



August 20, 2014

Via Certified Mail Return Receipt Requested

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

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

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

RE: Notice of Intent to Sue the Middle Rio Grande Conservancy District for Violations of the Endangered Species Act

Dear Directors Lente, Oglesby, Abeita, Kelly, Dunning, Paiz and Sichler, Chief Engineer Shah, Secretary Jewell, Director Ashe and Regional Director Tuggle:

In accordance with the 60-day notice requirement of Section 11(g) of the Endangered Species Act (“ESA” or “Act”), 16 U.S.C. § 1540(g), you are hereby notified that WildEarth Guardians (“Guardians”) intends to bring a civil action against the Middle Rio Grande Conservancy District (“District”), through the above-named officials, for violating section 9 of the ESA, 16 U.S.C. § 1538 and its implementing

regulations, 50 C.F.R. § 402 *et seq.* by illegally causing ongoing and imminent future “take” of the endangered Rio Grande silvery minnow (*Hybognathus amarus*) and Southwestern willow flycatcher (*Empidonax traillii extimus*). *See* 16 U.S.C. § 1538(g).

Specifically, the District has engaged in past and on-going water management actions and activities including diversion of water from the Rio Grande, thereby depleting flows and dewatering the river to a significant extent, having the effect of harming, harassing, wounding, and killing silvery minnows and willow flycatchers. Further, such actions and activities cause significant habitat modification and degradation resulting in actual death and injury of silvery minnow and willow flycatcher by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering. *See Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 516 U.S. 687 (1995); *Palila v. Hawaii Dept. of Land & Natural Resources*, 649 F.Supp. 1070 (D. Haw. 1986, *aff’d* 852 F.2d 1106 (9th Cir. 1988)); 50 C.F.R. §17.3. Accordingly, such diversions and dewatering of the Rio Grande represent “take” of the listed species.¹

As asserted in Guardians’ notices submitted to the U.S. Bureau of Reclamation (“Reclamation”), on May 13, 2013, February 4, 2014 and May 9, 2014 (“Guardians’ Notices”) and in its lawsuit filed on July 24, 2014 in the federal district court², Reclamation has the discretionary authority to re-operate dams and diversion structures in the Middle Rio Grande to reduce water deliveries to the District for the benefit of the silvery minnow and willow flycatcher and the failure to do so has and will continue to result in “take” of the listed species in violation of section 9 the ESA. However, independent of Reclamation exercising its duties under the ESA, the District must operate its system in a way that does not “take” the silvery minnow and willow flycatcher. Guardians provides this notice to the District of its separate and independent violations of section 9 of the ESA.

I. ESA Requirements

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

Under the mandates of the Act, the Secretary of the Interior is responsible for promulgating regulations listing “endangered” and “threatened” species of animals and plants based on specific criteria listed in section 4(a)(1), and to designate “critical habitat” for the listed species. 16 U.S.C. § 1533. Section 9 of the ESA prohibits the “take” of all listed endangered species. 16 U.S.C. § 1538(a)(1)(B). The term “take” means “to harass, harm, . . . wound, kill, trap, [or] capture” an endangered species. *Id.* § 1532(19).

The terms “harass” and “harm” are further defined in the ESA’s implementing regulations. “Harass” means “an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which

¹ The District’s water management actions are described in more detail in Reclamation’s Amended Joint Biological Assessment (“BA”) of January 2013 at 41-48.

² On July 24, 2014, Guardians filed Case No. 1:14-cv-00666 in the U.S. District Court in the District of New Mexico pursuant to Guardians notices.

include, but are not limited to, breeding, feeding, or sheltering.” 50 C.F.R. § 17.3. “Harm” means “an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.” *Id.* Congress intended to define ‘take’ “in the broadest possible manner to include every conceivable way in which a person could ‘take’ or attempt to ‘take’ any fish or wildlife.” *Babbitt*, 515 U.S. at 704.

It is also unlawful for any “person” to “cause [an ESA violation] to be committed,” and thus the ESA prohibits a governmental agency from authorizing any activity resulting in take. *See* 16 U.S.C. § 1538(g); *see also, e.g., Strahan v. Coxe*, 127 F.3d 155, 163 (1st Cir. 1997). “The ESA’s prohibition against “takes” governs both the actions, and failure to act, by all “persons,” including any “officer, employee, agent, department, or instrumentality of . . . any State.” 16 U.S.C. § 1532(13).

