

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

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

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No. 7
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Karen B. Molzen

RIO GRANDE SILVERY MINNOW (*Hybognathus*))
amarus); SOUTHWESTERN WILLOW FLYCATCHER)
(*Empidonax trailii extimus*); DEFENDERS OF)
WILDLIFE; FOREST GUARDIANS; NATIONAL)
AUDUBON SOCIETY; NEW MEXICO AUDUBON)
COUNCIL; SIERRA CLUB; and SOUTHWEST)
ENVIRONMENTAL CENTER,)

Plaintiffs,)

vs.)

ELUID L. MARTINEZ, Director, Bureau of)
Reclamation; MICHAEL R. GABALDON, Regional)
Director, Bureau of Reclamation; BUREAU)
OF RECLAMATION, an agency of the United)
States; GEN. JOSEPH BALLARD, Chief Engineer,)
Army Corps of Engineers; LT. COL. TOM)
FALLIN, Albuquerque District Engineer;)
U.S. ARMY CORPS OF ENGINEERS, an agency of)
the United States,)

Defendants.)

COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF

INTRODUCTION

1. This action seeks declaratory and injunctive relief for the violations by Defendants Bureau of Reclamation et al. ("Bureau") and U.S. Army Corps of Engineers et al. ("Corps") of the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 et seq., with respect to water operations and other agency actions in the Middle Rio Grande in New Mexico which adversely affect the Rio Grande silvery minnow and southwestern willow flycatcher, species both listed as "endangered" under the ESA. Plaintiffs also seek relief under the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332, with respect to the Bureau's failure to undertake a comprehensive study of water conservation measures, needed to ensure adequate flows for the Middle Rio Grande.

2. Defendants are violating ESA Sections 7(a)(2) and 7(d), 16 U.S.C. §§ 1536(a)(2) & (d), by failing to complete consultation with U.S. Fish and Wildlife Service ("FWS") over the full range of present and future Middle Rio Grande water operations including:

(a) storage of water in federally owned or controlled reservoir facilities on the Middle Rio Grande and its tributaries;

(b) delivery of federally owned or controlled water to irrigators and other contractors in the Middle Rio Grande basin, under federal contracts or similar authorization;

(c) operation and maintenance of facilities relating to water diversions, storage, and deliveries in the Middle Rio Grande; and/or

(d) funding, approving, or otherwise authorizing water diversions, storage, or

deliveries, or operation and maintenance of facilities on the Middle Rio Grande.

3. Such failure to consult under ESA § 7 is particularly serious, according to recent analysis by FWS, because current management actions by the Defendants are jeopardizing the continued survival of the listed species and are adversely modifying the species' critical habitat; and Defendants have further failed to use their authorities to undertake the actions necessary to conserve the endangered species under the ESA, such as providing necessary water for Middle Rio Grande flows essential to the health and survival of the silvery minnow and willow flycatcher.

4. Plaintiffs seek declaratory relief holding that Defendants have violated ESA § 7(a)(1) & (2) in failing to conserve and jeopardizing the listed species and in adversely modifying their critical habitat; and that Defendants have violated ESA § 9, 16 U.S.C. § 1538, by undertaking or authorizing actions which constitute "take" of the listed species. Plaintiffs seek judicial relief ordering Defendants to cure such violations by completing consultation and by undertaking the actions necessary to avoid jeopardy/take and to conserve the species. Plaintiffs further seek judicial relief ordering the Bureau to comply with NEPA by conducting a thorough review of water conservation measures.

JURISDICTION AND VENUE

5. The Court has jurisdiction over this action under 28 U.S.C. § 1331 (federal question), § 2201 (declaratory judgment), § 2202 (injunctive relief), and 16 U.S.C. § 1540(g) (Endangered Species Act citizen suit). As required by the ESA, 16 U.S.C. § 1540(g), Plaintiffs have provided sixty days' notice of intent to sue before bringing this action.

6. Venue is properly vested in this Court pursuant to 16 U.S.C. § 1540(g)(3)(A), as all or part of the violations of the ESA and NEPA alleged occur in the District of New Mexico; and 28 U.S.C. § 1391(e), as a substantial part of the events and omissions giving rise to the claims occurred in this judicial district, and one or more Defendants reside here.

PARTIES

7. Plaintiffs in this matter are set forth below:

A. DEFENDERS OF WILDLIFE ("Defenders") is a national non-profit conservation organization, incorporated under the laws of the District of Columbia. Defenders has over 300,000 members nationwide, and approximately 5,000 members throughout New Mexico and the Southwest. Defenders' mission is to protect all native wild animals and plants in their natural communities. Defenders has developed programs for combating species extinction, the loss of biological diversity, and habitat alteration and destruction. Defenders maintains an office in Albuquerque, New Mexico. Defenders has participated extensively in agency proceedings and other matters relating to the Rio Grande ecosystem broadly, and to the survival and recovery of the Rio Grande silvery minnow and southwestern willow flycatcher specifically.

