower flow levels than those required by the 2001 BO. The Court directed Reclamation to take SJC water from the contractors if necessary.[17]

In 2002 the MRGCD filed a cross-claim to quiet title to ownership of El Vado Reservoir and the Angostura and San Acacia Diversion Dams and other land and irrigation works within the MRGCD. MRGCD also sought a declaratory judgment interpreting the effect of their 1963 transfer of State Water Rights Permit No. 1690 to the United States.[18] The federal defendants opposed this claim and environmental plaintiffs sided with the federal government on this issue.

The Middle Rio Grande (MRG) Endangered Species Collaborative Program (Program) was formally organized in 2002 as a collaborative effort intended to prevent extinction and promote recovery of listed species while allowing existing water uses and development of future water uses to continue in accordance with applicable federal and state laws. Program members include federal, state, and local governmental entities, Indian Tribes and Pueblos, and non-governmental organizations.

2003 The ruling on the injunctive relief was immediately appealed to the Tenth Circuit Court of Appeals by the federal defendants and intervenors, which stayed the ruling pending the appeal. Oral arguments were heard in January 2003 before a three-judge panel, which affirmed the district court's ruling in June 2003.[19] The federal defendants and intervenors petitioned for rehearing *en banc*. Meanwhile, the FWS had issued a new Biological Opinion, dated March 17, 2003.[20]

Many parties participated in confidential settlement negotiations sponsored by New Mexico Governor Bill Richardson at the beginning of his administration in the summer and fall of 2003.[21] The federal government did not participate in the negotiations, which were ultimately suspended.

The State of New Mexico and the United States entered into an "Emergency Drought

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[16] Belin, supra at 209.
[17] Rio Grande Silvery Minnow v. Keys, 356 F. Supp. 2d 1222, 1234 and 1237 (D. NM 2002).
[18] Rio Grande Silvery Minnow v. Keys, et al., CIV 99-1320-JP/KBM (Docket Number 21, Filed 2-07-2000, amended Docket Number 366, Filed 3-26-2002).
[19] Rio Grande Silvery Minnow v. Keys, 333 F.3d 1109 (10th Cir. 2003).
[20] 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 Operations, and Non-Federal Actions on the Middle Rio Grande, New Mexico. U.S. Fish and Wildlife Service, Albuquerque Office, March 17, 2003.
[21] Belin, supra at 210.

Water Agreement" in 2003. This agreement was actually an amendment to the Conservation Water Agreement. It provided for up to 217,500 acre-feet of relinquished Compact credit water, if available, to be divided among the Bureau of Reclamation (up to 70,000 acre-feet), the City of Santa Fe (up to 7,500 acre-feet), and the MRGCD (up to 140,000 acre-feet).[22]

In October 2003, the Tenth Circuit requested additional briefing from all parties on the question of whether the case was moot and its June 2003 ruling should be vacated. On January 5, 2004 the Tenth Circuit vacated the panel opinion as moot because the time frame covered by the District Court's 2002 ruling had expired. Furthermore, the New Mexico delegation had introduced, and Congress later enacted, legislation restricting the federal government from using San Juan-Chama project water to meet ESA obligations. The district court was ordered to determine whether there were unresolved issues to be tried.[23]

The language in the Congressional appropriations bill also addressed the March 17, 2003 Biological Opinion and is quoted here in full:

> SEC. 208. (a) Notwithstanding any other provision of law and hereafter, the Secretary of the Interior, acting through the Commissioner of the Bureau of Reclamation, may not obligate funds, and may not use discretion, if any, to restrict, reduce or reallocate any water stored in Heron Reservoir or delivered pursuant to San Juan-Chama Project contracts, including execution of said contracts facilitated by the Middle Rio Grande Project, to meet the requirements of the Endangered Species Act, unless such water is acquired or otherwise made available from a willing seller or lessor and the use is in compliance with the laws of the State of New Mexico, including but not limited to, permitting requirements.
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> (b) Complying with the reasonable and prudent alternatives and the incidental take limits defined in the Biological Opinion released by the United States Fish and Wildlife Service dated March 17, 2003 combined with efforts carried out pursuant to Public Law 106-377, Public Law 107-66, and Public Law 108-7 fully meet all requirements of the Endangered Species Act (16 U.S.C. 1531 et seq.) for the conservation of the Rio Grande Silvery Minnow (Hybognathus amarus) and the Southwestern Willow Flycatcher (Empidonax trailii extimus) on the Middle Rio Grande in New Mexico.
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> (c) This section applies only to those Federal agencies and non-Federal actions addressed in the March 17, 2003 Biological Opinion.

