IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

WILDEARTH GUARDIANS, Plaintiff, v. UNITED STATES ARMY CORPS OF ENGINEERS, Federal Defendant, and MIDDLE RIO GRANDE CONSERVANCY DISTRICT, Intervenor-Defendant.	)	Case No. 1:14-cv-00666-RB/SCY

PLAINTIFF'S OPENING BRIEF IN SUPPORT OF *OLENHOUSE* MOTION FOR REVERSAL OF AGENCY ACTION

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TABLE OF ACRONYMS

BA	Biological Assessment
BiOp	Biological Opinion
ESA	Endangered Species Act
FCA	Flood Control Act
FWCA	Fish and Wildlife Coordination Act
FWS	Fish and Wildlife Service
MRG	Middle Rio Grande
RGCC	Rio Grande Compact Commission
RPA	Reasonable and Prudent Alternative
WRDA	Water Resources Development Act

INTRODUCTION AND BACKGROUND

Beginning in the 1990s, Defendant United States Army Corps of Engineers ("Corps") collaborated with interested stakeholders – including the United States Fish and Wildlife Service ("FWS"), the United State Bureau of Reclamation ("Bureau"), and the Rio Grande Compact Commission ("RGCC") – to exercise its discretionary authorities for the benefit of the endangered Rio Grande silvery minnow ("minnow") and southwestern willow flycatcher ("flycatcher"). In recognition of the fact that development, maintenance, and operation of its dams and reservoirs on the Middle Rio Grande ("MRG") contribute significantly to the habitat alterations that imperil the continued existence of these two species, Corps modified its flood and sediment control operations to mitigate the adverse impacts of those operations and to avert the imminent extinction of the minnow throughout its range and the permanent loss of flycatcher populations in New Mexico.

Most notably, Corps is uniquely situated to provide environmental flows from its MRG dams and reservoirs in a manner that induces spawning of the minnow and that creates riverine and riparian habitats necessary for the continued survival of both the minnow and the flycatcher. On many occasions – beginning in 1996 and continuing through 2013 – Corps exercised its discretionary authorities for operation of its MRG facilities to provide these critical

environmental flows. Corps itself acknowledges that re-regulation[1] of its MRG facilities for the benefit of the minnow and the flycatcher is a "no-cost solution for the federal government to meet" some of its most important obligations under the Endangered Species Act ("ESA"). Administrative Record ("AR") 2209.

Corps also acknowledges that it can re-regulate historical operations of its MRG facilities for the benefit of the minnow and the flycatcher in a manner fully consistent with the flood and sediment control objectives of those facilities. Even before the FWS finalized the ESA-listing of the minnow, an interagency working group that included Corps found as follows:

> [T]hrough consideration of the Cochiti re-regulation proposal, the interagency biological working group has come to recognize that significant, unrealized opportunities exist within the current authorization to greatly enhance management for fish, wildlife, and recreation at Cochiti Reservoir and still meet the primary flood and sediment control purposes of the dam . . . . Cochiti Reservoir can become an ecological asset which would complement the missions of the primary land managers, rather than existing as an environmentally detrimental intrusion.

AR 385. Corps' collaboration in re-regulating operations at its MRG facilities has significant positive benefits on species conservation efforts. AR 2207 (Corps states that its 2007 deviation from normal operations at Cochiti Dam resulted in a

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[1] "Re-regulation" refers to deviations from and modifications to ordinary operating procedures at Corps' MRG facilities, as they are set out in Corps Water Control Manuals.

"ten-fold increase" in the silvery minnow population).

On November 12, 2013 Corps informed governmental stakeholders that it would no longer exercise its discretionary authorities to operate its MRG facilities for the benefit of the silvery minnow and the flycatcher. AR 136. Two weeks later, on November 26, 2013, Corps informed the FWS that it had reviewed the historical arc of its participation in ESA-mandated conservation efforts for the minnow and the flycatcher "in light of new guidance from Headquarters." AR 127. That review led Corps to terminate its on-going ESA Section 7(a)(2), 16 U.S.C. § 1536(a)(2), consultation with the FWS. AR 128 (Corps states that the on-going consultation "is hereby terminated"). Corps' decision to terminate the consultation was ostensibly prompted by its concern that it be able to "ensure that we can operate and maintain the Civil Works projects to serve their Congressionally-authorized purposes," despite the fact that there has never been any showing or claim that Corps' provision of environmental flows in the MRG is in any way inconsistent with those purposes.[2] *Id.*

In this lawsuit, Plaintiff WildEarth Guardians ("Guardians") challenges Corps' November 26, 2013 decision to terminate its ESA Section 7(a)(2)

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[2] Indeed, all the available evidence is to the contrary. *See for example* AR 2237-38 (the Corp states that operational deviations at Cochiti do not alter flood control operations or increase flood risk).

consultation with the FWS as to the impacts of its MRG operations on the minnow and the flycatcher and, relatedly, Corps' decision not to modify those operations for the benefit of those species. The parties' respective positions on the relevant issues were fully ventilated in connection with Corps' Motion to Dismiss, which was denied by this Court in an Order of September 23, 2015. ECF Doc. Nos. 43, 69. The Court's Order concludes as follows:

> Plaintiff has alleged that Defendant Army Corps of Engineers' ongoing operation of its [MRG] facilities is an affirmative action that has adverse effects on the Rio Grande silvery minnow and the flycatcher and these actions may be modified for the benefit of listed species within the agency's discretionary action. If proven, these allegations would implicate duties under Section 7(a)(2) and Section 9 of the Endangered Species Act.

ECF Doc. No. 69 at 14. In this Opening Brief, Guardians will demonstrate (1) that Corps' operations of its MRG facilities *does* have an adverse impact on the minnow and the flycatcher which is widely acknowledged and understood, even by Corps, and (2) that Corps *does* have the discretionary authority within its existing congressional authorizations to modify its operations for the benefit of those species. For this reason, judgment should be entered in this matter in Guardians' favor and Corps should be ordered to resume compliance with its mandatory obligations under the ESA.

STANDING

Attached to this Opening Brief are the Declarations of Jen Pelz and Tomas Radcliffe who are both members of Guardians. APPX D-1, D-13. These declarations establish that Guardians meets the requirements for both organizational and representational standing as set out in *WildEarth Guardians v. U.S. Bureau of Land Management*, 870 F.3d 1222, 1230-32 (10th Cir. 2017). Specifically, the declarations establish (1) that Guardians' members have cognizable and protectable interests in the conservation of the minnow and the flycatcher and their habitats, (2) that these interests are injured in a concrete and direct way as a result of Corps' arbitrary and capricious decisions, (3) and that the injuries are likely to be redressed by a favorable decision in this case. Furthermore, the Pelz declaration establishes (1) that the interests asserted in this lawsuit are germane to Guardians' purpose and (2) that the participation of individual Guardians members as parties is required for adjudication of this dispute.

STANDARD OF REVIEW

Judicial review of final administrative decisions and actions under the ESA is governed by the Administrative Procedures Act ("APA"). 5 U.S.C. §706. Pursuant to the APA, the reviewing court must set aside an agency action if it "fails to meet statutory, procedural or constitutional requirements or if it was

arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1574 (10th Cir. 1994) (internal quotations omitted). The court must reverse an agency action unless it finds that there is a "rational connection between the facts found and the decision made." *Id.*

In its application of the applicable standard of review, the court must engage in a "thorough, probing, in-depth review" and the "inquiry into the facts is to be searching and careful." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415-6 (1971).

As explained more fully below, the resolution of this case hinges in large part on the appropriate interpretation of the relevant Flood Control Acts authorizing the construction and operation of Corps' MRG dams and reservoirs. Corps' interpretation of the relevant Flood Control Acts receives *de novo* review. *Wright v. Federal Bureau of Prisons*, 451 F.3d 1231, 1233-34 (10th Cir. 2006).

THE RELEVANT PROVISIONS OF LAW

I. The Law Regarding Development, Operation, and Modification of Corps Facilities Authorized by Congress in Flood Control Acts

Construction and operations of Corps' facilities on the MRG were authorized pursuant to the 1948 Flood Control Act ("FCA"), the 1960 FCA, and

the 1964 FCA.[3] Appendix ("APPX") A-1, A-5, A-9. While the primary purposes of the MRG Project under the 1948 FCA were flood and sediment control, Corp's plan of development for the Project – which was approved by Congress – specifically stated that fish and wildlife conservation was a complementary purpose of the MRG Project. AR 3726, 3756. Congress also expressly authorized fish and wildlife purposes for Cochiti Dam operations in the 1960 and 1964 FCAs. AR 2206, 3420.

However, even if Corps' facilities on the MRG had not been authorized for fish and wildlife purposes in the relevant FCAs (which is *not* the case), other statutory authorities require that *all* Corps physical facilities be operated for such purposes, to the extent that such purposes can be advanced without impairing expressly stated congressional purposes.