The ESA provides two separate means for allowing “take” of a protected species notwithstanding the prohibition of section 9: first, if the U.S. Fish and Wildlife Service (“Service”) issues a biological opinion and incidental take statement (“ITS”) under section 7(b)(4)(B), 16 U.S.C. §1536(b)(4)(B), and, second, if the Service issues a habitat conservation plan (“HCP”) and incidental take permit (“ITP”) pursuant to section 10, 16 U.S.C. §1539(a). Without either a valid ITS or HCP/ITP from the Service covering the activity’s take of an endangered species, no person is authorized to “take” *any* members of that species.

The ESA provides for citizen enforcement of the provisions of the Act. To enforce the “take” prohibition of section 9, 16 U.S.C. § 1538(g), “any person may commence a civil suit on his own behalf . . . to enjoin any person, including the United States and any other governmental instrumentality or agency, who is alleged to be in violation of any provision of the this chapter.” 16 U.S.C. §1540(g)(1)(A). An injunction under section 9 of the ESA can be warranted upon a showing of “a reasonably certain threat of imminent harm” to a listed species. *See Forest Conservation Council v. Rosboro Lumber Co.*, 50 F.3d 781, 784 (9th Cir. 1995).

II. Listed Species Imperiled by the District’s Water Management Actions in the Middle Rio Grande

A. Rio Grande Silvery Minnow (*Hybognathus amarus*)

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

The silvery minnow was historically one of the most abundant and widespread species in the entire Rio Grande, occurring from Espanola, New Mexico to the Gulf of Mexico and in much of the Pecos River. *Id.* at 15. The silvery minnow has been extirpated from more than 95% of its historical range

and today only occupies a portion of the 174-mile stretch of the river in the middle Rio Grande from Cochiti Dam and Elephant Butte Reservoir.³ *Id.* at 2.

The Service listed the Rio Grande silvery minnow as "endangered" under the ESA in 1994 and designated critical habitat for the entire reach of the Middle Rio Grande in 1999. *See* 59 Fed. Reg. 36988 (7/20/94); 64 Fed. Reg. 36,274 (7/6/99). Pursuant to section 4(f) of the ESA, the Secretary of the Interior developed a recovery plan for the silvery minnow in 1999 and revised it in 2010. *See* 75 Fed. Reg. 7625 (2/22/10). The decline of the Rio Grande silvery minnow is attributable to the "destruction and modification of its habitat due to dewatering and diversion of water, water impoundment, and modification of the river (channelization)" among other factors. 2010 *Recovery Plan* at 2.

On May 6, 2013, the Service issued a draft "recommendation for water needed to support a wild silvery minnow population in the Middle Rio Grande" whereby a self-sustaining population could be achieved ("Hydrologic Objective"). *See U.S. Fish and Wildlife Service's Hydrologic Objective* dated May 6, 2013 at 1. The Service's recommendations are based on "the best available scientific and commercial information on the relationship between average density of silvery minnows measured over 20 years and associated hydrologic variables measured during those same years." *Id.* Although the Hydrologic Objective focuses on the relationship between success of the silvery minnows and flow conditions, implementing the recommended flows in the Rio Grande would also benefit the flycatcher and help support flycatcher habitat and breeding territories.

The Service's Hydrologic Objective focuses on two life stages of the silvery minnow reproduction (Age 0 Strategy) and survival (Age 1+ Strategy). The Service reports that 95% of the silvery minnow population in the Middle Rio Grande is of the Age 0 class. *Id.* Reproduction of the silvery minnow is directly tied to the peak discharge including timing of flow, flow duration and flow magnitude. *Id.* The Service reached the following conclusions:

1. "Higher magnitude flow in spring results in more silvery minnows in fall." *Id.* at 2. The following table shows the average densities of silvery minnow found in the fall based on the magnitude of flow in the spring:

Rate of Flow (cubic feet per second)	Average Density in Fall (silvery minnow/100m ²)
2500	~ 1.0
3300	~ 1.5
5400	~ 5.0

2. "Duration of overbank flooding (i.e., days of peak discharge > 2,500 cfs at Central gage) results in more silvery minnows."⁴ *Id.* at 3.

Duration of Overbank Flooding (in excess of 2500 cfs at the	Average Density in Fall (silvery minnow/100m ²)
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³ The silvery minnow was reintroduced into the Rio Grande near Big Bend, Texas in 2008. This population is considered "a nonessential, experimental population under section 10(j) of the ESA (73 FR 74357)." 2010 *Recovery Plan* at 16.

⁴ The "Central gage" is more formally known as USGS Station No. 08330000, Rio Grande at Albuquerque, New Mexico and is located at Latitude 35°05'21", Longitude 106°40'50.5" in Bernalillo County, New Mexico.

