

City of Santa Fe



New Mexico

CITY CLERK'S OFFICE

DATE 1/28/14 TIME 2:10pm

PREPARED BY Stephanie Lopez

APPROVED BY [Signature]



AGENDA

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

Buckman Direct Diversion Board Meeting

THURSDAY, FEBRUARY 6, 2014

4:30 PM

CITY HALL

CITY COUNCIL CHAMBERS

200 Lincoln Avenue

1. CALL TO ORDER
2. ROLL CALL
3. APPROVAL OF AGENDA
4. APPROVAL OF CONSENT AGENDA
5. APPROVAL OF MINUTES FROM THE DECEMBER 12, 2013 BUCKMAN DIRECT DIVERSION BOARD MEETING
6. MATTERS FROM STAFF
7. REPORT ON FEBRUARY 4, 2014 FISCAL SERVICES AUDIT COMMITTEE

INFORMATIONAL ITEM

8. 2014 Fiscal Services and Audit Committee Schedule. (Stephanie Lopez)
9. Update on Early Notification System. (Shannon Jones/NSSA/DOE)

10. Update on recently filed Wild Earth Guardians Notice of Intent to Sue regarding the Rio Grande Silvery Minnow. (Shannon Jones and Kyle Harwood)
11. Presentation of New Mexico Water and Wastewater Association Max N. Summerlot Award and Good Housekeeping Awards. (Shannon Jones/Erick LaMonda)

CONSENT AGENDA

12. Update on 2nd Quarter Financial Statement. (Mackie Romero)
13. Update and discussion of BDD operations. (Shannon Jones)
14. Drought, Monsoon and Water Resource Management Update. (Rick Carpenter)
15. Request for approval of Amendment No. 1 to the Professional Services Agreement between Padilla Industries and the Buckman Direct Diversion Board for expanded fencing and gates associated with on-going BDD project habitat restoration work for the amount of \$87,424.00 inclusive of NMGRT. (Rick Carpenter)
16. Request for approval of Amendment No. 5 to the Professional Services Agreement between Harwood Consulting LLP and the Buckman Direct Diversion Board for the amount of \$60,000.00 exclusive of NMGRT. (Rick Carpenter)
17. Request for approval of Amendment No. 3 to the Professional Services Agreement between Alpha Southwest, Inc. and the Buckman Direct Diversion Board for the amount of \$50,000.00 exclusive of NMGRT. (Shannon Jones)
18. Request for approval to release an RFP to develop the Capital Asset Management Plan. (Shannon Jones)
19. Request for approval to purchase parts and supplies from Boyer and Seeley Pumps to repair Raw Water Pump Stations 1A and 2A in the amount of \$135,600.00. (Shannon Jones)

DISCUSSION AND ACTION ITEMS

20. Election of Chair and Vice-Chair of the Buckman Direct Diversion Board. (Nancy Long)
21. Request for consideration and possible action of Resolution No. 2014-1, determining reasonable notice for Public Meetings of the Buckman Direct Diversion Board. (Nancy Long)

22. Request for approval of process for selecting Buckman Direct Diversion Project Manager. (Shannon Jones and Adam Leigland)

MATTERS FROM THE PUBLIC

MATTERS FROM THE BOARD

NEXT MEETING: March 6, 2014

ADJOURN

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

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

February 6, 2014

This meeting of the Santa Fe County/City Buckman Direct Diversion Board meeting was called to order by Acting Chair, Chris Calvert, at approximately 4:32 p.m. in the Santa Fe City Council Chambers, 200 Lincoln Avenue, Santa Fe, New Mexico.

Roll was called and the following members were present:

BDD Board Members Present:

Councilor Chris Calvert
Commissioner Liz Stefanics
Ms. Consuelo Bokum
Councilor Carmichael Dominguez

Member(s) Excused:

Commissioner Miguel Chavez

Others Present:

Nancy Long, BDD Board Consulting Attorney
Shannon Jones, Interim BDD Facility Manager
Stephanie Lopez, Staff Liaison
Rick Carpenter, City Water Resources and Conservation Manager
Claudia Borchert, County Utilities Director
Adam Leigland, County Public Works Director
Teresa Martinez, County Finance Director
Erick LaMonda, BDD Staff
Kyle Harwood, BDD Board Counsel
Mackie Romero, BDD Staff
Jeff Mousseau, LANL
Cheryl Rodriguez, LANL

3. APPROVAL OF AGENDA

[Exhibit 1: Agenda]

CHAIR CALVERT: Are there are any changes from staff?

SHANNON JONES (Interim Director): Mr. Chair, there are no changes from staff.

COMMISSIONER STEFANICS: I'll move for approval.

MEMBER BOKUM: I had a few things.

COMMISSIONER STEFANICS: Then I'll withdraw my motion.

CHAIR CALVERT: You can second it for purposes of discussion.

MEMBER BOKUM: First of all, on #11, I'd just like to say congratulations.

CHAIR CALVERT: That will be presented, because it's an informational item. We will be hearing that.

MEMBER BOKUM: Okay. Then under the Consent Agenda I would like to ask a question on #14.

CHAIR CALVERT: Okay. We'll get to the Consent Agenda --

MEMBER BOKUM: Oh, you said the agenda.

CHAIR CALVERT: Yes. We're on the overall agenda.

MEMBER BOKUM: Okay.

COMMISSIONER STEFANICS: #4 is approval of the Consent.

MEMBER BOKUM: Okay. Sorry. I've been over at the legislature. I'm a little --

CHAIR CALVERT: That's okay. That could definitely be confusing.

COMMISSIONER STEFANICS: So, Mr. Chair, I will move for approval of the agenda.

MEMBER BOKUM: I will second.

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

4. APPROVAL OF CONSENT AGENDA

MEMBER BOKUM: I would like to remove #14, I would like to ask one question.

CHAIR CALVERT: Fourteen. Okay, item 14. Is there any other?

COUNCILOR DOMINGUEZ: I would move for approval as amended.

COMMISSIONER STEFANICS: Second.

CHAIR CALVERT: Okay. Any further discussion?

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

CONSENT AGENDA

- 12. Update on 2nd Quarter Financial Statement**
- 13. Update and discussion of BDD operations**
- 14. Drought, Monsoon and Water Resource Management Update ISOLATED FOR DISCUSSION**
- 15. Request for approval of Amendment No. 1 to the Professional Services Agreement between Padilla Industries and the Buckman Direct Diversion Board for expanded fencing and gates associated with on-going BDD project habitat restoration work for the amount of \$87,424.00, inclusive of NMGR**
- 16. Request for approval of Amendment No. 5 to the Professional Services Agreement between Harwood Consulting LLP and the Buckman Direct Diversion Board for the amount of \$60,000.00, exclusive of NMGR**
- 17. Request for approval of Amendment No. 3 to the Professional Services Agreement between Alpha Southwest, Inc. and the Buckman Direct Diversion Board for the amount of \$50,000.00 exclusive of NMGR**

18. **Request for approval to release an RFP to develop the Capital Asset Management Plan**
19. **Request for approval to purchase parts and supplies from Boyer and Seeley Pumps to repair Raw Water Pump Stations 1A and 2A in the amount of \$135,600.00**

5. **APPROVAL OF MINUTES: December 12, 2013**

CHAIR CALVERT: Any corrections from staff:

STEPHANIE LOPEZ (Staff Liaison): No corrections.

CHAIR CALVERT: Okay. What's the wishes of the committee?

MEMBER BOKUM: I would like to ask for one change.

CHAIR CALVERT: Okay.

MEMBER BOKUM: It's on page 10. It's the third dash down. "Ms. Bokum said that was before her time." I know I mumble. I don't believe I said that. It wasn't before my time and it doesn't reflect reality, so maybe just omit it. If that's okay.

CHAIR CALVERT: Any other changes? Okay. So if I could have a motion.

MEMBER BOKUM: Move to approve.

CHAIR CALVERT: As amended?

MEMBER BOKUM: As amended.

COUNCILOR DOMINGUEZ: Second.

CHAIR CALVERT: Okay. Any further discussion?

The motion passed by unanimous [3-0] voice vote with Commissioner Stefanics abstaining.

6. **MATTERS FROM STAFF**

MR. JONES: Mr. Chair, members of the Board, I do have things I'd like to bring up. The first one is to notify the Board that construction has begun on the 2A solar panel project and right now on the schedule it's looking at a completion date of October 31st. Secondly, if it pleases the Board, I'm prepared to give a staffing update.

CHAIR CALVERT: Please

COUNCILOR DOMINGUEZ: Mr. Chair, real quick, did you say October 31st?

MR. JONES: Yes. Okay, I want to start with I did receive a letter of resignation today from one of our charge operators who will be relocating to California, and while that's unfortunate I would like to look at the positive side, that we have filled three positions. We made an offer and the person accepted for regulatory compliance. We made an offer and the individual accepted for public relations coordinator, and we made an offer and the individual accepted for safety officer and training administrator. So those three, they all have the same recommended start date of March 3rd.

COMMISSIONER STEFANICS: Mr. Chair.

CHAIR CALVERT: Yes.

COMMISSIONER STEFANICS: Could you identify those people by name please?

MR. JONES: Mr. Chair, Commissioner Stefanics, let me try to do that. For regulatory compliance, the woman's name is Daniella Bulman. For public relations coordinator, that woman's name is Alana Moriarty. And for safety officer training administrator, the gentleman's name is Cesar Garcia.

COMMISSIONER STEFANICS: Thank you.

MR. JONES: That's it for Matters from the Staff.

CHAIR CALVERT: Great. Thank you.

7. REPORT ON FEBRUARY 4, 2014 FISCAL SERVICES AUDIT COMMITTEE MEETING

CHAIR CALVERT: At that meeting Commissioner Chavez and I were present along with staff, Shannon and Maggie and we discussed – we basically reviewed most of the items on the Consent Agenda that had any kind of fiscal impact, so that would have been 12, 13, 15, 16, 17, and 19, are the ones that we discussed at that meeting. And we're just checking to see if we thought the information was complete or if staff needed to do any further – provide any further information or feedback in the future. So do you have anything to add to that, Shannon?

MR. JONES: Mr. Chair, members of the Board, no. I think that's complete. Thank you.

CHAIR CALVERT: Any questions?

INFORMATIONAL ITEMS

8. 2014 Fiscal Services and Audit Committee Schedule

CHAIR CALVERT: I'm going to suggest – I think we discussed this too. I'm going to suggest that everybody can take a look at it now but since you will have new people coming onto this Board shortly and everybody may need to check their schedules anyway, that we just take this under advisement for right now and I guess maybe we can do it on a month-to-month basis until we get to, say, April and then at the April meeting I think we can do for the rest of the year. Does that sound like a reasonable plan?

So we're not approving anything anyway, but it is information that this isn't finalized and I think we can bring it back at the April meeting for approval, I think that would be the best course of action.

9. Update on Early Notification System

MR. JONES: Mr. Chair, members of the Board, as reflected in the memo on December 12th, the Board did pass a resolution requesting Los Alamos National Lab and their site office work with BDD staff on extending the duration of the current MOU. So we have been talks with Los Alamos National Lab and I believe we also have someone here from Los Alamos National Lab, Mr. Mousseau, is going to come. We did ask him to come and present on six talking points that we thought were relevant.

CHAIR CALVERT: Welcome. And if you'd just give your name for the record.

JEFF MOUSSEAU: My name is Jeff Mousseau. I'm the associate director of environmental programs at the laboratory, and it's my pleasure to brief you today. Mr. Maggiore who is usually here with me has taken ill so this is his second day. I talked to him this morning and he didn't sound good, so I think we can all be pleased that he took a day off to be sick. I've got an update here; I'll just pass this out. *[Exhibit 2]*

So Councilor Calvert, distinguished Board, there's a couple things in front of you. One is just a briefing that I'll walk through fairly quickly this afternoon. The other one is a map, kind of as a refresher of where the gauge stations are and so as we go through that you can refer to that to see the locations. When we were here last time we talked about moving forward with replacing E109.9 with E050 and E060 stations and adding one other station, E062 as a kind of a backup or a contingency for verification. And at that time we had talked about putting in place the flow detection systems, the camera systems, and making them have equal capability to what we had at E109.

So kind of where we are, since we started that in September after the flood event and got that up and going with the flow detection, we do have the cameras installed now at E050 and E060 stations. Those cameras are taking a photo once every hour. Those photos are uploaded onto a secure website for the Buckman Diversion and that really started viewing on the 27th of January. We're working with Shannon's folks now and we're putting place the capability for the five-minute image collection. We began work on that February 4th and hope to have that in place shortly.

Both of those stations, E050 and E060, are in a winterized status, meaning that they still – we still have the cameras working. They provide the flow detection, but we're not doing the sample collection during the freezing seasons. We really do that June through October. And then the handout just shows the locations. One other thing we did on E062 where we don't have the – there's pictures of each of those down in the bottom of the 11x17 handout and certainly you can see the flow detection there at 50 and at 60. At E062 we don't have that but that is, again, that's a verification that you can see flow, and that's down after the confluence of the two canyons. And so we do have a camera working at that location also today.

So that's kind of where we are on the stations. The amendments and the extension request as Shannon talked about, we are working together with them. We held a technical meeting in November. We've got another meeting scheduled, a technical working meeting scheduled for February 11th, so next week, and I think that's going well. The request is to be discussed at DOE headquarters for the extension in the upcoming months and we're basically continuing to work on the technical papers, technical issues and get this up and running in preparation for the monsoon season this year.

We had originally scheduled – I think twice now we've scheduled a tour to go look out at the stations and by other events that's been overtaken. We would continue to encourage a tour to come up and look at those. One idea that we had was perhaps even at the next Buckman Board meeting we'd be happy to host at Los Alamos so we could have the meeting, we could look at the stations, things like that if that would work out for you, Councilor, we'd offer that.

CHAIR CALVERT: On that, I will just offer that that's probably not a good month, simply because there's going to be transition on this Board because of the

City election in March, so I think that we might as well wait until you have the new people on before we schedule that.

MR. MOUSSEAU: Okay. That's a good idea. Just a couple of other pieces of information. DOE Los Alamos has a new field manager, put a new field manager in place, Kimberly Davis Lebak started January 27th. It's interesting to me because she has a real interest in environmental and really her first day on the job was out looking at some of the work that we've done with environmental. We will provide her a briefing if Pete hasn't already done this of kind of what our obligations to Buckman and give her a good idea of exactly what that is. She came to Los Alamos from Livermore National Laboratory where she was acting manager and the deputy site manager also at Sandi National Laboratory. So she has experience in New Mexico which is a good thing, along with her environmental experience. And then as it says she was at headquarters for a while as well as Pantex and I think she had started at Savannah River project.

Federal budget update – pretty good news from where we've been at the last couple years at \$173 million, so the new congressional number now is \$225 million. It's interesting to note that's \$5 million above the president's request and we think a lot of that has to do with some of the progress that's been made on cleanup, the good relations we have with stakeholders and regulators, and the support we got from everybody, really, for trying to get that budget increase so we could get some more cleanup done. So that's really good going into this year. In March we'll know the pass-back number from the president and so we'll know what the 15 number is. We've got our fingers crossed it's roughly the same as our 14 budget.

And then I talked about the upcoming technical meeting next week, and then considering the week of the 17th of March for the next biannual MOU technical meeting. That's all I have to present today. Thank you very much.

CHAIR CALVERT: Thank you. Does anybody have any questions? Yes, Councilor Dominguez.

COUNCILOR DOMINGUEZ: Thank you, Mr. Chair. I didn't catch that last part that you said about March. You want to have another technical meeting in February but also in March.

MR. MOUSSEAU: That's correct. It's called the biannual MOU technical meeting and that's the one that's scheduled I think right now for March 17th.

COUNCILOR DOMINGUEZ: Okay. So do we have an anticipated date when this MOU might be finalized and ready to, I guess take action on? It sounds like, if I'm reading this correctly, that you want to wait till after the 14 monsoon to make any changes to it as a result of what happened in 2013. Am I reading that correctly?

MR. MOUSSEAU: I believe that's correct. As I talked about this with Pete a little bit he had started the process with headquarters and I was unsure how long that was going to take to get that through the various departments that need to look at that. I can get you a better answer.

COUNCILOR DOMINGUEZ: Staff, do you have anything you want to add?

MR. JONES: Mr. Chair, Councilor Dominguez, while we are looking at making the modifications, the existing MOU doesn't actually expire until 2015, so we are looking at that early, trying to take a pro-active approach. So the MOU does continue to 2015. The technical meetings that we're having is really still looking at our existing

MOU and the appendixes to it and how we modify our current operation to better acquire the data that we're trying to get. The biannual technical meeting is just to also set up an MOU where we're required to meet twice a year to discuss that.

COUNCILOR DOMINGUEZ: But we're not going to wait until 2015 to amend it, right?

CHAIR CALVERT: Hopefully not.

MR. JONES: Mr. Chair, Councilor Dominguez, I think as soon as we can get a resolution and be able to bring that back we would move forward.

COUNCILOR DOMINGUEZ: So the intention is to amend it as soon as everyone feels comfortable with the agreement.

MR. JONES: Mr. Chair, Councilor Dominguez, that's correct.

COUNCILOR DOMINGUEZ: Comfortable to present the agreement, maybe not with the terms of the agreement. Okay.

CHAIR CALVERT: Let me just ask on that point, is that your understanding?

MR. MOUSSEAU: It would certainly be our intent to get this in place well in front of the existing one today.

COUNCILOR DOMINGUEZ: I had one other question but I can't find it here. That's it for now.

CHAIR CALVERT: Okay. Anybody else? So, the only question I have at this point, and it has to do with amendments to the MOU and the extension request. What are you looking at in terms of, if anything, an extension to the existing MOU? What is LANL's thinking on this at the present, if you would?

MR. MOUSSEAU: Cheryl.

CHERYL RODRIGUEZ: Hi, I'm Cheryl Rodriguez with the Department of Energy Environmental Projects Office. And regarding the extension to the MOU, Pete actually went back to headquarters last week, was it? And he said it was the most expensive breakfast he's had because they closed down headquarters. So his intent was to go over the request, the resolution back then and he didn't. So hopefully, like we said in here, within the next couple months – hopefully it won't even be that long before he can broach it with headquarters, and I know the formal letter was going to be sent for the resolution. I'm not sure if we've gotten it, but either way I think Pete already sent the resolution back to headquarters.

So as far as a timeframe for that, I think as soon as Pete gets the go ahead to begin working on an extension or discussions of such then we would start that. But the amendments to the MOU, it was established that we have a technical appendix and twice a year we get together and we go over the technical aspects of what we do under there. So this biannual meeting is that.

CHAIR CALVERT: Okay. I just wanted to – I guess make a request. In our previous meeting I think I stated that I would like to see that extension be at least five years because that was the length of the original MOU and we're basically starting over as we've had the new site. However, I did say at least five. So if it's at all possible I would prefer something like ten and I'll tell you why. One, we didn't foresee this circumstance. I know this was more of a jurisdictional thing than anything. But with climate change and more – what should I say? dramatic weather phenomena to come, probably, we can build this and think that this is going to be good and the right thing but

I'd certainly like to hedge and give ourselves, both of us more time to make sure that this will be a robust facility and will be a lasting one. And so I would again encourage as I said a minimum of five but hopefully something more like ten so if we get into another situation like this we don't have to stop in the middle to renegotiate again and all that. And like I said, with climate change I'm sure we're going to have more dramatic weather phenomena and so we're going to need to be able to see that this is a sustainable facility into the future.