Pursuant to the Fish and Wildlife Coordination Act ("FWCA") of 1958, 16 U.S.C. § 662(c), "Federal agencies authorized to construct of operate water-control projects [such as Corps] are authorized to modify or add to the structures . . . to accommodate the means and measures for such conservation of wildlife resources as an integral part of such projects." The FWCA goes on to state that all

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[3] These three FCAs, and their relevant provisions, are discussed in further detail in that section of this Opening Brief detailing the authorization and development of the MRG Project.

federal agencies should construct and operate water-control projects in consultation with the FWS "with a view to the conservation of wildlife resources by preventing loss of and damage to such resources." 16 U.S.C. § 662(a) *see also Rio Grande Silvery Minnow v. Keys*, 333 F.3d 1109, 1136-37 (10th Cir. 2003), (holding that the Bureau's discretionary authority in the administration of MRG Project water rights must be construed against the background of the FWCA).[4]

In a similar vein, the Water Resources Development Act ("WRDA") of 1986, 33 U.S.C. § 2294 note, specifically authorizes Corps "to review the operation of [existing] water resources projects . . . to determine the need for modifications in the structures and operations of such projects for the purpose of improving the quality of the environment in the public interest." APPX A-10. When Congress modified the 1986 WRDA in 1990 to broaden its scope and to allocate continuing future funding for its implementation, Congress noted the WRDA's important salutary purpose:

> The Committee believes that it is imperative for the [Corps] to incorporate environmental enhancement advances in all water resources projects and thus authorizes [the 1986 WRDA] as a permanent Corps program. This will allow the [Corps] to take

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[4] The cited decision was vacated on mootness grounds in *Rio Grande Silvery Minnow v. Keys*, 355 F.3d 1215 (10th Cir. 2004). However, vacated decisions "remain on the books" and "future courts and litigants will be able to consult their reasoning." *Rio Grande Silvery Minnow v. Keys ("RGSM")*, 601 F.3d 1096,1133 (10th Cir. 2010).

> advantage of environmental opportunities . . . at any completed water resources project . . . .

S.Rep. No. 333, 101st Cong., 2nd Sess (1990) *appearing at* 1990 WL 258953.[5]

The 1990 WRDA also builds upon Congress's previous instructions to Corps to integrate environmental enhancement operations into its ongoing operations at existing facilities. In this connection, the 1990 WRDA states that "[t]he Secretary [of the Army] *shall* include environmental protection as one of the primary missions of the Corps of Engineers in planning, designing, constructing, operating, and maintaining water resources projects." 33 U.S.C. § 2316 (emphasis added).

In the 1996 WRDA, Congress again stressed its intent and desire that Corps utilize its physical facilities for "aquatic ecosystem restoration." In that Act, Congress states that "[t]he Secretary [of the Army] may carry out an aquatic ecosystem restoration project and protection project" when such project "will improve the quality of the environment and is in the public interest." 33 U.S.C. § 2330(a).

In light of Congress's repeated directives to Corps to advance fish and wildlife interests at its facilities when such ends can be pursued without impairing

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[5] The pertinent provision of the 1990 WRDA is set out at Section 322 of Public Law 101-640. APPX 13.

expressly stated congressional purposes, courts routinely hold that facility-specific FCAs should be interpreted to include authorization for fish and wildlife purposes even if such purposes are not expressly stated. *See Miccosukee Tribe v. U.S. Army Corps of Engineers*, 716 F.3d 535, 541-42 (11th Cir. 2013) (examining the scope of Corps authority to deviate from normal operation schedules and holding that "[w]hen setting a water regulation schedule, the Corps is required to abide by the [ESA]"), *Raymond Proffitt Foundation v. U.S. Army Corps of Engineers*, 343 F.3d 199, 205-07 (3rd Cir. 2003) (holding that the 1990 WRDA "grants the Corps very broad discretion" to promote fish and wildlife purposes, and that Corps is affirmatively required "to include environmental protection as a mission"), *In re: Operation of the Missouri River* System, 363 F.Supp. 2nd 1145, 1153 (D.Minn. 2004) (holding that "[t]he Corps' obligations under the ESA" are one of the interests that must be taken into account in interpreting a FCA to determine the scope of Corps' discretionary authority, and further holding that "[t]he priority that the Corps gives the competing interesting interests is a discretionary function, and subject to the ESA"), *Raymond Proffitt Foundation v. U.S. Army Corps of Engineers*, 128 F.Supp.2d 762, 770-71 (E.D. Penn. 2000) (holding that "the Corps cannot abandon Congress' mandate that it include environmental protection as one of its primary missions in administering water resources projects"), *American*

Rivers v. U.S. Army Corps of Engineers, 271 F.Supp. 230, 252-53 (D.D.C. 2003) (holding that Corps had sufficient discretion under the pertinent FCA "to require the Corps to fulfill its responsibilities under the ESA").

More generally, judicial decisions exploring the outer boundaries of Corps discretionary authority hold that the operation of Corps facilities is a highly discretionary function, and that Congress authorizes Corps flood control projects knowing and expecting that they will be modified by Corps during implementation:

> It is well recognized that Congress customarily approves flood control projects on the basis of preliminary plans submitted by [Corps], and authorizes [Corps] to make such modifications as later studies indicate are necessary . . . The Congress has expressed confidence in the Corps' exercise of its discretion in these matters.

State of Missouri v. Department of the Army, 526 F.Supp. 660, 668 (W.D. Mo. 1980) *see also Britt v. U.S. Army Corps of Engineers*, 769 F.2d 84, 89 (2nd Cir. 1985) (holding that Corps Reports that form the basis for congressional authorization are "never intended to be the final plans for the project"). The decision in *Creppel v. U.S. Army Corps of Engineers*, 670 F.2d 564, 572-73 (5th Cir. 1982), pointedly describes why Congress left significant discretion to Corps in the operational evolution of a Corps facility:

> Even when a project's purpose is authorized by Congress,the executive officer charged with responsibility for the project may

> modify its purpose unless this action is so foreign to the original purpose as to be arbitrary or capricious. It imparts both stupidity and impracticality to Congress to conclude that the statute impliedly forbids any change in a project once approved, and thus prevents the agency official from providing for the unforeseen or the unforeseeable, from accommodating newly discovered facts, or from adjusting for changes in physical or legal conditions. Any change must, however, serve the original purpose of the project.

Thus, as a general matter, Corps can modify and add project purposes as project needs evolve – subject to the constraint that the modified project still "serve[s] the original purpose." *See also In re: Missouri*, 363 F.Supp.2d at 1154 ("the Corps must be permitted to vary its operations in the event that changed circumstances require it to do so").

Corps regulations reflect Corps' authority and duty to assure that operations at existing facilities are consistent with the objectives of environmental enhancement – including, particularly fish and wildlife conservation – even when such purposes are not expressly stated in the FCA authorizing the facility. For example, Corps' regulation concerning the development and maintenance of Water Control Plans for its existing facilities states as follows:

> [Corps] is responsible for water control management at the reservoir projects it owns and operates . . . . This responsibility is prescribed by laws initially authorizing construction of specific projects and any referenced project documents, laws specific to projects that are passed subsequent to construction, and the flood control acts and related legislation that Congress has passed that apply generally to all [Corps] reservoirs. Modifications to project operations are also

> permitted under laws passed post-construction.
>
> . . . .
>
> Revisions and updates [of Corps Water Control Plans] may incorporate upstream and downstream environmental flow objectives when compatible in accordance with authorization and approved purposes. Environmental flow may include both operational and structural modification of [Corps] facilities to improve the ecological sustainability of riverine systems.

Corps Environmental Regulation 1110-2-240 at ¶¶ 1-5(a), 3-2(g) *codified at* 33 C.F.R. § 222.5.[6] APPX B-1-5. Relatedly, the Corps regulation that specifically governs modification of operations at existing Corps facilities expressly states that existing Corps facilities may be re-regulated for fish and wildlife purposes without "[f]urther Congressional authorization" so long as the modification "would not significantly affect operation of the project for the originally authorized purposes." Corps Environmental Regulation 1165-2-119 at ¶ 8(c). APPX B-6-8 *see also* APPX B-9-10 (Corps Engineering Pamphlet 1165-2-1 at ¶ 11-7 states that Water Control Plans governing operations at existing Corps facilities "may be modified to add a purpose for which Congress has granted general authority to all Corps reservoirs . . . [including] threatened and endangered species preservation").

In short, Corps regulations reflect the fact that relevant statutes governing

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[6] Corps' Administrative Record contains a superceded iteration of 33 C.F.R. § 222.5. AR Tab B-19.

the operation of Corps facilities – including the FWCA, the WRDAs, and the ESA – together constitute a "blanket authorization" for Corps to operate its facilities for the conservation of ESA-listed species so long as such operations are not inimical to operation of those facilities for their primary purposes. The Corps' discretionary authority to modify operations for the benefit of listed species is particularly strong where, as here, the FCA authorizing a Corps project specifically and expressly contemplates the use of the project for fish and wildlife purposes.