B. Plaintiff FOREST GUARDIANS is a non-profit organization with its principal office in Santa Fe, New Mexico. Forest Guardians has approximately 2,900 members, most of whom reside in New Mexico and Arizona. One of Forest Guardians' main endeavors is its "Watershed Protection Program." A specific purpose of the "Watershed Protection Program" is to work towards the enhancement and restoration of

riverine ecosystems. In particular, the organization is concerned about impairment of rivers due to water management activities, point and nonpoint source pollution, and physical modification of river ecosystems through channelization and the construction of levees. Forest Guardians works through administrative appeals, litigation, public outreach, and other efforts to assure that all federal agencies fully comply with the provisions of all pertinent federal environmental law. Forest Guardians has participated extensively in agency proceedings and other matters relating to the Rio Grande ecosystem broadly, and the survival and recovery of the Rio Grande silvery minnow and southwestern willow flycatcher specifically.

C. Plaintiff NEW MEXICO AUDUBON COUNCIL ("Council") is a not-for-profit corporation organized under the laws of the State of New Mexico, consisting of five autonomous local chapters of the National Audubon Society in New Mexico. The Council represents over 4,000 members in New Mexico that are dedicated to conserving and restoring natural ecosystems, focusing on birds, other wildlife and their habitats for the benefit of humanity and the Earth's biological diversity. The Council is active in the management of natural resources at the local, state, and federal level, through educational and participatory activities including commenting on governmental and private actions, providing ecologically-based alternatives to damaging proposals, filing appeals to federal actions, and filing lawsuits when necessary to protect public resources. The New Mexico Audubon Council has strong concerns for the vitality of the entirety of the Rio Grande ecosystem and is particularly concerned with riparian, including aquatic, habitat conservation and restoration; and

with the actions of federal agencies that may have a negative effect on that habitat and the survival of obligate species to that habitat, such as the Rio Grande silvery minnow and southwestern willow flycatcher.

D. Plaintiff NATIONAL AUDUBON SOCIETY ("National Audubon") is a national non-profit conservation organization, with over four thousand members in New Mexico and more than 550,000 members nationwide. National Audubon is dedicated to conserving and restoring natural ecosystems, focusing on birds, other wildlife, and their habitats for the benefit of humanity and the Earth's biological diversity. National Audubon maintains an office and nature preserve in Santa Fe, and has participated extensively in agency proceedings and other matters relating to the Rio Grande ecosystem broadly, and the survival and recovery of the Rio Grande silvery minnow and southwestern willow flycatcher specifically.

E. Plaintiff SIERRA CLUB is a national non-profit environmental organization with approximately 6000 members in New Mexico, and over half a million members nationwide. The Club's mission is to protect the wild places of the earth; practice and promote the responsible use of the earth's ecosystems and resources; and educate and enlist humanity to protect and restore the quality of the natural and human environments. The Sierra Club maintains offices in Albuquerque and Santa Fe, and has participated extensively in agency proceedings and other matters relating to the Middle Rio Grande ecosystem broadly, and the survival and recovery of the Rio Grande silvery minnow and southwestern willow flycatcher specifically.

F. Plaintiff SOUTHWEST ENVIRONMENTAL CENTER ("SEC") is a New

Mexico non-profit organization, which is based in Las Cruces. SEC has about 1000 members, most of whom live in the Rio Grande valley. One of SEC's primary goals is to protect and recover the Rio Grande as a living river. Public education and outreach, as well as advocacy, are vital parts of SEC's mission. SEC has participated extensively in agency proceedings and other matters relating to the Rio Grande ecosystem broadly, and the survival and recovery of the Rio Grande silvery minnow and southwestern willow flycatcher specifically.

8. Plaintiffs bring this action on behalf of themselves and their members, and on behalf of the Rio Grande silvery minnow (*Hybognathus amarus*) and the southwestern willow flycatcher (*Empidonax trailii extimus*), two species which are listed as "endangered" under the Endangered Species Act and which are harmed by the Defendants' violations of law as alleged herein, thereby harming Plaintiffs and their members.

9. Plaintiffs and their members use and enjoy the Rio Grande and its tributaries and adjoining public lands in New Mexico for recreational, scientific, aesthetic, spiritual, commercial and other purposes. Plaintiffs and their members derive -- or, but for the endangered status of the Rio Grande silvery minnow and southwestern willow flycatcher, would derive -- recreational, scientific, aesthetic, spiritual, and commercial benefits from the existence in the wild of these species through observation, study, photography, and other pursuits. The interests of Plaintiffs and their members have been, are being, and will continue to be irreparably harmed by the Defendants' disregard of their statutory duties.