MR. MOUSSEAU: So, Councilor Calvert, we will take that back and at our next briefing we'll go over kind of exactly where we are on that extension and how long we're looking at and things like that and we will absolutely carry this message of at least five years and preferably long that that back.

CHAIR CALVERT: Okay. And was there something – you said you needed some documentation you needed from the staff?

MS. RODRIGUEZ: Oh, I think it was just a formal transmittal of the resolution.

CHAIR CALVERT: Okay, Shannon, have we done that? Do they have a copy of the resolution that we passed?

MR. JONES: Mr. Chair, they do have a copy of the resolution and the letter that she spoke of, we are executing as we speak.

CHAIR CALVERT: Okay. All right. Thank you. Thank you very much. Appreciate it.

10. Update on recently filed WildEarth Guardians Notice of Intent to Sue regarding the Rio Grande Silvery Minnow

MR. JONES: Mr. Chair, members of the Board, while we have been monitoring these issues, I have asked Kyle Harwood to come and provide the latest update to the Board.

KYLE HARWOOD: Good evening, Mr. Chair and Board members. There is late breaking news on this topic. *[Exhibits 3 and 4]*

CHAIR CALVERT: So that means paper. You're going to walk us through it, right?

MR. HARWOOD: So at the time we prepared the packet, as the packet describes, we wanted to just bring an informational update on the matter we are monitoring. It is a matter of some significance and appears to be getting more significant as the weeks go by. As you I think know and we reported about last year, the environmental group WildEarth Guardians filed a notice of intent to sue over essentially failures to follow the Endangered Species Act. They never pulled the trigger, so to speak, on that threatened lawsuit last year, however, this year –

CHAIR CALVERT: Has it expired then?

MR. HARWOOD: Well, the way the citizen supervision is set up they must provide this notice of intent to sue to provide the 60-day sort of breathing, cooling off and negotiation period, and then they may file their lawsuit after that 60-day period has run. They never did last year.

CHAIR CALVERT: Is there a deadline by which they must file the lawsuit?

MR. HARWOOD: No. They don't ever have to file their lawsuit. It's not that they then have to file it.

CHAIR CALVERT: Well, I know, but I mean is there a period by which is they're going to they have to?

MR. HARWOOD: I think people defending against a suit like this, if it did drag on for months or longer would start to argue that the issue is stale, but that becomes a matter of argument at that point.

CHAIR CALVERT: Okay.

MR. HARWOOD: So as the memo in your packet describes, they first filed a notice of intent to sue the Army Corps of Engineers withdrew from the consultation process around the minnow last fall, and I can give a little more background if you'd like on that. Then just after the new year, I think it was the 9th of – I'm sorry. That was on the 9th and then a couple days later they filed one against Colorado for Colorado's activities that adversely affect the minnow, and that's a whole new front in the silvery minnow, Rio Grande management dispute, because Colorado, of course is taking the position that their water use is governed by the Rio Grande Compact and that protects them from this sort of thing. This holding Colorado accountable for their changes to the flow in the critical reach of the minnow has been something that a lot of folks have talked about. We haven't actually seen an environmental group present the attack, so to speak, in this way in New Mexico before. So those are the two notices of intent to sue that you see in your packet.

And then the two that I've handed out today are both filed two days ago on February 4th. One is naming the US Fish and Wildlife Service for their failures to follow their own rules, in a nutshell, and also one filed against the US Bureau of Reclamation. And the one against the US Bureau of Reclamation is particularly important because in the first round of minnow fights, which are now 12 years ago the attack on the Bureau of Reclamation also picked up the San Juan/Chama contracts, because the Bureau of Reclamation administers those.

We've had – things have changed in the intervening 12 years, including the collaborative program and their efforts to come up with system-wide solutions for the silvery minnow but as is evidenced by the current interagency fighting that is going on, particularly between the Bureau of Reclamation and the Corps, who are the two main agencies involved with the collaborative program, the picture does not look good. There's one thing, just adding to what you might ask Rick about in his drought and monsoon memo, there's an interesting graph on page 5 of the Fish and Wildlife Service notice of intent to sue and you can see here part of the reason why WildEarth Guardians is so concerned for the future of the minnow. The purple line is the 2014 snowpack. It picks of the January and February – you can see we started out at the beginning of this year kind of middle of the way between last year's horrible situation and our sort of normally dismal situation. We started off in the middle between those and we have just gone straight down with the February 1 forecast to as bad as we were last year at this time.

And the angle of that line is not very encouraging. Now we have had a storm since the February 1 forecast. So these letters have a lot of factual information in them and they have a lot of citations to regulations and to federal environmental laws. I think I'll stop here for now with just letting you know, informing you these are obviously starting to define the boundaries of what is looking like it's going to shape up to be a very

important year for the Rio Grande. And one other fact I'll just remind us all of in case I failed to mention it earlier, the 2003 biological opinion expired last year and the agency has attempted to extend it by what's called re-initiation, and we're in a little bit of a gray zone right now with continuing coverage, and that is for the river activities, management activities generally. The Buckman Direct Diversion project has its own biological opinion, as does the Albuquerque diversion, standalone biological opinions, which we're obviously very protective of, and how these attacks, frankly, on all of these agencies, what this ultimately means for our projects and environmental permits we don't know yet, is the short answer.

So I'll stop there unless there's other questions or you have any direction for staff.

CHAIR CALVERT: Were there any questions?

COUNCILOR DOMINGUEZ: Could you send me a copy?

MR. HARWOOD: I'd be happy to send these to you. Yes, sir. I'll send it to –

CHAIR CALVERT: Yes, just send it to all of us, including Commissioner Chavez.

MR. HARWOOD: Yes, sir.

CHAIR CALVERT: Also, dare I characterize this as somewhat the legal shotgun approach? Naming as many people as possible, hoping that at least one of them will –

MR. HARWOOD: Yes. If we really want to use that analogy I would say this is pulling the shotgun out of the scabbard. It is not firing it yet.

CHAIR CALVERT: Not yet, no, but –

MR. HARWOOD: We could continue that analogy. But yes.

CHAIR CALVERT: Okay. Do you see any one of these as more – like the one with the Bureau of Reclamation, do you see that as potentially more serious for us than, say, some of the others? Or is there any way to know at this point?

MR. HARWOOD: I think the one against Colorado is the most creative one and it will be very interesting to see how a judge reconciles that claim. There's been a lot of talk, as I said about holding our neighbor to the north partially accountable for the influence they have on flows in New Mexico. I think probably the biggest concern is in the Fish and Wildlife NOI where they start to mention related non-federal parties, and that could mean anything from the Interstate Stream Commission, the Middle Rio Grande Conservancy District, Albuquerque Bernalillo County Water Utility Authority and other entities. We have kept a middle profile. Rick and I have gone to different meetings and listened and participated but we haven't had the same profile, as say the Albuquerque Bernalillo County Water Utility Authority or the Middle Rio Grande Conservancy District, so we don't know how this is going to unfold.

CHAIR CALVERT: Are you saying you don't know – would it bring in those others, would it bring in this project as well?

MR. HARWOOD: There are scenarios where environmental permits could be a topic of conversation and I think if we want to go into more detail I know it's always – I guess my recommendation is to go into more detail, I guess I'd recommend an executive session, although I'm not entirely clear, without talking to Nancy about whether we clearly have the grounds to do an executive session but I think that when we start talking in more detail about our exposure we should probably consider that.

CHAIR CALVERT: Okay. Yes, Commissioner Stefanics.

COMMISSIONER STEFANICS: Mr. Chair, thank you. And thank you, Kyle, for that. So right now, we're an observer, not a party?

MR. HARWOOD: We are not – we have not been named by any of these and in the collaborative program we are an observer, not a party.

COMMISSIONER STEFANICS: Thank you.

CHAIR CALVERT: So at this time we will take all this information under advisement and we'll see if we need to schedule such an executive session in the future.

MR. HARWOOD: Okay. Thank you.

11. Presentation of New Mexico Water and Wastewater Association Max N. Summerlot Award and Good Housekeeping Awards

MR. JONES: Mr. Chair, members of the Board, I'm actually pleased tonight to introduce one of our charge operators, Erick LaMonda. Erick is not only one of our charge operators but he's also – was one of the original members of our start-up team. So he's been with us from the beginning and Erick recently represented the BDD Board in Las Cruces where the New Mexico Water/Wastewater Association presented these awards, and so I will now turn that over to Erick LaMonda.

ERICK LAMONDA (Charge Operator): Mr. Chair, members of the Board, good afternoon. I would like to take a moment to thank you the Board for allowing me to speak on behalf of my colleagues. I recently had the opportunity to accept two awards that show the true fluidity of the well-oiled machine that BDD has become. The first award is the Good Housekeeping Award. The Good Housekeeping Award, this award defines true discipline and structure, followed by the Max Summerlot Award.

The Max Summerlot Award solidifies our position as a powerful, unified entity. The hard work and heartfelt dedication of the employees shows daily. As a result we received these accolades. I believe this solidifies the reason BDD employees are held to a higher standard. I feel this is only the horizon of many opportunities for both the facility and individual employees to be recognized. You the Board, in addition to our upper management's support and continued leadership is reflected in these awards. Because of your support and leadership we could not be more honored than to receive the highest, most prestigious award, the Max Summerlot Award.

This award alternates between water and wastewater each year. It is given to the system that demonstrates excellence in operations, maintenance, management, safety and professionalism of the system. We have defined these attributes and feel honored to aim for these awards and many more available in the future. Once again, I would like to thank you for your time and I will stand for any questions.

CHAIR CALVERT: I'd like to thank you for all of your hand work, for making this presentation both at the award ceremony and here, and hopefully, you'll take that back to all of your associates and fellow employees that we appreciate your hard work and dedication and we too look forward to more of these in the future. And maybe you could just bring those up and we can pass them down. Anybody else? Yes, Commissioner Stefanics.

COMMISSIONER STEFANICS: Thank you, Mr. Chair. I would like to thank all the staff, but we also have some staff and assisters from the past that were very

instrumental in getting us to this point and I think that everyone needs to be recognized for leading up to our accomplishments. And thank you very much.

MR. LAMONDA: Thank you.

CHAIR CALVERT: Yes.

MEMBER BOKUM: I finally want to add my heartfelt congratulations. It's really wonderful to have been a part of this Board and have it start from scratch and have it run so beautifully and it wouldn't do that without the staff. So thank you so much.

MR. LAMONDA: Thank you.

COUNCILOR DOMINGUEZ: Just very quickly, I think it's all been said. Thank you very much for all your hard work. I didn't even know that these awards exist, so there we go. Thank you.

CHAIR CALVERT: Shannon, anything you want to add?

MR. JONES: Mr. Chair, members of the Board, no, I think that's good. And thank you, Erick.

CHAIR CALVERT: Yes, I concur with Commissioner Stefanics. There's been a lot of staff that was involved up to this point and also various other Commissioners and Councilors that served on this Board and we thank all of them for their hard work and appreciate all their efforts, even if they're not as actively involved as they once were. Thanks.

14. Drought, Monsoon and Water Resource Management Update.

RICK CARPENTER (Project Manager): Thank you, Mr. Chair and members of the Board and thank you for the kind words. Board Member Bokum, do you have any specific questions or need for clarification or some additional information that you'd like?

MEMBER BOKUM: Yes, I just had one question. At the very last part of the report you talk about a January 15th meeting, and I wonder what happened at that meeting.

MR. CARPENTER: I'm sorry. I did not hear your question.

MEMBER BOKUM: On the third page, under San Juan Basin, you talk about the Bureau of Reclamation calling a meeting of the San Juan contractors for January 15th, and I was wondering what happened at that meeting.

MR. CARPENTER: Yes, I was there. Kyle Harwood was there. It was kind of an interesting meeting. They do this about this time every year and then they follow up as they have a little more certainty in their projects and the data's coming in. I thought at the meeting that the Bureau of Reclamation was being pretty optimistic; the numbers that they were putting forth were looking a little better than I thought that they would put forth. Since then we have a lot change and a lot of data has come in since then. I think if they were going to revise those numbers today they would revise them downward and that's what I would expect at the next meeting.

Also, at that time, you'll see in that last paragraph, they are saying that Heron Reservoir is at 35 percent capacity. It's now at about 28 or 29 percent. And it's not empty but it's pretty close and unless we get some very significant snowfall over the next few weeks it's just not going to come up a whole lot. The good news on that that's different from last year is that the soil moisture is much higher than last year, so if we do have

even moderate runoff it should reach it into the reservoirs. So we'll be happy to report back to the Board when BOR schedules a follow-up meeting.

CHAIR CALVERT: Any questions? It's Consent Agenda so we do need action to accept the report.

MEMBER BOKUM: Move to accept the report.

COMMISSIONER STEFANICS: Second.

CHAIR CALVERT: Any further discussion?

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

DISCUSSION AND ACTION ITEMS

20. Election of Chair and Vice-Chair of the Buckman Direct Diversion Board

CHAIR CALVERT: I don't know if we really want to do this at this point, election of chair and vice chair. What are the feelings of the Board on this matter?

NANCY LONG: Mr. Chair, it is – our rules call for the election of the chair and vice chair the first meeting of the year or sooner, as it says. I think in past years we have delayed this, a couple of times that I remember, depending on appointments to the Board, and as you pointed out, with the City March elections, we won't know who the City Councilors appointed to this Board will be until the organizational meeting of the Council, which is anticipated to be March 12th, as I understand it. Now, the election is March 4th. Our scheduled meeting is March 6th, two days later, but the new Councilors would not take office until the 10th. So if we did have a meeting in March, Councilor Calvert could continue to chair that as the vice chair. And the next year is a rotation so that the chair will be from the City, vice chair from the County, since Commissioner Holian chaired last year. So you may want to delay this really until April.

COMMISSIONER STEFANICS: Mr. Chair, I would be fine doing it either way. If we went and moved ahead tonight to elect you as our chair we just would know that there would be change come April.

MS. LONG: Another election.

COMMISSIONER STEFANICS: Right. But I'll go either way.

COUNCILOR DOMINGUEZ: I think it would be beneficial if – I think we should just wait. As long as the current – as long as you want to continue to be the vice chair for the next couple meetings.

CHAIR CALVERT: Well, one more meeting. That's fine. I don't have any stake one way or the other, obviously, but I'll be glad to continue to run the meetings if we'll defer titles until April, if that's okay. I think I'm the acting vice chair right now.

MEMBER BOKUM: So I'll move that you continue to be the acting vice chair or the acting chair since we don't have a chair, through the March meeting and that we'll make a decision in April when we know who the full Board will be. Also, I would like to move that we change the rules so that we don't have to do this every time, and I suppose that would be a future item.

CHAIR CALVERT: Why don't we separate those two?

MEMBER BOKUM: Yes. Shall I start with the first? I'll make a motion – what I just said. That Chris will continue to chair the meetings through March and that we'll elect new officers in April.

CHAIR CALVERT: Okay. That's the motion?

MEMBER BOKUM: That's the motion.

COUNCILOR DOMINGUEZ: I'll second for discussion I guess, just in terms of procedure. Is that okay with you, Nancy?

MS. LONG: Yes. I think that gets us to the same place. I don't think you have to have a motion. I think the officers continue in their office until the next election.

CHAIR CALVERT: Until the don't.

MS. LONG: Until they don't. Our rules don't specifically say that. We may want to. But I think this clarifies it for the Board and it's certainly appropriate for this item as noticed on the agenda so you could do it.

CHAIR CALVERT: So with that motion, is there any further discussion?

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

MEMBER BOKUM: So then I would like to propose that --

CHAIR CALVERT: On a future agenda?

MEMBER BOKUM: One a future agenda, probably April or May, that we considering changing the rules so that we don't have this problem.

CHAIR CALVERT: So that's just direction to staff to perhaps bring that forward.

MS. LONG: Yes. We haven't looked at our rules in several years, so it would be a good time to look at all of our governing rules. And maybe we could just bring back some proposals. So having a different time period, maybe for election, you're thinking?

CHAIR CALVERT: Well, I think we've always had this a little bit because the County does theirs at the beginning of the year and the City, if there's changes, they occur in March. So April will be -- we'll make sure that we would have all of that taken care of until --

MS. LONG: That makes sense to me because I think a couple of times I know we've had to have several elections and not just because people have resigned or we had election issues. So I think that's a good idea to address that timing issue in the rules.

COMMISSIONER STEFANICS: Mr. Chair.

CHAIR CALVERT: Yes.

COMMISSIONER STEFANICS: Nancy, the other way too might be to handle it as -- with language "by April" of each year, so that there is -- if there is a continuation by everybody then it might not be a big issue but if there's going to be change then you could put in "by".

COUNCILOR DOMINGUEZ: So, Mr. Chair, just to chime in a little bit, I think it would be beneficial to actually review those rules after the new group comes in, because I know that -- I'm not sure how much they've changed over the existence of this Board but it seems as though we're not in the midst of negotiations between the two governing bodies and some of the other things that maybe have called for meetings to happen more often. But just generally speaking, it might be a good thing to look at all those rules. We've changed the time of our meetings that start, so I think it should be official.

MS. LONG: It's a good idea. And I have a couple of notes from past meetings on recommendations I would have for changing the rules.

CHAIR CALVERT: Okay. Thank you.

21. Request for consideration and possible action of Resolution No. 2014-1, determining reasonable notice for Public Meetings of the Buckman Direct Diversion Board

MS. LONG: Mr. Chair and members of the Board, as you all know we're required by state law to annually pass what is known as an Open Meetings Act Resolution. Typically you do that the first meeting of the year. We didn't meet in January so it's appropriate to consider that Open Meetings Act Resolution at this meeting. Last year, as my memo points out, we actually passed two resolutions. Nothing prevents you from passing more than one. That was because of the legislative changes that went into effect after the 2013 legislative session addressing time for agendas to be made available, 72 hours instead of 24, and posting action and notifying the Attorney General's Office of any emergency meetings and action taken at emergency meetings.

So we made those adjustments. We had two resolutions last year. So the resolution presented to you has been reviewed by staff for notice requirements and is acceptable and outlines the process that we use for notifying of our meetings, and also contains the changes that we made last year. Now, I wanted to point out that I think it was at the second – consideration of the second resolution that we passed, there was discussion about participation of members by telephone. The law allows that so long as you have enabling legislation, so long as your resolution says members can participate by telephone, they can when it is difficult or impossible for them to attend the meeting.

This Board decided they wanted to further restrict that and allow telephone participation only – well, you would have to comply with the law when that member cannot attend the meeting, where it would be difficult or impossible, and also, only if needed for a quorum. Otherwise, participation was decided to be not allowed by the Board. So that's the way I presented this resolution. But I did want to point out that deviation from what is allowed by state law and remind you of that discussion we had last year.

CHAIR CALVERT: Yes, Commissioner Stefanics.

COMMISSIONER STEFANICS: Mr. Chair, thank you. Nancy, is there any – I've been scanning this so I'm not finding it. Is there anything that says that members of both bodies and the public must be present to establish a quorum? Could it be all City and the member of the public without a County member or vice versa?