II. Pertinent provisions of the ESA

The ESA is "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Tennessee Valley Authority v. Hill* ("*TVA*"), 437 U.S. 153, 177, 180 (1978). Based upon its review of the ESA's language, history, and structure, the Supreme Court held that "Congress intended endangered species to be afforded the highest of priorities" in an effort to "halt and reverse the trend towards species extinction, whatever the cost." *Id.* at 174.

The ESA imposes both substantive and procedural duties on federal agencies. *National Association of Home Builders* v. *Defenders of Wildlife* ("*NAHB*"), 551 U.S. 644, 667 (2007), *RGSM*, 601 F.3d at 1105. Substantively, ESA Section 7(a)(2) imposes a duty on federal agencies to "insure that any action

authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of an [ESA-listed species] or result in the destruction or adverse modification of [formally designated critical] habitat of such species." 16 U.S.C. § 1536(a)(2). Procedurally, ESA Section 7(a)(2) imposes a duty on federal agencies to engage in a "formal consultation" with the FWS as to the biological impact of a planned or ongoing agency action in those circumstances where the agency action "may affect" listed species, but can be modified by the agency for the benefit of listed species. *Id.*

A. The substantive requirements of ESA Section 7(a)(2)

The Supreme Court has recognized the core importance of Section 7(a)(2) to the ESA's conservation scheme, and held that "the mandatory provisions of § 7 were not casually or inadvertently included." *TVA*, 437 U.S. at 183, *see also Karuk Tribe of California v. U.S. Forest Service*, 681 F.3d 1006, 1019-20 (9th Cir. 2012) (en banc) (Section 7 is the "heart of the ESA"). The *TVA* decision makes clear that Congress contemplated – and expected – that operation of the substantive requirements of Section 7(a)(2) would require federal agencies to modify their actions for the benefit of listed species when they have the discretionary authority to do so. 437 U.S. at 186 (holding that "it is clear that Congress foresaw that § 7 would, on occasion, require agencies to alter ongoing

projects in order to fulfill the goals of the Act"). Similarly, in *NAHB* the Supreme Court held that the ESA's substantive mandate to avoid jeopardy and adverse modification to critical habitat "applies to every *discretionary* action – regardless of the expense or burden its application might impose." 551 U.S. at 670 (emphasis in original).

In *Center for Native Ecosystems v. Cables*, 509 F.3d 1310, 1321 (10th Cir. 2007), the Tenth Circuit held that "agencies must insure that actions not only prevent the extinction of species but also allow for the recovery of the species, that is, allow the species to increase sufficiently in population that it can be removed from the list of endangered or threatened species." Thus, any federal action that impairs a species' prospects for recovery – and not just its survival – "jeopardizes" the species and/or "adversely modifies" its critical habitat within the meaning of ESA Section 7(a)(2).

B. The procedural requirements of ESA Section 7(a)(2)

To assure that federal agencies act consistently with their substantive Section 7(a)(2), Section 7(a)(2) imposes the above-noted procedural duty to conduct a formal consultation with the FWS. *RGSM*, 601 F.3d at 1105 ("[t]he procedural obligation ensures that the agency proposing the action . . . consults with the FWS to determine the effects of its actions on endangered species and

their critical habitat"). Pursuant to the procedural requirements of Section 7(a)(2), "whenever a federal agency proposes an action in which it has discretion to act for the benefit of any endangered species, it must consult to insure that the action 'is not likely to jeopardize the continued existence of any endangered species or threatened species.'" *WildEarth Guardians v. U.S. Environmental Protection Agency*, 759 F.3d 1196, 1200 (10th Cir. 2014) *citing* 16 U.S.C. § 1536(a)(2), 50 C.F.R. § 402.03.

While the procedural obligation to engage in a formal consultation with the FWS under Section 7(a)(2) is broadly applicable – expressly applying by the statutory language to "any action" that may affect ESA-listed species[7] – there are two important limitations on an agency's obligation to conduct a Section 7(a)(2) consultation with the FWS.

First, the formal consultation obligation is triggered only in those instances where an agency is taking or proposes to take an affirmative action that "may affect" a listed species. *Karuk Tribe*, 681 F.3d at 1021. The "may affect" trigger is a very low threshold and "[a]ny possible effect, whether beneficial, benign,

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[7] The ESA's implementing regulations also highlight the extremely broad application of Section 7(a)(2). Those regulations define agency "action" as "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies." *WildEarth Guardians*, 759 F.3d at 1200 (*quoting* 50 C.F.R. § 402.02).

adverse or of an undetermined character, triggers the formal consultation requirement."[8] 51 Fed.Reg. 19926, 19949-50 (June 3, 1986) *see also California ex rel. Lockyer v. U.S. Department of Agriculture*, 575 F.3d 999, 1018-19 (9th Cir. 2009) (holding that "[t]he threshold for triggering [the obligations of ESA Section 7(a)(2)] is relatively low; consultation is required whenever a federal action 'may affect' listed species or critical habitat").

Second, a Section 7(a)(2) consultation obligation attaches to an affirmative action that "may affect" a listed species only in those instances where the agency has the discretionary authority to modify the proposed or ongoing action for the benefit of listed species. *NAHB*, 551 U.S. at 669-70, *Natural Resources Defense Council v. Jewell*, 749 F.3d 776, 784 (9th Cir. 2014) (en banc) ("Section 7(a)(2)'s consultation requirement applies with full force so long as a federal agency retains 'some discretion' to take action to benefit a protected species").

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[8] For those agency actions that have a beneficial or *de minimis* effect on listed species, there is an "off-ramp" to an abbreviated ESA compliance process known as "informal consultation." 50 C.F.R. § 402.13(a). Pursuant to the "informal consultation" mechanism, an agency which concedes that an ongoing or proposed action "may affect" listed species – but believes that the subject action is "not likely to adversely affect" listed species – may seek the FWS's written concurrence in the "not likely to adversely affect" determination. An agency may complete its ESA compliance in connection with an action through informal consultation only if the FWS provides a written concurrence that the action – although associated with a "may affect" conclusion – is "not likely to adversely affect listed species or critical habitat." *Cables*, 509 F.3d at 1321, 50 C.F.R. §402.13(a) *see also RGSM*, 601 F.3d at 1105.

Formal consultation under ESA Section 7(a)(2) is commenced by the action agency's preparation of a Biological Assessment ("BA"). In a BA, the agency describes the proposed action to the FWS and evaluates its potential effects on listed species and their designated critical habitats. 16 U.S.C. §1536(c)(1), 50 C.F.R. §402.14(c). An ESA Section 7(a)(2) formal consultation is concluded with the FWS's issuance of a Biological Opinion ("BiOp"). 16 U.S.C. §1536(b). In a BiOp, the FWS determines whether the proposed action, together with the cumulative effects of other actions affecting the species, is likely to jeopardize a listed species or adversely modify a listed species' critical habitat. *RGSM*, 601 F.3d at 1105, 50 C.F.R. §402.14(g)(4).

If the FWS finds that a proposed action is associated with a jeopardy and/or adverse modification effect, the FWS must develop and request implementation of a Reasonable and Prudent Alternative ("RPA") which is a proposal to modify the proposed action – within the constraints of the action agency's discretionary authority – in such a way that the action agency remains compliant with its substantive Section 7(a)(2) duties. 16 U.S.C. §1536(b)(3)(A).

Importantly, in developing an RPA the FWS looks to the full range of an agency's discretionary authority and is not required to constrain its consideration to only those actions that the agency itself plans to implement. "[A] Federal

agency's responsibility under Section 7(a)(2) permeates the full range of discretionary authority held by that agency; i.e., the [FWS] can specify a [RPA] that involves the maximum exercise of Federal agency authority when to do so is necessary, in the opinion of the [FWS] to avoid jeopardy." 51 Fed.Reg. 19926, 19937 (June 3, 1986).

If the BiOp prepared in connection with an agency action is associated with jeopardy and/or adverse modification – and is, therefore, coupled with an RPA – the action agency may comply with the ESA by implementing the RPA, terminating its action, or applying for a Cabinet-level exemption from Section 7(a)(2)'s substantive requirements. *RGSM*, 601 F.3d at 1106.

FACTUAL BACKGROUND

I. Authorization and Development of Corps' Physical Facilities in the Middle Rio Grande[9]

To forestall economic calamity in the MRG region, the federal government developed the MRG Project "to rehabilitate and construct irrigation facilities, control flooding and sedimentation in the river, and improve the economy in the [MRG] Valley." *Rio Grande Silvery Minnow v. U.S. Bureau of Reclamation*, 599 F.3d 1165, 1169 (10th Cir. 2010). The MRG Project was presented to Congress

[9] An excellent history of the MRG Project is set out at pages 547-71 of the law review article entitled "History of the Rio Grande Reservoirs in New Mexico: Legislation and Litigation." AR 3888, 3910-3934.

for authorization in contemporaneously prepared proposals issued by the Bureau and Corps. These proposals – submitted to Congress as "Reports" on plans for the agencies' respective portions of MRG Project development – discuss the then dire conditions in the MRG which required immediate federal intervention to salvage the valley's collapsing agricultural economy. In its Report, Corps stated:

> If relief from the conditions existing in the [MRG] Valley is not provided the agricultural production of the valley will be increasingly impaired, culminating in a probable abandonment of agricultural pursuits on a commercial basis within 50 years.