10. The above-described aesthetic, conservation, recreational, scientific and other interests of Plaintiffs and their members have been, are being, and, unless the relief prayed for is granted, will continue to be adversely affected and irreparably injured by the failure of Defendants to comply with the ESA and NEPA. Plaintiffs have no adequate remedy at law.

11. Defendants in this action are set forth below:

A. ELUID L. MARTINEZ is the Director of the Bureau of Reclamation. Mr. Martinez is sued solely in his official capacity.

B. MICHAEL R. GABALDON is the Regional Director of the Bureau's Albuquerque Regional Office, which oversees the Bureau's projects concerning the Middle Rio Grande at issue here. Mr. Gabaldon is sued solely in his official capacity.

C. BUREAU OF RECLAMATION ("Bureau") is an agency of the United States within the Department of Interior.

D. GEN. JOSEPH BALLARD is the Chief Engineer of the U.S. Army Corps of Engineers. General Ballard is sued solely in his official capacity.

E. LT. COL. TOM FALLIN is the District Engineer for the U.S. Army Corps of Engineer's Albuquerque District, which includes the Corps' projects and actions concerning the Middle Rio Grande at issue here. Lt. Col. Fallin is sued solely in his official capacity.

F. U.S. ARMY CORPS OF ENGINEERS ("Corps") is an agency of the United States within the Department of the Army.

FACTUAL ALLEGATIONS

12. Prior to human influence, the Rio Grande in New Mexico was a perennially flowing river, with a braided channel that would migrate back and forth across the floodplain. The river supported a mosaic of cottonwood and willow forest, or "bosque," of varying ages, sizes, and configurations, interspersed with more open areas of grass meadows, ponds, lakes, and marshes. The bosque mosaic provided the habitat for a wealth of native and migrating bird and wildlife species -- a true "ribbon of green" running through the region's arid lands. The river also was home to an abundance of fishes, including the shovelnose sturgeon, american eel, speckled chub, Rio Grande shiner, phantom shiner, Rio Grande bluntnose shiner, and blue catfish.

13. All of these -- the cottonwood bosque, the Rio Grande fishes, and the bird and wildlife species found in the bosque -- evolved in dependence upon the river's natural flows and characteristics. For example, fish like the Rio Grande silvery minnow would swim upstream to lay their semi-buoyant eggs, their spawning triggered by spring high flows; the eggs would float downstream, and the young fish would rear in the broad sandy-bottomed reaches of the river's braided path. Southwestern willow flycatchers nested in willows or cottonwoods overhanging the river, to access food and be safer from predators. And the bosque itself was renewed by overbank flows during spring or summer flooding, which generated cottonwood and willow growth that spread across the valley bottom as the river shifted course.

14. As human populations in the Rio Grande valley grew, however, their use of the water and control of the river increased dramatically. Now the Rio Grande is

controlled by a series of major dams from head to toe; it is dewatered by irrigation diversion dams; and it is confined within narrow boundaries set by levees running along both sides and kept in place by "jetty jacks" and other devices placed on the banks and in the floodplain. The overall impact of human activity on the Rio Grande has been to replace physically and structurally diverse, interconnected, flowing, and well-aerated habitats supporting diverse communities with physically monotonous, disjunct, impounded, and ditched (out of the river bed) habitats, with reduced species diversity and greatly declining native species.

15. As a result, both the river and the bosque, as well as all associated native fish and wildlife, are in a steep downward spiral. As the New Mexico legislature stated in a bill passed in 1997 (but not signed by the Governor), "the Rio Grande bosque is an important natural resource that is undergoing rapid ecological change that endangers the future existence of native biological communities, especially riparian gallery forests of cottonwood and willow."

16. Federal actions have played a major role in these changes. In particular, the Middle Rio Grande -- defined roughly as the reach of the Rio Grande from north/central New Mexico down to the headwaters of the Elephant Butte Reservoir, plus all tributaries (including the Rio Chama, Rio Puerco, Galisteo Creek, and others) -- is today characterized by extensive federal investment, ownership, authorization, and control, which affect virtually all aspects of water operations and river management. As alleged below in more detail, the Bureau and Corps retain and exercise authority over all key elements of river management and operations, including water diversions

into reservoirs, operation and releases from reservoirs, irrigation diversion facilities, and delivery of water to federal contractors -- and they bear significant responsibilities under federal law to use those authorities to prevent further degradation of the Rio Grande's living resources.

