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 REPLY BRIEF IN SUPPORT OF *OLENHOUSE* MOTION FOR REVERSAL OF AGENCY ACTION

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I. Legislation authorizing the Middle Rio Grande Project dovetails neatly with Congress's "overall statutory scheme" requiring the Corps to integrate environmental protection considerations at *all* federal water control projects

In no uncertain terms, Congress specifically and expressly requires that the Corps "*shall* include environmental protection as one of the primary missions of the Corps of Engineers in planning, designing, construction, operating, and maintaining water resource projects." 33 U.S.C. § 2316. This case arises from the quixotic effort of Defendant U.S. Army Corps of Engineers ("Corps") to disavow its clear statutory duty to integrate environmental concerns into ongoing operation of Middle Rio Grande ("MRG") Project dams and reservoirs.

The overarching statutory mandate to elevate "environmental protection" to one of the Corps' "primary missions" – adopted as part of the Water Resource Development Act ("WRDA") of 1990 – is just one of a series of congressional enactments specifically intended by Congress to assure that federal agencies have the necessary statutory authorities to operate federal water resource projects in a manner that protects the environment generally, and that conserves fish and wildlife resources specifically. The first in this series of enactments was the Fish and Wildlife Coordination Act ("FWCA") of 1958 which specifically vested federal agencies with the authority to construct new federal water control projects – and to modify existing federal water control projects – "to accommodate the

means and measures for . . . conservation of wildlife resources as an integral part of such projects" "with a view to the conservation of wildlife resources by preventing loss of and damage to such resources." 16 U.S.C. §§ 662(a), (c). Subsequently – in the WRDAs of 1986, 1990, and 1996 – Congress enacted laws that further confirm Congress's intent to impose a statutory duty upon the Corps to operate water control projects for the benefit of the environment.

The legislative history of the 1990 WRDA leaves no room for doubt as to the broad and expansive sweep of Congress's exhortation to the Corps to elevate environmental protection concerns to one of the agency's primary missions. A Senate Report on that particular Act states as follows:

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

S.Rep. No. 333, 101st Cong., 2nd Sess. (1990) (emphasis added) *appearing at* 1990 WL 258953. Plainly and unambiguously – and for more than 50 years now – Congress has repeatedly made clear its unwavering intent that all federal water resource projects be operated in a way that enhances environmental protection and that minimizes damage to wildlife resources.

Heeding Congress's clear statutory mandate, the Corps has promulgated a

raft of regulations that are specifically aimed at assuring the incorporation of environmental protection concerns into the operation of Corps water resource projects. Amongst those regulations is one that specifically addresses the situation where a Corps project was initially authorized by Congress to serve purposes other than environmental protection and wildlife conservation.[1] It states as follows:

> Further Congressional authorization is not required to add municipal and industrial water supply, water quality, and recreation and fish and wildlife purposes if the related revisions in regulation would not significantly affect operation of the project for the originally authorized purposes.

Corps Environmental Regulation 1165-2-119 at ¶ 8(c) *see also* Corps Engineering Pamphlet 1165-2-1 at ¶ 11-7 (water control plans governing operations at the 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*") (emphasis added).

Taken together, the statutes and regulations governing Corps operations and environmental protection constitute a carefully and deliberately constructed bulwark that protects the environment generally – and wildlife specifically – from undue and unnecessary environmental harm associated with the operation of federal water projects. Consistent with the clearly expressed statutory mandate

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[1] The primary purposes of the MRG Project are flood and sediment control, and ancillary purposes include fish and wildlife conservation.

and its implementing regulations, Federal courts have unanimously held that the Corps has not only the authority – but also the duty – to assure that the Corps' operations at its water control facilities are modified to account for the conservation needs of ESA-protected species. *See for example Miccosukee Tribe v. U.S. Army Corps of Engineers*, 716 F.3d 535, 541-42 (11th Cir. 2013), *Raymond Proffitt Foundation v. U.S. Army Corps of Engineers*, 343 F.3d 199, 205-07 (3rd Cir. 2003), *In re: Operation of the Missouri River System*, 363 F.Supp.2d 1145, 1153 (D.Minn. 2004), *Raymond Proffitt Foundation v. U.S. Army Corps of Engineers*, 128 F.Supp.2d 762, 770-71 (E.D. Penn. 2000), *American Rivers v. U.S. Army Corps of Engineers*, 271 F.Supp.2d 230, 252-53 (D.D.C. 2003).

