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UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

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

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Robert M. Marsh **MLK**
CLERK, U.S. DISTRICT COURT

RIO GRANDE SILVERY MINNOW, et al.,

Plaintiffs,

vs.

JOHN W. KEYS III, et al.,

Federal Defendants,

MIDDLE RIO GRANDE CONSERVANCY
DISTRICT, et al.,

Defendant-Intervenors.

No. CIV 99-1320-JP/RLP-ACE

**BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR
EMERGENCY INJUNCTIVE RELIEF**

415

TABLE OF CONTENTS

INTRODUCTION.....	1
STATEMENT OF RELEVANT FACTS.....	2
Current Projected River Flows.....	2
What Led to This Scenario.....	6
Consultation Status.....	8
Current Water Availability.....	9
River Drying and Current Status of the Silvery Minnow.....	10
ARGUMENT.....	12
I. THE COURT SHOULD ORDER IMMEDIATE INJUNCTIVE RELIEF UNDER THE APRIL 19 TH OPINION AND THE ESA.....	12
A. The Court Has Power to Order Federal Defendants To Release Water For the Minnow Under the ESA.....	14
B. An Injunction Is Appropriate Under ESA Section 7(a)(2).....	17
C. An Injunction Is Also Warranted Under ESA Section 9.....	18
D. Injunctive Relief Under ESA Section 7(a)(1).....	20
II. TIMING AND SCOPE OF INJUNCTIVE RELIEF.....	20
A. An Emergency Injunction Is Needed.....	21
B. Scope Of Injunction.....	21
CONCLUSION.....	25

INTRODUCTION

Plaintiffs seek emergency injunctive relief to prevent the possible extinction in the wild of the Rio Grande silvery minnow during the remainder of this terrible drought year.

Under the June 29, 2001 Biological Opinion ("June 29th BO"), which the Court upheld in its Memorandum Opinion and Order of April 19, 2002 ("April 19th Opinion"), significant river drying between Isleta Dam and Elephant Butte has already occurred this year, and many minnows have died. See Declarations of Alletta Belin and John Pittenger, filed herewith. The Bureau of Reclamation ("Bureau") now advises that water supplies will not be sufficient to meet the flow requirements of the June 29th BO for the remainder of the year; and so the approximately 120 miles of river below Isleta Dam, where over 95% of Rio Grande silvery minnows have been found in recent years, will go dry sometime soon, even within days. Even more ominously, the Bureau states that it may not be able to maintain flows through the Albuquerque Reach of the river (between Cochiti Dam and Isleta Dam) beginning as early as mid-September, if it is not able to acquire additional water from Albuquerque. Thus, if the Bureau cannot buy more water, the only flows that will remain in the entire Middle Rio Grande below Bernalillo will be the sewage effluent from Albuquerque and Bernalillo and possibly a short stretch of river above San Acacia Dam.

Yet approximately 280,000 acre-feet of water remains in upstream storage in federal reservoirs, including Heron and Cochiti.¹ The Federal Defendants refuse to consider using any of this water to meet the flow requirements of the June 29th BO or

¹ Reservoir storage figures dated August 26, 2002, showed about 300,000 a-f of water in storage in the four upstream reservoirs: Heron, Abiquiu, El Vado, and Cochiti. Belin Decl. ¶ 24. By the time this Memorandum is filed, that number will have decreased by some amount, resulting in Plaintiffs' estimate of 280,000 a-f of reservoir storage now.

even to keep some water (other than sewage effluent) flowing in the Albuquerque Reach below Bernalillo. Such refusal comes despite the Court's express ruling in the April 19th Opinion that the Bureau has discretion to consider using such water to aid the endangered minnow; and despite the fact that the Bureau now concedes it cannot even come close to meeting the flow requirements of the June 29th BO during the remainder of 2002, and must reinitiate consultation with U.S. Fish and Wildlife Service ("FWS").

Under the Bureau's plans, then, it is likely that for some time period this fall, only sewage effluent will keep small parts of the Rio Grande wet from Bernalillo down to Isleta Dam, and the river will be almost completely dry from Isleta Dam down to Elephant Butte. This is a prescription for extinction of the silvery minnow; and will violate ESA Sections 7(a)(2) (prohibiting federal agencies from causing "jeopardy" of listed species, 7(a)(1) (requiring federal agencies to carry out programs for the conservation of endangered species) and 9 (prohibiting unauthorized "take" of listed species). Emergency injunctive relief is necessary to order the Bureau to adhere to the Court's rulings in the April 19th Opinion, and to maintain some flows in the Middle Rio Grande for the remainder of this year to keep a viable population of silvery minnow alive in the Rio Grande.

Plaintiffs thus request that the Court enter a temporary restraining order and/or preliminary injunction as soon as possible, ordering the Federal Defendants to release water from federal storage in order maintain some flows in the Rio Grande for the remainder of the year, as described further below. Alternatively, Plaintiffs request the Court to enter such other relief as it deems appropriate.

STATEMENT OF RELEVANT FACTS

The facts supporting this Motion for Emergency Injunctive Relief are largely set forth in the Court's April 19th Opinion, Plaintiffs' prior briefings, and the Administrative Record filed by Federal Defendants, and will not be repeated here. The following facts are intended to update the Court on what has happened since the April 19th Opinion was issued, with respect to river flows and the status of the silvery minnow.

Current Projected River Flows

On Wednesday, August 28, 2002, Federal Defendants held a meeting with Plaintiffs where representatives of the Bureau of Reclamation described the current water supply scenario and the Bureau's possible plans for managing water in the Middle Rio Grande for the remainder of the 2002 calendar year. See accompanying Belin Decl. & Exhs. 1-5 (copies of documents provided by Bureau).