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[22] Emergency Drought Water Agreement, New Mexico Interstate Stream Commission (2003).
[23] Section 205, Pub.L. 108-447, 118 Stat. 2809 at 2949, 108th Congress, Second Session, Convening January 7, 2005, Consolidated Appropriations Act, December 8, 2004, see http://www.pubklaw.com/legis/publaw108- 447.html.

(d) Subsection (b) will remain in effect for 2 years following the implementation of this Act.[24]

Plaintiffs filed a Motion to Dismiss Remaining Claims without prejudice.[25] The defendants responded that the prior rulings (Memorandum Opinions and Orders of April 19, 2002 and September 23, 2002) should be vacated for mootness and lack of subject matter jurisdiction.

2004 Subsequently, on April 26, 2004 plaintiffs withdrew their motion to dismiss.[26] Plaintiffs asked Judge Parker not to vacate his rulings but to incorporate them into a final judgment that could be appealed yet again to the Tenth Circuit should defendants wish to do so.[27]

Also in 2004, the 2003 rider to the Energy and Water Development Appropriations Act was amended to extend the March 17, 2003 Biological Opinion for ten years, to March 16, 2013.[28]

2005 The environmental plaintiffs entered into negotiations with the City of Albuquerque and the Albuquerque-Bernalillo County Water Utility Authority (Water Authority) to establish an "Environmental Pool" of 30,000 acre-feet capacity within Abiquiu Reservoir.[29] The parties reached an agreement on April 20, 2005. In return for the establishment of the "Environmental Pool," into which the plaintiffs would be able to store water legally acquired from voluntary purchases, leases and donations, and several other concessions, the plaintiffs dropped their remaining claims against the City (and Water Authority, successor in interest to the City) and refrained from challenging the legality of Section 205 of Public Law 108-447.[30] The Court approved the settlement as part of a ruling later in the year.

On July 25, 2005, the Federal District Court ruled on the cross-claim by MRGCD to quiet title to El Vado Reservoir and other Middle Rio Grande Project works. The District Court ruled the 12-year statute of limitation under the Quiet Title Act had run because MRGCD had been on notice since 1951 that the United States claimed an adverse interest in the properties. The District Court went on to rule that ownership of these properties

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[24] Energy and Water Development Act of 2004, Pub. L. No. 108-137, 117 Stat. 1827, 1849.
[25] Rio Grande Silvery Minnow v. Keys, et al., CIV 99-1320-JP/KBM (Docket Number 535, Filed 03-04-2004).
[26] Belin, Aletta, "Reflections on Six Years of Silvery Minnow Litigation," Rocky Mountain Mineral Law Foundation Paper, presented in Santa Fe, New Mexico (June 2005).
[27] Ibid.
[28] Section 205, Pub. L. 108-447, 118 Stat. 2809 at 2949, 108th Congress, Second Session, Convening January 7, 2005, Consolidated Appropriations Act, December 8, 2004, see http://www.pubklaw.com/legis/publaw108- 447.html.
[29] Maria O'Brien, "Lessons Learned Resolving the Unresolvable: Rio Grande Silvery Minnow vs. City of Albuquerque", Rocky Mountain Mineral Law Foundation presentation, Santa Fe (June 2005).
[30] Maria O'Brien, supra.

and certain specific tracts identified in the cross-claim was declared to be in the United States of America.[31] The Court also ruled that Permit No. 1690 must remain in the name of the United States unless Congress authorizes its conveyance to the MRGCD. The MRGCD appealed.