Despite the absolute clarity of Congress's intent, the Corps endeavors to disavow its statutory environmental protection obligations in this case. Specifically, and notwithstanding the general statutory scheme that is inconsistent with its litigation position, the Corps argues that it lacks the discretionary authority to modify water control operations at its MRG Project dams and reservoirs for the benefit of the Rio Grande silvery minnow and the southwestern willow flycatcher.

The Corps' argument in this regard is a textbook example of impermissible cramped textual literalism. It is premised entirely on isolated language included in

the 1948 and 1960 Flood Control Acts, and it disregards the remainder of those Acts' statutory language. As importantly, the Corps' interpretation ignores the broader statutory context in which the Acts exist. "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." *F.D.A. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (quotations and citation omitted). In this case, the Corps' so-called interpretation of the relevant Flood Control Acts is inconsistent with – and does violence to – Congress's clearly expressed intent regarding the operation of federal water control projects, and therefore cannot withstand judicial review. *See* Opening Brief at 45-51.

There is no dispute as to the relevant facts. Accordingly, this case presents a pure issue of law for resolution: whether the Corps has the discretionary authority – pursuant to the statutory and regulatory scheme – to operate its MRG Project dams and reservoirs for the benefit of the minnow and the flycatcher, so long as those wildlife conservation operations do not impair the flood control and sediment control functions of those dams and reservoirs? Plaintiff WildEarth Guardians ("Guardians") respectfully submits that the answer to this question is clearly in the affirmative, and that judgment should therefore be entered in its

favor on its claims against the Corps in this matter.[2]

II. There is no dispute as to the relevant factual circumstances

The Corps does not dispute the relevant factual circumstances, as they were set out by Guardians in its Opening Brief in this case.

First, the Corps does not dispute that operation of its MRG Project dams and reservoirs – and particularly the construction and ongoing operation of Cochiti Dam – has had a significant adverse biological impact to the minnow, the flycatcher, and their designated critical habitats. There is no dispute about the fact that the adverse impacts associated with Corps operations on the MRG are continuous and ongoing, and that the river miles of riverine-riparian habitat adversely affected by those operations continues to expand. *See* Opening Brief at 28-34.

Second, the Corps does not dispute the fact that it has the *physical* and *engineering* capability to operate its MRG Project dams and reservoirs for the

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[2] The Corps takes Guardians to task for not accounting for the arguments that the Corps incorporated into its post-decisional "Reassessment." Corps at 15, 36. The Corps made the challenged decision to terminate its Section 7(a)(2) consultation in November of 2013, and the Reassessment was not issued until June of 2014. The Court may not consider the Corps' post-decisional explanation of its decision to terminate consultation; rather, it must limit its consideration to the administrative record evidence that was before the Corps at the time that the decision was made. *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 704 (10th Cir. 2009).

benefit of the minnow and the flycatcher, and that such operations are considered a "no cost" solution to minnow and flycatcher conservation concerns because they provide significant environmental benefits to those species and their habitats with the use of an extremely limited amount of water. *See* Opening Brief at 34-37.

Third, the Corps does not dispute that it *has*, in fact, deviated from the reservoir regulation schedule set out in the 1960 FCA on a number of occasions – in 1996, 1997, 2000, 2001, 2002, 2003, 2007, and 2010, at least – pursuant to the Corps' "planned deviation" authority, and that these deviations were successful at accomplishing their habitat improvement and conservation objectives.[3] *See*