AR at 3730.

The MRG Project was conceived and authorized as a multiple purpose project. In its 1948 Report, Corps stated that implementation of its proposed work on the MRG Project would serve several complementary purposes other than flood and sediment control. Those complementary purposes include power generation, watershed improvement, recreation, and fish and wildlife development. AR 3726 (Corps enumerates "fish and wildlife development" as one of the purposes of the MRG Project), AR 3756 (Corps states that "fish and wildlife development" is one of the "main features" of the MRG Project). Thus, while the primary objective of the MRG Project is flood and sediment control, Congress authorized the MRG Project in the 1948 FCA on the basis of a Corps Report which specifically and expressly contemplates that the Project will also serve fish and wildlife purposes.

From the very inception of MRG Project planning, all the stakeholders acknowledged that the Project could only be developed in strict accordance with the 1938 Rio Grande Compact ("Compact") which effected an equitable allocation of the Rio Grande's water between the states of Colorado, New Mexico, and Texas. *See for example* AR 3728 (Corps' 1948 Report acknowledges that Congress could authorize Corps' Project facilities only insofar as they were "subject to the provision that all flood-control works be operated in accordance with the Rio Grande Compact"). Ultimately, those Compact-related constraints proved to be an impediment to authorization of main stem reservoirs on the Rio Grande when the MRG Project was taken up by Congress in 1948.

As originally proposed by Corps, a principal features of the MRG Project was a large dam on the main stem of the Rio Grande – known as Chiflo Dam – just south of Colorado-New Mexico border. AR 3726. *Id.* New Mexico was generally supportive of all aspects of Corps' proposal as set out in the 1948 Report and recommended its immediate authorization and implementation subject to continuing appropriations. AR 3721.

Texas and Colorado – which played critical roles in reviewing Project plans in light of their significant interests under the Compact – were less sanguine about the Project. Although they were sympathetic to New Mexico's needs, they were

concerned that construction of a large dam on the main stem of the Rio Grande was unnecessary and would cause impairment of their rights to their fair shares of Rio Grande water as allocated by the Compact. Texas wrote in its comments on Corps' proposal that "reservoir capacity has been unduly stressed" in project planning and that construction of the Chiflo Dam "might well lead to a reallocation of storage behind the dams when they come into existence." AR 3721. Likewise, Colorado took the position that construction of the Project as proposed by Corps would result in "direct competition" between New Mexico and Colorado for the Rio Grande's water resources. AR 3708. Both states took the position that Congress should authorize the MRG Project only upon the condition that the Chiflo Dam was excised from Corps' proposal. AR 3708, 3721.

The Compact concerns ultimately carried the day when Congress authorized the MRG Project in the 1948 FCA. In its authorization, Congress specifically stated that it was withholding authorization for the main stem dam – Chiflo Dam – without prejudice to future consideration of a main stem Rio Grande dam. APPX A-2. The authorizing legislation also expressly requires that Corps' physical facilities in the MRG Project be operated "in conformity with the Rio Grande Compact as it is administered by the Rio Grande Compact Commission." *Id.*

Importantly for purposes of this case, Congress authorized the MRG Project

knowing that operating plans would develop and evolve over time. (As explained above at pages 11-14 of this Opening Brief, this is customary practice in the authorization of Corps projects.) Corps stated in its 1948 Report that "provisions are included for such modifications of the plans within the terms of the Compact as may be found advisable . . . and which are consonant with the responsibilities of the [Corps] for Federal flood-control improvements." AR 3728. Likewise, in its review of the Project, the Bureau of the Budget wrote that "adjustments in the plan of operations can be made in accordance" with Compact objectives. AR 3705.

Insofar as the MRG Project's fish and wildlife purpose was concerned, Corps' 1948 Report stated that the precise manner of integrating this purpose into the Project would be deferred until after the development of specific operating schedules for Project dams and reservoirs

> *For maximum fish and wildlife benefits, [Project dams] should be operated not only so that pools will be maintained in the reservoirs but also so that water releases will always maintain a live stream below the dam* . . . . The detailed plans for fish and wildlife development would be prepared . . . concurrently with the preparation of the detailed plans for any flood-control project which may be authorized.

AR 3762-63 (emphasis added). In a similar vein, the FWS commented on Corps' 1948 Report that specific plans to achieve the Project's fish and wildlife purpose could not be developed until after the development of "final working plans for

operating" Project dams and reservoirs. AR 3706. Nonetheless, the FWS urged that "to the extent practicable the project be provided with means for maintaining fish and wildlife values at not less than present values," and that this objective be pursued in greater depth as implementation of the Project progressed. *Id.*

After the MRG Project's initial authorization in 1948, MRG interests continued to lobby for construction of a main stem dam under the belief that dams along MRG tributaries did not provide sufficient protection from floods in the MRG valley. AR 3840-41. Corps supported New Mexico's position, and in the late 1950s it proposed the construction of Cochiti Dam on the Rio Grande below the confluences of that river with the Jemez River and the Santa Fe River. *Id.*

On this go-around, New Mexico received more support from Texas and Colorado for a main stem dam than it had received during initial review of the MRG Project in the late 1940s, primarily because New Mexico's sister states in the Compact actively participated in writing the "Reservoir Regulation Plan" that would be incorporated into the congressional authorization for Cochiti Dam. AR 3842. The RGCC passed a resolution supporting congressional authorization of Cochiti Dam subject to the condition that the authorizing legislation incorporate the Reservoir Regulation Plan "developed through the cooperation of the States of Colorado, New Mexico, and Texas." AR 3850 *see also* AR 3842 (setting out the

Reservoir Regulation Plan agreed to by the Compact states and requesting "that it be included verbatim in any bill" authorizing the construction of Cochiti Dam), AR 3844 (explaining that the prior controversy as to the construction of a main-stem dam was resolved by adoption of an agreement concerning operation of Corps' MRG facilities).

In the 1960 FCA, Congress authorized the construction of Cochiti Dam and – as requested by the states of New Mexico, Texas, and Colorado – incorporated the Reservoir Regulation Plan written by the RGCC into the authorizing legislation. APPX A-6-8. The FAC expressly contemplates that Corps might deviate from the incorporated reservoir regulation schedule at a later date, and provides that such modifications can be effected "with the advice and the consent of the Rio Grande Compact." APPX A-7. In "History of the Rio Grande Reservoirs in New Mexico: Legislation and Litigation," the authors discuss the overriding interests of the RGCC in the authorization of Cochiti dam – and Congress's ultimate deferral to the Commission's concerns:

> At the insistence of Texas and Colorado, the 1960 Act contains a Reservoir Regulation Plan (Plan) that was agreed to and drafted by the three Rio Grande Compact states . . . . Although the federal government ratified the Plan, it was the three Compact states that made decisions about the operation and regulation of the reservoirs . . . . Pursuant to the Plan, Cochiti, Galisteo, and the other dams were to be operated together as a total unit. The Commission was to supervise any changes to the stated Plan in the operation of the

> reservoirs that would be pivotal to any proposed use of the reservoirs for alternate purposes.

AR 3925-26.

Thus, the Reservoir Regulation Plan set out in the authorization for Cochiti Dam is not an immutable congressional edict forever insulated from modifications. To the contrary; the authorizing legislation (like the 1948 FCA before it) expressly and plainly contemplates that Corps' operations might be modified in the future – upon the advice and consent of the RGCC – to promote its fish and wildlife purpose, and to conform to the evolving needs and interests of the Compact states. *See* AR 3452 (Corps states that the authorizing legislation "provides the [RGCC] with the authority to approve Corps-requested departures from the reservoir operations schedule").

Fish and wildlife concerns were also taken up by the stakeholders in negotiations on the construction of Cochiti dam. Again, Compact concerns proved to be paramount. As discussed above, Corps' 1948 Report on the MRG Project – authorized by Congress with the exception of Chiflo Dam in the 1948 FCA – states that fish and wildlife development was a purpose of the Project. Upon the request of Corps and in furtherance of this project purpose, Congress specifically authorized the operation of Cochiti Dam for fish and wildlife development but – out of deference to the Compact states and the delicate balance of water in the Rio

Grande Basin – stated that any water used in furtherance of such purpose could not be "native water" in the Rio Grande, but would have to be water imported from other river basins through trans-basin diversion projects such as the San Juan-Chama Project. APPX A-7-8[10] *see also* AR 2206 (Corps explains that "development of fish and wildlife resources" is one of Cochiti Dam's specifically authorized purposes), AR 3420 (same).