On November 22, 2005 the Court ruled on the mootness and vacatur issues sent down from the 10th Circuit Court of Appeals from the appeal in 2003.[32] Judge Parker held that, because of the 2003 and 2004 minnow riders, the issue of BOR discretion to reduce water deliveries to the San Juan-Chama Project was moot. However, he ruled that because Congress was silent on the issue of BOR discretion regarding Middle Rio Grande Project waters, this issue remained justiciable. In addition, the Judge stated that, where a defendant has voluntarily ceased conduct, it still must show that the same behavior cannot be reasonably expected to occur again, and that ill effects of the behavior have been erased. Because the federal defendants had not shown that they would not return to an impermissibly narrow scope of discretion in the future, the issue of discretion over use of MRGP waters remained justiciable. The Court granted the stipulated settlement between the environmental plaintiffs and the City of Albuquerque. Finally, with the exception of those related to the use of San Juan-Chama Project water, the Court denied the motion of the defendants to vacate its prior orders in the case, based on the fact that these prior rulings regarding scope of discretion could have significant consequences for future consultations. The federal defendants, and the MRGCD, the Water Authority and the State of New Mexico appealed.

2007 The U.S. Fish and Wildlife Service issued a draft Revised Recovery Plan for the silvery minnow in 2007.[33] The Plan was finalized in February, 2010.

2010 The 10th Circuit Court of Appeals ruled on both of the 2005 appeals. In March, it held that the district court did not clearly err in finding that the MRGCD action to quiet title in El Vado Reservoir and the other properties conveyed to the BOR through the 1951 contract was untimely under the 12-year statute of limitations.[34] The Court adopted the district court's account of the evidence as plausible, and ruled against MRGCD's argument that because the property may have been conveyed as easements and not in fee simple, that the MRGCD did not have notice of the adverse claim of the United States until 2000. The Court held further that any abandonment of property rights by the United States would have to be explicitly authorized by Congress. However, because timely filing of a quiet title action is what confers jurisdiction on the court, the lack of timely filing meant that the district court did not have jurisdiction to rule on the merits. The 10th Circuit vacated the district court's judgment on the merits quieting title in the BOR. Therefore, the title issue remains unresolved.

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[31] Rio Grande Silvery Minnow v. Keys, et al. & MRGCD, CIV 99-1320-JP/KBM (Docket Number 665, Filed 7-25- 2005).
[32] Rio Grande Silvery Minnow v. Keys, et al. & MRGCD, 469 F.Supp.2d 1003 (2005).
[33] Draft Revised Rio Grande Silvery Minnow Recovery Plan, U.S. Fish and Wildlife Service, Southwest Region (2007).
[34] Rio Grande Silvery Minnow v. Bureau of Reclamation, 599 F.3d 1165 (2010).

In the second opinion, issued on April 21, 2010, the Court overruled all of the district court's 2005 holdings on the mootness and vactatur issues.[35] The Court ruled that the intervening 2003 Biological Opinion and subsequent minnow riders had mooted the claims of the environmental groups. The court based its mootness ruling on the fact that the environmental groups' claims and relief sought were related to consultation over discretionary aspects of the 2001 and 2002 BO's. Therefore, even though the Middle Rio Grande Project water was not explicitly mentioned in the minnow riders, the 2003 BO had superceded the earlier BO's, taking away any claim for relief. Although the court recognized that the voluntary cessation of the BOR from applying a narrow and limited scope to consultations over alternatives under the ESA was likely to recur, this wrongful behavior was too fact and context-specific to trigger the voluntary cessation exception to the mootness claim relied on by the district court. Regarding the district court's refusal to vacate its 2002 rulings, the 10th Circuit found that this was an abuse of the district court's discretion since it appeared to be based on the district court's discomfort with probable lobbying of Congress by the federal defendants and MRGCD for passage of the minnow riders.

The result of these most recent decisions is that there continues to be uncertainty regarding both the discretion of the BOR to allocate Middle Rio Grande Project water to maintain stream flows for the continued survival of the Rio Grande silvery minnow, and about ownership of Middle Rio Grande Project properties.