At that meeting, and in their subsequent amended request to reinitiate consultation with FWS, Bureau officials stated that they could not meet the river flow requirements of the June 29th BO throughout the remainder of this irrigation season (which ends October 31, 2002). Id., ¶ 4; Exh. 7 to Belin Decl. They predicted that they would drop river flows below the minimums mandated by the BO sometime between September 2 and the latter part of September. They stated that meeting the flow requirements of the BO would require them to make releases of water from Heron Reservoir, and they were not willing to do that. Belin Decl. ¶ 4.

Bureau officials estimate that meeting the flow requirements of the June 29th BO would require somewhere around 58,000 acre-feet ("a-f") of additional water (that the Bureau does not have at this time) until October 31, and probably some unknown

additional amount of water to maintain flow levels after October 31 until flows naturally bump back up after the close of the irrigation season. Belin Decl. ¶ 5; Exh. 7.

Bureau officials have also estimated the amount of additional water needed to comply with a different alternative that they had proposed in an August 2nd letter to FWS requesting to reinitiate consultation over Middle Rio Grande water operations. See Belin Decl., Exh. 6. Under that alternative, the Albuquerque Reach of the river (between Cochiti Dam and Isleta Dam) would be kept flowing, the Isleta Reach (from Isleta Dam to San Acacia Dam)² would be allowed to mostly dry up, and 50 cubic feet per second (“cfs”) of flows would pass over San Acacia Dam from water diverted at Isleta Dam and run through ditches down to San Acacia. Id. This alternative would meet the flow requirements of the BO for the Albuquerque and San Acacia Reaches but not for the Isleta Reach, as the BO requires 100 cfs of flows over Isleta Dam. FWS A.R. 2.IX.A.97 (BO) at 109. The Bureau estimates that it would need to acquire an additional 34,000 a-f of water to meet this alternative for the remainder of this irrigation season. Exh. 7.

Bureau officials described a third alternative: keeping only the Albuquerque Reach of the river wet, and allowing both the Isleta and San Acacia reaches to dry completely. Id. ; ¶ 7. They estimated that implementing this alternative would require approximately 20,000 a-f more water above and beyond what they have available at this time. Id. Two days later, they refined that estimate to 22,000 a-f. Exh. 7. They stated that they were trying to purchase this water from Albuquerque, based on their estimate

² The various reaches of the Middle Rio Grande are given multiple, and sometimes conflicting, labels in different contexts. In these papers, the river reach between the Isleta Dam and San Acacia Dam, sometimes known as the Belen Reach, will be referred to as the Isleta Reach. Similarly, the reach of river between the San Acacia Dam, sometimes known as the Socorro Reach, will be called the San Acacia Reach. The reach of the river between Cochiti Dam and Isleta will be referred to as the Albuquerque Reach.

that Albuquerque has somewhere between 20,000-30,000 a-f of water currently stored in Abiquiu Reservoir which is not firmly committed to other uses and which might be available for purchase. Id.

Finally, Bureau officials described what they estimated would happen to river flows if they are not able to acquire the additional 22,000 a-f of additional water. Belin Decl., ¶ 8. They stated that if this scenario occurs, after the Bureau runs out of its remaining supplemental minnow water, which would probably occur sometime in mid to late September, the river would probably dry up entirely except for the sewage effluent from Albuquerque (and presumably Bernalillo). Id. The effluent would comprise the river flows from the effluent outflow site on the south side of Albuquerque down to approximately Isleta Dam, where any remaining effluent would likely be diverted by Isleta Pueblo.

Two days after that meeting, on August 30, 2002, the Bureau sent FWS a request for consultation on its proposal to attempt to keep the river flowing only in the Albuquerque Reach to Isleta Dam. Belin Decl., Exh. 7. The Bureau refined its estimate of the amount of river flow that would occur under this proposal and that would occur if the Bureau ran out of supplemental water. The Bureau stated that under its proposal, a few miles of the river just above San Acacia Dam might still flow, but almost the entire Isleta (49 miles) and San Acacia Reaches (56 miles) of river (from Isleta Dam to Elephant Butte) would be expected to dry. The Bureau stated that if it ran out of supplemental water entirely, there would still be some river flow from Cochiti to Bernalillo, but from Bernalillo to the Albuquerque sewage effluent outfall (23 miles) the river would dry, and below that the only flow would be effluent.

What Led to This Scenario

In late April and early May of this year, shortly after the issuance of this Court's April 19th Opinion, the Bureau wrote to both Albuquerque and the Middle Rio Grande Conservancy District ("MRGCD"), stating that the Bureau would not make 2002 San Juan-Chama Project water deliveries to Albuquerque and MRGCD "until we review Judge Parker's decision and determine what Reclamation's options are, relative to his decision." Belin Decl., ¶ 12 & Exh. 8. Albuquerque has a contract for 48,200 a-f and MRGCD has a contract for 20,900 a-f of San Juan-Chama water annually. At that time, the Bureau was considering three sources of water for supplemental river flows: (a) 2002 San Juan-Chama contract water; (b) water from Cochiti Reservoir; and (c) unallocated water from Heron Reservoir. Belin Decl. ¶ 13 & Exh. 9.