II. The Rio Grande Silvery Minnow and the Southwestern Willow Flycatcher

The Rio Grande silvery minnow was historically one of the most abundant and widespread fishes in the Rio Grande basin, occurring from Espanola, New Mexico, to the Gulf of Mexico . 59 Fed. Reg. 36,988 (July 20, 1994). It was also found in the Pecos River from Santa Rosa, New Mexico, downstream to its confluence with the Rio Grande in south Texas. *Id.* According to the FWS, the species presently occupies only about 5% of its historic range. *Id.* It has been completely extirpated from the Pecos River and from the Rio Grande upstream from Cochiti Reservoir and downstream of Elephant Butte Reservoir. *Id.* Currently, it is found only in the MRG from Cochiti Dam to the headwaters of Elephant Butte Reservoir. *Id.*

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[10] In the 1964 FCA, Congress authorized the use of San Juan-Chama water for the creation of a permanent pool in Cochiti reservoit to serve recreation and fish and wildlife purposes. APPX A-9.

The decline of the minnow is attributed to modification of stream discharge patterns and channel desiccation by impoundments, water diversion for agriculture, and stream channelization. *Id.* When it listed the minnow as an endangered species on July 20, 1994, the FWS explained how the operation of dams on the Rio Grande modified the species' habitat to such an extent that listing was warranted:

> Mainstream dams permit the artificial regulation of flow, prevent flooding, trap nutrients, alter sediment transport, prolong flows, and create reservoirs that favor non-native fish species. These changes may affect the Rio Grande silvery minnow by reducing its food supply, altering its preferred habitat, preventing dispersal, and providing a continual supply of non-native fishes that may compete with or prey upon the species.

Id. at 36,992. The FWS designated critical habitat for the minnow in 2003. 68 Fed. Reg. 8,088 (Feb. 19, 2003).

The southwestern willow flycatcher occurs in riparian habitats along rivers, streams, and other wetlands. 60 Fed.Reg. 10,694 (Feb. 27, 1995). When it listed the species as endangered in 1995, the FWS noted that the range-wide population of the flycatcher had "declined precipitously," and was in a continuing downward trend. *Id.* at 10,697. Land uses and river management actions that degrade riparian areas cause an adverse modification of flycatcher habitat. *Id.* In the flycatcher listing rule, the FWS found that the construction of dams in particular has a negative impact of the riparian habitat required for flycatcher life phases. *Id.*

at 10,700. The FWS also stated that up to 90% of riparian areas in the southwestern United States "have been lost or modified" as a result of alterations in flow regimes, channel confinement, changes in water quality, and the floristic makeup of riparian systems. *Id.* at 10,698. The FWS made its initial designation of critical habitat for the flycatcher in 1997, and that designation has been amended several times including, most recently, in 2013. 78 Fed.Reg. 344 (Jan. 2, 2013).

III. The Physical and Biological Impacts of Operations at Corps' Middle Rio Grande facilities

Prior to the development of water resources, the MRG was a very dynamic riparian-riverine ecosystem characterized by an active braided channel that migrated over a broad sandy floodplain up to a half-mile wide. Periodically, uncontrolled floods swept down the MRG valley and inundated the entire flood plain and adjacent area in overbank flows that promoted and sustained the riparian ecosystem. AR 2696. This active channel and flood plain connection provided habitat for all life stages of the silvery minnow and various successional stages of vegetation along the riparian corridor, used as breeding habitat by flycatchers. *Id.* *see also* AR 2773 ("[a] connected flood plain provides important larval and rearing habitats for silvery minnow as well as inundated riparianvegetation for flycatcher").

The development of dams and reservoirs in the MRG – together with other anthropogenic factors – has changed the physical shape and ecological function of the Rio Grande. Downstream of Cochiti Dam, continuing sediment retention behind the dam is changing the river in many ways that imperil the continued survival of the minnow. Amongst the adverse impacts are these three: (1) the channel is deepening and is thereby becoming increasingly disconnected from the associated flood plain; (2) the channel is transitioning from a sand and gravel bottom appropriate for essential minnow life phases to a coarse cobble-bottomed river that does not support minnow reproduction and survival; and (3) the channel has changed from a braided channel of different depths and flow rates offering diverse off-channel habitat for the minnow to a single straight channel. AR 3445-46. These change to the geomorphology of the Rio Grande downstream of Cochiti Dam have impaired the associated riparian areas, and thereby harm the flycatcher. *Id.*

Corps acknowledges that Cochiti Dam and Jemez Canyon Dam – two of its four MRG Project dams – are "particularly important for evolution of the Rio Grande":

> Cochiti Dam on the Rio Grande started operations in 1973, retaining flood flows and the upstream sediment supply. On the Rio Jemez, [sediment retention operations begain in 1980] . . . . By 1980, much of the Rio Grande downstream from Cochiti Dam had converted to a

> coarse gravel bedded channel, with that transition migrating downstream to its present location in the Albuquerque area today. As two major supplies of sediment were removed from the Rio Grande, rapid channel incision has occurred throughout this area of the Rio Grande. Much of the historical floodplain has become abandoned through degradation [deepening] of the channel bed, with vegetated bars constituting the majority of flooded surfaces in years with normal spring discharge.

AR 2218 *see also* AR 3446-47 (Corps explains that Cochiti Dam "pointedly affected the geomorphology of the main stem" and "caused significant incision immediately downstream"), AR 2768-79 (the Bureau states that "[i]ncision on the MRG between Cochiti and Isleta has been impacted most strongly by construction of Cochiti and Jemez Canyon Dams, and these effects appear to be continuing to extend downstream"), AR 2522 (a Bureau geomorphology study concludes that "[a]fter operations began at Cochiti Dam in 1973, the channel bed immediately began to erode and coarsen").

Corps admits as follows in connection with the impacts of its MRG operations on the minnow:

> Channel narrowing by encroachment of non-natives forming a single-threaded channel reduces the quantity and quality of silvery minnow critical habitat. Flows that produce overbank flooding create pointbars and islands that function as nursery areas essential for recruitment. The shallow backwaters that form on the terraces, pointbars, islands and arroyo confluences are a component of silvery minnow critical habitat. Past actions have reduced the total habitat from historic conditions and altered habitat conditions for the [minnow]. Narrowing and deepening of the channel, lack of side

> channels and off-channel pools, and changes in natural flow regimes have all adversely affected the [minnow] and its habitat. These environmental changes have degraded spawning, nursery, feeding, resting, and refugia areas required for species survival and recovery.

AR 2227. The flycatcher is similarly adversely affected by Corps' operations at its MRG facilities. *See for example also* 2696 (the Bureau states that "[w]ater and sediment management have resulted in a large reduction of suitable habitat for the flycatcher, as a result of the reduction of high flow frequency, duration, and magnitude that helped to create and maintain habitat for this species").

Recent analyses concerning the impacts of Corps' operations at Cochiti Dam and Corps' other MRG facilities show that the adverse habitat modifications – deepening of the river channel result and armoring of the river bed – are continuing and are moving downstream. AR 3448 (Corps states that the deepening of the river channel "will continue downstream"), AR 2696-97 (the Bureau states that "[t]he channel narrowing trend in the Rio Grande and the resulting degradation of aquatic habitat will continue under the current river management regime").

Most recently – and very shortly before Corps terminated its ESA Section 7(a)(2) consultation with the FWS in November of 2013 – Corps acknowledged that the biological impacts of its MRG Project operations trigger the substantive and procedural requirements of ESA Section 7(a)(2). AR 3523-24. Corps

specifically found that its MRG operations "would likely adversely affect" the minnow and its critical habitat. AR 3523. Corps also determined that MRG operations "may affect, but would not likely adversely affect" the flycatcher and its critical habitat.

IV. Corps Re-Regulates its Middle Rio Grande Operations for the Benefit of the Minnow and the Flycatcher and Formally Consults with the FWS under ESA Section 7(a)(2)

After the FWS listed the minnow and the flycatcher as endangered species, Corps commenced re-regulation of its MRG facilities for the benefit of the species – as expressly allowed by Corps' general statutory authorities and the provisions of the 11948 and 1960 FCAs. Corps also initiated ESA Section 7(a)(2) consultations with the FWS, in coordination with the Bureau.

A. Re-regulation actions

Since the 1990s, the RGCC has approved various deviations from the normal regulation plans at Corps' MRG facilities.[11] AR 3452. Deviations from the Reservoir Regulation Plan set out in the 1960 FCA for the benefit of the

[11] The normal regulation plan for the Corps' facilities are set out in Water Control Manuals ("WCMs") that govern operations at each Corps facility. *See for example* AR Tab B-6 (Cochiti Water Control Manual). As noted above, WCMs can be modified to effect permanent changes to Corps operations at a facility. *See* pages 12-13 above. Alternatively, in the absence of a modification to a WCM, Corps can implement deviations from the approved WCM pursuant to its "Planned Deviation" authority. AR 904 (Cochiti WCM provides that Corps can implement "Planned Deviations" with the advice and the consent of the RGCC).

minnow and the flycatcher were initiated in 1996 and 1997 shortly after the species' listing, and were also implemented in 2000, 2001-2003, 2007, and 2010. AR 3415-18 *see also* AR 3933 (discussing the 2001through 2003 deviation at Jemez Dam that "was used to store and provide conservation water to promote the recovery of the [minnow]" with the advice and consent of the RGCC). In a 2001 brief in the previous "minnow litigation," the Corps acknowledges its ability to implement planned deviation and explains that the deviation at Jemez Dam in the early 2000s "was a planned deviation requiring normal approval, documentation, and coordination for environmental compliance," and that the planned deviation occurred "only after approval of the [RGCC]." *Rio Grande Silvery Minnow v. McDonald*, Civil No. 99-1320, Federal Defendants' Response Brief [ECF Doc. No. 247] at p. 40.