Published in Water Matters! (2011) as on-line article[36]
http://uttoncenter.unm.edu/Water_Matters!_articles.html.

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[35] Rio Grande Silvery Minnow v. Bureau of Reclamation, 601 F.3d 1096.

[36] The article, covering litigation through 2005, was originally included as an appendix to the Preliminary Reservoir Storage Modeling Analysis, prepared by Susan Kelly, Associate Director, Utton Transboundary Resources Center, in collaboration with the Water Acquisition and Management Subcommittee (2005), and was also included in a 2005 version of the MRGESA Collaborative Program Water Plan.

United States Department of the Interior

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IN REPLY REFER TO:

ALB-172
ENV-7.00

JUL 31 2012

MEMORANDUM

To: Field Supervisor, U.S. Fish and Wildlife Service
New Mexico Ecological Services Field Office
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Attn: Mr. Wally Murphy

From: Mike Hamman
Area Manager

Subject: Submission of Biological Assessment (BA) for Middle Rio Grande Water Operations and Maintenance.

The Bureau of Reclamation submits this BA for the purpose of initiating formal consultation, to maintain the BO schedule that has been conveyed by the Service to Reclamation, pursuant to Section 7 of the Endangered Species Act of 1973, for the subject actions. The enclosed BA considers the potential effects of the proposed actions on the federally listed endangered Rio Grande silvery minnow (*Hybognathus amarus*), endangered Southwestern Willow Flycatcher (*Empidonax traillii extimus*), and endangered Pecos sunflower (*Helianthus paradoxus*). Effects of the proposed action on Interior Least Tern (*Sternula antillarum athalassos*) are not fully evaluated in the document due to the species very limited presence in the action area. The current description of actions consists of Reclamation's water-management activities associated with Heron Dam, El Vado Dam and River Maintenance in the Middle Rio Grande, as well as related non-federal actions of the Middle Rio Grande Conservancy District (MRGCD). In addition, Reclamation expects to supplement this BA with actions proposed by the New Mexico State Engineer and Interstate Stream Commission, including proposed surface and ground water related actions of other non-Federal and non-Pueblo entities. We anticipate that the supplemental information will be submitted on August 15, 2012.

The conservation measure included in the BA is the formation of a Recovery Implementation Program (RIP) for silvery minnow and willow flycatcher within the Middle Rio Grande Endangered Species Collaborative Program. The RIP documents and plans as well as specific commitments by Reclamation and the MRGCD are included for consideration. The defining documents for the RIP are anticipated to be the Program Document and the Action Plan.

Additionally there will be annual work plans that are anticipated to be tiered from the Action Plan, and a Water Management Plan that will contain the water management tools that will be implemented to meet the needs of the listed species. These documents are currently in draft form but are anticipated to be finalized prior to the signing of the Biological Opinion (BO). Reclamation anticipates that a consultation tiered to this BA would be required when and if other species that occur within the Middle Rio Grande corridor are listed.

It is the intention that the RIP provide regulatory certainty under the ESA for the actions referenced in the Proposed Action of this BA and any future supplements. The final RIP Action Plan will include activities for which there is commitment from the responsible entities and which are based on recovery actions of the silvery minnow and flycatcher recovery plans. Some of the specific commitments of conservation measures from Reclamation and MRGCD are also described in this BA. For the purposes of the RIP and Section 7 consultations, it is assumed that: (1) the RIP will produce a list of actions that can be implemented to assist in the recovery of the species, (2) the funding will be available to implement these actions, (3) participants will take appropriate steps to implement those actions, and (4) actions will be implemented in accordance with the developed schedule. To provide certainty of occurrence of the above, each entity seeking coverage under the new BO through the RIP will sign a Cooperative Agreement with the Service prior to the final issuance of the BO.

We appreciate the Service's efforts of working cooperatively through this consultation process and look forward to interagency coordination with the Middle Rio Grande Endangered Species Collaborative program to develop the aforementioned conservation measure.

Any questions may be directed to Ms. Yvette Paroz of my staff at 505-462-3581.

Attachments - 3

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