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[3] In a *post hoc* rationalization which is not supported by even a scintilla of evidence in the administrative record, the Corps argues that its past "fill and spill" deviations were authorized by a "special congressional study authority" incorporated into the Omnibus Appropriations Act of 2009. Corps at 34-35. This is a red herring argument that is easily dispensed with. First, it is well settled that a court will exclude from its consideration "*post hoc* rationalization[s] concocted by counsel in briefs. *New Mexico*, 565 F.3d at 704. Second, the Corps' newly minted argument overlooks the fact that the Corps deviated from its normal operating schedule at Jemez and Cochitit dams in many years *before* before the 2009 Omnibus Appropriations Act was enacted. Indeed, the very same attorney who represents the Corps in this action explained in a 2001 brief that past deviations at the Corps' MRG Project facilities required nothing more that "normal approval, documentation, and coordination for environmental compliance," and were not dependent on any special congressional study authority. *See* Opening Brief at 35. Third, none of the planning or authorization documents for the post-2009 deviations so much as even mention the 2009 Omnibus Appropriations Act. Fourth, the Corps letter of November 12, 2013 – in which the Corps advises other members of the Middle Rio Grande Endangered Species Collaborative Program that it will no longer collaborate in the implementation of "fill and spill" deviations – fails to so much as even mention

Opening Brief at 34-35.

Fourth, the Corps does not dispute that the operation of its MRG Project dams and reservoirs for the benefit of the minnow and the flycatcher – through, for example, "fill and spill" deviations at Jemez and/or Cochiti dams – is *consistent* with and *complementary* to the facilities' primary flood and sediment control purposes, and does not dispute that such operations *do not* impair the flood control or sediment control operations at those facilities. *See* Opening Brief at 35-37.

III. The Corps' interpretation of the statutes specifically authorizing the operation of its physical facilities for wildlife conservation is irrational, arbitrary, and capricious because it is clearly inconsistent with congressional intent

In its September 23, 2015 Memorandum Opinion and Order denying the Corps' Motion to Dismiss this case, this Court held as follows:

> Plaintiff has alleged that Defendant Army Corps of Engineers' ongoing operation of its Middle Rio Grande 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 [ESA].

ECF Doc. No. 69 at 14. Here, as discussed above, the Corps concedes (1) that its

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the expiration of any special congressional study authority as the justification for that decision. AR 136. And fifth, Senator Bingaman acknowledged on the Senate Floor in 2003 that the Corps already had the discretionary authority – at that time – to deviate from its normal operations for the benefit of the minnow and the flycatcher. *See* Opening Brief at 39.

ongoing operation of the MRG Project facilities is an affirmative action, (2) that the affirmative action has adverse effects on the minnow, the flycatcher, and their formally designated critical habitat, (3) that it has the physical and engineering capability to modify the operations of its MRG Project facilities for the benefit of the species, and (4) that such conservation-focused operations do not in any way impair the flood or sediment control operations of the Corps' MRG Project facilities. Under this set of circumstances, resolution of this case hinges entirely on whether the Corps' statutory interpretation of its discretionary authorities can withstand judicial review. The Corps' statutory interpretation must fail because it is clearly inconsistent with congressional intent.

In its Response Brief, the Corps asserts that its interpretation of the scope of its discretionary authorities should be reviewed pursuant to *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Corps Response Brief ("Corps") at 22-23. However, *Chevron* deference is unwarranted in this case since the Corps' newly minted position with respect to its discretionary authorities was not the product of "notice-and-comment rulemaking or formal adjudication," and was not otherwise developed pursuant to "a relatively formal administrative proceeding tending to foster . . . fairness and deliberation." *United States v. Mead Corp.*, 533 U.S. 218, 230 (2001). Accordingly, the Corps' interpretation is

entitled to – at most – *Skidmore* deference in which a court's review of an interpretation is guided by "the degree of the agency's care, its consistency[4], formality, and relative expertness, and . . . the persuasiveness of the agency's position." *Id.* at 228 *citing Skidmore v. Swift and Co.*, 323 U.S. 134, 139-40 (1944).

Regardless of whether this Court reviews the Corps' statutory interpretation pursuant to *Chevron* or *Skidmore*, however, the result is the same. Under *Chevron*, the Corps' interpretation must be rejected because it fails at *Chevron* "Step One": it is simply inconsistent with plainly expressed congressional intent, ignores the statutory context, and runs counter to Congress's "overall statutory scheme" for the operation of federal water control projects. And under *Skidmore*, the Corps' interpretation must be rejected because for that same reason, and also because it lacks other indicia of reliability and is generally unpersuasive.