Central gauge in NM)	
15 days	~ 1.0
28 days	~ 1.5
68 days	~ 5.0

3. “Successful spawning, percent hatch, and rate of development is optimal in early to late May.” *Id.*

These correlations found by the Service indicate that for silvery minnows to successfully reproduce, the species needs high magnitude flows, for a longer duration that occur in the spring (ideally in May).

The Service also recommends “measures should be taken to reduce the extent and duration of drying.” *Id.* The Service found that similar to the relationship between peak flow and successful reproduction in the minnow “there is a significant relationship between the magnitude of flow measured at San Acacia Gage and the abundance of silvery minnows surveyed in fall.”⁵ *Id.* The following table shows the relationship between duration of low flow and number of silvery minnow:

Duration of Low Flow Days (i.e. <150 cfs at San Acacia gage in summer or <300 cf in winter)	Average Density in Fall (silvery minnow/100m ²)
98 days	~ 1.5
63 days	~ 3.0

Likewise, a correlation can be found between magnitude of river drying (i.e. miles of river drying or days <150 cfs at San Acacia gage in summer or <300 cfs in winter) and the decrease in density of silvery minnows:

Magnitude of River Drying	Average Density in Fall (silvery minnow/100m ²)
42 miles	~ 1.5
30 miles	~ 3.0

Id.

The Service’s Hydrologic Object emphasizes that peak flows in May, of a certain magnitude and duration, and base flows in the river for the remainder of the summer are crucial to prevent significant habitat modification actually killing the minnow by impairing essential behavior patterns such as breeding, feeding or sheltering. The District’s diversion and dewatering of the Rio Grande from March through October of each year is contrary to the needs of the endangered silvery minnow and has and will continue to result in “take” of the listed species.

⁵ The “San Acacia gage” is also know as USGS Station No. 08354900, Rio Grande Floodway at San Acacia, New Mexico and is located at Latitude 34°15'23", Longitude 106°53'27" in Socorro County, New Mexico.

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

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

On February 27, 1995, the Service listed the Southwestern willow flycatcher as endangered pursuant to section 4 of the ESA and designated critical habitat on July 22, 1997. See 60 Fed. Reg. 10694 (2/27/95); 62 Fed. Reg. 39129 (7/22/97). The Service revised the critical habitat designation for the flycatcher on January 3, 2013. See 78 Fed. Reg. 343 (1/3/13). At the time of listing, the known flycatcher population was estimated between 300 and 500 pairs. *Id.* In its listing rule, the Service found that the Southwestern willow flycatcher is endangered by loss of habitat and population declines resulting in substantial part from human impacts on the species and its critical habitat. *Id.* These include adverse modifications of riparian habitat necessary for the breeding and successful reproduction of the flycatcher as a result of human development, channelization, changes in surface water hydrologic regimes, introduction of alien species, and other activities. *Id.* In 2002, the Secretary of the Interior released a recovery plan setting forth the measures necessary to recover the species. See 2002 *Southwestern Willow Flycatcher Final Recovery Plan*. The recovery plan indicates that the most severe loss of flycatchers and their habitat occurred in the Rio Grande valley. *Id.* at 31.

Flycatchers arrive on their breeding grounds in late April and May and the peak flows that benefit the minnow also promote flycatcher nesting habitat and breeding territories. Spring peak flows and base flows in the Rio Grande during the irrigation season are key factors for protecting and restoring habitat for the Southwestern willow flycatcher. The District’s diversions and dewatering of key reaches of the Rio Grande during the irrigation season is directly contrary to the needs of the endangered Southwestern willow flycatcher in the Middle Rio Grande and has and will continue to result in “take” of the listed species.

III. The District’s Water Management Actions and Activities in the Middle Rio Grande Has Caused and Continues to Cause “Take” of the Listed Species

From March 1 to October 31 of each year, the District diverts a substantial amount of water from the Rio Grande at four separate diversion structures (Cochiti, Angostura, Isleta and San Acacia dams) to irrigate lands within the District. The District’s diversions of water from the Rio Grande depletes flows and dewateres the river to a significant extent, having the effect of harming, harassing, wounding, and killing silvery minnows and willow flycatchers. Further, such diversions cause significant habitat modification and degradation resulting in actual death and injury of silvery minnow and willow flycatcher by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering. See *Babbitt*, 516 U.S. 687; *Palila*, 649 F.Supp. 1070; 50 C.F.R. §17.3. Such reduction or elimination of flows in the Rio Grande have caused and will continue to cause “take” of the listed species in violation of section 9 of the ESA.