MS. LONG: That requirement is in our rules, not in the Open Meetings Act resolution.

MEMBER BOKUM: Mr. Chair, just to clarify, it's only that we have to have at least one City Councilor and one County Commissioner. It doesn't affect the public member's participation.

MS. LONG: That is correct. That's absolutely correct.

CHAIR CALVERT: But we do have to have three.

MEMBER BOKUM: You have to have three and at least one –

CHAIR CALVERT: One from the County and one from the City.

MS. LONG: A third could be the non-citizen member, County Commissioner, City Councilor.

COMMISSIONER STEFANICS: So, Mr. Chair, when you go back to looking at the rules, two years ago when I was on this body, or a year ago-plus, I had requested that we look at an alternate to the public member and I still would like to recommend that if we're going to be looking at rule changes.

MS. LONG: I believe, Commissioner Stefanics, we did look at that and decided it would require an amendment to the joint powers agreement, so it would be very difficult to do, but I will certainly look at that again in conjunction with the rule review and give you our conclusions.

COMMISSIONER STEFANICS: Thank you.

CHAIR CALVERT: So, on the matter before us, this resolution. What's the pleasure of the committee?

COMMISSIONER STEFANICS: I would move for approval.

COUNCILOR DOMINGUEZ: Second.

CHAIR CALVERT: Is there any further discussion?

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

22. Request for approval of process for selecting Buckman Direct Diversion Project Manager

ADAM LEIGLAND (County Public Works Director): Good afternoon, Mr. Chair, members of the Board. The JPA creates the office of the project manager, and the project manager is an entity that manages essentially the day-to-day operations, the back office if you will, the day-to-day operations of the BDD. That's spelled out in the JPA and there was the creation of a second agreement called the Project Management Fiscal Services Agreement. Paragraph 13 of the JPA specifies that in December of 2015, the Project Management Fiscal Services Agreement expires and the BDD Board will have the opportunity to turn to a new contract or a new agreement with another entity, and the JPA says that the choice of agencies are the City Water Utility, the County Water Utility, or a regional entity.

So to prepare for this selection, in July of last year this Board asked the BDD staff to convene a committee to create an evaluation process. In August, Shannon came to you with the composition of that committee, which was approved by the Board. And then since then, since August we've been meeting every month to come up with a selection process. And I just want to stress that it was just to create the process and what we're looking for tonight is approval of that process and maybe some direction on how that process is implemented.

So the memo in front of you describes that process and I'll just reiterate it a little bit. The first step is just first of all establish what the project manager does. So we've called out and parsed out all the existing documents and came up with a list of 51 individual acts that would then be subsequently grouped for ease into six larger categories, and those categories are described in the memo and also in the large process description.

The second step in this process is to rank the ability of each of the possible successor agencies to do that. So for instance, one of the categories is financial support. The City and the County and whatever the regional entity is, they would have differing abilities to provide that financial support. So we need to evaluate each of their abilities to meet these tasks. And then once you prioritize the tasks and evaluate the abilities to do it you can combine those into an objectively ranked ranking of those possible successor agencies.

One of the weaknesses we've found in the JPA language is this concept of a regional entity. We said that's too vague. How can we evaluate that as an agency? So we came up with this idea of creating what we call notional agencies or straw men. So you create a notional entity and then you just evaluate it, knowing that that might not be what the regional entity ultimately looks like if that's what's selected but just as a tool for evaluating. In order to come up with these notional entities we looked around at the region and compared them to existing regional entities. So if we look you look on the memo you'll see that we called one the modified status quo, and that's essentially the BDD Board as it is now with a little bit of tweaking, and then one, a second notional entity, I think it's closer to the Solid Waste Management Authority.

And so we would propose we would evaluate those as what the JPA calls a regional entity. And both those entities are described in more detail in the process. And so we're looking for – if there are any questions about this process I can answer them.

Also then, in the course of coming up with this process the committee identified some changes that we think should be down regardless of whatever else happens, and if you look at the very last page of the packet material in Attachment E you'll see four recommendations that we think should happen, and one of them may seem kind of trivial, but we believe that the current project manager should be changed because it causes a great deal of confusion. People confuse the project manager, which is an agency, with the BDD facility manager who is a person. So we wanted to somehow clear that up. We've talked about internally some possible names but whatever happens we believe that the next entity should be called something different.

The Project Management and Fiscal Services Agreement expires in December but we think that if a transition has to occur it should occur on a fiscal year, either July of 2015 or July of 2016, just to ease that transition process. We think that whatever else happens the BDD Board should come up with some personnel policies. And then finally, just now that the JPA and the other agreements are aging, just as this Board mentioned about some of the rules, we think we should evaluate the Project Management and Fiscal Services Agreement, and maybe the FOPA and some other things and evaluate some structurals and kind of learn from our experience and maybe bring back some changes to that.

So in addition to approving the selection process we've presented to you we'd also like you to approve these four recommendations to be implemented in this transition process. With that, Mr. Chair, I'll stand for any questions.

CHAIR CALVERT: Okay. I guess I'll start off, Adam. What I would say is I've got some questions but since I just got this document on Monday because that's when I got back from vacation, I haven't had a chance to look at it in the depth that I would like to, so I would – I appreciate all the work you guys have done and it's probably fine the way it is but personally, I would like to have a little more time with this. I did

look at the timeline. I don't think, say, actually voting on this at the next meeting would affect the timeline any. So I'm just saying for me, my personal preference would be to have more time with this. Quite honestly, some of these original agreements are not as clear in my recollection as they should be but I was hot and heavy on them in 2006 when I first came on the Board but now some of them, my memory on details is not clear. And so I would also like an opportunity to be able to go back through those as well.

So I'm just stating that. If everybody, if the other people want to move ahead tonight, that's fine. I'm just stating where I stand personally, then I'll open it up to the rest. Commissioner Stefanics.

COMMISSIONER STEFANICS: Thank you, Mr. Chair. First of all, Adam, is this time-sensitive?

MR. LEIGLAND: Mr. Chair, Commissioner Stefanics, we outlined a schedule in here – I think we're okay. We could probably – we tried to build in a very good schedule and we have plenty of time – well, we have some time before December 2015, but I don't think it's time-sensitive.

COMMISSIONER STEFANICS: Well, the reason I ask is I already know I will be in Washington, DC at the next meeting, so I won't be present, and I wanted to weigh in. I appreciate and would support Attachment E, the recommendations that are there. So if the chair has some concerns about some of the old documents needing changes it looks like some of those would still have to go to both governing bodies if we changed them. Is that correct, Nancy?

MS. LONG: Yes, Commissioner, it is correct. You would have to go through that process.

COMMISSIONER STEFANICS: Well, Mr. Chair, I'll wait to hear what my other colleagues have to say. Thanks.

CHAIR CALVERT: Yes, Member Bokum.

MEMBER BOKUM: I guess my first question is a timing question. The agreement says that the timeframe to consider making the change is by the – it would be sort of aimed at the end of next year but is that mandatory? Do we have to make the decision by December 2015 or is that just sort of a goal? How mandatory is the language I guess is –

MR. LEIGLAND: Mr. Chair, Member Bokum, the JPA says on December 1, 2015, the BDD Board will choose this, so I would – I guess I'll defer to counsel but I would interpret that as –

MEMBER BOKUM: Pretty solid.

MR. LEIGLAND: Yes.

CHAIR CALVERT: Yes, I will just point out, in terms of the timeline, which is on page 16, it lists like – it has a milestone at 4/14, finalize selection process and identify PM evaluation team. So I'm guessing that that allows for more consideration of this evaluation process. Do you have any –

MEMBER BOKUM: I'm finding this hard. There's the actual content and then, for instance, I have a concern because the County has convened a Water Advisory Board and they're supposed to look at the regionalization and not just – in a much broader way than is reflected in the Level 1 regionalization and the Level 2. They're talking about a real regional entity that deals with water and wastewater. I don't know how smart it is to, on the one hand, be considering making a major change like this and

then sort of doing a change pursuant to this, if we're just going to turn around and do something else. So that concerns me some. It seems like maybe if we're really considering something major, just maintain the status quo might be advisable. So instead of having to deal with all the changes that might be disruptive and the consequences of those, maybe it's just better to maintain the status quo so if we're really considering something major we can focus on that. So that's just one concern, since the County started that conversation.

And then when I went through I had a fair number of questions. And then I think it is totally appropriate for us to go back and look at the JPA and the FOPA and the other agreements. I think we've probably learned a whole lot in the last however many years it's been, and we very well may want to change those. So if that's true, I'm not sure how far down we should go in this process. If we are going to start looking at them and if we do think there are some changes then we could change. We could put off this decision for a year or two. So I guess I'm feeling some discomfort with adopting it tonight and I really appreciate when you came to us and said if we're going to do something by the end of 2015 we better get started on it and you were right. Only I think the work that you did only shows actually it's a bigger deal and it raises more issues than we maybe anticipated.

So I'm feeling a little uncomfortable at this point. Because I think I would like to go through a more reasoned process where first we look at the JPA and the FOPA see what all that raises, then be able to come back to this and then if we are going to be considering a regional authority, either one, two, or what I think as a third possibility, that could affect what we decide. So, I'm sorry but – because you've put a lot of work into it and it's clearly very thoughtful but it just sort of raised a lot of flags for me.

MR. LEIGLAND: Mr. Chair, I'll just point out that Paragraph 13 of the JPA which is what says the PMFS will expire, it also says that the new PMFS contract can essentially have any term that is chosen. So it could be a possibility, if you want to maintain the status quo for some period of time you could just negotiate or enter into a new PMFS but make it last only a year or two and then get it to December 2016 or something like that.

CHAIR CALVERT: I'm sorry. Were you done?

MEMBER BOKUM: I'll pass for a while. I may pass permanently.

COUNCILOR DOMINGUEZ: I guess, Mr. Chair, I'm just wondering how comfortable you are with Attachment E and the process itself.

CHAIR CALVERT: Well, I don't necessarily have a problem with Attachment E, although #2 concerns me in that on page 16 you show a timeline and on 4/15 a milestone that says execute agreements and implement transition plan. What I don't see is the final date. So I don't know if you're shooting for 6/15 or 12/15 or what date with that transition plan are you shooting for. Because your second recommendation – if we're shooting for 12/15 but your Attachment E, second recommendation is transition on a fiscal year period, 12/15 doesn't work. So I'm a little – how you reconcile that. I know you mention two possibilities to do that but I'm trying to also reconcile that with the timeline and what that's trying to tell me.

MR. JONES: Mr. Chair, members of the Board, we didn't want to make the assumption that though we were making a recommendation on the fiscal year that that would go either way. So while this is a draft transition plan as you can see – and also the

timeline talks about the development of the transition plan. So if those times were to change that's when that should occur. So as we did the draft we didn't want to make assumptions that our recommendations would be heard. So I think just to add, Attachment E, while a series of recommendations necessarily for the Board, but these would be recommendations for the actual selection committee who's doing the work and developing it, that these would be recommendations that they would consider and present – recommendations back to the Board for final approval.

CHAIR CALVERT: Well, I think – go ahead.

COUNCILOR DOMINGUEZ: Mr. Chair, so what I'm hearing staff say is that, well certainly I think that it's important for us to get the ball rolling, if you will, but it doesn't sound like staff is too concerned about – it doesn't sound like they're thinking that we're going to get too far ahead of the process before we can kind of open up all the other stuff. So I'm kind of inclined to go with what Commissioner Stefanics I think was almost recommending was that we kind of go that direction and looking at Attachment E and allowing that process to start. Did I hear that correctly, Commissioner?

COMMISSIONER STEFANICS: Mr. Chair.

CHAIR CALVERT: Yes, Commissioner Stefanics.

COMMISSIONER STEFANICS: Yes, that is what I was suggesting. I also would like to comment that the water task force at the County has a time limit. It's not a forever and it's not going to drag on because we don't let things drag on without getting upset. So we in fact had a conversation with Adam and others a month or so ago saying we'd like to see a report sooner rather than later. I don't believe continuing a status quo is something that allows change to occur within our organization and this same conversation started while I was still on the BDD. So it's been over a year since it was brought up. It could have been two years for all I know. So this is not a new concept and the staff, all of the staff, have put some time and work into this. I don't think we have to approve everything tonight but I do think we should take seriously moving step by step. And if we want to break it down into little pieces I think that's fine. But to say, oh, we're just going to wait another year or two I don't think is acceptable.

CHAIR CALVERT: Member Bokum.

MEMBER BOKUM: First of all, just for a point of information, the task force is only meeting quarterly, and I don't see the task force having developed any cohesion yet, although they are aware that there's a time limit. I think there's a very clear intent to try and do something sooner. My use of the word status quo was maybe not quite reflective of what I meant. I think if we need it we should take a couple of extra months to make this decision. It sounds like there's sufficient language that we could work our way around the December 2015 deadline by coming to an agreement that the "status quo" would last three, five, six months while we continue the process. I really like Liz' idea of trying to figure out, at least work through approving steps at some point and maybe we could do that at the next meeting. I won't be here in March either, so for what it's worth.

CHAIR CALVERT: Okay. Commissioner Stefanics.

COMMISSIONER STEFANICS: Thank you, Mr. Chair. And I guess I'd like to ask Shannon and Adam and whoever else has been involved in trying to screen applicants for the position of the operations manager, how much – let me rephrase it.

CHAIR CALVERT: Are you talking about the facility manager?

COMMISSIONER STEFANICS: The facility manager. How important this will be to a person before they are selected. If an applicant comes along are they going to want to see what they're going to be operating under?

MR. LEIGLAND: Mr. Chair, Commissioner Stefanics, actually, I think that's a great point because it could potentially change quite a bit. For instance, one of the – in the notional regional entities that we created we posited a structure closer to the Solid Waste Management Authority where the facility manager reports directly to the Board. I think that would definitely change the character of that position, so I maybe have to look at the acting manager to see what his opinions are but I think that's a great point.

COMMISSIONER STEFANICS: Well, Mr. Chair, the reason I bring that up is we have gone through different operations managers and facility managers, and I'd like to get this secured but I'd like to make sure that what we have in place is something that whoever is offered the position is going to know what their future is going to hold, and not have another turnover in another six months or a year. That's all I'm saying. And I think our staff are doing a great job right now, and thank you, Shannon for spending time with me and getting me up to speed, but I think it's only fair for whoever is applying to know what they're going to be dealing with. Thank you.

CHAIR CALVERT: Okay. So we've got a time deadline here because the Planning Commission meets at 6:00 in this room, so what's the pleasure?

MEMBER BOKUM: Mr. Chair, I just want to point out another complicating factor which is I think it's hard for this group to make a decision when we're going to have two new members in April that won't have – that probably should be part of this decision making process, because they're the ones that are going to be here to follow through.

COMMISSIONER STEFANICS: So Mr. Chair, we could actually start tearing it apart, piece by piece, and bringing forward portions of this that we want to review and actually make recommendations for changes to so that the working group can go back and say, okay, this is an easy thing to change or this is massive, so that we can at least get going. Three out of the five of us will be remaining.

CHAIR CALVERT: We don't know that.

COMMISSIONER STEFANICS: No, I'm talking about Commissioner Chavez, myself and Board Member Bokum.

CHAIR CALVERT: Right. You're right.

COMMISSIONER STEFANICS: And I'm going to assume positive things here, but I am saying there are three of us that are constant, so we could have a great conversation. You all have the background and you've been here many, many years. You've been here a long time and we could continue to have a productive conversation about this.

CHAIR CALVERT: Well, I guess here would be my recommendation, and everybody can weigh in on it. I guess what I would say is I'll be glad to give this a – what? – conceptual approval at this point and then have the formal approval at the April meeting when you have the full Board here. So that way staff can continue working down this path, and even if something changes it probably won't change that much but it will allow them to continue to work. But I think one of the other things that comes up in my mind is identifying these people that are going to be doing this evaluation. Because when you talk about the people ranking these entities' abilities – I'm trying to understand. Yes,

if we have somebody from the City they can speak to that but how is the County going to know – if they're ranking that same entity, how do they know the ability of that body to do it?

So I'm a little unclear exactly how that's going to work. Each will know their own strengths or abilities but they won't necessarily know the others'.

MR. LEIGLAND: Mr. Chair, yes. It will have to come down to really a discussion of the subject matter experts and maybe it will come down to arm-wrestling. Me doing a footrace with Nick or something like that. Because we're looking just for a relative ranking. I think it will just have to be a frank discussion and say, this is how we do it. This is how we do it, sort of thing.

CHAIR CALVERT: All right. So that would be my recommendation at this point and given the time is we conceptually approve this at this point and formally adopt it, I guess if you will at the April meeting when you have the full team that will be moving it forward. Does that sound reasonable?

COUNCILOR DOMINGUEZ: I was going to say, for me it sounds reasonable as long as staff feels that's enough direction to kind of get things –

CHAIR CALVERT: Keep things moving. Because I think one of the things, and if it kept moving, because that 4/14 timeline says part of that is not only adoption of the process but approval of those individuals, right? So I think that's something you're going to have to be working on as well, right?

MR. LEIGLAND: Mr. Chair, I think that one thing that could come out of tonight is just an appointment of the selection committee and I think we're anticipating it would be the same committee that put together the process, so it would be the same individuals.

CHAIR CALVERT: The selection committee that did the –

MR. LEIGLAND: The implementation committee would be the same committed that would process –

CHAIR CALVERT: Are they going to be the evaluators as well?

MR. LEIGLAND: Those would be the ones that would implement any process, so one thing that could come would just be the creation of that committee. And then we could be looking at some of the members. We could just meet to maybe figure out how to answer the question you have about ranking the relative abilities, for instance, and maybe that's just a matter of how we do that.

COUNCILOR DOMINGUEZ: So, Mr. Chair, I guess the question is, is conceptual approval – does that give – does staff feel comfortable that that's enough?

MR. LEIGLAND: Well, conceptual approval, but if there are no changes yet – if you want us to start marching down this – we would – I think the steps that we could undertake that could await other changes would be just as I said, appointment of the committee if you will. I think we're recommending they be the same committee that has gotten us this far. And then maybe coming up with a way to answer the chair's question about the abilities, because that might just have to be a process. We didn't anticipate having that get approved today.

CHAIR CALVERT: That was included in the – I understand there's going to be, what did you call it? The implementation, but it wasn't clear to me that they were going to be the same ones that were going to be doing the evaluation.

MR. LEIGLAND: Well, Mr. Chair, they don't have to be. It could be anybody. It doesn't even have to be – it could be the Board, if they –

CHAIR CALVERT: Well, no, I don't think that's going to work. I mean we will eventually weigh in, right? I think we will be the ultimate arbiter of that but I don't think that probably scheduling-wise it's going to work to accomplish what you want to do. But I do think that – I guess that's one of the questions I had or one of the things I want to reflect on is who should be on this evaluation team, and I've read through this. Maybe it would be the same people that have been on there so far but maybe we need some other skills or something on that. One that comes to mind is like a procurement manager or something like that. When you talk about the process and the waiting and all that, that's something that they know well how to do and I'm not sure I see that necessarily. I'm not saying it's not on the team currently but not specifically. So that's just a for instance.

COMMISSIONER STEFANICS: Mr. Chair, I move that the team, the committee that's been working on this be the initial team to continue its work with room for additional recommendations by this Board.