Shortly after that, when it was clear that there had been little or no spring runoff and hence river flows were projected to be extremely low, negotiations began concerning possible leases of water from Albuquerque. Those negotiations resulted in two separate agreements signed in early June: one between Albuquerque and the federal government, and the other between Albuquerque and MRGCD. See Belin Decl., Exhs. 10 and 11. Under the agreement with MRGCD, Albuquerque provided it 70,000 a-f of water for irrigation. Under the agreement with the federal government, Albuquerque provided approximately 40,000 a-f of supplemental water to be exchanged with native water and used to supplement river flows for the benefit of the silvery minnow. Id. The 2002 San Juan-Chama Project water earmarked for both Albuquerque and MRGCD was included as part of the water leased by these agreements. Federal officials told Plaintiffs at the time that these agreements would enable the government to comply with the flow requirements of the June 29th BO throughout this irrigation season, because the

supplemental minnow water would be able to “ride on” the irrigation water, so that there would be enough water to get through the season. Belin Decl., ¶ 14.

Unfortunately, however, these agreements contained no requirement that MRGCD stretch out the use of its leased irrigation water to ensure that irrigation continued throughout the irrigation season until the end of October. As a result, and with the added problem of hot and dry weather during much of the summer, MRGCD used up its water too quickly to last the whole season. MRGCD is expected to run out of water and terminate its irrigation season (except for Pueblo irrigation pursuant to prior and paramount water rights) about six weeks early, in early to mid-September. *Id.* At the August 28th meeting with federal officials, Bureau officials stated that they believed that MRGCD would end its irrigation releases from reservoirs on September 1 or 2. *Id.*, ¶ 15. An August 30, 2002, email from a Bureau official estimates the MRGCD reservoir release termination date as Sept. 4th. Belin Decl., Exh. 12. It takes water approximately a week to get from Abiquiu down to MRGCD, and several more days to get all the way through the MRGCD system. MRGCD stated in an August 28 press release that its supplemental water will be exhausted between Sept. 7th and 15th. Belin Decl., Exh. 13.

Because MRGCD will stop irrigating well before the normal end of the irrigation season, the supplemental water leased by the federal government for the minnow will not be sufficient to maintain the flows required by the June 29th BO for the remainder of the season. Belin Decl., ¶ 16. After MRGCD terminates its irrigation, Bureau officials state that they have only enough water to continue to meet the BO flow requirements (100 cfs over Isleta; 50 cfs over San Acacia) for another two weeks or so. *Id.*; Exh. 7. After that time, if no more water is obtained, they would expect almost the entire river to dry,

except for some flow above Bernalillo (where there are almost no silvery minnows), sewage effluent from Albuquerque, and possibly another short stretch of river. Id.

Even meeting the flow requirements of the June 29th BO would result in large-scale river drying below San Acacia Dam. That is because after the end of MRGCD's irrigation season, Bureau officials expect that there will be little or no flow in the Low Flow Conveyance Channel available for pumping back into the river. Belin Decl., ¶ 17. Thus, it is possible that compliance with the San Acacia bypass flow requirements of the BO would result in only some 5-7 miles of the river below San Acacia Dam staying wet, and the remaining more than 50 miles drying up. Id. It would also be expected that large sections of the Isleta Reach would go dry even under the BO flow requirements because there would likely be no water in the Low Flow Conveyance Channel to pump into the river. Already this summer, as much as eighteen miles of the Isleta Reach have dried up at one time.

Consultation Status

On August 2, 2002, the Bureau requested to reinitiate consultation with FWS concerning elements of the June 29th BO. Belin Decl., Exh. 6. In that request, the Bureau proposed a flow regime below that required in the BO. The Bureau proposed to allow the Isleta Reach to dry, which would reduce the supplemental water requirements.

At the August 28th meeting, Bureau officials stated that the Bureau's August 2nd reinitiation request was no longer in effect since the Bureau was no longer planning to pursue the alternative of drying only the Isleta Reach of the river. Id. FWS officials stated that the Bureau had not yet provided FWS with another specific alternative for consultation, and therefore that FWS had not provided any response through the consultation process. Id.

On Friday, August 30th, the Bureau sent to FWS a memorandum amending its earlier request to reinitiate consultation over Middle Rio Grande operations. Id., Exh. 7. The Bureau's new proposal is to "target continuous flow in the Albuquerque Reach" (from Cochiti to Isleta Dam) as best it can. Id. If the Bureau is able to purchase 22,000 a-f of additional water from Albuquerque, it anticipates that it will succeed in "targeting" continuous flow in the Albuquerque Reach. If not, the Bureau expects to run out of supplemental water sometime between September 12 and the last week of September, at which point the Albuquerque Reach of the river will start to dry up. Id. The Bureau seeks FWS concurrence in this proposal as soon as possible, which could come within a few days, Plaintiffs believe.

Current Water Availability

At the August 28th meeting, Bureau officials provided Plaintiffs with information concerning water storage in four upstream reservoirs: Heron, El Vado, Abiquiu, and Cochiti. As of August 26, Heron Reservoir had about 170,000 a-f in storage. Belin Decl., Exh.3. About 11,500 a-f of that is allocated for delivery under 2002 San Juan-Chama contracts (not to Albuquerque or MRGCD), and the remaining 159,000 a-f is unallocated. El Vado Reservoir had about 13,700 a-f, about 6,000 a-f of which was San Juan-Chama water belonging to contractors other than MRGCD and Albuquerque, 2700 was native Rio Grande water, and the remainder was prior and paramount water to be used by the Pueblos. Id. Abiquiu Reservoir held approximately 66,000 a-f, most of which belongs to Albuquerque and 7,000 a-f of which belongs to other San Juan-Chama contractors. Cochiti Reservoir had about 49,400 a-f. Id. Since August 26th, levels at El Vado and Abiquiu have declined due to irrigation and supplemental minnow water use.