The deviations that occurred in 2007 and 2010 are colloquially known as "fill and spill" deviations, and are particularly important to the continued survival of the minnow and to the conservation of critical habitat for both the minnow and the flycatcher.[12] During such a deviation, water which would ordinarily flow through Cochiti Lake during the spawning season for the minnow is held back in

[12] In 2008, Corps approved deviations from the default Reservoir Regulation Plan for the benefit of the minnow and the flycatcher for years 2009-11. That authorization was extended for years 2012-13 in 2011. AR 2738.

Cochiti Reservoir for a period of up to 10 days. Upon release of the temporarily retained water, the simulated flood flow cues minnow spawning and provides overbank flooding for the benefit of the riverine-riparian system. AR 2738. Corps explains that implementation of a "fill and spill" deviation "facilitate[s] spawning and recruitment flows for the silvery minnow and also . . . provide[s] overbanking opportunities to benefit habitat for the [flycatcher]." AR 3463. These deviations are especially critical in the approximately 25% of the years in which normal runoff in the MRG basin would not result in a flood of sufficient magnitude to cue minnow spawning or to recharge riparian habitat. AR 2212-13.

Importantly, "fill and spill" deviations at Cochiti are considered a "no cost" solution to minnow and flycatcher conservation concerns because they provide significant environmental benefits with the use of an extremely limited amount of water. In light of the increasing scarcity of "supplemental water" sources from the San Juan-Chama Project, "fill and spill" deviations are recognized as the mitigation measure that has the most environmental benefit for the least amount of disruption to water supplies. AR 2209, 3462. Furthermore, the implementation of such deviations do not impair Corps' flood and sediment control operations at its MRG facilities, and do not result in any downstream flood threat. AR 2237-38. The RGCC has exercised the authority preserved to it by the 1948 and 1960 FCAs

to actively encourage and support Corps in its authorization and implementation of such deviations. AR 3933 (the RGCC approves deviations to operations at Jemez in 2001, 2002, and 2003), AR 2256 (the Commission requests a deviation from normal Corps operations in 2007), AR 2342 (the Commission supports Corps' 2009 five-year authorization for deviations).

B. Corps' ESA Section 7(a)(2) consultations with the FWS, enactment of the Minnow Rider, and Corps' partial implementation of the mandatory elements of the 2003 RPA

In recognition of the fact that its MRG operations adversely affect listed species and their critical habitat in th MRG, Corps has formally consulted with the FWS pursuant to the requirements of ESA Section 7(a)(2) on a number of occasions since the species were listed. AR AR 3415-18. Reflecting the fact that Corps' MRG facilities have impacts that are cumulative with the impacts of the Bureau's water operations, and also reflecting that Corps and the Bureau have historically considered the MRG Project a single and unified project of the two agencies, Corps and the Bureau have consulted jointly with the FWS in the past. AR 3415-17.

The last Corps consultation that was carried out to completion was conducted in 2003, and led to the issuance of a BiOp in that year which covered the agencies' joint operations on the MRG through 2013. AR 3417. In that BiOp,

the FWS concluded that on-going operations in connection with the MRG Project jeopardized the continued existence of the minnow and adversely modified its critical habitat. AR 2144-45. The BiOp also concluded that the on-going operations jeopardized the continued existence of the MRG population of flycatchers. AR 2156. To account for that jeopardy, the FWS incorporated an RPA into the 2003 BiOp and explained:

> The Service has developed the following RPA to the March 10, 2003, through February 28, 2013, water operations and river maintenance proposed action that we believe will avoid jeopardy to the silvery minnow and flycatcher and adverse modification to silvery minnow critical habitat.

Corps AR 2157. The RPA prescribes 32 mandatory measures that Corps and the Bureau were required to implement to assure that their MRG Project operations complied with the substantive requirements of ESA Section 7(a)(2) and did not "jeopardize" both species or result in "adverse modification" to critical habitat for the minnow. *See* AR 2156-71, AR 2155 (without the RPA, the operations of Corps and the Bureau on the MRG "are likely to jeopardize the continued survival and recovery of the silvery minnow in its entire occupied range").

The 2003 BiOp and the incorporated RPA received a "legislative imprimatur" when Congress enacted the so-called "Minnow Rider" and related

amendments in 2003, 2004, and 2005.[13] APPX A-20-21, A-23, A-25. In the Minnow Rider, Congress determined that the Bureau could not unilaterally utilize water from the San Juan-Chama Project for the benefit of endangered species in the MRG. However, as to all other elements of the 2003 BiOp's RPA, Congress found that compliance with its requirements would "fully meet all requirements of the [ESA] for the conservation of the [minnow] and the [flycatcher]." APPX A-21.

When Senator Bingaman urged his Senate colleagues to enact the Minnow Rider in 2003, he acknowledged that congressional action "that legislates the sufficiency" of a BiOp "is not insignificant," but he argued that the Rider addressed a critical "need [for] some level of certainty for water users if we are to proceed to address the long-term requirements of the ESA." 149 Cong. Rec. S10896-97 (daily ed. August 1, 2003) (statement of Sen. Bingaman). Importantly for purposes of this case, Senator Bingaman also expressly acknowledged in his floor comments that the RPA endorsed by Congress with the Minnow Rider requires implementation of Corps' "fill and spill" deviations to trigger minnow spawning. *Id.*

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[13] The Tenth Circuit discusses the Minnow Rider, its practical effect on Corps' MRG operations, and its "mooting effect" on the previous round of litigation between the parties in *Rio Gande Silvery Minnow v. U.S. Bureau of Reclamation,* 601 F.3d at 1108-09.

Subsequent congressional authorizations also constitute a "congressional seal of approval" of the 2003 BiOp and RPA, and clearly evidence Congress's intent that Corps participate fully in conservation efforts for the minnow and the flycatcher. In Section 121(a) of the Energy and Water Development Appropriations Act of 2006, Congress specifically stated that "the Secretary of the Army may carry out and fund projects to comply with the 2003 Biological Opinion." APPX A-25. Similarly, in Section 3118 of the Water Resources Development Act of 2007, Congress stated that "the Secretary shall select and shall carry out restoration projects in the [MRG] from Cochiti Dam to the headwaters of Elephant Butte Reservoir" and appropriated $25,000,000 for that specific purpose. APPX A-27. Congress's specific authorization and mandate to Corps to utilize its MRG facilities for the benefit of environment "has the effect of ratifying" Corps' use of its discretionary authorities for the benefit of the minnow and the flycatcher. *State of Missouri,* 526 F.Supp. at 669 n. 3, *see also Young v. TVA*, 606 F.2d 143, 147 (6th Cir. 1979) (same).

Of the various RPA elements incorporated into the 2003 BiOp, three in particular implicated Corps' operations in connection with the MRG Project. Element A required an annual increase in flows between April 15 and June 15 to cue minnow spawning. AR 2160. Element V requires a spring time release of

floodwater "to provide for overbank flooding" in appropriate hydrologic conditions. AR 2167. Corps' various deviations from normal operating criteria at Cochiti Dam were authorized and implemented by Corps – with the encouragement, and advice and consent of the RGCC, as contemplated by the 1948 and 1960 FCAs – to create the required "spawning spike" and overbank flows in the Rio Grande downstream of Cochiti. *See for example* AR 2208 (Corps explains that "fill and spill" deviations at Cochiti Dam response to the requirements of RPA Elements A and V).

Element U of the RPA required Corps to relocate the San Marcial Railroad Bridge by 2008. AR 2167-68. Corps acknowledges that this element of the RPA is "consistent with the scope of the Corps' legal authority and jurisdiction." AR 3419. The objective of this RPA was to enhance riverine-riparian habitat for both the minnow and the flycatcher by facilitating higher volume flood flows from Cochiti. AR 2167-68. Since the functional channel capacity downstream of Cochiti Dam is limited by the low river-spanning railroad railroad bridge at San Marcial, the requirement for relocation and reconstruction of that bridge was intended to increase the channel's flood capacity and thereby permit higher flood flows in the MRG that more closely mimic the natural hydrograph of the river. Corps did not implement RPA Element U.