COUNCILOR DOMINGUEZ: I'll second that because I think staff would appreciate some action from the Board. So I'll second that.

MEMBER BOKUM: I think I'm comfortable with that. I would just like to suggest that we all read this carefully and give you all questions and concerns that we have, so that you can take those into account sooner rather than later. And on Councilor Calvert's question, one thought I had was shouldn't the City Manager and the County Manager be part of this, because they need to take into account how this fits into their whole operation.

CHAIR CALVERT: I'm sure they would love that addition to their schedule.

COMMISSIONER STEFANICS: They may not even be here.

MEMBER BOKUM: Okay, so that presupposes it's a bad idea, which it may be. I don't know. But if I were one of the two managers I'd have concerns about – that's a pretty big change if we're going to change and –

CHAIR CALVERT: Well, I do think it's a good idea, like you said, I would like to have more time with this. I appreciate all the work that's gone in and I will certainly give staff my questions and concerns and I hope the rest of the Board will pass that along to Commissioner Chavez as well. Take some time to look through this. If nothing else it's a good review of all these documents that we're supposed to be abiding by and sometimes, like mine, your memory isn't as good as it once was, so it's good to refresh your memory. And that will be good for the new members as they come on as well, is to get that refresher because to them it will be new.

So we have a motion and a second. Is there any further discussion?

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

COMMISSIONER STEFANICS: Mr. Chair.

CHAIR CALVERT: Yes.

COMMISSIONER STEFANICS: I would propose that we have this discussion again, continue this discussion at least on our April agenda.

CHAIR CALVERT: Right. I will – I appreciate the fact that you won't be here and neither will Member Bokum and we won't decide anything but we might have another iteration of it March, even. So Commissioner Chavez will be here. Whoever else. And so we can continue to refine this as we go and it will probably be a regular item on the agenda henceforth. Is that –

MR. LEIGLAND: Yes. I think we have enough direction.

CHAIR CALVERT: All right. Thank you very much. Sorry you didn't get exactly what you wanted but we're getting there.

MATTERS FROM THE PUBLIC

None were offered.

MATTERS FROM THE BOARD

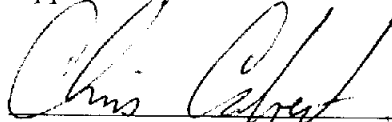
None were offered.

NEXT MEETING: Thursday, March 6, 2014 @ 4:30 pm, County Chambers

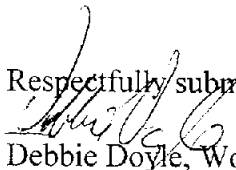
ADJOURNMENT

Having completed the agenda, Councilor Calvert declared this meeting adjourned at approximately 6:00 p.m.

Approved by:


Chris Calvert, Acting Chair

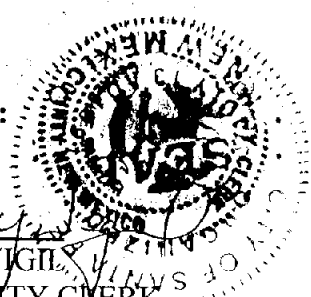
Respectfully submitted:


Debbie Doyle, Wordswork

GERALDINE SALAZAR
SANTA FE COUNTY CLERK

ATTEST TO:


YOLANDA VIGIL
SANTA FE CITY CLERK





COUNTY OF SANTA FE)
STATE OF NEW MEXICO) ss

BUCKMAN DIRECT DIV MIN
PAGES: 66

I Hereby Certify That This Instrument Was Filed for
Record On The 14TH Day Of August, 2014 at 12:58:51 PM
And Was Duly Recorded as Instrument # **1743573**
Of The Records Of Santa Fe County

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

City of Santa Fe



New Mexico

CITY CLERK'S OFFICE

DATE 1/28/14 TIME 2:10pm

SERVED BY Stephanie Lopez

RECEIVED BY [Signature]

EXHIBIT

tabbies

1

AGENDA

The City of Santa Fe
And
Santa Fe County

Buckman Direct Diversion Board Meeting

THURSDAY, FEBRUARY 6, 2014

4:30 PM

CITY HALL

CITY COUNCIL CHAMBERS

200 Lincoln Avenue

1. CALL TO ORDER
2. ROLL CALL
3. APPROVAL OF AGENDA
4. APPROVAL OF CONSENT AGENDA
5. APPROVAL OF MINUTES FROM THE DECEMBER 12, 2013 BUCKMAN DIRECT DIVERSION BOARD MEETING
6. MATTERS FROM STAFF
7. REPORT ON FEBRUARY 4, 2014 FISCAL SERVICES AUDIT COMMITTEE

INFORMATIONAL ITEM

8. 2014 Fiscal Services and Audit Committee Schedule. (Stephanie Lopez)
9. Update on Early Notification System. (Shannon Jones/NSSA/DOE)

10. Update on recently filed Wild Earth Guardians Notice of Intent to Sue regarding the Rio Grande Silvery Minnow. (Shannon Jones and Kyle Harwood)
11. Presentation of New Mexico Water and Wastewater Association Max N. Summerlot Award and Good Housekeeping Awards. (Shannon Jones/Erick LaMonda)

CONSENT AGENDA

12. Update on 2nd Quarter Financial Statement. (Mackie Romero)
13. Update and discussion of BDD operations. (Shannon Jones)
14. Drought, Monsoon and Water Resource Management Update. (Rick Carpenter)
15. Request for approval of Amendment No. 1 to the Professional Services Agreement between Padilla Industries and the Buckman Direct Diversion Board for expanded fencing and gates associated with on-going BDD project habitat restoration work for the amount of \$87,424.00 inclusive of NMGRT. (Rick Carpenter)
16. Request for approval of Amendment No. 5 to the Professional Services Agreement between Harwood Consulting LLP and the Buckman Direct Diversion Board for the amount of \$60,000.00 exclusive of NMGRT. (Rick Carpenter)
17. Request for approval of Amendment No. 3 to the Professional Services Agreement between Alpha Southwest, Inc. and the Buckman Direct Diversion Board for the amount of \$50,000.00 exclusive of NMGRT. (Shannon Jones)
18. Request for approval to release an RFP to develop the Capital Asset Management Plan. (Shannon Jones)
19. Request for approval to purchase parts and supplies from Boyer and Seeley Pumps to repair Raw Water Pump Stations 1A and 2A in the amount of \$135,600.00. (Shannon Jones)

DISCUSSION AND ACTION ITEMS

20. Election of Chair and Vice-Chair of the Buckman Direct Diversion Board. (Nancy Long)
21. Request for consideration and possible action of Resolution No. 2014-1, determining reasonable notice for Public Meetings of the Buckman Direct Diversion Board. (Nancy Long)

22. Request for approval of process for selecting Buckman Direct Diversion Project Manager. (Shannon Jones and Adam Leigland)

MATTERS FROM THE PUBLIC

MATTERS FROM THE BOARD

NEXT MEETING: March 6, 2014

ADJOURN

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

2014 MAR 06 PM 03:00
CITY CLERK'S OFFICE
505-955-6520

DOE/NNSA ENS & MOU Update February 6, 2014 BDDDB Meeting

Early Notification System (ENS)

Since the September 2013 decision to move to a two gage station ENS with contingency flow verification:

- Cameras installed at E050.1 and E060.1
- Backup/contingency camera for flow verification (E062) deployed and activated December 20, 2014; located below confluence of Los Alamos and Pueblo Canyons; installed on LANL property
- Hourly images from E050.1, E060.1 and E062 being uploaded to a secure website for BDD and LANL personnel viewing as of January 27, 2014;
- 5-minute image collection testing began February 4, 2014
- Gage Stations E050.1 and E060.1 are in winterized status meaning they provide flow measurement notifications and images; sampling capabilities are enabled for monsoon flows from June through October.
- Figure handout (11 x 17) shows E050.1, E060.1, flow verification station E062; former location of E109.9; and BDD Intake; also includes images collected from each station

Amendments to MOU and Extension Request

- Staff continues to work on updates to be considered at the next upcoming March Biannual Technical Meeting;
 - Held technical working meeting November 26, 2014;
 - Follow-up technical working meeting scheduled for February 11, 2014
- Extension request to be discussed at HQ in the upcoming months; will continue to work on technical issues in preparation of the 2014 monsoon season

Tour of ENS Stations

- Interest in rescheduling the ENS tour planned for late 2013

New Los Alamos Field Office Manager

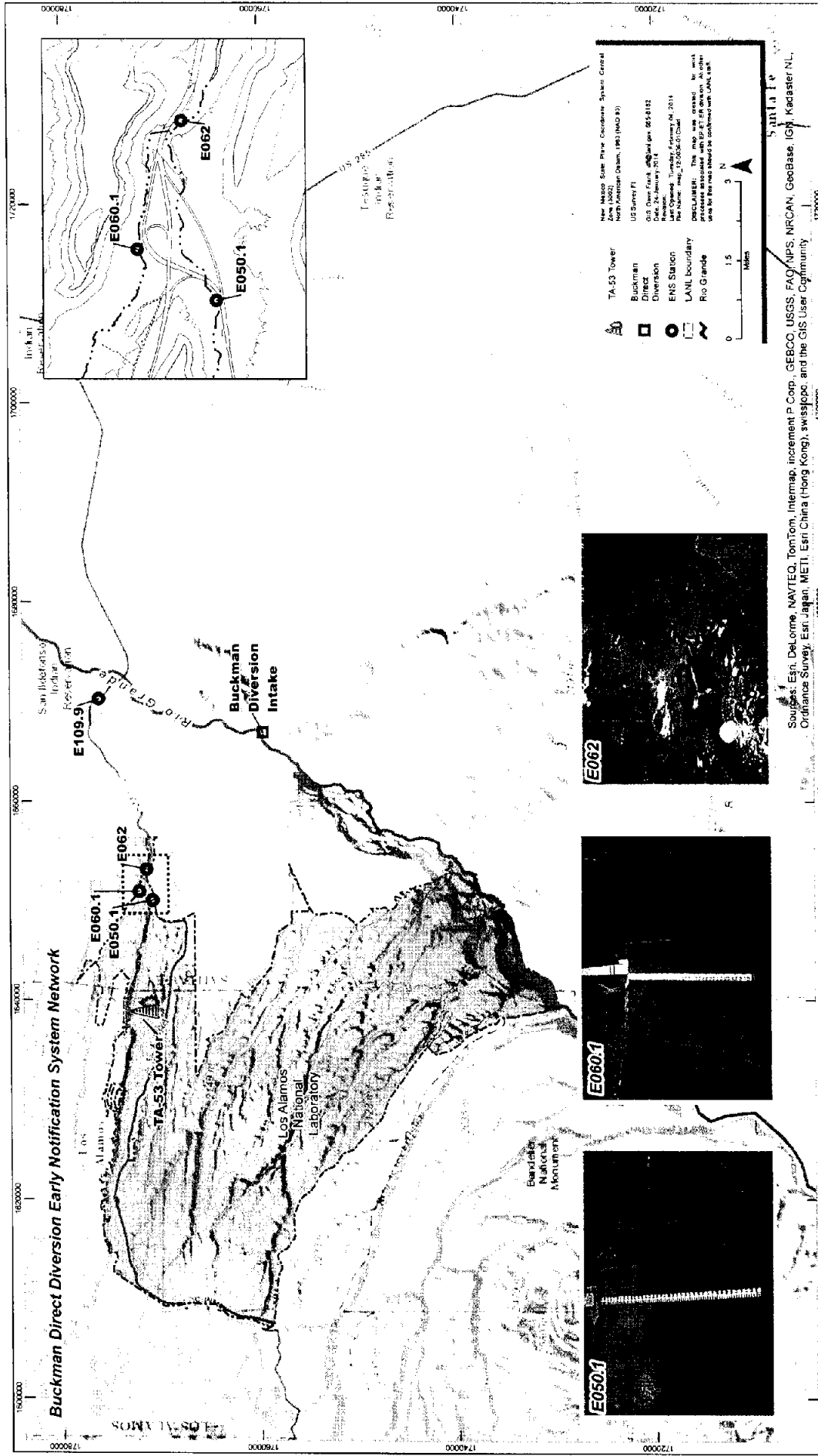
- Mrs. Kimberly Davis Lebak started as LAFO Manager on January 27, 2014
- Former Manager of the LLNL and before then she was the Acting Manager and Deputy Site Manager for the SNL
- Prior to her work at Sandia, Lebak served in DOE and NNSA headquarters as well as at the Pantex and Savannah River field offices
- Lebak has a master's degree in Environmental Engineering

FY 2014 Federal Budget

- President's budget request for LANL: \$220M; FY14 Omnibus: \$225M
- Although TRU removal from LANL has been a priority in recent years; work under the MOU has been and will continue to be a priority as well

Upcoming Technical Meetings

- February 11, 2014 – Follow up staff technical meeting at the NNM CAB Office in Pojoaque, NM
- March 2014 – Looking at the week of March 17, 2014 for next Biannual MOU Technical Meeting

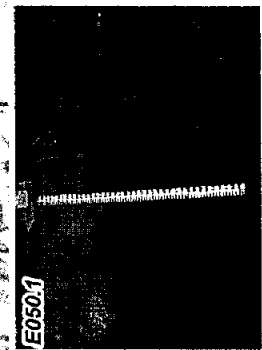
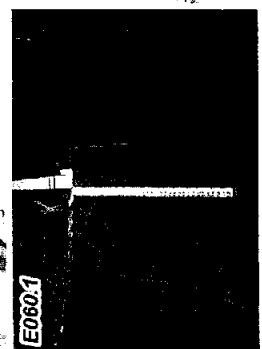


TA-53 Tower

Buckman
Direct
Diversion
ENS Station
LANL boundary
Rio Grande

Map Scale: 1:50,000
North Arrow
Scale bar: 0 to 3 miles

Map Information:
 Map Date: 10/20/2014
 Map Name: Buckman Direct Diversion
 Map Path: \\nas01\proj\Buckman Direct Diversion\Buckman Direct Diversion.mxd
 Map Scale: 1:50,000
 Map Date: 10/20/2014
 Map Name: Buckman Direct Diversion
 Map Path: \\nas01\proj\Buckman Direct Diversion\Buckman Direct Diversion.mxd



Sources: Esri, DeLorme, NAVTEQ, TomTom, Intermap, increment P Corp., GEBCO, USGS, FAO, NPS, NRCAN, GeoBase, IGN, Kadaster NL, Ordnance Survey, Esri Japan, METI, Esri China (Hong Kong), Swisstopo, and the GIS User Community



February 4, 2014

Via Federal Express or Certified Mail Return Receipt Requested

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

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

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

RE: Notice of Intent to Sue the U.S. Fish and Wildlife Service for Violations of the Endangered Species Act in the Middle Rio Grande in New Mexico

Dear Director Ashe, Regional Director Tuggle and Secretary Jewell:

In accordance with the 60-day notice requirement of Section 11(g) of the Endangered Species Act ("ESA" or "Act"), 16 U.S.C. § 1540(g), you are hereby notified that WildEarth Guardians ("Guardians") intends to bring a civil action against the U.S. Fish and Wildlife Service ("Service"), through the above-named officials, for violating section 7 of the ESA, 16 U.S.C. § 1536 and its implementing regulations, 50 C.F.R. §402 *et seq.*, by failing to insure that the water management, flood control and river maintenance activities of the U.S. Bureau of Reclamation ("Reclamation"), U.S. Army Corps of Engineers ("Corps") and the related non-federal parties in the middle Rio Grande are not likely to jeopardize the continued existence of the endangered Rio Grande silvery minnow (*Hybognathus amarus*) and/or Southwestern willow flycatcher (*Empidonax traillii extimus*), Pecos sunflower (*Helianthus paradoxus*), interior least tern (*Sternula antillarum*), New Mexico meadow jumping mouse (*Zapus hudsonius luteus*), and/or yellow-billed cuckoo (*Coccyzus americanus*). See 16 U.S.C. § 1536(a)(2).

I. ESA Requirements

In 1973, Congress enacted the Endangered Species Act to provide "a program for the conservation of . . . endangered species and threatened species" and "a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." 16 U.S.C. § 1531(b). In enacting the statute, the plain intent of Congress was "to halt and reverse

the trend towards species extinction, whatever the cost.” *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 184, 98 S.Ct. 2279 (1978).

Section 2(c) of the ESA establishes that it is “. . . the policy of Congress that all Federal . . . agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of” the ESA. 16 U.S.C. § 1531(c)(1). To implement this policy, section 7(a)(2) of the ESA requires that each federal agency, in consultation with and with the assistance of the Secretary of the Interior (“Secretary”), insure that any action authorized, funded, or carried out by the agency is not likely to 1) jeopardize the continued existence of any threatened or endangered species or 2) result in the destruction or adverse modification of the critical habitat of such species. 16 U.S.C. § 1536(a)(2). “Action” is broadly defined to mean “all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies” and includes “actions directly or indirectly causing modifications to the land, water, or air.” 50 C.F.R. § 402.02.

For federal actions, the federal agency must request from the Service a determination of whether any listed or proposed species may be present in the area of the agency action. 16 U.S.C. § 1536(c)(1). If listed or proposed species may be present, the federal agency must prepare a “biological assessment” to determine whether the listed species may be affected by the proposed action. *See id.*; 50 C.F.R. § 402.12. If the agency determines that its proposed action “may affect” any listed species or its critical habitat, the agency must engage in “formal consultation” with the Service. 50 C.F.R. § 402.14; *see also*, 51 Fed. Reg. 19,926, 19,949 (June 3, 1986) (explaining that “may affect” broadly includes “[a]ny possible effect, whether beneficial benign, adverse or of an undetermined character”).

The Service must conclude formal consultation with the action agencies within 90 days of the date upon which consultation was initiated. 16 U.S.C. § 1536(b). While that period may be extended “upon mutual agreement of the Secretary and the federal agency, the Secretary must before the close of the 90-day period provide a written statement of 1) the reasons why a longer period is required, 2) the information necessary to complete the consultation and 3) an estimate of the date on which consultation will be completed. 16 U.S.C. § 1536(b)(1)(B)(i).

Upon completion of formal consultation, the Service issues a biological opinion to explain whether the agency action is likely to “jeopardize” any species’ existence. 16 U.S.C. § 1536(a)(2). The biological opinion must include a summary of the information on which it is based and must adequately detail and assess how the proposed action affects listed species. 50 C.F.R. § 402.14(h). If the action is likely to cause jeopardy, then the biological opinion shall specify reasonable and prudent alternatives that avoid jeopardy. *See* 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(h)(3). If the Service concludes that the action or the implementation of reasonable and prudent alternatives will not cause jeopardy in violation of section 7(a)(2), the Service will issue an incidental take statement that specifies “the impact, i.e., the amount or extent, of . . . incidental taking” that may occur. *See* 50 C.F.R. § 402.14(i)(1). The ESA requires

agencies to use the best available science when conducting their analysis. *See* 16 U.S.C. § 1536(a)(2).

However, the responsibility of the Service and the federal agency to consult does not end with the issuance of a biological opinion. Instead, the Service and the action agency retain a duty to reinitiate consultation when: 1) the amount of take specified in the incidental take statement is exceeded, 2) new information reveals that the action may have effects not previously considered, 3) the action is modified in a way not previously considered, or 4) “[i]f a new species is listed or critical habitat designated that may be affected by the identified action.” *See* 50 C.F.R. § 402.16.