“Native” flows in the Rio Grande are currently very low, as are native flows in the Rio Chama. Bureau officials stated that current flows in the Chama are about 1 cfs, and in the Rio Grande at Embudo are about 150 cfs, which means that there is only about 100 cfs of native Rio Grande flows below Cochiti Dam. Belin Decl., ¶ 26. The Bureau expects that after MRGCD has completed its reservoir releases, all native flows will be diverted for Pueblo use. Plaintiffs believe that flows in the Rio Grande might be increased above this level if the Bureau increased water production from the Closed Basin Project in the San Luis Valley of southern Colorado. However, native flows are subject to diversion to satisfy Pueblo prior and paramount rights and, if there is any water above and beyond that, to diversion by MRGCD. Id.

River Drying and Current Status of the Silvery Minnow

Even though the Bureau has largely complied with the flow requirements of the June 29th BO so far this year, there already has been significant river drying and associated minnow deaths this summer. See Pittenger, Belin Declarations. The most recent report provided to Plaintiffs by FWS reviews the river drying episodes that occurred between June 3 and August 20th and notes that at times this summer up to 26 miles of the river below Isleta Dam have been observed to be dry at one time. See Belin Decl. ¶ 16, Exh. 14. As of the last count provided to Plaintiffs, dated July 16th, the official number of minnows counted as “taken” under the BO was 248 – only 2 under the BO limit of 250. Belin Decl. ¶ 22. However, subsequently FWS revised its counting methods to allow a total take of 500 dead minnows rather than 250. Belin Decl. ¶ 23.

More important, however, as described in the declaration of biologist John Pittenger, the most recent monitoring results show lower densities of silvery minnow than have ever been found before. Pittenger Decl. The large-scale river drying seen already

this summer has “decimated the Rio Grande silvery minnow and brought the species to an unprecedented, dangerously low population size.” Pittenger Decl., ¶ 10. Population monitoring done in July 2002 found the lowest densities of minnow ever recorded. Id. Salvage operations (taking minnows from drying pools and depositing them upstream in the Albuquerque Reach) have “not resulted in an increase in abundance.” Id., ¶ 13. Minnow population densities in June 2002 were three thousand times higher in the San Acacia Reach than in the Isleta and Albuquerque Reaches combined. Id.

Drying of the entire San Acacia Reach “would extirpate the only remaining viable wild population of Rio Grande silvery minnow.” Pittenger Decl. ¶ 14. Translocation of the entire remaining population in the San Acacia Reach to the Angostura (Albuquerque) Reach is infeasible, and past salvage operations to move silvery minnow upstream have not produced any measurable increase in the abundance of Rio Grande silvery minnow in the Angostura or Isleta reaches. Id. Therefore, “drying of the entire San Acacia Reach would seriously jeopardize the probability of continued existence of Rio Grande silvery minnow in the wild.” Id.; See April 19th Opinion at 15-16 (summarizing biological evidence in record concerning harm to minnow caused by large-scale drying, especially of San Acacia Reach).

Moreover, drying of the vast majority of the Isleta and/or Albuquerque Reaches poses even more dramatic risks to the species:

... The possibility of drying in the Angostura and Isleta reaches, in addition to the San Acacia Reach, in the remainder of 2002 would likely make imminent the extinction of Rio Grande silvery minnow. Despite the low population abundance, these reaches still support some Rio Grande silvery minnow that could potentially repopulate the San Acacia Reach upon restoration of stream flows. It is thus imperative that, at a very minimum, the Angostura Reach remain wetted with sufficient flows to provide adequate minnow habitat during the remainder of the year.

Pittenger Decl. ¶ 15.

As explained above, Federal Defendants will apparently allow these scenarios to occur, despite the fact that water remains available in upstream federal reservoirs that could be tapped to maintain flows in the three river reaches (or parts of them) for the minnow; and despite the fact that this Court has already held the Bureau has discretion to utilize these water resources for the minnow. In light of the Bureau's insistence that it will not release stored water for the minnow, immediate judicial relief is necessary in order to enforce the requirements of the ESA and prevent further decline and possible extinction of the minnow. And because the Bureau intends to allow this scenario to commence very soon, possibly with a matter of days, Plaintiffs believe an emergency situation exists requiring immediate judicial attention.

ARGUMENT

I. THE COURT SHOULD ORDER IMMEDIATE INJUNCTIVE RELIEF UNDER THE APRIL 19TH OPINION AND THE ESA

The Court's April 19th Opinion upheld the June 29th BO over Plaintiffs' challenges, but acknowledged that it was a close question whether the "Reasonable and Prudent Alternative" ("RPA") developed in the June 29th BO would, in light of the record before the Court, avoid jeopardy to the silvery minnow. See April 19th Opinion, p.20.

Now Federal Defendants say they will under no circumstances adhere to the June 29th BO and RPA flow requirements for the rest of 2002. At minimum, they plan to allow the drying of the more than 100 miles of river below Isleta Dam, where well over 95% of the remaining silvery minnows are found. The only question is whether they will also allow most of the Albuquerque Reach of the river to dry as well. In addition, the fact that the "incidental take" limit of 250 dead adult silvery minnows was nearly met by July

16th, and substantial river drying has occurred since then, also means that Federal Defendants may have already exceeded the allowed “take” limit under the June 29th BO as of this date or will likely exceed that level soon, particularly if they proceed with their plan to dry most of the river.³

Both circumstances – failing to meet the RPA flow requirements, and exceeding the allowable “incidental take” – require the Bureau to reinitiate consultation with FWS under the ESA and the express requirements of the June 29th BO. See 50 CFR 402.16; April 19th Opinion at 19. However, that process is only just beginning, with the Bureau’s August 30th reinitiation request to FWS. It is thus likely that completion of the reinitiated consultation will take some time.⁴ That delay alone could spell the demise of the minnow in its remaining occupied habitat, since the Bureau refuses to utilize water out of Heron or other federal reservoirs for minnow purposes.