In reviewing an agency's interpretation of a statute – whether under *Chevron* or under *Skidmore* – the touchstone for judicial review is congressional intent. As Guardians explains in its Opening Brief, an agency's statutory

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[4] Insofar as the "consistency" of the Corps' interpretation is concerned, Guardians respectfully submits that this Court's evidentiary ruling prohibiting Guardians from adducing evidence of the Corps' prior position on the interpretation issue – including a 2007 legal opinion and evidence of the Corps' recurrent deviations at MRG Project facilities – precludes this Court from engaging in a meaningful assessment of the Corps' consistency.

interpretation must be rejected by a court if it is inconsistent with clearly expressed congressional intent:

> 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.

Opening Brief at 46 *citing F.D.A.*, 529 U.S. at 132. Guardians also explains that reviewing courts have been repeatedly admonished by the Supreme Court to refrain from focusing narrowly on isolated statutory terms and/or phrases in discerning congressional intent under *Chevron* "Step One":

> 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 132-33 *see also United States v. American Trucking Associations, Inc.*, 60 S.Ct. 1059, 1063-64 (1940) ("[t]o take a few words from their context and with them thus isolated to attempt to determine their meaning, certainly would not contribute greatly to the discovery of the purpose of the draftsmen of a statute"),

Fish v. Kobach, 840 F.3d 710, 736 (10th Cir. 2016) ("[i]t is well settled that we are obliged to construe cognate statutory provisions harmoniously, if possible").

Application of this fundamental rule of statutory construction is dispositive of the legal dispute in this case. The Corps' entire argument disregards the overall statutory scheme concerning the operation of federal water control projects, and is nothing more than an exercise in unmoored and non-contextual textual literalism that focuses on isolated words of the 1948 Flood Control Act ("FCA") (which authorized the MRG Project generally) and the 1960 FCA (which authorized the construction of Cochiti and Galisteo Dams specifically). Specifically, the Corps argues that the mere presence of isolated language in those Acts to the effect that the facilities are to be used "solely" for flood and sediment control activities permits this Court (1) to disregard and ignore the inconsistent provisions of the same Act which expressly contemplate deviations from the default operating schedule and (2) to disregard the "overall statutory scheme" created by Congress to govern the operation of federal water control projects. *See for example* Corps Response Brief at 5 (arguing that the 1948 and 1960 FCAs "strictly limit the Corps' operations 'solely' to flood and sediment control"). This argument – which focuses exclusively on the use of the word "solely" in the congressional texts to the exclusion of all other indicia of congressional intent – must be rejected by the

Court as it is clearly at odds with well settled rules regarding statutory interpretation.

The Corps argues that isolated language of the 1948 and 1960 FCAs – and, specifically, the use of the word "solely" in those Acts – prohibits the operation of its MRG Project facilities for environmental protection and wildlife conservation purposes, even in those instances where such operations would not impair the flood and sediment control purposes of the facilities. This reading is historically inaccurate and misleading. It is true that the 1948 FCA does contain isolated language that limits the operation of MRG Project dams and reservoirs to flood control purposes. However, pursuant to the express language of the Act, this limitation applies *only* when New Mexico is in a debit situation under the Rio Grande Compact. *See* Appx. A-2 ("[a]t all times when New Mexico shall have accrued debits . . . all reservoirs constructed as a part of the project shall be operated solely for flood control except as otherwise required by the Rio Grande Compact"). The clear implication is that the "solely" limitation incorporated into the 1948 FCA *does not* apply when New Mexico is in a credit situation *vis-a-vis* the other Compact states. And while it is also true that the 1960 FCA broadens the "solely" limitation to all Compact debit and credit statuses, the inclusion of that broader language was advisedly and deliberately coupled with specific language

that expressly provides for deviations from the default operating procedures upon the advice and consent of the Rio Grande Compact Commission ("RGCC"). A leading commentator on the history of the MRG Project describes how the textual language of the 1948 and the 1960 FCAs specifically reserve to the Corps the discretion to modify MRG Project purposes and operations upon the advice and consent of the RGCC:

> Significantly, the 1960 Act drops the language restricting the reservoirs to flood control so long as New Mexico is in a debit position and provides simply that all reservoirs shall be operated "solely for flood control and sediment control." The Act does not seem to allow New Mexico to use the reservoirs for non-flood and sediment control purposes even when it is in a credit position. *However, the change in language in the 1960 Act limiting the reservoir purposes to "flood control and sediment control" is part of the Reservoir Regulation Plan, which allows departures with the advice and consent of the Rio Grande Compact Commission.*
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> . . . .
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> Importantly, the [Reservoir Regulation] Plan represents an operation and regulation agreement among the 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.*
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> . . . .
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> 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.* The downstream users would carefully scrutinize any

possible deviation of reservoir use . . . .

S. Kelly, et al., *History of the Rio Grande Reservoirs in New Mexico: Legislation and Litigation,* 47 Natural Resources Journal 525 (2007) at 560, 562, 563, *see* AR 3923, 3925, 3926.[5] Accordingly, the Corps' so-called "plain language" interpretation ignores the fact that both the 1948 and 1960 FCAs – when read in their entirety – specifically contemplate the use of the MRG Project facilities for purposes other than flood and sediment control.

Additionally, the Corps' argument sweeps under the rug the critical fact that the 1960 FCA contains a specific and express provision contemplating deviations from the operating criteria set out in that Act upon the advice and consent of the RGCC. In an effort to "explain away" this express deviation authority in the FCA, the Corps feebly argues that the deviation "provision is one of limitation, not authority." Corps at 26. But this is a distinction without a difference. If the deviation provision were one of "limitation" and not "authority," as argued by the Corps, it would nonetheless presuppose that a deviation authority

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[5] Furthermore, the fact that the Corps has long acknowledged that it *does* have the authority to deviate from the regulation schedule incorporated into the 1960 FCA is clearly reflected in the Corps' 1963 "Master Flood Control Regulation Manual: Rio Grande Basin Above Elephant Butte Reservoir." There, the Corps acknowledges that the reservoir regulation schedule incorporated into the 1960 FCA was approved by the RGCC, and states that "[a]ny variation from these regulations must be unanimously approved by the Compact Commission." AR 147, 194.

exists that requires congressional constraint through a "limitation" provision. Whether the (1) *authorizes* deviations from the default operating schedule or (2) *limits* deviations to those that are approved by the RGCC, the net practical effect is the same. Either way, the Corps' admission that the 1960 FCA incorporates a deviation authority is fatal to its argument that it does not have the discretionary authority to modify its operations at its MRG Project facilities.

Accordingly, the Corps is simply incorrect when it argues that the plain language of the 1948 and the 1960 FCAs divests it of all discretionary authority to operate its MRG Project facilities for purposes other than flood and sediment control. The Corps' statutory interpretation is based on a cramped reading of isolated words and phrases that it has plucked from the statutory texts, and requires a reviewing court to disregard the counterpart statutory language that qualifies the Corps' selected words and phrases, and all other expressions of congressional intent regarding the operation of federal water control projects for environmental protection and wildlife conservation purposes. This is precisely the sort of cramped statutory interpretation that has been repeatedly rejected by reviewing courts.

IV. The statutory interpretation canon concerning specific and general statutory language does not save the Corps' argument in this case

As Guardians has amply explained in both its Opening Brief and in this

Reply Brief, Congress has plainly and repeatedly articulated that its overarching policy and intent is that federal water control projects – including those water control projects already in existence – be operated to promote environmental protection and wildlife conservation purposes. The Corps argues that Congress's various enactments along these lines are simply irrelevant because they apply "if, and only if, these provisions are capable of implementation within specific project authority." *See* Corps at 28. This argument is absurd. In fact, the specific purpose animating Congress's concern with the management of federal water control projects is that congressional authorizations for specific projects routinely failed to provide expressly for environmental protection and wildlife conservation purposes. Insofar as the modification of currently existing project operations is concerned, it was Congress's specific intent to rectify this omission by enacting a blanket authorization for such purposes that applies to *all* federal water control projects.[6]