The ESA provides for citizen enforcement of the provisions of the Act. To enforce section 7 of the ESA, 16 U.S.C. § 1536(a)(2), “any person may commence a civil suit on his own behalf . . . to enjoin any person, including the United States and any other governmental instrumentality or agency, who is alleged to be in violation of any provision of the this chapter.” 16 U.S.C. §1540(g)(1)(A).

II. Factual Background

A. Endangered Species Imperiled by Federal Water Management Activities in the Middle Rio Grande

i. Rio Grande silvery minnow (*Hybognathus amarus*)

The Rio Grande silvery minnow is a “small, relatively heavy-bodied minnow, round to ovate in cross-section, with moderately small eyes and a small, slightly oblique mouth.” *See Rio Grande Silvery Minnow Recovery Plan*, First Revision 2010 (Originally Approved on July 8, 1999) at 5. Adults reach about 4 inches in length and exhibit a light greenish-yellow color. *Id.* The silvery minnow is a “pelagic spawner that produces thousands of semibuoyant, non-adhesive eggs that passively drift while developing.” *Id.* at 6. Reproduction in the silvery minnow is triggered by and corresponds with high or peak spring flows that historically occurred in May or June as a result of snowmelt runoff. *Id.* at 7.

The silvery minnow was historically one of the most abundant and widespread species in the entire Rio Grande, occurring from Espanola, New Mexico to the Gulf of Mexico and in much of the Pecos River. *Id.* at 15. The silvery minnow has been extirpated from more than 95% of its historical range and today only occupies a 174-mile stretch of the river in the middle Rio Grande from Cochiti Dam to Elephant Butte Reservoir.¹ *Id.* at 2.

¹ The silvery minnow was reintroduced into the Rio Grande near Big Bend, Texas in 2008. This population is considered “a nonessential, experimental population under section 10(j) of the ESA (73 FR 74357).” 2010 Recovery Plan at 16.

The Service listed the Rio Grande silvery minnow as endangered under the ESA in 1994 and designated critical habitat for the entire reach of the middle Rio Grande in 1999. *See* 59 Fed. Reg. 36988 (7/20/94); 64 Fed. Reg. 36,274 (7/6/99). The Secretary of the Interior developed a recovery plan for the silvery minnow in 1999 and revised it in 2010. *See* 75 Fed. Reg. 7625 (2/22/10). The recovery plan attributes the decline of the Rio Grande silvery minnow to the “destruction and modification of its habitat due to dewatering and diversion of water, water impoundment, and modification of the river (channelization)” among other factors. 2010 *Recovery Plan* at 2.

Since 2009, lack of high spring runoff combined with summer drying have resulted in a decline of silvery minnow populations.² A 2013 report indicated that the silvery minnow population is at its lowest level since comprehensive surveys began in 1993. *See* Minnow Action Team Report dated May 16, 2013 at 6. The decline in population has resulted from three consecutive years (2011-2013) without a peak flow in the middle Rio Grande to trigger reproduction and significant river drying (one-third of the minnow’s critical habitat in 2012)³ during the irrigation season. In 2012, such conditions resulted in no minnows being discovered in population surveys in October. Similarly, surveys reported only three minnows present in population monitoring conducted in October of 2013. *Id.*

ii. Southwestern willow flycatcher (*Empidonax traillii extimus*)

The Southwestern willow flycatcher is a small migratory bird approximately six inches long, weighing about half an ounce. *See* 2002 *Southwestern Willow Flycatcher Final Recovery Plan* dated August 30, 2002 at 4. “It has a grayish-green back and wings, whitish throat, light grey-olive breast, and pale yellowish belly.” *Id.* The willow flycatcher inhabits the streamside and wetland thickets of New Mexico, Arizona, west Texas, and southern portions of Nevada, Utah, California, and Colorado. *Id.* at 7. The willow flycatcher’s breeding habitat includes “patchy to dense riparian habitats along streams or other wetlands, near or adjacent to surface water or underlain by saturated soil.” *Id.* at 11.

On February 27, 1995, the Service listed the Southwestern willow flycatcher as endangered and designated critical habitat on July 22, 1997. *See* 60 Fed. Reg. 10694 (2/27/95); 62 Fed. Reg. 39129 (7/22/97). At the time of listing, the known flycatcher population was estimated between 300 and 500 pairs. *Id.* In its listing rule, the Service found that the decline of the Southwestern willow flycatcher resulted from loss of habitat, including adverse modifications

² *See* Dudley, Robert K., Adam L. Barkalow, and Steven P. Platania, Spawning Periodicity of Rio Grande Silvery Minnow During 2012 (October 12, 2012) at 38-39 (“The loss of individuals from downstream reaches during river drying events is particularly problematic as these are the areas that most frequently and consistently support the highest densities of Rio Grande silvery minnows”).

³ Approximately 21 percent (37 miles) of the silvery minnow’s critical habitat dried in 2013. *See* 2013 Preliminary Salvage Data of the Service.

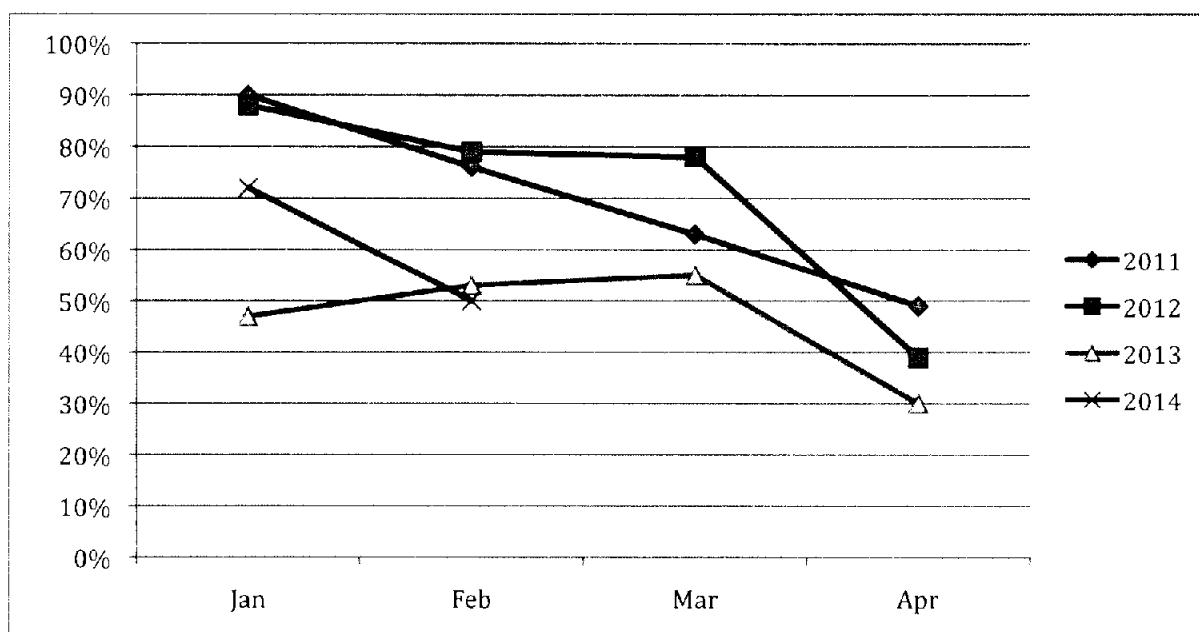
of riparian habitat necessary for the breeding and successful reproduction of the flycatcher as a result of human development, channelization, changes in surface water hydrologic regimes, introduction of alien species, and other activities. *Id.* In 2002, the Secretary of the Interior released a recovery plan setting forth the measures necessary to recover the species. *See 2002 Southwestern Willow Flycatcher Final Recovery Plan.*

Over the years, the Service modified its critical habitat designation for the flycatcher on several occasions. *See* 62 Fed. Reg. 44228 (8/20/97) and 70 Fed. Reg. 60886 (10/19/05). In 2013, the Service revised the critical habitat designation for the willow flycatcher to include 112 miles in the middle Rio Grande between the Valencia-Bernalillo county line and the upper part of the Elephant Butte Reservoir in Socorro County, New Mexico. *See* 78 Fed. Reg. 344 (1/3/13).

B. Natural Resources Conservation Service's 2014 Forecast for the Rio Grande

On January 1, 2014, the Natural Resources Conservation Service ("NRCS") issued its first set of monthly streamflow forecasts for New Mexico for 2014. *See New Mexico Basin Outlook Report* dated January 1, 2014. The NRCS forecast for January predicts below normal streamflow (72 percent of average) at the Rio Grande at Otowi Bridge (USGS Station No. 08313000); the preliminary forecast for February indicates a drop to 50% of average. Figure 1 demonstrates the NRCS streamflow forecasts at the Rio Grande at Otowi Bridge gauge for the months of January through April and covering the period from 2011 to 2014 (2014 only includes the January and preliminary February forecasts).

**Figure 1. NRCS Streamflow Forecasts
at Rio Grande near Otowi Bridge Gauge 2011-2014**



A clear downward trend exists for the Rio Grande at Otowi forecasts between January and April during the period from 2011 to 2013. While the January 2014 forecast of 72 percent of average is not as dire as the forecast in 2013, it is still well below the forecasted streamflow in 2011 and 2012 (also very dry years in the middle Rio Grande). However, the dramatic drop from 70 percent in January 2014 to 50 percent in February combined with the fact that New Mexico's reservoirs contain little stored water could mean another perilous summer for the Rio Grande silvery minnow and Southwestern willow flycatcher in the middle Rio Grande.

C. Consultation History Concerning Water Management in the Middle Rio Grande

i. 2003 Biological Opinion Issued by the Service

The Service began consulting with Reclamation, the Corps and the non-federal parties⁴ over their water management, river maintenance and flood control activities in the middle Rio Grande in 1996. Over the next seven years, the Service issued three separate biological opinions in 2001, 2002 and 2003 collectively to Reclamation, the Corps and the non-federal parties. Like its biological opinions in 2001 and 2002, the Service's March 17, 2003 biological opinion⁵ ("2003 Biological Opinion") concluded that Reclamation's water and river maintenance operations, the Corps flood control operations, and the related non-federal parties actions "are *likely to jeopardize* the continued existence of the silvery minnow and the flycatcher and adversely modify critical habitat of the silvery minnow."⁶ 2003 Biological Opinion at 84-88 (emphasis added). As a result of its "jeopardy" determination, the Service developed a reasonable and prudent alternative ("RPA"), an incidental take statement ("ITS"), reasonable and prudent measures ("RPMs"), terms and conditions, and conservation recommendations to provide a guide for the water management in the middle Rio Grande over the next decade. *Id.* at 102-110.

The RPA detailed a number of actions that, if implemented together, the Service believed would mitigate the significant negative effects on the listed species and alleviate jeopardy. *Id.* at 87-102. Those mandatory actions incorporate: (1) water operations elements, including a spawning spike to cue reproduction in the silvery minnow (Element A), management of available water to create habitat and allow species to persist in less than ideal conditions (Element B), and

⁴ The non-federal parties included the State of New Mexico and the Middle Rio Grande Conservancy District.

⁵ Biological and Conference Opinions on the Effects of Actions Associated with the Programmatic Biological Assessment of the Bureau of Reclamation's Water and River Maintenance Operations, U.S. Army Corps of Engineers' Flood Control Operation, and Related Non-Federal Actions on the Middle Rio Grande, New Mexico (Consultation #2-22-03-F-0129).

⁶ "Jeopardize the continued existence of" means "to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." See 50 C.F.R. § 402.02.

maintenance of minimum flows in the river during certain times of the year depending on the hydrologic conditions that year (Elements E to N); (2) habitat improvement elements, including restoring river connectivity to allow upstream movement of silvery minnow throughout the middle Rio Grande (Element R), creating riparian habitat and low velocity in-channel aquatic habitat throughout the action area (Element S), increasing the safe channel capacity of the river near San Marcial to allow for essential flooding flows (Element U), and completing the Cochiti environmental baseline study and investigating feasibility of sediment transport from Cochiti Lake (Element W); (3) water quality elements, and (4) reporting elements, among other requirements. *Id.*

In addition to the RPA, the original ITS included in the 2003 Biological Opinion provided the estimated number of silvery minnows and flycatcher territories the agencies could “take” without causing “jeopardy” to the species. *Id.* at 102-105. On August 15, 2005, the Service amended the 2003 Biological Opinion to allow for “take” to be estimated for the silvery minnow on an annual basis (April 1 to March 31). *See* Letter of the Service dated June 15, 2006 (“2006 Amendment”). The Service calculates the level of take each year as a proportion of the 38,000 minnows originally included in the ITS. *Id.* at 3. By April 1 of each year, the Service must transmit a letter to Reclamation, the Corps and the non-federal parties specifying the estimated take for the year. *Id.* at 2.

As required by 50 C.F.R. §402.14(i), the Service specifically integrated the RPA’s requirements into the both the original ITS and the ITS as modified by the 2006 Amendment. The ITS in the 2003 Biological Opinion provides that “[t]he Service has developed the following incidental take statement *based on the premise that the RPA will be implemented.*” *See* 2003 Biological Opinion at 103 (emphasis added). The original ITS also declared that “this level of anticipated take is not likely to result in jeopardy to the silvery minnow [and flycatcher] *when the RPA is implemented.*” *Id.* at 104-105 (emphasis added). The ITS in the 2006 amendment provides “[t]he Service has determined that the level of take in this amended ITS is not likely to result in jeopardy to the silvery minnow *with implementation of the [RPA]*”. 2006 Amendment at 3. Therefore, the exception to the “take” prohibition in the ESA provided in the ITS for the 2003 Biological Opinion as amended assumes implementation of the RPA by Reclamation, the Corps and non-federal agencies in the middle Rio Grande. Thus, the failure by Reclamation, the Corps and the non-federal agencies to implement the RPA invalidates the coverage provided by the ITS and opens the agencies to “take” liability under section 9 of the ESA.

ii. Reinitiation of Consultation Upon Expiration of the Biological Opinion

The 2003 Biological Opinion remained valid for a 10-year term ending on February 28, 2013. *Id.* at 110. However, the 2003 Biological Opinion contains a specific provision that appears to provide a unique opportunity for the agencies to ensure continued compliance with the ESA upon reinitiation of consultation. *Id.* The *Reinitiation Notice* provision provides “[c]onsultation must be reinitiated prior to the expiration of this biological opinion to ensure continued compliance with sections 7 and 9 of the ESA.” *Id.* While the validity of this extension

under the ESA is questionable, any potential coverage that stems from reinitiation of consultation must be linked to compliance with the RPA in the 2003 Biological Opinion and associated ITS.

On February 22, 2013 (prior to the expiration of the 2003 Biological Opinion), the Service reinitiated consultation with Reclamation and the non-federal parties (Consultation #02ENNM00-2013-F-0033), the Corps (Consultation #02ENNM00-2013-F-0034) and the Bosque del Apache National Wildlife Refuge (Consultation #02ENNM00-2013-F-0035) concerning the effects of their proposed water management, river maintenance and flood control activities on the silvery minnow and willow flycatcher. *Id.* During the 2013 irrigation season, Reclamation and the non-federal parties operated pursuant to this so-called “extension” of the 2003 Biological Opinion and RPA. In correspondence with Reclamation at the beginning of the irrigation season, the Service emphasized that “[d]uring this interim period before new biological opinions are issued, *compliance with the 2003 BO remains necessary to alleviate jeopardy to the listed species and adverse modification to designated critical habitat.*” See April 2, 2013 Letter from the Service transmitting 2013 ITS at 1 (emphasis added).

To date, and far beyond the ESA’s deadline for completion of consultation, the Service continues to consult with Reclamation, the non-federal parties and the Bosque del Apache National Wildlife Refuge (“Refuge”) regarding their activities in the middle Rio Grande. Until recently, it appeared the Service anticipated issuing a new biological opinion (to Reclamation and the non-federal parties, the Corps and the Refuge) before the 2014 irrigation season commences on March 1. However, on November 26, 2013, the Corps withdrew from consultation with the Service creating delay and uncertainty regarding the future of a new biological opinion for the middle Rio Grande.

iii. 2013 Modifications of 2003 Biological Opinion RPA

In November of 2012, the Service requested the Middle Rio Grande Endangered Species Collaborative Program (“Collaborative Program”) develop options for managing water “for the persistence of endangered species during the upcoming irrigation season, given the severity of the drought and the poor population status of the Rio Grande silvery minnow.” See May 31, 2013 Memorandum of the Service. The Collaborative Program formed the minnow action team⁷ and it began meeting regularly to determine potential water management options. *Id.*

⁷ The minnow action team consists of representatives of the New Mexico Interstate Stream Commission, the Middle Rio Grande Conservancy District, Albuquerque-Bernalillo County Water Utility Authority, City of Albuquerque Bio Park, New Mexico Department of Game and Fish, Santa Ana Pueblo, the Service, Reclamation, Bosque del Apache National Wildlife Refuge and the Corps. 2013 *Minnow Action Team Report* at 3.

On April 2, 2013, the Service provided its annual ITS to Reclamation and the Corps setting forth the Service's "determination of flow targets and estimated incidental take for the 2013 irrigation season, pursuant to the Service's March 17, 2003, Biological Opinion" ("2013 ITS"). *See* 2013 ITS at 1. The Service notified the agencies that the dry year flow targets (RPA Elements E through G) of the 2003 Biological Opinion remained in effect requiring the agencies to (1) provide continuous flows from Cochiti dam to Elephant Butte from November 16 to June 15 (Element E); (2) provide year-round continuous flows from Cochiti dam to Isleta diversion dam with a minimum flow of 100 cubic feet per second ("cfs") at the Central gauge;⁸ and (3) pump from the low flow conveyance canal to manage river drying below San Acacia diversion dam for the benefit of the flycatchers. *Id.* at 1-2.

In addition, the Service set out the amount of permitted "take" due to channel drying for the 2013 irrigation season using the formulas established in amendment to the 2003 Biological Opinion. *Id.* at 2. The Service permitted take of 2,746 minnows and clarified that "[i]f observed mortality (the number of dead silvery minnows found) exceeds 55 individuals (2,746 divided by 50), the level of anticipated take will have been exceeded." *Id.* The Service's take limit was the lowest it had ever been due to the fact that in the fall of 2012 population surveys discovered no minnows.

On May 16, 2013, the minnow action team presented a proposal for "emergency measures" to the Executive Committee of the Collaborative Program. *See* Minnow Action Team Report dated May 16, 2013. These "emergency actions" included the elimination of the minimum flow requirement of 100 cfs at the Central gauge (Element F of the RPA) in exchange for maintaining some suitable habitat in each reach of the middle Rio Grande (Angostura, Isleta and San Acacia reaches). *Id.* The minnow action team estimated that—without implementation of the "emergency measures"—Reclamation would exhaust its "supplemental water" to maintain the minimum flow requirements by June 15th. *Id.* However, implementing the "emergency measures" would require an amendment to the RPA of the 2003 Biological Opinion. The minimum flow requirements serve as one of the key features in the RPA that avoids jeopardy to the silvery minnow and willow flycatcher. Notwithstanding this fact, the Executive Committee unanimously endorsed these measures.