Under these circumstances, and given the Court’s rulings in the April 19th Opinion that the Bureau in fact has discretion to use Heron or other water for minnow

³ FWS proposes to unilaterally revise the BO by doubling the 250 minnow take limit specified in the BO to 500 minnows, without any further consultation or public input whatsoever. Plaintiffs contend that FWS cannot amend the BO without reinitiating consultation. In any event, as John Pittenger explains in his declaration, if and when the Bureau allows the drying of the San Acacia and the Isleta Reaches of the river, it is a virtual certainty that even the doubled take limits of the BO will be easily exceeded. Pittenger Decl. ¶¶ 12-14.

⁴ In its August 30th memorandum to FWS, the Bureau requests that it be permitted to ramp down flows to a level that would dry the Isleta and San Acacia Reaches “immediately” upon completion of the requested consultation. The Bureau seems to presume that the consultation might be completed within a few days, when no Biological Assessment has even been prepared, and the Bureau is proposing drastic harm to the remaining silvery minnow population. This presents another possibility of impending irreparable harm, to the extent that there is a risk that the Bureau will ramp down flows before it runs out of supplemental water, thereby drying the San Acacia and Isleta Reaches before Plaintiffs have had the opportunity to have this motion heard in Court.

purposes over which it must consult in future ESA consultations, immediate injunctive relief is appropriate to require Federal Defendants to continue meeting the flow requirements of the June 29th BO/RPA, at least until reinitiated consultation is completed; or to provide alternative flow requirements for the Bureau to meet (at a minimum, keeping the Albuquerque reach wet the remainder of the year with a carefully staged drying of the lower reaches).

Plaintiffs are very aware of how difficult this year is, in terms of drought and available water supplies, and are appreciative of the earlier efforts of the Bureau and City to manage water in a responsible fashion this summer to meet all competing needs. Yet farmers in the MRGCD have gotten much of the water they wanted to irrigate this year, while the minnow is not getting even the minimum water it needs. Now that irrigation is ending, the river managers intend to simply allow all or most of the river to dry up. Where the effects will be further severe harm to the remaining minnow populations, and likely extinction of the species in the wild, this result cannot be permitted under the requirements of the ESA.

A. The Court Has Power To Order Federal Defendants To Release Water For The Minnow Under The ESA

Under the ESA citizen suit provision, the Court is authorized to enjoin Defendants from violating Sections 7 and 9 of the ESA. 16 U.S.C. § 1540(g)(1)(A).

Moreover, in enacting the ESA, Congress has modified the traditional injunction standard by removing courts' equitable discretion in balancing the parties' competing interests and the public interest. TVA v. Hill, 437 U.S. 153, 173-94 (1978); Strahan v. Coxe, 127 F.3d 155, 160 (1st Cir. 1997), cert. denied 525 U.S. 830 (1998); National Wildlife Federation v. Burlington Northern R.R., 23 F.3d 1508, 1511 (9th Cir. 1994).

"Congress has spoken in the plainest of words, making it abundantly clear that the balance

has been struck in favor of affording endangered species the highest of priorities, thereby adopting a policy which it described as 'institutionalized caution.'" TVA v. Hill, 437 U.S. at 194. This Congressional policy of preserving endangered species from extinction outweighs nearly any other equitable consideration, including the expenditure of even "extraordinary" financial or practical resources. TVA v. Hill, 437 U.S. at 173, 186, 193-94. As the Court noted in the April 19th Opinion, "the plain intent of Congress in enacting [the ESA] was to halt and reverse the trend toward species extinction, whatever the cost." April 19th Opinion, at 5, quoting TVA v. Hill, 437 U.S. at 184.

Hence, absent "unusual circumstances," an injunction is the appropriate remedy for proven or likely violations of the ESA. Thomas v. Peterson, 753 F.2d 754, 765 (9th Cir. 1985); PRC v. Thomas, 30 F.3d 1050, 1056-57 (9th Cir. 1994), cert. denied 514 U.S. 1082 (1995); NWF v. Marsh, 721 F.2d 767, 786 (11th Cir. 1983).⁵ A preliminary injunction will issue if the plaintiff shows that a violation of the ESA is "at least likely in the future." NWF v. Burlington, 23 F.3d at 1511; see also TVA v. Hill, 437 U.S. at 169-72 (imminent violation of the ESA requires injunctive relief). Where "take" of endangered species is alleged, an injunction is proper if the plaintiff demonstrates an "imminent threat" of future harm to the listed species. Forest Conservation Council v. Rosboro Lumber Co., 50 F.3d 781, 783 (9th Cir. 1995); Marbled Murrelet v. Babbitt, 83 F.3d 1060, 1064 (9th Cir. 1996); Palila v. Hawaii Dept. of Lands, 852 F.2d 1106, 1108 (9th Cir. 1988).