Middle Rio Grande Project

17. The federal involvement and control over the Middle Rio Grande traces back to the 1940s, when the Bureau and the Corps undertook extensive studies and agreed to develop a "unified plan for flood control, reclamation and numerous water uses in the Middle Rio Grande Basin." The result was the "Middle Rio Grande Project" and related flood/sediment control measures, approved by Congress in the 1948 and 1950 Flood Control Acts. See Flood Control Act of 1948, Pub. L. 858, Title II, Section 201 et seq.; Flood Control Act of 1950, Pub. L. 516, Title II, Section 204.

18. The Middle Rio Grande Project, as authorized by these Acts, is a federal project under which the Bureau assumed control and authority over all assets and operations of the Middle Rio Grande Conservancy District ("MRGCD"), a public agency authorized under the laws of New Mexico, at a time when MRGCD was essentially bankrupt and seeking federal assistance. Among other things, the Middle Rio Grande Project provided federal funds to retire all outstanding MRGCD bonds, and expended federal funds to construct, repair, and improve water storage, diversion, and conveyance facilities within the MRGCD system.

1951 Contract

19. The Bureau entered into a 1951 "repayment contract" under federal

Reclamation law with MRGCD as part of the Middle Rio Grande Project. The contract provides, inter alia, that all MRGCD's property interests -- including diversion dams, irrigation and drainage canals, and storage facilities -- were conveyed to the Bureau, which owns both the facilities conveyed to it and everything that it built or rebuilt until MRGCD pays off the costs allocated to irrigation as part of the project, and Congress acts to retransfer property back to MRGCD. Neither repayment nor Congressional retransfer of assets has occurred to date.

20. The 1951 contract further provides that "any and all [water right] filings made in the name of the District" are "to be assigned to the United States for beneficial use in the project and for Indian lands in the project area." Pursuant to this provision, MRGCD has assigned and transferred to the Bureau its interest in New Mexico State Engineer water permit number 1690, for storage of some 198,000 acre-feet of Rio Grande basin water in El Vado Reservoir.

21. Under the 1951 repayment contract, the United States further claimed and reserved, and currently holds, rights to "all of the increment, waste, seepage and return flow water which may result from the construction and operation of the project."

San Juan-Chama Project

22. In the 1960's, an additional component to the system was authorized by Congress, in the form of the San Juan-Chama Project, Public Law 87-483. This project authorized diversion of water from the San Juan River basin for interbasin movement to the Rio Grande.

23. Under the San Juan-Chama Project, the Bureau constructed Heron

Reservoir for storage of San Juan water; and entered into repayment contracts with a number of entities, notably the City of Albuquerque and MRGCD, to provide them water in return for payment of a portion of project costs.

Federal Ownership and Control Of Reservoir System

24. As a result of the Middle Rio Grande Project, San-Juan Chama Project, and Corps' flood/sediment control projects, all the major reservoirs or storage facilities on the Middle Rio Grande were constructed or improved with federal funds, are federally-owned, are federally-regulated and operated, and/or remain subject to federal authorization, funding or other control. They include the following facilities:

A. Heron Reservoir: Heron Reservoir was constructed using federal funds and is owned and operated by the United States, through the Bureau. Water is diverted from the San Juan basin and stored in Heron under the Bureau's regulation, authorization, ownership, and control. Water released from Heron flows into nearby El Vado Reservoir on the Rio Chama, and then downstream to the Rio Grande.

B. El Vado Reservoir: El Vado Reservoir is located on the Rio Chama near Heron Reservoir. It receives water both from Heron Reservoir and "native" water (i.e., water "native" to the Rio Grande basin) from the Rio Chama and tributaries. El Vado was originally constructed in about 1935 by MRGCD. As hereinbefore alleged, the Bureau has obtained legal ownership of El Vado facilities as part of the Middle Rio Grande Project and 1951 repayment contract, including dam works and other facilities constructed or repaired as part of the Middle Rio Grande Project. The Bureau also holds legal title under New Mexico State Engineer permit number 1690 for storage of

some 198,000 acre-feet of "native" water in El Vado. The Bureau has further spent federal funds to expand and improve El Vado facilities, and retains legal title to such works under the San Juan-Chama legislation and implementing contracts. The Bureau continues to operate and maintain El Vado Reservoir and associated intake and outlet facilities.

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

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

E. Other Storage Facilities: In addition, the Corps has constructed, operated, maintains, and controls several smaller storage facilities on the Middle Rio Grande

system, including Platoro Dam on the Conejos River, about 80 miles above the confluence with the Rio Grande; Galisteo Dam on Galisteo Creek, about 12 miles upstream of its confluence with the Rio Grande; and Jemez Canyon Dam and Reservoir, on the Jemez River about 3 miles upstream of its confluence with the Rio Grande some 22 miles north of Albuquerque.

Water Deliveries and Irrigation Diversions

25. As a result of these Middle Rio Grande and San Juan-Chama Projects and associated flood control facilities, the Bureau and Corps own, control, fund, operate and/or authorize releases from the reservoir system, and diversions from the Middle Rio Grande for irrigation and other purposes; and they deliver water to MRGCD and other entities for diversion into ditches and canals along the Middle Rio Grande.