On May 23, 2013, Reclamation notified the Service that due to drought conditions in the middle Rio Grande it did not believe it could comply with the dry year flow targets required by the RPA in the 2003 Biological Opinion and anticipated that the "take" limit set out in the ITS for 2013 would be exceeded. Reclamation proposed implementing the minnow action team's "emergency actions" for the 2013 irrigation season and requested the Service's approval.

⁸ The "Central gauge" is also known as the USGS Station No. 08330000, Rio Grande at Albuquerque, New Mexico located in Bernalillo County, New Mexico.

On May 31, 2013, in a somewhat cryptic memorandum, the Service appears to endorse implementation of the emergency drought measures proposed by Reclamation. The Service confirmed its understanding in the following paragraph:

As such, we understand that MRG flows are scheduled to be ramped down beginning June 1, 2013, with a goal of conserving water to maintain specific refugial habitats for the silvery minnow in the Angostura, Isleta, San Acacia Reaches, and in the Temp Channel. We understand that utilizing MRGCD infrastructure to route water around the Isleta Reach is paramount to the success of this strategy. The Service confirms that starting river recession between May 25 and June 5, 2013, is within the dates contemplated by the MAT and reflected in their recommendations. The Service believes that action you are taking will have the best possible outcome for the Rio Grande silvery minnow, Southwestern willow flycatcher, and the New Mexico jumping mouse given the severe circumstances associated with the 2013 drought.

May 31, 2013 Memorandum of the Service at 2.

The Service did not explicitly waive the minimum flow requirements in RPA Element F of the 2003 Biological Opinion, but allowed the “emergency measures” to be implemented without any further instruction as to whether or under what conditions the normal operations would resume as hydrologic conditions changed or the impact of such operation on the level of take specified in the 2013 ITS. This action or inaction by the Service is contrary to the clear statement in its 2013 ITS that “[d]uring this interim period before new biological opinions are issued, *compliance with the 2003 BO remains necessary to alleviate jeopardy to the listed species and adverse modification to designated critical habitat.*” See 2013 ITS at 1 (emphasis added).

According to its 2013 salvage data, the Service reported 234 dead minnows during the 2013 irrigations season; 230 of the deaths occurred prior to July 1, 2013. The permitted take specified in the 2013 ITS (observed mortality of 55 individuals) was exceeded by 179 silvery minnows (4 times the permitted take). Neither Reclamation nor the Service reinitiated consultation specifically to address Reclamations violation of the level of take set out in the 2013 ITS.

To summarize, the 2003 Biological Opinion expired by its own terms on February 28, 2013. Upon its expiration, any ITS permitting take incidental to the proposed action also became invalid. Thus, Reclamation, the Corps and the non-federal parties have been operating at their own peril in continuing the agencies’ water management, river maintenance and flood control operations as described in the 2003 Biological Opinion and subject to liability under sections 7 and 9 of the ESA. Even assuming the *Reinitiation Notice* provision of the 2003 Biological Opinion extended the opinion past its expiration, the 2003 Biological Opinion and its ITS have been invalidated by: 1) the widespread non-compliance of Reclamation, the Corps and the non-

federal agencies with the RPA required by section 7(a)(2) of the ESA to prevent jeopardy to the minnow and flycatcher; 2) Reclamation and the non-federal parties exceeding the level of take specified in its 2013 ITS; 3) Reclamation's failure to implement the RPMs and non-discretionary term and conditions of the ITS; and 4) the ongoing failure of the action agencies and the Service to reinitiate consultation upon Reclamation and the non-federal agencies exceeded the permitted level of take in the ITS, modified an essential element of the RPA in a way not previously considered by the 2003 Biological Opinion, and the Service's revision to the critical habitat of the flycatcher. Therefore, until the Service issues a new biological opinion, Reclamation and the non-federal agencies remain without a valid permit to take any individual silvery minnow or willow flycatcher during the 2014 irrigation season.

III. The Service's Acquiescence to the "Emergency Measures" Requested by Reclamation in 2013 to Modify the RPA Violates the ESA

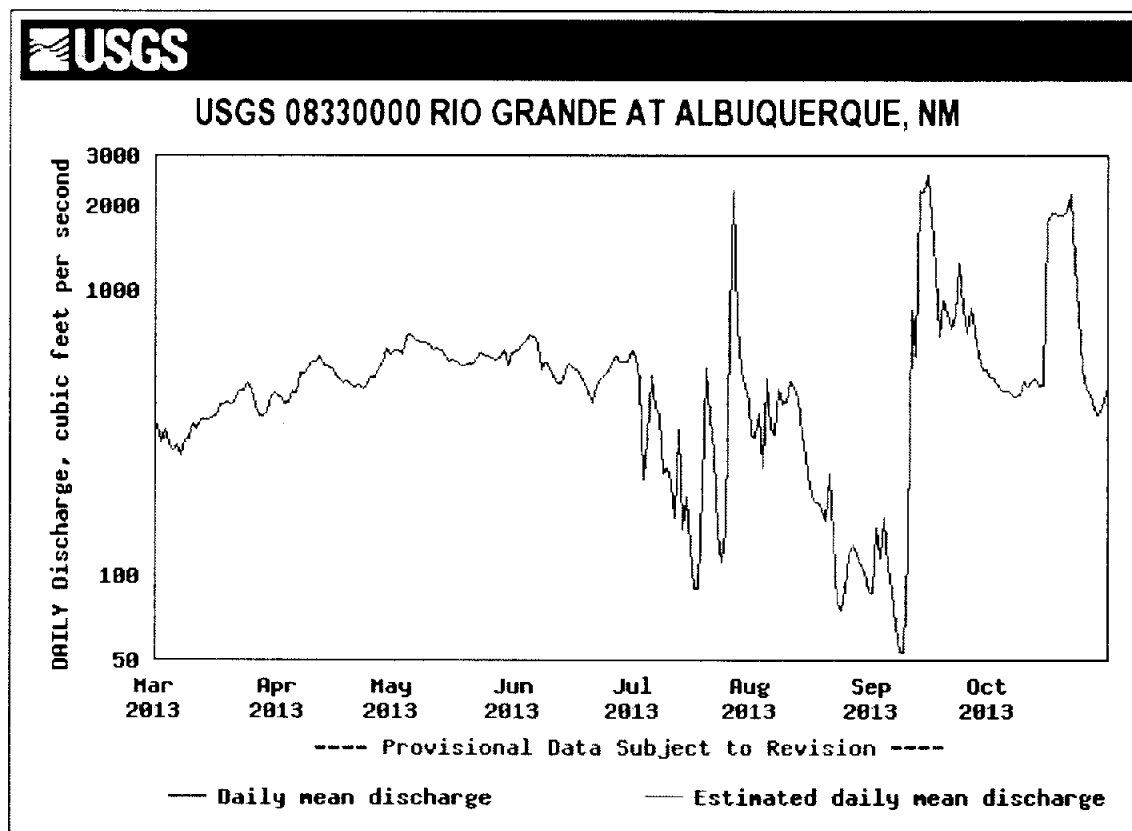
The Service cannot approve ad hoc modifications of the RPA detailed in the 2003 Biological Opinion without insuring that the modification will not jeopardize the continued existence of the species.⁹ See 16 U.S.C. § 1536(a)(2). In 2013, the Service clearly specified that under the so-called extension of the 2003 Biological Opinion and until it issued a new biological opinion that "*compliance with the 2003 BO remains necessary to alleviate jeopardy to the listed species and adverse modification to designated critical habitat.*" See 2013 ITS at 1 (emphasis added). However, a few months after the 2013 ITS was issued, the Service appeared to approve a significant modification of Element F of the RPA to the 2003 Biological Opinion waiving the minimum flow requirements at the Central gauge for the remainder of the irrigation season. Further, the Service failed to reinitiate a specific consultation with Reclamation and the non-federal agencies when it became clear on July 1, 2013 that the level of take in the 2013 ITS had been exceeded.

The Service failed to meet its substantive obligation under section 7(a)(2) of the ESA to insure that the modification to the RPA—removing the minimum flow requirements at the Central gauge—would not jeopardize the silvery minnow or willow flycatcher. The May 31, 2013 Memorandum of the Service was unclear regarding what activities it authorized and did not provide any conditions under which the waiver might be lifted. For example, once Reclamation was given approval to violate RPA Element F, the flows at the Central gauge dropped below 100 cfs on at least eleven separate days in 2013. See [Table 1](#), attached hereto and [Figure 2](#), on the next page, showing the streamflow data from the Central gauge from March to October 2013.¹⁰

⁹ Even if the action agencies were consulting with the Service at that time in order to develop a new biological opinion, the Service still retains a substantive duty under section 7(a)(2) to prevent jeopardy to the species in the short term. The Service has failed to fulfill this duty during the irrigation season in 2013.

¹⁰ See http://nwis.waterdata.usgs.gov/nm/nwis/uv?cb_00060=on&format=gif_default&period=&begin_date=2013-03-01&end_date=2013-10-31&site_no=08330000.

**Figure 2. USGS Streamflow Data
at Central Gauge from March to October 2013**



Even after it began to rain in the middle Rio Grande in 2013, Reclamation and the non-federal agencies continued to operate under the “emergency measures” and not meeting the minimum flow requirement at the Central gauge. During at least one point in the summer, the Middle Rio Grande Conservancy District was operating its water bank (the most junior water users in the basin) when these “emergency measures” were still operational. The Service failed to fulfill its duty to insure no jeopardy would result to the silvery minnow. Further, as a result of Reclamation’s water operations in 2013, 234 minnows were killed due to river drying in excess of the 55 observed mortality threshold set by the Service. In addition, the Service did not immediately reinitiate consultation with Reclamation and the non-federal agencies as required by 50 C.F.R. § 402.14(i)(4) and 402.16(a) once it became clear that the specified level of take had been exceeded.

It should be emphasized that by allowing Reclamation and the non-federal agencies to modify the minimum flow requirements of the RPA in the 2003 Biological Opinion in 2013 and

exceed the specified take limit in the 2013 ITS, the Service compounded and approved of the already widespread non-compliance with the RPA and the 2003 Biological Opinion.¹¹

IV. Violations of Section 7 of the ESA

Guardians hereby puts the Service on notice that it will promptly seek judicial relief if the agency fails to remedy the ongoing and imminent future violations of the ESA. 16 U.S.C. §§ 1536(a)(2).

Guardians hereby puts the Service on notice that it is violating section 7 of the ESA, 16 U.S.C. § 1536(a)(2), and its implementing regulations, 50 C.F.R. § 402 *et seq.*, by: 1) failing to insure that the ongoing actions of Reclamation, the Corps and non-federal agencies in the middle Rio Grande are not likely to jeopardize the continued existence of the silvery minnow, willow flycatcher or other listed or proposed species; and 2) failing to insure that the ongoing actions of Reclamation, the Corps and non-federal agencies in the middle Rio Grande are not likely to result in the destruction or adverse modification of the designated critical habitat of the silvery minnow and/or willow flycatcher. 16 U.S.C. § 1536(a)(2).

Guardians hereby puts the Service on notice that its is violating section 7(b) of the ESA, 16 U.S.C. § 1536(b) by failing to conclude formal consultation with Reclamation, the non-federal agencies and the Refuge with in 90 days of February 22, 2013, and failing to specify a date when consultation will be completed if the parties mutually agreed to a different period.

Guardians hereby puts the Service on notice that it is violating 50 C.F.R. § 402.14(i)(4) and 402.16(a) by failing to immediately reinitiate consultation upon learning that Reclamation and the non-federal agencies exceeded the level of take specified in the 2013 ITS.

Guardians hereby puts the Service on notice that it is violating 50 C.F.R. § 402.16(c) and (d), respectively by: 1) failing to reinitiate consultation with Reclamation for modifying an essential element of the RPA (Element F) to the 2003 Biological Opinion in a way that was not previously considered by the Service; and 2) failing to conduct a separate consultation or incorporate into their ongoing consultation an analysis of its revised critical habitat designation for the Southwestern willow flycatcher.

¹¹ Reclamation, the Corps, and the non-federal agencies have failed to comply with the following RPA elements of the 2003 Biological Opinion over the past decade: Element A (one-time increase in flows to create spawning spike); Elements E and F (year-round and minimum flows requirement); Element R (fish passage at San Acacia and Isleta diversion dams); Element S (habitat restoration projects throughout the middle Rio Grande); Element U (realignment of San Marcial railroad bridge); and Element W (study of sediment transport), among others. *See also* the Notice of Intent to Sue of WildEarth Guardians dated February 4, 2013, incorporated herein by this reference.

V. Noticing Party

WildEarth Guardians is a non-profit, public interest, environmental advocacy, and conservation organization. Guardians' mission is to protect and restore wildlife, wild rivers, and wild places in the American West. Guardians has over 43,000 members and activists, many of whom live, work, and recreate in areas affected by the ESA violations described herein. Guardians and its members have a substantial interest in the conservation and recovery of the Rio Grande silvery minnow, Southwestern willow flycatcher, and other listed species in the middle Rio Grande and are adversely affected by the State of Colorado's failure to protect the listed species and their habitat in compliance with the ESA.

The name, address and telephone number of the party giving this notice is as follows:

WildEarth Guardians
516 Alto Street
Santa Fe, New Mexico 87501
(303) 884-2702
jpelz@wildearthguardians.org

VI. Conclusion

One of the purposes of the Endangered Species Act citizen suit provision, 16 U.S.C. § 1540(g), is to encourage discussions among parties in order to avoid potential litigation. We encourage the Service to seriously consider the concerns detailed in this notice and ask that you discuss the steps the agency may taken going forward to remedy these legal violations. However, if the aforementioned violations of the ESA are not remedied within 60 days of the date of this letter, we intend to file a citizen's suit in federal court seeking preliminary and permanent injunctive relief, declaratory relief, and attorneys' fees and costs concerning these violations.

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

Sincerely,

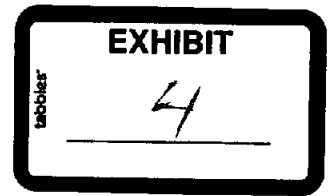

Jen Pelz
Wild Rivers Program Director
jpelz@wildearthguardians.org
303-884-2702

Digitally signed by Jen Pelz
DN: cn=Jen Pelz, o=WildEarth Guardians,
ou=Wild Rivers Program Director,
email=jpelz@wildearthguardians.org, c=US
Date: 2014.02.04 16:01:35 -07'00'

Table 1.
Rio Grande at Albuquerque, NM
Station No. 08330000

Daily Mean Discharge, cubic feet per second

DATE	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct
	2013	2013	2013	2013	2013	2013	2013	2013
1	335 ^P	435 ^P	617 ^P	612 ^P	620 ^P	310 ^P	86 ^P	507 ^P
2	294 ^P	428 ^P	617 ^P	617 ^P	579 ^P	306 ^P	146 ^P	497 ^P
3	327 ^P	400 ^P	604 ^P	651 ^P	484 ^P	371 ^P	115 ^P	476 ^P
4	286 ^P	407 ^P	691 ^P	669 ^P	218 ^P	239 ^P	158 ^P	454 ^P
5	274 ^P	447 ^P	697 ^P	705 ^P	300 ^P	492 ^P	106 ^P	444 ^P
6	286 ^P	436 ^P	682 ^P	696 ^P	504 ^P	326 ^P	88 ^P	446 ^P
7	262 ^P	514 ^P	669 ^P	652 ^P	388 ^P	312 ^P	66 ^P	433 ^P
8	297 ^P	514 ^P	662 ^P	529 ^P	363 ^P	451 ^P	53 ^P	424 ^P
9	301 ^P	537 ^P	663 ^P	564 ^P	229 ^P	397 ^P	53 ^P	431 ^P
10	344 ^P	561 ^P	651 ^P	527 ^P	240 ^P	403 ^P	123 ^P	483 ^P
11	326 ^P	560 ^P	624 ^P	494 ^P	209 ^P	479 ^P	856 ^P	463 ^P
12	351 ^P	589 ^P	631 ^P	478 ^P	160 ^P	458 ^P	593 ^P	480 ^P
13	354 ^P	549 ^P	620 ^P	477 ^P	326 ^P	418 ^P	2,260 ^P	491 ^P
14	353 ^P	543 ^P	589 ^P	524 ^P	145 ^P	313 ^P	2,250 ^P	459 ^P
15	358 ^P	542 ^P	565 ^P	554 ^P	189 ^P	258 ^P	2,590 ^P	464 ^P
16	361 ^P	504 ^P	573 ^P	538 ^P	126 ^P	205 ^P	1,810 ^P	1,730 ^P
17	401 ^P	486 ^P	561 ^P	532 ^P	89 ^P	184 ^P	1,180 ^P	1,870 ^P
18	401 ^P	472 ^P	543 ^P	499 ^P	89 ^P	180 ^P	688 ^P	1,870 ^P
19	404 ^P	481 ^P	550 ^P	477 ^P	201 ^P	170 ^P	933 ^P	1,850 ^P
20	399 ^P	469 ^P	555 ^P	438 ^P	535 ^P	155 ^P	836 ^P	1,850 ^P
21	421 ^P	461 ^P	554 ^P	408 ^P	358 ^P	227 ^P	741 ^P	1,920 ^P
22	446 ^P	464 ^P	583 ^P	457 ^P	269 ^P	135 ^{e P}	819 ^P	2,190 ^P
23	448 ^P	456 ^P	608 ^P	491 ^P	139 ^P	78 ^{e P}	1,260 ^P	1,250 ^P
24	472 ^P	465 ^P	589 ^P	507 ^P	111 ^P	75 ^P	856 ^P	835 ^P
25	449 ^P	499 ^P	590 ^P	519 ^P	143 ^P	89 ^P	716 ^P	532 ^P
26	391 ^P	500 ^P	580 ^P	568 ^P	773 ^P	118 ^P	875 ^P	456 ^P
27	361 ^P	537 ^P	577 ^P	592 ^P	2,270 ^P	128 ^P	719 ^P	429 ^P
28	362 ^P	565 ^P	580 ^P	564 ^P	758 ^P	118 ^P	594 ^P	382 ^P
29	377 ^P	628 ^P	620 ^P	568 ^P	519 ^P	107 ^P	533 ^P	363 ^P
30	423 ^P	603 ^P	545 ^P	565 ^P	470 ^P	102 ^P	527 ^P	385 ^P
31	442 ^P		606 ^P		404 ^P	88 ^P		446 ^P
COUNT	31	30	31	30	31	31	30	31
MAX	472	628	697	705	2,270	492	2,590	2,190
MIN	262	400	543	408	89	75	53	363



February 4, 2014

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

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

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

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

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

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

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

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

In accordance with the 60-day notice requirement of Section 11(g) of the Endangered Species Act ("ESA" or "Act"), 16 U.S.C. § 1540(g), you are hereby notified that WildEarth Guardians ("Guardians") intends to bring a civil action against the U.S. Bureau of Reclamation ("Reclamation"), through the above-named officials, for violating sections 7 and 9 of the ESA, 16 U.S.C. § 1536 and 1538 and its implementing regulations, 50 C.F.R. § 402 *et seq.*: (1) by failing to ensure that Reclamation's water management and river maintenance activities are not likely to jeopardize the continued existence of the Rio Grande silvery minnow (*Hybognathus amarus*), Southwestern willow flycatcher (*Empidonax traillii extimus*), Pecos sunflower (*Helianthus paradoxus*), interior least tern (*Sternula antillarum*), New Mexico meadow jumping

mouse (*Zapus hudsonius luteus*), and/or yellow-billed cuckoo (*Coccyzus americanus*) or result in the destruction or adverse modification of the silvery minnow and willow flycatchers' designated critical habitat; (2) by making irreversible or irretrievable commitment(s) of resources foreclosing the formulation or implementation of any reasonable and prudent alternative measures; (3) by causing ongoing and imminent future "take" without a permit authorized by law of the endangered silvery minnow and willow flycatcher; and (4) by causing ongoing and future imminent "take" without a permit authorized by law of the endangered silvery minnow and willow flycatcher by destroying or adversely modifying their designated critical habitat as defined in 50 C.F.R. § 402.02. *See* 16 U.S.C. §§ 1536(a)(2), 1536(d) and 1538(g).