In addressing appropriate injunctive relief for the ESA violations discussed below, this Court must fashion a remedy that would "vindicate the objectives of the Act"

⁵ In Sierra Club v. Marsh, 816 F.2d 1376, 1382-84 (9th Cir. 1987), the Ninth Circuit held that the district court erred by applying the traditional balancing test to plaintiff's motion for preliminary injunction under the ESA. The court stated that an injunction must issue where the Corps failed to complete consultation on a highway project, because "Congress has established procedures to further its policy of protecting endangered species. The substantive and procedural provisions of the ESA are the means determined by Congress to assure adequate protection. Only by requiring substantial compliance with the act's procedures can we effectuate the intent of the legislature."

in light of the "purpose and language of the statute." Weinberger v. Romero-Barcelo, 456 U.S. 456 305, 313-24 (1982). The Court "may enjoin the agency from continuing activity that has resulted in past violations and, to the extent necessary, may dictate temporarily the actions the agency must take with regard to the activity until the party has submitted to the court an acceptable plan of its own." Silver v. Babbitt, 924 F. Supp. 976, 988 (D.Ariz. 1995), citing Sierra Club v. Yeutter, 926 F.2d 429, 439 (5th Cir. 1991).

The range of injunctive relief that courts have ordered under the ESA is thus quite broad, and includes enjoining water deliveries on Reclamation projects pending consultation, NRDC v. Houston, 146 F.3d 1118 (9th Cir. 1998), cert. denied; enjoining irrigation diversions which "entrain" listed salmon, U.S. v. Glenn-Colusa Irrigation Dist., 788 F. Supp. 1126 (E.D. Cal. 1992); halting closure of a reservoir which would destroy habitat of endangered fish, TVA v. Hill, supra; mandatory removal of animals harming endangered species, Mountain States Legal Foundation v. Hodel, 799 F.2d 1423, 1427-28 (10th Cir. 1980), Palila v. Hawaii Dept. of Land, 649 F. Supp. 1070 (D. Hawaii 1986), aff'd 852 F.2d 1106 (9th Cir. 1988); prohibiting vehicles from using beaches and harming endangered species, Loggerhead Turtle v. Volusia County Council, 896 F. Supp. 1170 (M.D. Fla. 1995), U.S. v. Town of Plymouth, 6 F.Supp.2d 81 (D. Mass. 1998); ordering a state to "restrict, modify or eliminate the use of fixed-fishing gear" which harm endangered whales, Strahan v. Coxe, 127 F.3d 155 (1st Cir. 1997), cert. denied; and enjoining ongoing land management projects pending completion of consultation. See Thomas v. Peterson, 753 F.2d 754, 765 (9th Cir. 1985) (enjoining logging and road project); PRC v. Thomas, 30 F.3d 1050 (9th Cir. 1994), cert. denied (enjoining logging and grazing activities on national forests in Oregon and Washington); Conner v. Burford, 836 F.2d 1521, 1533 (9th Cir. 1988) (enjoining oil and gas lease program on federal lands); Pacific Rivers Council v.

Thomas, 936 F. Supp. 738, 745 (D. Idaho 1996) (enjoining grazing on federal allotment in Idaho), Silver v. Babbitt, 924 F. Supp. 976 (D. Ariz. 1995) (enjoining federal timber sales in Arizona and New Mexico).

B. An Injunction Is Appropriate Under ESA Section 7(a)(2).⁶

Emergency injunctive relief is appropriate here, first, under ESA Section 7(a)(2) to prevent Federal Defendants from causing “jeopardy” to the Rio Grande silvery minnow through their management of the Middle Rio Grande the remainder of this year.

ESA Section 7(a)(2) commands that federal agencies must “insure” that their actions do not “jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification” of critical habitat for the species. 16 U.S.C. § 1536(a)(2). “Jeopardize the continued existence” is defined as meaning “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. Adverse modification of critical habitat is further defined as modifying the “physical or biological features that were the basis of determining habitat to be critical.” Id.

Here, FWS has already found in the BO that the Bureau’s and Corps’ management of the Middle Rio Grande is likely to “jeopardize” the silvery minnow, unless the agencies follow the specific requirements of the “Reasonable and Prudent

⁶ In its April 19th Opinion (at pp. 47-48), the Court anticipated the possibility that Plaintiffs might have to return to Court seeking injunctive relief under their jeopardy and failure to conserve claims and noted that Plaintiffs would not be required to send another 60 day notice in advance of requesting injunctive relief.

Alternative". See June 29th BO (FWS A.R. 2.IX.A.97). Since the FWS issued its RPA, the status of the minnow has only declined even further. See Pittenger Decl.

But now the Bureau states that it will not meet the flow requirements of the June 29th BO and RPA for the remainder of the year. That means that Federal Defendants' management of the Middle Rio Grande's reservoirs and river flows will cause "jeopardy" to the silvery minnow, under the analysis of the June 29th BO. Simply put, Federal Defendants are or will shortly be in violation of ESA Section 7(a)(2), thus warranting injunctive relief.

C. An Injunction Is Also Warranted Under ESA Section 9.

Second, an injunction is also appropriate now to prevent Federal Defendants from causing unauthorized "take" of the Rio Grande silvery minnow, in violation of ESA Section 9, 16 U.S.C. § 1538.

ESA Section 9 prohibits any "person" from unauthorized "take" of listed endangered species. See 16 U.S.C. § 1538(a).⁷ "Person" is defined to include federal agencies and officials. 16 U.S.C. § 1532(13). "Take" as used in Section 9 "means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. 1532(19). Of these categories of "take," the term "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 and sheltering.