26. In releasing water from the reservoir system and delivering water for diversion into the MRGCD irrigation system, Defendants have approved and allowed inefficient and wasteful diversions of water by MRGCD out of the Middle Rio Grande, a practice which is continuing today. A recent study by the Bureau estimated, for example, that in 1992 MRGCD had diversions of some 600,000 acre/feet in order to irrigate a little over 50,000 acres, resulting in a diversionary rate of nearly 12 acre-feet per acre in a region where the recognized "duty" of water is at most 3 acre-feet per acre.

27. Irrigation diversion facilities on and along the Middle Rio Grande include diversion dams, irrigation canals, ditches, and other works which are owned, authorized, funded, and/or controlled by the Bureau and/or Corps. These facilities have significant adverse impacts upon aquatic life associated with the Middle Rio

Grande, including dewatering of the river, "entrainment" of fish in irrigation facilities, and physical obstruction of fish passage.

28. Although the Bureau has turned over day-to-day responsibility for operation and maintenance of many irrigation diversion dams and related facilities within the Middle Rio Grande Project to MRGCD, the Bureau retains authority and control over MRGCD's operation and maintenance activities; continues to fund such activities, at least in part, including expenditure of approximately \$10 million per year on actions within the Middle Rio Grande valley. Moreover, MRGCD acts as the Bureau's agent in conducting such activities pursuant to the terms of the Middle Rio Grande Project and the 1951 repayment contract.

29. Defendants, particularly the Bureau, have failed to use their authority, funding, ownership and control of the physical structures and water deliveries to limit the excessive diversions by MRGCD, or to otherwise ensure flows in the river, with the result that insufficient water remains in the Middle Rio Grande to adequately maintain river flows and the biota which depend on them.

Impacts to Listed Species In Middle Rio Grande

30. As hereinbefore alleged, extensive human modification and alteration has occurred in the Middle Rio Grande, including both of aquatic and of riparian (streamside) habitat. Such modification and alteration includes the Defendants' construction and operation of water storage reservoirs and dams, diversion dams, and levees, as set forth above; as well as channelization activities, irrigation withdrawals, land development, introduction of exotic species, and other factors.

31. Such actions, which have controlled and dewatered the Middle Rio Grande, have taken a great toll on the river ecosystem and the fish and wildlife species dependent on it. Of seventeen fish species native to the Middle Rio Grande, at least seven have been extirpated or have become extinct. These include the shovelnose sturgeon, american eel, speckled chub, Rio Grande shiner, phantom shiner, Rio Grande bluntnose shiner, and blue catfish.

32. The Rio Grande silvery minnow was historically one of the most abundant and widespread fishes in the middle Rio Grande, occurring from Espanola to the Gulf of Mexico and in the Pecos River. It is now reduced to 5% (at most) of its historic range -- the Rio Grande between Cochiti Dam and Elephant Butte Reservoir. The most recent data suggests that most of the remaining dwindling Rio Grande silvery minnow population is concentrated in just a few miles of the river immediately above Elephant Butte Reservoir, in the river reach below the San Marcial railroad bridge, where the minnow is exceedingly vulnerable to river drying and predation.

33. On July 20, 1994, pursuant to Section 4 of the ESA, FWS determined to list the Rio Grande silvery minnow as an "endangered" species. See 59 Fed. Reg. 36988 (7/20/94). Critical habitat was designated by FWS in a rule published on July 6, 1999, and includes the Middle Rio Grande. See 64 Fed. Reg. 36,274 (7/6/99). In determining to list the Rio Grande silvery minnow as endangered, FWS cited the loss and fragmentation of aquatic habitat; the shrinking of the species' range; the impacts of irrigation withdrawals and dewatering of its habitat; and other factors.

34. The southwestern willow flycatcher is a small bird that inhabits the

streamside and wetland thickets of New Mexico, Arizona, west Texas, and southern portions of Nevada, Utah, California, and Colorado. It is estimated that not more than 800 pairs of southwestern willow flycatchers remain living today. Fewer than 20 pairs occur along the middle Rio Grande in New Mexico.

35. On February 27, 1995, FWS determined to list the southwestern willow flycatcher as "endangered" pursuant to ESA Section 4. See 60 Fed. Reg. 10694 (2/27/95). Critical habitat was designated on July 22, 1997. See 62 Fed. Reg. 39129 (7/22/97). In its listing rule, FWS found that the southwestern willow flycatcher is endangered by loss of habitat and population declines resulting in substantial part from human impacts on the species and its critical habitat. These include 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.