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[6] Of course, notwithstanding the Corps' arguments to the contrary, the evidentiary record in this case clearly shows that Congress intended that the MRG Project would serve fish and wildlife conservation purposes ancillary to the project's primary flood and sediment control purposes. *See* Opening Brief at 27-28. In an effort to refute this fact, the Corps points to the fact that the 1948 FCA did not authorize the Chiflo Dam recommended by the Corps and that the Chamita Dam was renamed and moved. Response Brief at 26-27. However, there is simply no rational connection that the Corps can provide between these project changes and the underlying intent of Congress to authorize the MRG Project as described by the Corps in its 1948 Report – which sets out a number of project

An irrational result would occur if this Court accepts the Corps' argument that Congress's various enactments regarding the management of federal water control projects for environmental protection and wildlife conservation purposes do not apply to the MRG Project facilities because Congress has already provided specific direction for the operation of those facilities in the 1948 and 1960 FCAs. *All* federal water control projects are specifically authorized for some purpose or another by Congress. Pursuant to the Corps' argument, the mere articulation of those specifically designated purposes at specific projects would always trump and eviscerate Congress's oft-repeated statements of purpose and intent regarding the importance of integrating environmental protection into federal water control project operations. In other words, the Corps' so-called statutory interpretation argument renders completely null and void Congress's various enactments requiring the integration of environmental protection and wildlife conservation concerns into the management of *all* federal water control projects, and subverts Congress's clearly expressed intent. This is an irrational result that cannot be countenanced by this Court.

V. The Corps erroneously argues that its claims in this lawsuit were previously adjudicated by Judge Parker

In its Response Brief, the Corps recycles an argument that it previously lost

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purposes including fish and wildlife conservation.

on its Motion to Dismiss. Specifically, the Corps still hopes to convince the Court that Guardians' claims in this lawsuit were previously adjudicated – and rejected – by Judge Parker. *See* Corps at 15, 36 n. 11. This is patently incorrect. In briefing on the Corps' Motion to Dismiss, Guardians explained to the Court that Judge Parker dealt specifically and exclusively with the issue of whether or not the Corps' "emergency deviation" authority vested the Corps with the discretionary authority to operate the MRG Project facilities for the benefit of the minnow and the flycatcher. *Rio Grande Silvery Minnow v. Keys*, 469 F.Supp.2d 973, 997-98 (D.N.M. 2002) *vacated as moot sub nom. Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096 (10th Cir. 2010). As this Court correctly held, "Plaintiff does not pursue this argument herein." ECF Doc. No. 69 at 14.

VI. The Corps' argument that it cannot be obligated to consult on an action that is not taking is a red herring argument that simply misses the mark

As it did in proceedings on its failed Motion to Dismiss, the Corps argues in its Response Brief that its discretionary authority to operate its MRG Project facilities for the benefit of the minnow and the flycatcher – if such authority exists – does not trigger a consultation obligation under Section 7(a)(2) of the Endangered Species Act because it is *not* exercising that discretion. Response Brief at 20-21. The Corps' resurrected argument is a strawman plainly intended to obfuscate the true nature of Guardians' claims and to confuse the Court.

In this lawsuit, Guardians does *not* allege that the Corps' unexercised discretion to implement deviations for the benefit of the minnow and the flycatcher at its MRG Project facilities is the "trigger" for ESA Section 7(a)(2) obligations. Rather, Guardians explains that the consultation trigger in this case is an *affirmative action* by the Corps: the ongoing and continuous operation of MRG Project dams and reservoirs, which the Corps itself has found continue to adversely affect the minnow and the flycatcher. Opening Brief at 30-34, 43-45. The Corps has not disputed the fact that such affirmative operations are ongoing, and has not disputed the fact that such affirmative operations have significant adverse effects on the minnow, the flycatcher, and their critical habitats. For this reason, the Corps' argument that unexercised agency discretion does not trigger ESA consultation obligations is simply inapposite in this case.

VII. The Corps misrepresents the facts when it argues that it "has never taken the position" that it has discretion to conduct deviations at its MRG Project facilities for the benefit of the minnow and the flycatcher

The Corps departs from the truth when it argues that it "has never taken the position it had ongoing discretion to conduct deviations" at the MRG Project dams and reservoirs for the benefit on downstream species. *See* Response Brief at 36 n. 11. This misrepresentation requires a direct response by Guardians.