I. ESA Requirements

In 1973, Congress enacted the Endangered Species Act to provide "a program for the conservation of . . . endangered species and threatened species" and "a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." 16 U.S.C. § 1531(b). In enacting the statute, the plain intent of Congress was "to halt and reverse the trend towards species extinction, whatever the cost." *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 184, 98 S.Ct. 2279 (1978).

Section 2(c) of the ESA establishes that it is " . . . the policy of Congress that all Federal . . . agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of" the ESA. 16 U.S.C. § 1531(c)(1). To implement this policy, section 7(a)(2) of the ESA requires that each federal agency, including Reclamation, consult with the U.S. Fish and Wildlife Service ("Service") to insure that any action authorized, funded, or carried out by the agency is not likely to 1) jeopardize the continued existence of any threatened or endangered species or 2) result in the destruction or adverse modification of the critical habitat of such species. 16 U.S.C. § 1536(a)(2). "Action" is broadly defined to mean "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies" and includes "actions directly or indirectly causing modifications to the land, water, or air." 50 C.F.R. § 402.02.

For federal actions, the federal agency must request from the Service a determination of whether any listed or proposed species may be present in the area of the agency action. 16 U.S.C. § 1536(c)(1). If listed or proposed species may be present, the federal agency must prepare a "biological assessment" to determine whether the listed species may be affected by the proposed action. *See id.*; 50 C.F.R. § 402.12. If the agency determines that its proposed action "may affect" any listed species or its critical habitat, the agency must engage in "formal consultation" with the Service. 50 C.F.R. § 402.14; *see also*, 51 Fed. Reg. 19,926, 19,949 (June 3, 1986) (explaining that "may affect" broadly includes "[a]ny possible effect, whether beneficial benign, adverse or of an undetermined character").

After formal consultation, the Service issues a biological opinion to explain whether the agency action is likely to "jeopardize" any species' existence. 16 U.S.C. § 1536(a)(2). The biological opinion must include a summary of the information on which it is based and must

adequately detail and assess how the proposed action affects listed species. 50 C.F.R. § 402.14(h). If the action is likely to cause jeopardy, then the biological opinion shall specify reasonable and prudent alternatives that avoid jeopardy.¹ See 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(h)(3). If the Service concludes that the action or the implementation of reasonable and prudent alternatives will not cause jeopardy in violation of section 7(a)(2), the Service will issue an incidental take statement that specifies “the impact, i.e., the amount or extent, of . . . incidental taking” that may occur. See 50 C.F.R. § 402.14(i)(1). The ESA requires agencies to use the best available science when conducting their analysis. See 16 U.S.C. § 1536(a)(2).

However, an agency’s consultation duties do not end with the issuance of a biological opinion. Instead, an agency must reinitiate consultation when: 1) the amount of take specified in the incidental take statement is exceeded, 2) new information reveals that the action may have effects not previously considered, 3) the action is modified in a way not previously considered, or 4) “[i]f a new species is listed or critical habitat designated that may be affected by the identified action.” See 50 C.F.R. § 402.16.

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

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

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

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

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

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

The ESA provides for citizen enforcement of the provisions of the Act. To enforce sections 7 and 9 of the ESA, 16 U.S.C. § 1536(a)(2), (d) and 1538(g), "any person may commence a civil suit on his own behalf . . . to enjoin any person, including the United States and any other governmental instrumentality or agency, who is alleged to be in violation of any provision of the this chapter." 16 U.S.C. §1540(g)(1)(A).

II. Factual Background

A. Endangered Species Imperiled by Reclamation's Water Management Activities in the Middle Rio Grande

i. Rio Grande silvery minnow (*Hybognathus amarus*)

The Rio Grande silvery minnow is a "small, relatively heavy-bodied minnow, round to ovate in cross-section, with moderately small eyes and a small, slightly oblique mouth." *See Rio Grande Silvery Minnow Recovery Plan*, First Revision 2010 (Originally Approved on July 8, 1999) at 5. Adults reach about 4 inches in length and exhibit a light greenish-yellow color. *Id.* The silvery minnow is a "pelagic spawner that produces thousands of semibuoyant, non-adhesive eggs that passively drift while developing." *Id.* at 6. Reproduction in the silvery minnow is triggered by and corresponds with high or peak spring flows that historically occurred in May or June as a result of snowmelt runoff. *Id.* at 7.

The silvery minnow was historically one of the most abundant and widespread species in the entire Rio Grande, occurring from Espanola, New Mexico to the Gulf of Mexico and in much of the Pecos River. *Id.* at 15. The silvery minnow has been extirpated from more than 95% of its historical range and today only occupies a 174-mile stretch of the river in the middle Rio Grande from Cochiti Dam to Elephant Butte Reservoir.³ *Id.* at 2.

The Service listed the Rio Grande silvery minnow as endangered under the ESA in 1994 and designated critical habitat for the entire reach of the middle Rio Grande in 1999. *See* 59 Fed. Reg. 36988 (7/20/94); 64 Fed. Reg. 36,274 (7/6/99). The Secretary of the Interior developed a recovery plan for the silvery minnow in 1999 and revised it in 2010. *See* 75 Fed. Reg. 7625 (2/22/10). The recovery plan attributes the decline of the Rio Grande silvery minnow to the "destruction and modification of its habitat due to dewatering and diversion of water, water impoundment, and modification of the river (channelization)" among other factors. 2010 *Recovery Plan* at 2.

³ The silvery minnow was reintroduced into the Rio Grande near Big Bend, Texas in 2008. This population is considered "a nonessential, experimental population under section 10(j) of the ESA (73 FR 74357)." 2010 *Recovery Plan* at 16.

Since 2009, lack of high spring runoff combined with summer drying have resulted in a decline of silvery minnow populations.⁴ A 2013 report indicated that the silvery minnow population is at its lowest level since comprehensive surveys began in 1993. *See* Minnow Action Team Report dated May 16, 2013 at 6. The decline in population has resulted from three consecutive years (2011-2013) without a peak flow in the middle Rio Grande to trigger reproduction and significant river drying (one-third of the minnow's critical habitat in 2012)⁵ during the irrigation season. In 2012, such conditions resulted in no minnows being discovered in population surveys in October. Similarly, surveys reported only three minnows present in population monitoring conducted in October of 2013. *Id.*

ii. Southwestern willow flycatcher (*Empidonax traillii extimus*)

The Southwestern willow flycatcher is a small migratory bird approximately six inches long, weighing about half an ounce. *See* 2002 *Southwestern Willow Flycatcher Final Recovery Plan* dated August 30, 2002 at 4. "It has a grayish-green back and wings, whitish throat, light grey-olive breast, and pale yellowish belly." *Id.* The willow flycatcher inhabits the streamside and wetland thickets of New Mexico, Arizona, west Texas, and southern portions of Nevada, Utah, California, and Colorado. *Id.* at 7. The willow flycatcher's breeding habitat includes "patchy to dense riparian habitats along streams or other wetlands, near or adjacent to surface water or underlain by saturated soil." *Id.* at 11.

On February 27, 1995, the Service listed the Southwestern willow flycatcher as endangered and designated critical habitat on July 22, 1997. *See* 60 Fed. Reg. 10694 (2/27/95); 62 Fed. Reg. 39129 (7/22/97). At the time of listing, the known flycatcher population was estimated between 300 and 500 pairs. *Id.* In its listing rule, the Service found that the decline of the Southwestern willow flycatcher resulted from loss of habitat, including adverse modifications of riparian habitat necessary for the breeding and successful reproduction of the flycatcher as a result of human development, channelization, changes in surface water hydrologic regimes, introduction of alien species, and other activities. *Id.* In 2002, the Secretary of the Interior released a recovery plan setting forth the measures necessary to recover the species. *See* 2002 *Southwestern Willow Flycatcher Final Recovery Plan*.

Over the years, the Service modified its critical habitat designation for the flycatcher on several occasions. *See* 62 Fed. Reg. 44228 (8/20/97) and 70 Fed. Reg. 60886 (10/19/05). In 2013, the Service revised the critical habitat designation for the willow flycatcher to include 112 miles

⁴ *See* Dudley, Robert K., Adam L. Barkalow, and Steven P. Platania, Spawning Periodicity of Rio Grande Silvery Minnow During 2012 (October 12, 2012) at 38-39 ("The loss of individuals from downstream reaches during river drying events is particularly problematic as these are the areas that most frequently and consistently support the highest densities of Rio Grande silvery minnows").

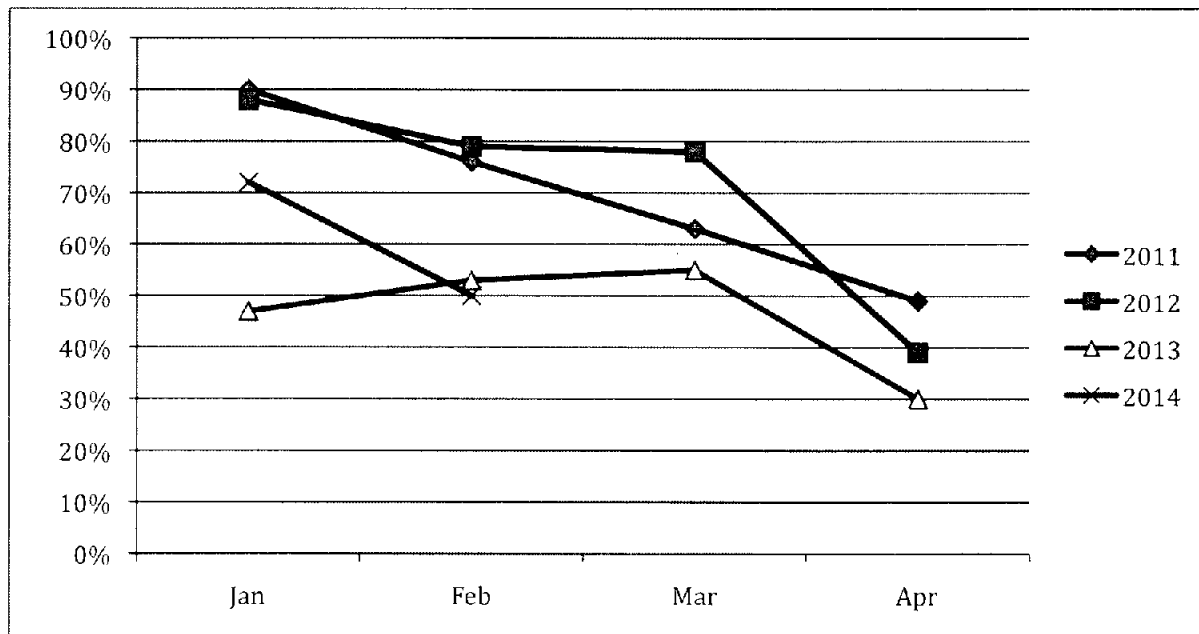
⁵ Approximately 21 percent (37 miles) of the silvery minnow's critical habitat dried in 2013. *See* 2013 Preliminary Salvage Data of the Service.

in the middle Rio Grande between the Valencia-Bernalillo county line and the upper part of the Elephant Butte Reservoir in Socorro County, New Mexico. *See* 78 Fed. Reg. 344 (1/3/13).

B. Natural Resources Conservation Service's 2014 Forecast for the Rio Grande

On January 1, 2014, the Natural Resources Conservation Service ("NRCS") issued its first set of monthly streamflow forecasts for New Mexico for 2014. *See New Mexico Basin Outlook Report* dated January 1, 2014. The NRCS forecast for January predicts below normal streamflow (72 percent of average) at the Rio Grande at Otowi Bridge (USGS Station No. 08313000); the preliminary forecast for February indicates a drop to 50% of average. Figure 1 demonstrates the NRCS streamflow forecasts at the Rio Grande at Otowi Bridge gauge for the months of January through April and covering the period from 2011 to 2014 (2014 only includes the January and preliminary February forecasts).

**Figure 1. NRCS Streamflow Forecasts
at Rio Grande near Otowi Bridge Gauge 2011-2014**



A clear downward trend exists for the Rio Grande at Otowi forecasts between January and April during the period from 2011 to 2013. While the January 2014 forecast of 72 percent of average is not as dire as the forecast in 2013, it is still well below the forecasted streamflow in 2011 and 2012 (also very dry years in the middle Rio Grande). However, the dramatic drop from 70 percent in January 2014 to 50 percent in February combined with the fact that New Mexico's reservoirs contain little stored water could mean another perilous summer for the Rio Grande silvery minnow and Southwestern willow flycatcher in the middle Rio Grande.

C. Reclamation's Consultation History in the Middle Rio Grande

i. 2003 Biological Opinion Issued by the Service

Reclamation began consulting with the Service over its water management and river maintenance activities in the middle Rio Grande in 1996. Over the next seven years, the Service issued three separate biological opinions in 2001, 2002 and 2003 collectively to Reclamation, the U.S. Army Corps of Engineers ("Corps") and the non-federal parties.⁶ Like its biological opinions in 2001 and 2002, the Service's March 17, 2003 biological opinion⁷ ("2003 Biological Opinion") concluded that Reclamation's water and river maintenance operations and the related actions of the non-federal parties "are *likely to jeopardize* the continued existence of the silvery minnow and the flycatcher and adversely modify critical habitat of the silvery minnow."⁸ 2003 Biological Opinion at 84-88 (emphasis added). As a result of its "jeopardy" determination, the Service developed a reasonable and prudent alternative ("RPA"), an incidental take statement ("ITS"), reasonable and prudent measures ("RPMs"), terms and conditions, and conservation recommendations to provide a guide for water management in the middle Rio Grande over the next decade. *Id.* at 102-110.

The RPA detailed a number of actions that, if implemented together, the Service believed would mitigate the significant negative effects on the listed species and alleviate jeopardy. *Id.* at 87-102. Those mandatory actions incorporate: (1) water operations elements, including a spawning spike to cue reproduction in the silvery minnow (Element A), management of available water to create habitat and allow species to persist in less than ideal conditions (Element B), and maintenance of minimum flows in the river during certain times of the year depending on the hydrologic conditions that year (Elements E to N); (2) habitat improvement elements, including restoring river connectivity to allow upstream movement of silvery minnow throughout the middle Rio Grande (Element R), creating riparian habitat and low velocity in-channel aquatic habitat throughout the action area (Element S), increasing the safe channel capacity of the river near San Marcial to allow for essential flooding flows (Element U), and completing the Cochiti environmental baseline study and investigating feasibility of sediment transport from Cochiti Lake (Element W); (3) water quality elements, and (4) reporting elements, among other requirements. *Id.*

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

⁷ Biological and Conference Opinions on the Effects of Actions Associated with the Programmatic Biological Assessment of the Bureau of Reclamation's Water and River Maintenance Operations, U.S. Army Corps of Engineers' Flood Control Operation, and Related Non-Federal Actions on the Middle Rio Grande, New Mexico (Consultation #2-22-03-F-0129).

⁸ "Jeopardize the continued existence of" means "to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." See 50 C.F.R. § 402.02.

In addition to the RPA, the original ITS included in the 2003 Biological Opinion provided the estimated number of silvery minnows and flycatcher territories the agencies could “take” without causing “jeopardy” to the species. *Id.* at 102-105. On August 15, 2005, the Service amended the 2003 Biological Opinion to allow for “take” to be estimated for the silvery minnow on an annual basis (April 1 to March 31). *See* Letter of the Service dated June 15, 2006 (“2006 Amendment”). The Service calculates the level of take each year as a proportion of the 38,000 minnows originally included in the ITS. *Id.* at 3. By April 1 of each year, the Service must transmit a letter to Reclamation, the Corps and the non-federal parties specifying the estimated take for the year. *Id.* at 2.

As required by 50 C.F.R. § 402.14(i), the Service specifically integrated the RPA’s requirements into both the original ITS and the ITS as modified by the 2006 Amendment. The ITS in the 2003 Biological Opinion provides that “[t]he Service has developed the following incidental take statement *based on the premise that the RPA will be implemented.*” *See* 2003 Biological Opinion at 103 (emphasis added). The original ITS also declared “this level of anticipated take is not likely to result in jeopardy to the silvery minnow [and flycatcher] *when the RPA is implemented.*” *Id.* at 104-105 (emphasis added). The ITS in the 2006 amendment provides “[t]he Service has determined that the level of take in this amended ITS is not likely to result in jeopardy to the silvery minnow *with implementation of the [RPA].*” 2006 Amendment at 3. Therefore, the exception to the “take” prohibition in the ESA provided in the ITS for the 2003 Biological Opinion as amended assumes implementation of the RPA by Reclamation and other federal and non-federal agencies in the middle Rio Grande. Thus, failed implementation of the RPA by Reclamation and other agencies invalidates the coverage provided by the ITS and opens the agencies to “take” liability under section 9 of the ESA.

ii. Reinitiation of Consultation Upon Expiration of the 2003 Biological Opinion

The 2003 Biological Opinion remained valid for a 10-year term ending on February 28, 2013. *Id.* at 110. However, the 2003 Biological Opinion contains a specific provision that appears to provide a unique opportunity for the agencies to ensure continued compliance with the ESA upon reinitiation of consultation. *Id.* The *Reinitiation Notice* provision provides “[c]onsultation must be reinitiated prior to the expiration of this biological opinion to ensure continued compliance with sections 7 and 9 of the ESA.” *Id.* While the validity of this extension under the ESA is questionable, any potential coverage that stems from reinitiation of consultation must be linked to compliance with the RPA in the 2003 Biological Opinion and the associated ITS. As when the 2003 Biological Opinion was current, it can only shield the agencies from ESA liability when the agencies are actually complying with the RPA which was developed to ensure the activities of Reclamation, the Corps and the non-federal parties do not jeopardize the continued existence of the species.

On February 22, 2013 (prior to the expiration of the 2003 Biological Opinion), the Service reinitiated consultation with Reclamation and the non-federal parties (Consultation

#02ENNM00-2013-F-0033) concerning the effects of its proposed water management and river maintenance activities on the listed species.⁹ *Id.* During the 2013 irrigation season, Reclamation and the non-federal parties operated pursuant to this so-called “extension” of the 2003 Biological Opinion and RPA. In correspondence with Reclamation at the beginning of the irrigation season, the Service emphasized that “[d]uring this interim period before new biological opinions are issued, *compliance with the 2003 BO remains necessary to alleviate jeopardy to the listed species and adverse modification to designated critical habitat.*” See April 2, 2013 Letter of the Service transmitting 2013 ITS at 1 (emphasis added).