36. Diversions of water from the Middle Rio Grande are presently occurring and will continue to occur, using Middle Rio Grande Project and San Juan-Chama Project diversion facilities, relying on authorization, operation, funding, and other actions by the Bureau, under contracts with the Bureau, and/or utilizing releases from Corps' reservoirs (including Cochiti and Abiquiu). Such diversions have had and will foreseeably continue to have severe impacts upon river flows, aquatic and riparian environments, and numerous species, including the Rio Grande silvery minnow and southwestern willow flycatcher. Such impacts include, but are not limited to, degradation and destruction of habitat essential to the breeding, reproduction, or

survival of the species, through drying up of river stretches, elimination of overbank flooding, "entrainment" of silvery minnow in irrigation and other facilities, obstruction of migration and other behavior, and other impacts.

37. Such impacts were dramatically evidenced in spring 1996, when irrigation diversions dried up many miles of the Middle Rio Grande and killed a substantial portion of the remaining silvery minnow population. Again in 1998 and 1999, the river was allowed to dry up on several occasions during the irrigation season, resulting in the deaths of thousands of silvery minnows. These are just a few in a long list of examples of historical effects of diversions upon the river and its biota.

38. FWS recently authored a draft biological opinion concerning river operations and management actions by the Bureau and Corps on the Middle Rio Grande, which addressed the ongoing harm that is occurring to the Rio Grande silvery minnow, the southwestern willow flycatcher, and the aquatic and terrestrial biota generally, as a result of the ongoing actions of these agencies. The draft opinion stated that current activities are jeopardizing the continuing survival of the listed species, a conclusion which is borne out and supported by the overwhelming weight of available data and evidence.

39. Plaintiffs have sought to persuade the Bureau and Corps to take the actions necessary to prevent further harm to the silvery minnow and willow flycatcher, and to begin the process of restoring the long-term ecological health of the Middle Rio Grande and its biota. Plaintiffs further provided a sixty day notice of intent to sue letter on January 29, 1999 to Defendants, in the hope that such notice would lead to

meaningful action by Defendants. While the Bureau and Corps have taken some steps to provide supplemental flows or other ameliorative effects, however, their basic management and operation of the Middle Rio Grande remains the same as in past years, thus allowing excessive irrigation diversions, dewatering of the river, and other actions which inflict continued harms to the endangered silvery minnow and willow flycatcher.

40. Unless injunctive relief is granted, irreparable harm will result to the listed Rio Grande silvery minnow and/or southwestern willow flycatcher species, and to Plaintiffs' interests, as a result of Defendants' ongoing and unlawful activities.

CLAIMS FOR RELIEF

First Claim for Relief: Violation of the Endangered Species Act § 7(a)(2)

41. Plaintiffs incorporate by reference all preceding paragraphs.

42. Congress in enacting the ESA explicitly determined "to require agencies to afford first priority to the declared national policy of saving endangered species" and made a "conscious decision . . . to give endangered species priority over the 'primary missions' of federal agencies." TVA v. Hill, 437 U.S. 153, 184-86 (1978).

43. ESA Section 7(a)(2) requires all federal agencies, including the Bureau and Corps, to "insure that any action authorized, funded or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species." 16 U.S.C. § 1536(a)(2). To ensure against causing jeopardy to listed species, ESA § 7 requires agencies to complete consultation with FWS before proceeding with

any action that may adversely affect or jeopardize a listed species.

44. Since the listing of the Rio Grande silvery minnow and southwestern willow flycatcher, Defendants have failed to consult fully with FWS over all aspects of their Middle Rio Grande water operations and related activities, as required by ESA § 7(a)(2) and implementing regulations. As demonstrated by the "Programmatic Biological Assessment of Federal Discretionary Actions Related To Water Management on the Middle Rio Grande" released in October 1999 by the Bureau and the Corps, their intent is to consult with FWS on only a very narrow subset of their actions on the middle Rio Grande. While the Bureau and the Corps assert that they have extremely limited discretion and thus a very narrow duty to consult, Plaintiffs contend that the Bureau and the Corps have significant discretion over virtually all aspects of their funding and operation of the Middle Rio Grande Project, and therefore they must consult with the FWS on all of these actions.

45. To date, Defendants have failed to complete consultation with FWS under ESA § 7(a)(2) and implementing regulations even over the scope of actions identified in the recent Biological Assessment, or over the full scope of their river management operations -- including water deliveries -- on the Middle Rio Grande.

46. Despite their failure to complete consultation with FWS, Defendants are proceeding with water operations, water deliveries, funding, operation and maintenance, and other actions on the Middle Rio Grande which adversely affect, and in fact, jeopardize the existence of the silvery minnow and/or willow flycatcher and which adversely modify their critical habitat.