As this Court is aware, the Corps *did* previously take the position that it had

the authority to conduct deviations from default operating schedules for the benefit of the minnow and the flycatcher. Indeed, it is in recognition of this long-acknowledged discretionary authority to deviate for the benefit of listed species that (1) the Corps' Master Flood Control Manual for the MRG Project and the Corps' Water Control Manual for Cochiti Dam expressly incorporate planned deviation provisions, requiring the advice and consent of theRGCC, (2) the Corps previously engaged in a series of ESA Section 7(a)(2) relative to the minnow and the flycatcher beginning in the late 1990s, and (3) the Corps in fact recurrently deviated from operations at its MRG Project facilities for the benefit of the species. The Corps' effort to disavow its past interpretation of its discretionary authorities, and its exercise of those authorities, should not be endorsed by this Court.[7]

VIII. The ESA's requirements are *not* limited to those situations where a federal agency acts unilaterally to conserve an endangered species

Running throughout the Corps' Response Brief is a "backup" argument: the Corps argues that even if it does have discretionary authority to modify MRG

[7] Respectfully, and cognizant of the Court's prior evidentiary ruling, Guardians also reminds the Court that when the issue of the Corps' discretionary authority to deviate for the benefit of listed species at the MRG Project facilities was addressed by a Corps attorney in 2007, the Corps attorney concluded that the Corps *does* have such discretionary authority. So far as Guardians is aware, this is the only opinion issued on the issue by a Corps attorney outside of the context of litigation.

Project facility operations for the benefit of the minnow and the flycatcher, the existence of that discretionary authority has no practical consequences under the ESA because it must be exercised in concert with the RGCC. *See for example* Corps at 17 ("[t]o the extent that the Corps otherwise enjoyed any authority to implement deviations under [the 1960 FCA] or any other, the prerequisite RGCC consent manifestly divests the Corps of unilateral discretion"), 18 (same), 26 ("the plain language of the 1960 FCA" "plac[es] the ultimate discretionary authority over possible deviations in the hands of the RGCC, not the Corps"). The Corps states the gist of this argument as follows: "If a federal agency lacks unilateral discretion over an action, that action is not subject to ESA requirements." Corps at 18. And in support of this novel argument, the Corps states that "courts have consistently held that federal agencies do not have a duty to consult over actions that the agencies could not take without the consent or agreement of a third party." *Id.*

The Corps is simply wrong. While the Corps refers to "consistent" decisions on the issue, it fails to cite to even a single case in which a court has found that *only* unilateral agency actions are subject to ESA requirements. The Corps' lead case in support of its position is *Platte River Whooping Crane v. FERC*, 962 F.2d 27 (D.C. Cir. 1992), which is *not* apposite here. In *Whooping*

Crane, the court dealt with a situation in which a private party that owned a FERC-licensed hydroelectric power plant refused to cooperate with FERC to establish environmental flows in the Platte River. And since the express language of the subject FERC license permitted FERC to modify the license terms *only* "upon mutual agreement," the court held that there was nothing that FERC could do under the ESA to bring the obdurate private party to the table. In these circumstances, the court held that the ESA "directs agencies to 'utilize their authorities' to carry out the ESA's objectives; it does not expand the powers conferred on an agency by its enabling act." *Id.* at 34. Thus, the *Whooping Crane* decision stands only for the proposition that the ESA does not vest agencies with a "superpower" that enables them to force private parties to take actions that they are not required to – and do not desire to – take. The other cases cited by the Corps in support of this argument are all to the same effect: they all deal with situations where a private party refused to cooperate with a federal agency in the modification of some permit or license.