To date, the Service continues to consult with Reclamation and the non-federal parties regarding their activities in the middle Rio Grande.¹⁰ Until recently, the Service anticipated issuing a new biological opinion to Reclamation and the non-federal parties, the Corps and the Bosque del Apache National Wildlife Refuge before the 2014 irrigation season commences on March 1. However, on November 26, 2013, the Corps withdrew from consultation with the Service creating delay and uncertainty regarding the future of a new biological opinion for the middle Rio Grande.

iii. 2013 Modifications of 2003 Biological Opinion RPA

In November of 2012, the Service requested the Middle Rio Grande Endangered Species Collaborative Program (“Collaborative Program”) develop options for managing water “for the persistence of endangered species during the upcoming irrigation season, given the severity of the drought and the poor population status of the Rio Grande silvery minnow.” See May 31, 2013 Memorandum of the Service. The Collaborative Program formed the minnow action team¹¹ and it began meeting regularly to determine potential water management options for 2013. *Id.*

On April 2, 2013, the Service provided its annual ITS to Reclamation and the Corps setting forth the Service’s “determination of flow targets and estimated incidental take for the 2013 irrigation season, pursuant to the Service’s March 17, 2003, Biological Opinion” (“2013 ITS”). See 2013 ITS at 1. The Service notified the agencies that the dry year flow targets (RPA Elements E through G) of the 2003 Biological Opinion remained in effect requiring the agencies to (1) provide continuous flows from Cochiti dam to Elephant Butte from November 16 to June 15 (Element E); (2) provide year-round continuous flows from Cochiti dam to Isleta diversion dam with a minimum flow of 100 cubic feet per second (“cfs”) at the Central gauge near

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

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

¹¹ The minnow action team consists of representatives of the New Mexico Interstate Stream Commission, the Middle Rio Grande Conservancy District, Albuquerque-Bernalillo County Water Utility Authority, City of Albuquerque Bio Park, New Mexico Department of Game and Fish, Santa Ana Pueblo, the Service, Reclamation, Bosque del Apache National Wildlife Refuge and the Corps. 2013 *Minnow Action Team Report* at 3.

Albuquerque;¹² and (3) pump from the low flow conveyance canal to manage river drying below San Acacia diversion dam for the benefit of the flycatchers. *Id.* at 1-2.

In addition, the Service set out the amount of permitted “take” due to channel drying for the 2013 irrigation season using the formulas established in the amendment to the 2003 Biological Opinion. *Id.* at 2. The Service permitted take of 2,746 minnows and clarified that “[i]f observed mortality (the number of dead silvery minnows found) exceeds 55 individuals (2,746 divided by 50), the level of anticipated take will have been exceeded.” *Id.* The Service’s take estimate was the lowest it had ever been due to the fact that in the fall of 2012 population surveys discovered no minnows.

On May 16, 2013, the minnow action team presented a proposal for “emergency measures” to the Executive Committee of the Collaborative Program. *See* Minnow Action Team Report dated May 16, 2013. These “emergency actions” included the elimination of the minimum flow requirements of 100 cfs at the Central gauge (Element F of the RPA) in exchange for maintaining some suitable habitat in each reach of the middle Rio Grande (Angostura, Isleta and San Acacia reaches). *Id.* The minnow action team estimated that—without implementation of the “emergency measures”—utilizing Reclamation’s “supplemental water” to maintain the minimum flow requirements would exhaust the supply by June 15th. *Id.* However, implementing the “emergency measures” would require an amendment to the RPA of the 2003 Biological Opinion. The minimum flow requirements serve as one of the key features in the RPA that avoids jeopardy to the silvery minnow and willow flycatcher. Notwithstanding this fact, the Executive Committee unanimously endorsed these measures.

On May 23, 2013, Reclamation notified the Service that due to drought conditions in the middle Rio Grande it did not believe it could comply with the dry year flow targets required by the RPA in the 2003 Biological Opinion and anticipated that the “take” estimate set out in the ITS for 2013 would be exceeded. Reclamation proposed implementing the minnow action team’s “emergency actions” for the 2013 irrigation season and requested the Service’s approval.

On May 31, 2013, in a somewhat cryptic memorandum, the Service appeared to endorse implementation of the emergency drought measures proposed by Reclamation. The Service confirmed its understanding in the following paragraph:

As such, we understand that MRG flows are scheduled to be ramped down beginning June 1, 2013, with a goal of conserving water to maintain specific refugial habitats for the silvery minnow in the Angostura, Isleta, San Acacia Reaches, and in the Temp Channel. We understand that utilizing MRGCD infrastructure to route water around the Isleta Reach is paramount to the success of this strategy. The Service confirms that starting river recession between May

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

25 and June 5, 2013, is within the dates contemplated by the MAT and reflected in their recommendations. The Service believes that action you are taking will have the best possible outcome for the Rio Grande silvery minnow, Southwestern willow flycatcher, and the New Mexico jumping mouse given the severe circumstances associated with the 2013 drought.

May 31, 2013 Memorandum of the Service at 2.

The Service did not explicitly waive the minimum flow requirements in RPA Element F of the 2003 Biological Opinion, but allowed the “emergency measures” to be implemented without any further instruction as to whether or under what conditions the normal operations would resume as hydrologic conditions changed or the impact of such operation on the level of take specified in the 2013 ITS. This action or inaction by the Service does not shield Reclamation from its responsibility to prevent jeopardy to the silvery minnow or from liability for its violations of section 9 of the ESA.

According to its 2013 salvage data, the Service reported 234 dead minnows during the 2013 irrigations season; 230 of the deaths occurred prior to July 1, 2013. Reclamation exceeded the permitted take in the 2013 ITS (observed mortality of 55 individuals) by 179 silvery minnows (4 times the permitted take). Neither Reclamation nor the Service reinitiated consultation specifically to address Reclamations violation of the level of take set out in the 2013 ITS.

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

As discussed above, the 2003 Biological Opinion expired by its own terms on February 28, 2013. Upon its expiration, any ITS permitting take incidental to the proposed action also became invalid. Thus, Reclamation is operating at its own peril in continuing the agency’s water management and river maintenance operations as described in the 2003 Biological Opinion and subject to liability under sections 7 and 9 of the ESA. Even assuming the *Reinitiation Notice* provision of the 2003 Biological Opinion extended the opinion past its expiration, the 2003 Biological Opinion and its ITS have been invalidated by: 1) Reclamation’s ongoing failure to implement the RPA required by section 7(a)(2) of the ESA to prevent jeopardy to the minnow and flycatcher; 2) Reclamation’s failure in 2013 to comply with the level of take specified in its ITS or reinitiate consultation with the Service; 3) Reclamation’s ongoing failure to implement the RPMs and non-discretionary term and conditions of the ITS; and 4) Reclamation’s ongoing failure to reinitiate consultation with the Service upon a) exceeding the permitted level of take in the ITS, b) modifying an essential element of the RPA in a way not previously considered by the 2003 Biological Opinion, and c) the Service’s revision to the critical habitat of the flycatcher. Therefore, until the Service issues a new biological opinion, Reclamation remains without a valid permit to take any individual silvery minnow or willow flycatcher during the 2014 irrigation season.

A. Failure to Implement the RPA

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

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

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

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

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

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

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

Provide for fish passage at irrigation diversion structures.

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

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

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

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

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

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

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

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

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

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

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

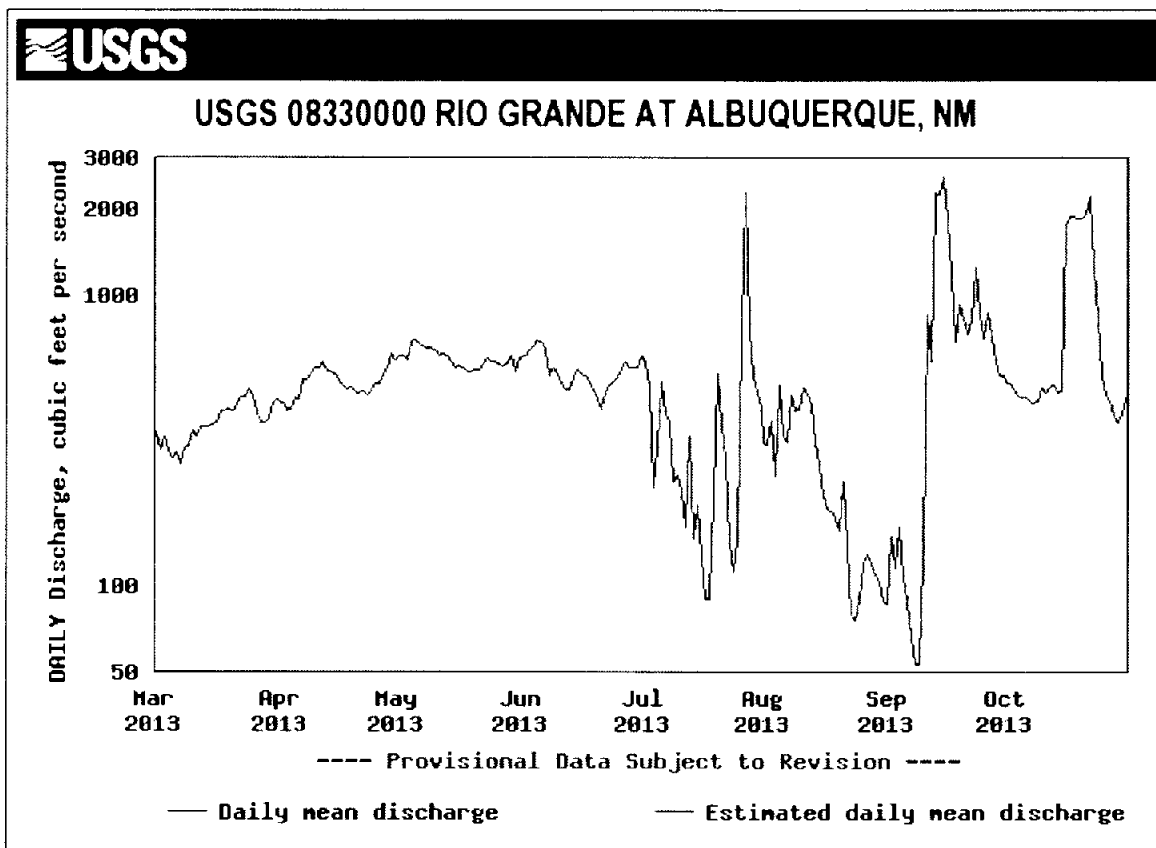
Likewise, Reclamation violated RPA Element F by failing to maintain a minimum flow of 100 cfs at the Central gauge on at least eleven separate days in 2013.¹⁵ *See Table 1*, attached hereto. *Figure 2*, on the next page, shows the streamflow data from the Central gauge from March to October 2013.¹⁶

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

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

¹⁶ *See* http://nwis.waterdata.usgs.gov/nm/nwis-uv?cb_00060=on&format=gif_default&period=&begin_date=2013-03-01&end_date=2013-10-31&site_no=08330000.

**Figure 2. USGS Streamflow Data
at Central Gauge from March to October 2013**



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

iv. Failure to Provide Spawning Spike

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

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

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

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

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

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

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

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

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

D. Failure to Reinitiate Consultation

As required by 50 C.F.R. § 402.16, the 2003 Biological Opinion provides that Reclamation must reinitiate consultation when: 1) the amount of take specified in the incidental take statement is exceeded, 2) new information reveals that the action may have effects not previously considered, 3) the action is modified in a way not previously considered, or 4) “[i]f a new species is listed or critical habitat designated that may be affected by the identified action.” *See* 50 C.F.R. § 402.16. Since the Service reinitiated consultation with Reclamation on February 22, 2013, nearly all of these triggers to reconsultation have occurred. First, as of July 1, 2013, Reclamation exceeded the limit of 55 minnows (observed mortality) specified in the 2013 ITS. Second, Reclamation modified an essential element of the RPA (Element F) to the 2003 Biological Opinion in a way that was not previously considered by the Service. Finally, in January of 2013 (just before consultation was reinitiated), the Service also revised its critical habitat designation for the Southwestern willow flycatcher.

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

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

IV. Violations of the ESA

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

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

Guardians hereby puts Reclamation on notice that the agency is violating section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), and its implementing regulations, 50 C.F.R. § 402 *et seq.*, by: 1) failing to insure that Reclamation’s ongoing and future actions in the middle Rio Grande are not likely to jeopardize the continued existence of the silvery minnow, willow flycatcher or other listed or proposed species; and 2) failing to insure that Reclamation’s ongoing and future actions in the middle Rio Grande are not likely to result in the destruction or adverse modification of the designated critical habitat of the silvery minnow and/or willow flycatcher. 16 U.S.C. § 1536(a)(2).

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

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

C. Violations of Section 9 of the ESA

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

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

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

D. Violations of ESA’s Implementing Regulations

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

Guardians hereby puts Reclamation on notice that the agency is violating 50 C.F.R. § 402.16 by 1) failing to reinitiate consultation with the Service for modifying an essential element of the RPA (Element F) to the 2003 Biological Opinion in a way that was not previously considered by the Service; and 2) failing to reinitiate consultation or to incorporate in their ongoing consultation with the Service an analysis of the revised critical habitat designation for the Southwestern willow flycatcher.

V. Noticing Party

WildEarth Guardians is a non-profit, public interest, environmental advocacy, and conservation organization. Guardians’ mission is to protect and restore wildlife, wild rivers, and wild places in the American West. Guardians has over 43,000 members and activists, many of whom live, work, and recreate in areas affected by the ESA violations described herein. Guardians and its members have a substantial interest in the conservation and recovery of the Rio Grande silvery minnow, Southwestern willow flycatcher, and other listed species in the middle Rio Grande and are adversely affected by the State of Colorado’s failure to protect the listed species and their habitat in compliance with the ESA.

The name, address and telephone number of the party giving this notice is as follows:

WildEarth Guardians
516 Alto Street
Santa Fe, New Mexico 87501
(303) 884-2702
jpelz@wildearthguardians.org

VI. Conclusion

One of the purposes of the Endangered Species Act’s citizen suit provision, 16 U.S.C. § 1540(g), is to encourage discussions among parties in order to avoid potential litigation. We encourage Reclamation to seriously consider the concerns detailed in this notice and ask that you discuss the steps the agency may taken going forward to remedy these legal violations. However,

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

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if the aforementioned violations of the ESA are not remedied within 60 days of the date of this letter, we intend to file a citizen's suit in federal court seeking preliminary and permanent injunctive relief, declaratory relief, and attorneys' fees and costs concerning these violations.

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

Sincerely,

Digitally signed by Jen Pelz
DN: cn=Jen Pelz, o=WildEarth Guardians,
ou=Wild Rivers Program Director,
email=jpelz@wildearthguardians.org,
c=US
Date: 2014.02.04 16:04:50 -07'00'

Jen Pelz
Wild Rivers Program Director
jpelz@wildearthguardians.org
303-884-2702

Table 1.
Rio Grande at Albuquerque, NM
Station No. 08330000

Daily Mean Discharge, cubic feet per second

DATE	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct
	2013	2013	2013	2013	2013	2013	2013	2013
1	335 ^P	435 ^P	617 ^P	612 ^P	620 ^P	310 ^P	86 ^P	507 ^P
2	294 ^P	428 ^P	617 ^P	617 ^P	579 ^P	306 ^P	146 ^P	497 ^P
3	327 ^P	400 ^P	604 ^P	651 ^P	484 ^P	371 ^P	115 ^P	476 ^P
4	286 ^P	407 ^P	691 ^P	669 ^P	218 ^P	239 ^P	158 ^P	454 ^P
5	274 ^P	447 ^P	697 ^P	705 ^P	300 ^P	492 ^P	106 ^P	444 ^P
6	286 ^P	436 ^P	682 ^P	696 ^P	504 ^P	326 ^P	88 ^P	446 ^P
7	262 ^P	514 ^P	669 ^P	652 ^P	388 ^P	312 ^P	66 ^P	433 ^P
8	297 ^P	514 ^P	662 ^P	529 ^P	363 ^P	451 ^P	53 ^P	424 ^P
9	301 ^P	537 ^P	663 ^P	564 ^P	229 ^P	397 ^P	53 ^P	431 ^P
10	344 ^P	561 ^P	651 ^P	527 ^P	240 ^P	403 ^P	123 ^P	483 ^P
11	326 ^P	560 ^P	624 ^P	494 ^P	209 ^P	479 ^P	856 ^P	463 ^P
12	351 ^P	589 ^P	631 ^P	478 ^P	160 ^P	458 ^P	593 ^P	480 ^P
13	354 ^P	549 ^P	620 ^P	477 ^P	326 ^P	418 ^P	2,260 ^P	491 ^P
14	353 ^P	543 ^P	589 ^P	524 ^P	145 ^P	313 ^P	2,250 ^P	459 ^P
15	358 ^P	542 ^P	565 ^P	554 ^P	189 ^P	258 ^P	2,590 ^P	464 ^P
16	361 ^P	504 ^P	573 ^P	538 ^P	126 ^P	205 ^P	1,810 ^P	1,730 ^P
17	401 ^P	486 ^P	561 ^P	532 ^P	89 ^P	184 ^P	1,180 ^P	1,870 ^P
18	401 ^P	472 ^P	543 ^P	499 ^P	89 ^P	180 ^P	688 ^P	1,870 ^P
19	404 ^P	481 ^P	550 ^P	477 ^P	201 ^P	170 ^P	933 ^P	1,850 ^P
20	399 ^P	469 ^P	555 ^P	438 ^P	535 ^P	155 ^P	836 ^P	1,850 ^P
21	421 ^P	461 ^P	554 ^P	408 ^P	358 ^P	227 ^P	741 ^P	1,920 ^P
22	446 ^P	464 ^P	583 ^P	457 ^P	269 ^P	135 ^{e P}	819 ^P	2,190 ^P
23	448 ^P	456 ^P	608 ^P	491 ^P	139 ^P	78 ^{e P}	1,260 ^P	1,250 ^P
24	472 ^P	465 ^P	589 ^P	507 ^P	111 ^P	75 ^P	856 ^P	835 ^P
25	449 ^P	499 ^P	590 ^P	519 ^P	143 ^P	89 ^P	716 ^P	532 ^P
26	391 ^P	500 ^P	580 ^P	568 ^P	773 ^P	118 ^P	875 ^P	456 ^P
27	361 ^P	537 ^P	577 ^P	592 ^P	2,270 ^P	128 ^P	719 ^P	429 ^P
28	362 ^P	565 ^P	580 ^P	564 ^P	758 ^P	118 ^P	594 ^P	382 ^P
29	377 ^P	628 ^P	620 ^P	568 ^P	519 ^P	107 ^P	533 ^P	363 ^P
30	423 ^P	603 ^P	545 ^P	565 ^P	470 ^P	102 ^P	527 ^P	385 ^P
31	442 ^P		606 ^P		404 ^P	88 ^P		446 ^P
COUNT	31	30	31	30	31	31	30	31
MAX	472	628	697	705	2,270	492	2,590	2,190
MIN	262	400	543	408	89	75	53	363