V. Corps Terminates its "Fill and Spill" Deviations and Terminates its ESA Section 7(a)(2) Consultation with the FWS

On November 12, 2013 Corps informed governmental stakeholders that it would no longer exercise its discretionary authorities to operate its MRG facilities for the benefit of the silvery minnow and the flycatcher. AR 136-37. Corps did not take the position that it lacked statutory authority to implement "fill and spill" deviations, as required by RPA Elements A and V. Rather, the Corps terminated the deviations as a policy matter. *Id.*

Two weeks later, Corps terminated its on-going ESA Section 7(a)(2) consultation with the FWS "in light of new guidance from Headquarters" that mandates "careful legal review to determine whether legal principles are being implemented." AR 127-28. Additionally, Corps' termination letter articulates a concern that it be able to "ensure that we can operate and maintain the [MRG Project facilities] to serve their Congressionally-authorized purposes" – despite the fact that Corps has determined that "fill and spill" deviations do not interfere with flood control operations or increase flood risk. *Id.*

ARGUMENT

As this Court previously recognized, and as discussed above in this Opening Brief, Corps' procedural and substantive obligations under ESA Section 7(a)(2) are triggered (1) if Corps is taking an affirmative action at its MRG facilities that

"may affect" the minnow and the flycatcher and (2) if Corps has discretionary authority to modify its MRG operations for the benefit of those endangered species. Clearly, both of these tests are easily satisfied in this case.

I. Corps' Decision to Terminate ESA Section 7(a)(2) Consultation with the FWS is Arbitrary and Capricious (Sixth Claim for Relief of the Third Amended Complaint)

A. Corps' operations of its Middle Rio Grande facilities may affect the minnow, the flycatcher, and their designated critical habitat

As set out above at pages 30-34 of this Opening Brief, Corps admits that its MRG operations have adversely affected the minnow, the flycatcher, and the riverine-riparian habitat that the species depend upon for essential life phases. *See also* AR 3523. Specifically, Corps' operations generally – and its operations at Cochiti Dam, in particular – have resulted in numerous significant adverse changes to the geomorphology and biological function of the river. Corps operations have caused the river channel to deepen, to narrow, to armor, and to become disconnected from the adjacent flood plan – all to the detriment of the minnow, the flycatcher, and their designated critical habitat. Corps admits that "[t]hese environmental changes have degraded spawning, nursery, feeding, resting, and refugia areas required for species survival and recovery." AR 2227. Additionally, Corps admits that these adverse impacts on the species and their critical habitat are ongoing, and that they "will continue downstream." AR 3448.

In recognition of the indisputable fact that ongoing Corps operations on the MRG "may affect" ESA-listed species and their critical habitats, Corps has consulted with the FWS as to the impacts of those operations under ESA Section 7(a)(2) on multiple occasions after the minnow and flycatcher were listed as endangered species.

In the BA that Corps prepared before it terminated formal consultation with the FWS on November 26, 2013, Corps acknowledged that its MRG operations result in various impacts to the species that trigger the ESA Section 7(a)(2) requirement for formal consultation. In the 2013 BA, Corps admitted that some aspects of its MRG operations are likely to adversely affect the minnow and its critical habitat, and the flycatcher. AR 3523. Corps also determined that other aspects of its MRG operations "may affect, but are not likely to adversely affect" the minnow, the flycatcher, and their designated critical habitat.[14] *Id. see also* AR AR 3473 (Corps acknowledges that its operations on the MRG "have confined the Rio Grande to a narrower and channel and reduced the connectivity with adjacent

[14] As noted above, the FWS has stated that the impacts of Corps' MRG operations trigger the requirement a formal consultation under ESA Section 7(a)(2), and that it does not necessarily agree with all of Corps' effects determinations. AR 3605. Since the FWS has not provided a written concurrence to Corps' "not likely to adversely affect" determinations, the "informal consultation" mechanism set out in 50 C.F.R. § 402.13 is not available and Corps must enter into a formal consultation even as to those operations which Corps characterized as "not likely to adversely affect" operations.

riparian habitat" and that "[t]he loss of low-velocity nursey habitat . . . has likely reduced larval and juvenile recruitment"), AR 3453 (Corps acknowledges that "the Rio Chama below Abiquiu Dam and the Rio Grande downstream of Cochiti Dam are less dynamic rivers than they had been historically" because "[c]hanges in hydrology and geomorphology have reduced the frequency of overbank flows in most of the reaches"). In short, there is no factual dispute as to the adverse impacts that Corps' MRG operations have caused to endangered species and their critical habitats in the MRG.

B. Corps has discretionary authority to modify its Middle Rio Grande operations for the benefit of the minnow and the flycatcher

So long as an agency retains "some discretion" to modify its ongoing actions for the benefit of ESA-listed species, it must undertake a formal consultation under ESA Section 7(a)(2) with the FWS. *Jewell*, 749 F.3d at 784 ("Section 7(a)(2)'s consultation requirement applies with full force so long as a federal agency retains 'some discretion' to take action to benefit a protected species"). Guardians respectfully submits that a review of the language in the FCAs authorizing Corps' facilities on the MRG – together with the other statutory authorities governing Corps operations – leads inescapably to the legal conclusion that Corps does have, at the very least, this modicum of discretionary authority.

Corps argues, as a matter of law, that it does not have such discretionary authority. The parties' dispute on this point is a matter of statutory interpretation which receives *de novo* review by this Court. *State of Missouri*, 526 F.Supp. at 667 (determination of the scope of Corps' discretionary authorities in connection with project operations "is a problem of statutory construction" which "must begin with the language" of the relevant statute), *Wright*, 451 F.3d at 1233-34 (court will give *de novo* review to an agency's construction of a statute).

The Supreme Court's decision in *Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), sets out the framework for judicial resolution of the parties' statutory construction dispute:

> Because this case involves an administrative agency's construction of a statute that it administers, our analysis is governed by *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1987). Under *Chevron,* a reviewing court must first ask "whether Congress has directly spoken to the precise question at issue." If Congress has done so, the inquiry is at an end; the court "must give effect to the unambiguously expressed intent of Congress."
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> . . . . .
>
> In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning – or ambiguity – of certain words or phrases may only become evident when placed in context. It is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." A court must therefore interpret the statute "as a

> symmetrical and coherent regulatory scheme," and "fit, if possible, all parts into an harmonious whole." Similarly, the meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand.

Id. at 1300-01 (citations omitted), *see also United States v. Heckenliable*, 446 F.3d 1048, 1051 (10 Cir. 2006) (holding that judicial constructions of statutes "must give practical effect to Congress's intent, rather than frustrate it"). Categorically, the Supreme Court repudiates statutory constructions that are based on cramped readings of particular statutory provisions and that disregard the statute as a whole and to the congressional intent and purpose which animated the statute:

> Over and over we have stressed that in expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provision of the whole law, and to its object and policy.

United States National Bank of Oregon v. Independent Insurance Agents of America, 508 U.S. 439, 454-55 (1993) (internal quotations and citation omitted) *see also id.* at 455 (holding that "[s]tatutory construction is a holistic endeavor . . . and, at a minimum, must account for a statute's full text, language as well as punctuation, structure, and subject matter"), *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50 , 60 (2004) (holding that "statutory language must be read in its proper context and not viewed in isolation").

Here, application of these principles to the specific FCAs authorizing the MRG Project – together with the general statutory authorities governing Corps'

project operations – leads ineluctably to only one reasonable construction of the relevant FCAs: Corps possesses the discretionary authority to modify its MRG operations for the benefit of endangered species.

First, the plain language of the 1948 and 1960 FCAs makes clear that Congress authorized Corps to operate its MRG facilities for the benefit of the minnow and the flycatcher. *See* pages 20-28 above.

Second, the 1948 and 1960 FCAs must be read against the background of other statutory authorities – including the FWCA and the 1986, 1990, and 1996 WRDAs – in which Congress specifically granted Corps the discretionary authority to modify its project operations for the benefit of fish and wildlife. *See* pages 7-9 above.

Third, courts have routinely construed Corps' discretionary authorities to include the authority to modify project operations to take into account evolving on-the-ground conditions – and even to add new project purposes – so long as the modified operations are not inimical to pursuit of the originally enumerated project purposes. *See* pages 9-12 above.

Fourth, Corps' regulations concerning the modification of existing facilities plainly reflect the fact that it has a "blanket authorization" to add new project purposes for the benefit of ESA-listed species. *See* pages 12-14 above.

Fifth, Corps has operated its MRG facilities since the mid-1990s in a fashion consistent with an interpretation that it possesses discretionary authority to modify MRG operations for the benefit of the minnow and the flycatcher. *See* pages 35-37 above *see also American Rivers*, 271 F.Supp.2d at 252 (holding that "[i]t is hard to believe that the Corps would have participated in this lengthy consultation unless it recognized and accepted its obligations to conform [its operations] to the ESA").

Sixth, passage of the Minnow Rider constituted an endorsement of the 2003 BiOp and RPA and subsequent congressional enactments mandating the use of Corp's MRG facilities for the benefit of the environment further clarify Congress's intent that Corps' facilities on the MRG be utilized to conserve the minnow and the flycatcher. *See* pages 39-41 above.