47. Defendants' failure to consult with FWS over Middle Rio Grande operations and actions violates § 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), and its implementing regulations, 50 C.F.R. Part 401. Such violations are subject to judicial review under 16 U.S.C. § 1540(g).

48. Defendants' failure to consult with FWS is also arbitrary, capricious, and not in accordance with law, in violation of the Administrative Procedure Act, 5 U.S.C. § 706; and is subject to judicial review under 5 U.S.C. § 701 et seq.

WHEREFORE, Plaintiffs pray for relief as set forth below.

Second Claim for Relief:
Violation of the Endangered Species Act § 7(a)(1)

49. Plaintiffs incorporate by reference all preceding paragraphs.

50. Section 7(a)(1) of the ESA, 16 U.S.C. §1536(a)(1), directs federal agencies to use their authorities to further the purposes of the Act by carrying out conservation programs for listed species. As defined under ESA § 3, the term "conservation" means to use all necessary methods and procedures to bring any endangered or threatened species to the point at which the measures provided pursuant to the ESA are no longer necessary. 16 U.S.C. § 1532(3).

51. Defendants are violating their duties under § 7(a)(1) by operating reservoirs, dams, and other irrigation and flood control facilities, and by releasing and delivering water to MRGCD and others, in such a way as to allow excessive or wasteful irrigation withdrawals, to cause drying of significant portion of the Middle Rio Grande

above Elephant Butte, and/or to otherwise harm and jeopardize the existence of the Rio Grande silvery minnow and the southwestern willow flycatcher and adversely modify their critical habitat.

52. Defendants are also violating their duties under § 7(a)(1) by failing to utilize their authorities in order to conserve the listed silvery minnow and willow flycatcher species, including by providing water which is federally owned or controlled in amounts sufficient to prevent drying up of significant portions of the Middle Rio Grande or otherwise harming the listed species through excessive diversions.

53. Defendants are also violating their duties under § 7(a)(1) by failing to use their authorities to prevent harm to the Rio Grande silvery minnow as a result of operation of irrigation and other facilities, including "entrainment" and physical obstruction of fish passage.

54. These violations of ESA § 7(a)(1) are subject to judicial review under 16 U.S.C. § 1540(g).

55. Defendants' failure to utilize their authorities in furtherance of the purposes of the ESA under ESA § 7(a)(1) is also arbitrary, capricious, and not in accordance with law, in violation of the Administrative Procedure Act, 5 U.S.C. § 706; and is subject to judicial review under 5 U.S.C. § 701 et seq.

WHEREFORE, Plaintiffs pray for relief as set forth below.

Third Claim for Relief:
Violation of the Endangered Species Act § 7(d)

56. Plaintiffs incorporate by reference all preceding paragraphs.

57. Section 7(d) of the ESA, 16 U.S.C. § 1536(d), provides that once a federal agency initiates consultation on an action under ESA § 7(a)(2), it “shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section.” The purpose of ESA § 7(d) is to maintain the status quo pending the completion of interagency consultation.

58. Defendants are violating ESA § 7(d), 16 U.S.C. § 1536(d), by continuing to undertake water operations and related actions on the Middle Rio Grande that may adversely affect the listed Rio Grande silvery minnow and/or southwestern willow flycatcher endangered species, prior to completing consultation with FWS. Their ongoing actions, including but not limited to reservoir releases and water deliveries, constitute irreversible or irretrievable commitments 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), in violation of § 7(d).

59. Defendants' violations of the ESA are subject to judicial review under 16 U.S.C. § 1540(g).

60. Defendants' violations of ESA § 7(d) are also arbitrary, capricious, and not in accordance with law, in violation of the Administrative Procedure Act, 5 U.S.C. § 706; and are subject to judicial review under 5 U.S.C. § 701 et seq.

**Fourth Claim for Relief:
Violation of the Endangered Species Act § 9**

61. Plaintiffs incorporate by reference all preceding paragraphs.

62. Section 9 of the ESA, U.S.C. § 1538, prohibits any person from "take" of listed endangered species. The term "take" is defined in the ESA as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in such conduct." 16 U.S.C. § 1532(19). Implementing regulations for the "take" prohibitions of ESA § 9 are further addressed in FWS regulations at 50 C.F.R. 17.3.

63. Defendants are violating ESA § 9 and implementing regulations by causing "take" of the listed Rio Grande silvery minnow and/or southwestern willow flycatcher as a direct result of their river management activities, funding, and authorizations with respect to the Middle Rio Grande, including reservoir storage management and releases, water deliveries, operation and maintenance activities, approval of excessive or wasteful irrigation diversions, and others.

64. Defendants' violations of ESA § 9 are subject to judicial review under 16 U.S.C. § 1540(g).

65. Defendants' violations of ESA § 9 are also arbitrary, capricious, and not in accordance with law, in violation of the Administrative Procedure Act, 5 U.S.C. § 706; and are subject to judicial review under 5 U.S.C. § 701 et seq.