See 50 C.F.R. § 17.3. Likewise, "harm" is defined to mean "an act which actually kills or injures wildlife." 50 C.F.R. § 17.3. This includes "significant habitat modification or

⁷ Whether an agency action will result in "take" of endangered species, in violation of ESA Section 9, is determined de novo by the district court. Palila v. Hawaii Dept. of Land, 649 F. Supp. 1070 (D. Hawaii 1986), aff'd 852 F.2d 1106 (9th Cir. 1988); Sierra Club v. Yeutter, 926 F.2d 429, 438 (5th Cir. 1991); Swan View Coalition v. Turner, 824 F. Supp.

degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." Id.; see Babbitt v. Sweet Home, 515 U.S. 687 (1995) (upholding this definition).

The record before the Court abundantly demonstrates that prohibited "take" of silvery minnow will occur, probably on a massive scale, during coming weeks and months if injunctive relief is not entered. Assuming that the Bureau stops meeting the flow requirements of the BO before the reinitiated consultation is completed, as appears almost certain, then any take of silvery minnow will not be covered by the BO's Incidental Take Statement and Federal Defendants will be unlawfully taking minnows and destroying their habitat in violation of ESA Section 9. Moreover, the Bureau's plans for large-scale river drying are virtually certain to kill large numbers of minnows, thereby grossly exceed the BO/RPA take limit – whether it is 250 or 500 – in short order. See Pittenger Decl. ¶¶ 12-14. In that respect as well, there will be unlawful "take" of silvery minnow in violation of ESA Section 9.

As the Court observed in the April 19th Opinion, Plaintiffs anticipated previously that a scenario like this could develop, and urged the Court to delay adjudication of their "take" claims in their Second Amended Complaint (Fourth Claim for Relief) until those claims were fully ripe. See April 19th Opinion, pp. 3, 48. Now, what Plaintiffs feared is coming to pass: the Bureau intends to allow extensive river drying well beyond that anticipated in the June 29th BO, causing "take" of silvery minnow unauthorized and unpermitted by the existing Incidental Take Statement.

Accordingly, at least until such time as the Federal Defendants complete reinitiated consultation with FWS over new river management proposals and obtain a

923 (D. Mont. 1992).

new and valid Incidental Take Statement, the Court should exercise its jurisdiction and authority under the ESA to prevent such unlawful “take” from occurring. Certainly, there is an “imminent threat” of harm to the silvery minnow, sufficient to warrant injunctive relief under ESA Section 9. TVA v. Hill, 437 U.S. at 169-72; Forest Conservation Council v. Rosboro Lumber Co., 50 F.3d 781 (9th Cir. 1995); Marbled Murrelet v. Babbitt, 83 F.3d 1060 (9th Cir. 1996).

D. Injunctive Relief Under ESA Section 7(a)(1)

Finally, injunctive relief is also appropriate at this stage of the proceedings under ESA Section 7(a)(1), 16 U.S.C. § 1536(a)(1), because the river drying that Federal Defendants propose will violate their duty to “utilize their authorities in furtherance of [the ESA] by carrying out programs for the conservation of endangered species.” As with Plaintiffs’ jeopardy claim under ESA Section 7(a)(2), the Court has already acknowledged the possibility that Plaintiffs could pursue this claim by way of a request for injunctive relief. April 19th Opinion at 47-48. The same reasons supporting Plaintiffs’ jeopardy and take claims also support the “conservation of the species” claim under Section 7(a)(1).

II. TIMING AND SCOPE OF INJUNCTIVE RELIEF

Plaintiffs are deeply aware, as is the Court, of the difficult demands that this drought year has placed upon the river managers. Again, Plaintiffs are appreciative of the efforts of the Defendants to provide supplemental water to at least meet the flow requirements of the June 29th BO so far this summer. But all those efforts will be for naught if extensive river drying is allowed to occur the remainder of this year. This section addresses practical issues of timing and scope of injunctive relief necessary to prevent that from occurring.

A. An Emergency Injunction Is Needed

From a timing perspective, Plaintiffs believe that an emergency situation now confronts the silvery minnow, and that Federal Defendants will not dispute this fact. The Bureau is projecting that it will run out of supplemental water within just a couple of weeks. It is proposing to “target” flows for as long as possible in the Albuquerque stretch of the river only, while allowing the rest of the lower river to dry completely, starting as soon as FWS approves this proposal. But the Bureau’s ability even to meet this very limited goal is highly questionable, in light of its firm decision not to use Heron or other federal reservoir water for the minnow.

It takes several days for water released from Heron to come down the Rio Chama, and then the Rio Grande, and pass through Abiquiu and Cochiti reservoirs to wet the river below San Acacia Dam. Plaintiffs believe that it is vital that the Bureau began releasing water from Heron very shortly, in order to maintain adequate river flow conditions for the minnow when the existing “supplemental” water is used up. Thus, Plaintiffs request that the Court issue an emergency injunction, on a TRO basis if necessary, in order to compel Federal Defendants to begin such releases.

Plaintiffs also understand that the Court’s schedule is crowded in coming weeks. Plaintiffs thus propose that the Court issue a TRO promptly, with or without a hearing; and that a hearing be set for later in September for consideration of a full injunction.