In a quixotic effort to avoid this inevitable result, Corps will ask this Court to focus its analysis on certain statutory language that it has plucked from the statutory landscape and that it reads in isolation, and without regard for statutory context and congressional purpose, and intent. Corps will argue to the Court that it does not have the discretion to deviate from the Reservoir Regulation Plan set out in the 1960 FCA. This is a "red herring" that overlooks not only general principles of law applicable to all Corps facilities (such as the FWCA and the

various relevant WRDAs), but also the following circumstances unique to the MRG Project: (1) both the 1948 and 1960 FCAs specifically and plainly contemplate the use of MRG Project facilities for fish and wildlife purposes, (2) both the 1948 and 1960 FCAs reserve to Corps the authority to deviate from the Reservoir Regulation Plan developed by the RGCC, so long as the RGCC consents to such deviations, and (3) Congress has specifically endorsed the utilization of Corps' MRG facilities for environmental restoration work, including implementation of the 2003 BiOp and RPA.

In a nutshell, the statutory interpretation urged by Corps in this case is inconsistent with the plain language of the 1948 and 1960 FCAs and is inconsistent with Congress's plain and oft-repeated intent that Corps water developments be operated to advance fish and wildlife concerns, whenever such operations can occur without impairing primary project purposes. Clearly, Congress has "specifically addressed the question at issue": when the 1948 and 1960 FCAs are "read in their context and with a view to their place in the overall statutory scheme," the only reasonable construction of the FCAs is that Corps has discretion to cooperate in the implementation of operational deviations for the benefit of the minnow and the flycatcher. *Brown & Williamson*, 529 U.S. at 1301.

Since the Corps' MRG operations have adverse impacts on the minnow, the

flycatcher, and their critical habitats, and since those operations can be modified for the benefit of endangered species, Corps' decision to terminate formal consultation with the FWS was arbitrary and capricious.

II. Corps' Middle Rio Grande operations jeopardize endangered species and adversely modify their critical habitats in violation of the substantive requirements of ESA Section 7(a)(2) (Seventh Claim for Relief of the Third Amended Complaint)

Various appellate courts – including the Tenth Circuit – have construed the terms "jeopardize" and "adverse modification," as those terms are used in ESA Section 7(a)(2). Unanimously, the courts hold that an action "jeopardizes" a listed species or "adversely modifies" critical habitat whenever the action impairs the species' prospects for recovery and de-listing under the ESA.[15] *Cables*, 509 F.3d at 1321-22 and n.2 *see also National Wildlife Federation v. National Marine Fisheries Service*, 524 F.3d 917, 931-32 (9th Cir. 2008), *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, 378 F.3d 1059, 1069-71 (9th Cir. 2004),

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[15] Of course, an agency is not categorically foreclosed from taking an action that jeopardizes a species or adversely modifies critical habitat. If the agency conducts an ESA Section 7(a)(2) consultation with the FWS as to the impacts of the action and receives a BiOp that includes a "jeopardy" or "adverse modification" conclusion, the agency can nonetheless proceed with the action so long as it implements the terms of the RPA which the FWS incorporates into the BiOp, or applies for and is granted an exemption. *See* page 20 above. In this way, an ESA Section 7(a)(2) consultation – together with implementation of the incorporated RPA – functions as a "safe harbor" for agencies that desire to take actions that would be associated with jeopardy or adverse modification in the absence of mitigating measures prescribed by the FWS.

Sierra Club v. U.S. Fish and Wildlife Service, 245 F.3d 434, 441-43 (5th Cir. 2001). So long as an agency action has the tendency to worsen the plight of an ESA-listed species, it falls within ESA Section 7(a)(2)'s prohibition on jeopardy and adverse modification:

> Agency action . . . 'jeopardize[s]'a species' existence if that agency action causes some deterioration in the species' pre-action condition . . . An agency may still take action that removes a species from jeopardy entirely, or that lessens the degree of jeopardy. However, an agency may not take action that will tip a species from a state of precarious survival into a state of likely extinction. Likewise, even where baseline conditions already jeopardize a species, an agency may not take action that deepens the jeopardy by causing additional harm.

National Wildife Federation, 524 F.3d at 930. As stated by the Tenth Circuit in *Cables*:

> [A]gencies must insure that actions not only prevent the extinction of species but also allow for the recovery of the species, that is, allow the species to increase sufficiently in population that it can be removed from the list of endangered or threatened species.

509 F.3d at 1321.

In this case, the FWS's last analysis of Corps' MRG operations in the context of a formal consultation occurred in 2003. As set out above, the 2003 BiOp that concluded that consultation found that Corps' actions – in concert with others' actions – jeopardized the continued existence of the minnow and the

flycatcher and adversely modified minnow critical habitat.[16] AR 2153-56. Since that time, Corps analyses, and the analyses of others, show that the adverse impacts of its MRG operations continue to occur and are extending downstream. *See* pages 33-34 above. In light of the fact that the minnow's range is now a scant 5% of its historic range in the Rio Grande Basin, any Corps action (1) that tends to exacerbate past impairment and (2) that results in a deterioration of habitat values in relatively unimpaired downstream areas falls on the wrong side of the legal line: simply put, such an action keeps recovery of the species out of reach and tips the species closer towards extinction in violation of the substantive requirements of ESA Section 7(a)(2). Additionally, Corps' failure to implement Element U of the RPA constitutes a violation of the substantive requirements of ESA Section 7(a)(2).

Importantly, this is not a case where Corps is subject to irreconcilable mandates under the pertinent FCAs and the ESA. To the contrary, Corps can fulfill both its flood and sediment control mandates in the MRG under the FCAs and its obligation to conserve endangered species under the ESA. Corps' statutory mandates in these regards, as explained above, are "consistent" and "complementary." *San Luis & Delta-Mendota Water Authority v. Jewell*, 747 F.3d

[16] At the time that FWS issued the 2003 BiOp, critical habitat for the flycatcher did not exist.

581, 640 (9th Cir. 2014). Accordingly, the jeopardy and adverse prohibitions of ESA Section 7(a)(2) apply to Corps' operation of its facilities on the MRG. Since the ESA's prohibitions apply, and since Corps' operations are both factually and legally inconsistent with those statutory prohibitions – absent the operation of a valid BiOp and RPA – Corps is in violation of its substantive duty to avoid jeopardy and adverse modification under the ESA.

CONCLUSION AND REQUEST FOR RELIEF

Congress has repeatedly and emphatically reaffirmed its desire and intent that operations of all federal water resource project – and Corps projects in particular – be integrated with fish and wildlife purposes. 33 U.S.C. § 2316 (Corps "shall include environmental protection as one of [its] primary missions . . . in planning, designing, constructing, operating, and maintaining water resources projects"). As described above, the statutory and regulatory landscape governing Corps operations is pellucidly clear: Corps retains the discretionary authority to modify its existing operations for the benefit of ESA-listed species. Furthermore, Congress's various authorizations for the MRG Project specifically show – beyond a shadow of a doubt – that Congress has always contemplated that Corps will utilize its MRG Project facilities to promote fish and wildlife conservation purposes and that the operation of those facilities can be modified with the advice

and consent of the RGCC.

For more than a decade, Corps acknowledged its discretionary authorities in connection with MRG operations and collaborated with other government stakeholders to modify its MRG operations for the benefit of the minnow and the flycatcher. Now, Corps seeks to thwart the clearly expressed intent of Congress upon the basis of "new guidance from Headquarters" that takes a new – and impermissibly narrow – view of Corps' authority to cooperate in the significant inter-agency efforts that are ongoing to assure the continued survival of endangered species and the protection of their critical habitats in the MRG. Most alarmingly, despite the Supreme Court's admonition that federal agencies take steps to "halt and reverse the trend towards species extinction, whatever the cost," *TVA,* 437 U.S. at 174, the Corps has decided that it will no longer cooperate in the implementation of "no cost" (in Corps' own characterization) spill and fill operations for the benefit of endangered species

Guardians respectfully submits that Corps' effort to thwart congressional intent should be rejected by this Court, and that Corps should be ordered and enjoined to comply with its mandatory duties under ESA Section 7(a)(2). Specifically, Guardians requests that the Court find that Corps' November 26, 2013 termination of ESA consultation with the FWS was arbitrary and capricious,

and that the Court order Corps to re-commence the formal consultation required by ESA Section 7(a)(2). Guardians further requests that the Court find that Corps' actions in connection with its MRG operations jeopardize the continued existence of the minnow and flycatcher and adversely modify the species' critical habitat., since such operations are implemented without the coverage of a BiOp and RPA.

Respectfully submitted this 15th day of December, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that a true and copy of **PLAINTIFF WILDEARTH GUARDIANS' OPENING BRIEF IN SUPPORT OF MOTION FOR REVERSAL OF AGENCY ACTION** was filed through the Court's CM/ECF service on December 15, 2017, and that all parties to this action will be served with said document through CM/ECF.

/s/ Steven Sugarman
Steven Sugarman

CERTIFICATE OF COMPLIANCE

I hereby certify that this Opening Brief in Support of Reversal of Agency Action contains 12, 980 words, as counted in the Word Count feature of WordPerfect X8.

/s/ Steven Sugarman
Steven Sugarman