**Fifth Claim for Relief:
Violation of the National Environmental Policy Act**

66. Plaintiffs incorporate by reference all preceding paragraphs.

67. The National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332(C),

requires that every federal agency must conduct a detailed study of environmental impacts and alternatives for all major federal actions significantly affecting the quality of the human environment.

68. The Bureau in recent years has undertaken major federal actions significantly affecting the environment through expenditure of funds and other actions relating to improvements of the MRGCD irrigation system and water conservation by MRGCD, but has failed to conduct any detailed environmental impact study as required by NEPA. In particular, the Bureau has failed to analyze environmental impacts and alternatives relating to actions to increase the efficiency of the MRGCD irrigation system.

69. The Bureau's violations of NEPA are arbitrary, capricious, and not in accordance with law, in violation of the Administrative Procedure Act, 5 U.S.C. § 706; and are subject to judicial review under 5 U.S.C. § 701 et seq.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court:

A. Adjudge and declare that Defendants are violating ESA § 7(a)(2) by failing to consult with FWS on all aspects of water operations and related management actions on the Middle Rio Grande, including but not limited to storage and releases from reservoirs, water deliveries, funding, and operation and maintenance of irrigation diversion and conveyance facilities;

B. Adjudge and declare that Defendants are violating ESA § 7(a)(1) by failing to affirmatively utilize their authorities to conserve endangered Rio Grande silvery

minnow and/or southwestern willow flycatcher in the Middle Rio Grande;

C. Adjudge and declare that Defendants are violating ESA § 7(d) by undertaking ongoing water operations and other management actions despite completion of consultation with FWS;

D. Adjudge and declare that Defendants are violating ESA § 7 and § 9 by causing "jeopardy" and/or "take" of the listed Rio Grande silver minnow and/or southwestern willow flycatcher;

E. Adjudge and declare that the Bureau is violating NEPA with respect to its funding and improvements relating to the MRGCD irrigation system;

F. Order Defendants to consult fully with FWS pursuant to ESA § 7(a)(2) with respect to all actions authorized, funded, or carried out by Defendants on the Middle Rio Grande, including ongoing water deliveries, reservoir operations, and operation and maintenance of irrigation diversion and conveyance facilities;

G. Order Defendants, in consultation with FWS, to review their ongoing activities and projects on or affecting the Middle Rio Grande, and make changes necessary to affirmatively conserve the endangered silvery minnow and willow flycatcher in compliance with ESA § 7(a)(1);

H. Order the Bureau to undertake an environmental impact statement relating to its funding and other activities with respect to improvements of the MRGCD irrigation system;


I. Enter such temporary, preliminary, or permanent injunctive relief as specifically prayed for by Plaintiffs hereinafter;

J. Award Plaintiffs their reasonable fees, costs, expenses, and disbursements, including attorneys fees, associated with this litigation pursuant to the ESA and/or the Equal Access to Justice Act;

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

DATED this 15th day of November, 1999.

Respectfully submitted,



Alletta Belin
LAND AND WATER FUND OF THE ROCKIES
1239 Madrid Rd.
Santa Fe NM 87501
(505) 983-8936

Laurence ("Laird") J. Lucas
LAND AND WATER FUND OF THE ROCKIES
PO Box 1612
Boise ID 83701
(208) 342-7024

Steven C. Sugarman
320 Aztec St. #4
Santa Fe, NM 87501
(505) 983-1700

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on November 15, 1999, a copy of the foregoing Complaint was served by certified mail, return receipt requested, upon the following:

Michael Gabaldon
Area Manager
U.S. Bureau of Reclamation
505 Marquette NW, Suite 1313
Albuquerque, NM 87102-2162

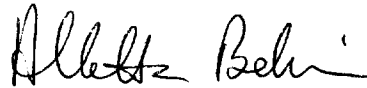
Attorney General Janet Reno
U.S. Department of Justice
950 Pennsylvania Ave.
Washington, D.C. 20530

Thomas Fallin, LTC, EN
District Engineer
Albuquerque District
U.S. Army Corps of Engineers
4101 Jefferson Plaza NE
Albuquerque, NM 87109

Eluid Martinez, Commissioner
U.S. Bureau of Reclamation
1849 C St., NW
Washington, D.C. 20240-0001

John J. Kelly, U.S. Attorney
John W. Zavitz, Assistant U.S. Attorney
Attn: Civil Process Clerk
P.O. Box 607
Albuquerque, NM 87103-0607

Gen. Joseph Ballard, Commander
U.S. Army Corps of Engineers
20 Massachusetts Ave. NW
Washington, D.C. 20314-1000



ALLETTA BELIN