Importantly, the administrative record evidence here shows that this case is nothing like *Whooping Crane* or the other cases cited by the Corps. Here, the RGCC has *not* indicated that it will withhold its agreement to modifications of the Reservoir Regulation Plan for the benefit of the minnow and the flycatcher. To

the contrary, the record shows that the RGCC has not only acceded to the Corps' past operation deviations – it has also *encouraged* the Corps to deviate from the default operating schedule for the benefit of the listed species and their critical habitats. Unlike in *Whooping Crane*, in this case, it is the *Corps* – and *not* regulated third parties – that refuses to take action for the benefit of ESA-listed species.[8] Case law regarding an agency's authority under the ESA to obligate a recalcitrant party to modify its actions for the benefit of listed species is simply inapposite here.

Furthermore, acceptance of the Corps' argument on this point would lead to absurd results. Federal agencies, including the Corps, often times engage in coordinated and collaborative actions to conserve ESA-listed species. Indeed, Corps Engineering Regulation 1165-2-501 provides as follows in pertinent part:

> Ecosystem restoration and protection initiatives should be conceived in the context of broader watershed or regional water resources management programs and objectives, which may involve contributive actions by other Federal and non-Federal agencies and other stakeholders.

Id. at ¶ 6(c). There is simply no policy reason – and certainly no justification

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[8] The Corps' suggestion that it is the RGCC's intransigence which prevents it from exercising its discretionary authority to implement "fill and spill" deviations at the MRG Project facilities is simply false. Indeed, a letter from the Corps *to* the RGCC makes it abundantly clear that it is the Corps itself that is the intransigent party. AR 136.

under the ESA itself or the case law construing the ESA – for this Court to blaze a new trail in ESA jurisprudence, and to hold that *only unilateral* federal agency actions fall within the scope of the ESA. Such a holding would constitute a substantial modification of the ESA, and would significantly and irrationally narrow the ESA's application. The Corps has failed to articulate any legal, policy, or factual reason for this Court to limit the sweep of the ESA's application so severely.

IX. There is no *NAHB* bar to consultation in this case

Just as it did in proceedings on its Motion to Dismiss, the Corps argues here that the decision in *National Association of Home Builders* v. *Defenders of Wildlife* ("*NAHB*"), 551 U.S. 644, 667 (2007), justifies its decision to forego Section 7(a)(2) consultation as to the impacts of its MRG Project operations on the minnow and the flycatcher. This argument must fail.

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." *Id.* at 670 (emphasis in original). That is, if an agency has *any* discretion whatsoever to modify its actions for the benefit of endangered species, the existence of that discretion triggers ESA requirements. *See for example*

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"). In *NAHB,* the substantive statute at issue divested the U.S. Environmental Protection Agency of *all* discretionary authority. In this case on the other hand, as explained in Guardians' Opening Brief and in this Reply Brief, the Corps does have discretionary authority to modify its MRG Project operations for the benefit of the minnow and the flycatcher. Accordingly, those aspects of the *NAHB* decision which deal with circumstances where agencies have no statutory discretion whatsoever are not applicable here.

X. The appropriate remedy on the substantive jeopardy claim

Guardians agrees with the Corps that the procedural and substantive Section 7(a)(2) claims in this case "merge into a single claim," but disagrees as to the correct remedy. Corps at 39-40. The Corps proposes that this case be remanded so that it can consult with the FWS pursuant to Section 7(a)(2). Guardians agrees that this is appropriate, but also inadequate. This Court should additionally issue an injunctive ordering the Corps to implement its discretionary authorities authorities to the fullest extent possible, in collaboration with other interested parties.

XI. Conclusion

In light of the overall statutory scheme, the Corps' interpretation of its discretionary authorities in this case is irrational, arbitrary, and capricious. It should be declared to be in violation of the procedural and substantive requirements of ESA Section 7(a)(2), and enjoined to implement its discretionary authorities to the fullest extent possible on behalf of the minnow and the flycatcher in cooperation and collaboration with other interested parties.

Respectfully submitted this 15th day of March, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that a true and copy of **PLAINTIFF WILDEARTH GUARDIANS' REPLY BRIEF IN SUPPORT OF MOTION FOR REVERSAL OF AGENCY ACTION** was filed through the Court's CM/ECF service on March 15, 2018, 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 Reply Brief in Support of Reversal of Agency Action contains 6,494 words, as counted in the Word Count feature of WordPerfect X8.

/s/ Steven Sugarman
Steven Sugarman