B. Scope of Injunction

Plaintiffs did not believe that the flow regime called for in the June 29th BO and RPA would be adequate to prevent irreparable harm and “jeopardy” to the silvery minnow, which is why they challenged the BO and RPA before this Court. Nevertheless, the BO’s requirement that flows be maintained through most of the lower river during the

summer and early fall, including 50 cfs past the San Acacia diversion (coupled with expected pumping from the Low Flow Conveyance Channel), is far better for the minnow than simply allowing the lower 110 miles of the river to dry completely, as FWS found in approving the June 29th BO and RPA. Since the BO was approved, the status of the silvery minnow has deteriorated even further, such that minnow densities found in July 2002 were the “lowest ever recorded.” Declaration of John Pittenger ¶ 10. The “best scientific and commercial data available” (which FWS presumably used in approving the June 29th BO and RPA) thus supports the conclusion that an injunction must now be issued to enforce minimum flow requirements to avoid jeopardy to and possible extinction in the wild of the silvery minnow. See record references cited in Plaintiffs’ Opening Case Brief on Second Amended Complaint (Doc. No. 279), pp. 35-42; Plaintiffs’ Reply Case Brief on Second Am. Complaint (Doc. No. 303), pp. 7-13.

As the Court held in the April 19th Opinion, the best available science indicates that the minimum flow levels that have any reasonable chance of protecting the silvery minnow from jeopardy or extinction are those set forth in the BO/RPA. Nevertheless, Plaintiffs recognize that requiring compliance with those flow levels would have potential significant negative effects that must also be considered. For example, Federal Defendants have calculated that meeting the June 29th BO requirements for the rest of the irrigation season would require more than 58,000 acre-feet of additional water. Belin Decl., ¶ 9. Meeting the BO flow requirements from November 1 to the end of the calendar year would almost certainly require additional water, although the Bureau did not provide Plaintiffs with an estimate of how much.

As noted above, there is significant water still in storage in upstream reservoirs, including about 170,000 a-f in Heron alone, which is available to be used to meet this

target. Id., ¶ 24. Plaintiffs acknowledge, however, that using a substantial portion of this water from storage the remainder of this year could imperil the Federal Defendants' ability to meet minimum flow targets for next year, particularly if dry conditions continue (and MRGCD cannot store water in El Vado). Moreover, as Plaintiffs acknowledged in their earlier briefing, even though Federal Defendants may declare a shortage in San Juan-Chama contract deliveries in order to provide water for endangered species, they must still, under the San Juan-Chama Project legislation, deliver "a reasonable amount" of Project water to the contractors. See Bureau A.R. 614, Act of June 13, 1962, § 11(a); Plaintiffs' Reply Case Br. On Second Am. Comp. (Doc. No. 303) at pp.27-8. Plaintiffs acknowledge that there could come a point where so much water is released from Heron that the Bureau's ability to deliver a reasonable amount of water to the contractors would be impaired. Although Plaintiffs do not concede that the San Juan-Chama legislation would take precedence over the ESA's powerful mandate to avoid extinction of species, still every effort should be made to interpret the two laws consistently with one another. Yet another consideration is that following the BO's flow requirements, while better than letting the entire Isleta and San Acacia Reaches dry up, still will leave large portions of those river segments dry.

If the Court were to find that releasing enough water to comply with the BO flow requirements would be either unlawful or otherwise inappropriate, Plaintiffs suggest an alternative course of action, based on a proposal that Plaintiffs made last week to Federal Defendants and Albuquerque. Although Plaintiffs strongly believe that keeping only the Albuquerque reach wet the rest of this year poses severe risks to the continued existence of the silvery minnow, in order to seek a practical resolution that does not endanger future years' water in upstream storage, Plaintiffs proposed to Federal Defendants and

Albuquerque that they would not seek an injunction requiring reservoir releases if Defendants would agree to a mix of short-term and long-term measures to aid the minnow. For the short term, these focus on the requirement that the Albuquerque reach be kept flowing throughout the rest of the year – having a “target” of flows through the Albuquerque Reach is clearly insufficient. Obviously, as many minnows as possible would be relocated from lower reaches to this section through a carefully managed recession of the lower river. But these short-term measures would have to be coupled with long-term steps necessary to conserve the minnow and reduce its extreme vulnerability to river drying in the Middle Rio Grande, including (1) requiring FWS to begin and expedite the rulemaking process necessary under the ESA to reintroduce minnows to other locations in their historic habitat but outside of the Middle Rio Grande; (2) ensuring that the Bureau begins taking the steps necessary to evaluate MRGCD “reasonable beneficial use” delivery needs before next year, pursuant to the April 19th Opinion, in order to potentially make more water available for the minnow in the coming years; (3) taking concrete steps towards establishing a Bureau “forebearance” program to pay for leasing water from lands within MRGCD, again to free up more water for the minnow, and (4) moving forward quickly on constructing fish passage/river reconnection facilities at both San Acacia and Isleta Dams.

Unfortunately, no agreement has been reached on these proposals. While far more risky for the minnow, Plaintiffs suggest that this alternative might form the basis for injunctive relief by the Court, if it is reluctant to order that enough water be released from Heron or other reservoirs to meet the flow requirements of the BO for the remainder of the calendar year.

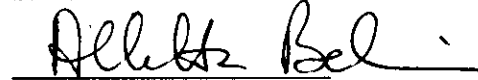
CONCLUSION

For reasons set forth above, Plaintiffs respectfully pray that the Court enter emergency injunctive relief under the ESA and the April 19th Opinion in order to protect the continued existence of the Rio Grande silvery minnow during the remainder of this calendar year.

DATED: Sept. 4, 2002

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 4, 2002, copies of the foregoing BRIEF IN SUPPORT OF MOTION FOR EMERGENCY INJUNCTIVE RELIEF was served via electronic mail where possible, and either hand delivery, overnight mail, or U.S. mail on the following counsel of record:

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