In addition, the District has caused and continues to cause “take” of the silvery minnow through physical “entrainment” in irrigation diversion facilities and conveyance facilities, which are operated and

controlled by the District within the Middle Rio Grande valley. Through such entrainment, silvery minnow are caught or captured within the diversions, canals or other conveyance systems; their essential behavioral patterns, including breeding, feeding or sheltering, are disrupted or impaired; and individuals of the species are harassed, harmed, injured and/or killed. Accordingly, entrainment of the silvery minnow further represents “take” of the listed species, in violation of ESA section 9 and its implementing regulations. See 16 U.S.C. § 1538(a); 50 C.F.R. § 17.3; *Babbitt*, 515 U.S. 687; *U.S. v. Glenn-Colusa Irrig. Dist.*, 788 F. Supp. 1126 (E.D. Cal. 1992).

The District has also caused and continues to cause “take” of the silvery minnow through its operation and control of irrigation diversion structures, including but not limited to the San Acacia and Isleta diversion dams. These diversion dams cause harm to the silvery minnow, including by blocking the ability of the minnow to move upstream past these facilities, and thereby occupy or reoccupy habitat critical for breeding, feeding, sheltering, reproduction, and survival. The dams have no fish passage facilities, despite the fact that both agency and scientific studies have documented the importance of upstream movement to successful reproduction of silvery minnow and habitat reoccupation and that the reasonable and prudent alternative (“RPA”) for the 2003 Biological Opinion⁶ (“2003 BO”) required such fish passage to be in place for both facilities by 2013. The impacts of these dams thus have caused, and will continue to cause, “take” of silvery minnow in violation of ESA section 9.

Further, the District has caused and continues to cause “take” of the silvery minnow and willow flycatcher by undertaking a number of activities that have the effect of increasing the diversions and/or net depletions in the Middle Rio Grande, including but not limited to: 1) operation of the Water Bank; 2) transferring water for non-irrigation purposes both inside and outside of the District; and 3) inefficient use and distribution of water throughout the District. The impacts of such depletions of water from the Rio Grande will result in harm to the silvery minnow and willow flycatcher, and thereby in “take” of the species as that word is used for purposes of the ESA.

IV. The District’s Water Management Actions and Activities in the Middle Rio Grande are Subject to Liability under Section 9 of the ESA

The District does not currently have any incidental take coverage that would exempt it from the “take” prohibition of section 9 of the ESA. The District is not authorized to “take” *any* members of the listed species under an existing valid ITS or HCP/ITP issued by the Service. Therefore, any “take” resulting from the District’s water management activities will subject the District to liability under section 9 of the ESA.

Over the past 15 years, the District has fallen under the umbrella of Reclamation’s consultations with the Service under section 7(a)(2) of the ESA. As one of the non-federal parties to the consultation that resulted in the 2003 BO, the District has benefitted over the past decade from incidental take coverage to insulate it from liability under section 9 of the ESA. This incidental take coverage was contingent on the consulting parties’ implementation of the 2003 BO, its RPA, ITS, reasonable and prudent measures (“RPMs”), and terms and conditions that were in effect until February 28, 2013. Upon expiration of the 2003 BO, any ITS permitting take incidental to the proposed action also became invalid.

⁶ Biological and Conference Opinions on the Effects of Actions Associated with the Programmatic Biological Assessment of the Bureau of Reclamation’s Water and River Maintenance Operations, U.S. Army Corps of Engineers’ Flood Control Operation, and Related Non-Federal Actions on the Middle Rio Grande, New Mexico (Consultation #2-22-03-F-0219).

Thus, the District's current diversions from the Rio Grande are at its own peril and subject to liability under section 9 of the ESA.

Even assuming the *Reinitiation Notice* provision of the 2003 BO extended the opinion past its expiration, the 2003 BO and its ITS have been invalidated by: 1) Reclamation and the District's ongoing failure to implement the RPA required by section 7(a)(2) of the ESA to prevent jeopardy to the minnow and flycatcher; 2) Reclamation and the District's failure in 2013 to comply with the level of take specified in its ITS or reinitiate consultation with the Service; 3) Reclamation and the District's ongoing failure to implement the RPMs and non-discretionary term and conditions of the ITS; and 4) Reclamation and the District's ongoing failure to reinitiate consultation with the Service upon a) exceeding the permitted level of take in the ITS and b) modifying an essential element of the RPA in a way not previously considered by the 2003 BO. Therefore, until the Service issues a new biological opinion, the District remains without a valid permit to take any individual silvery minnow or willow flycatcher during the 2014 irrigation season and beyond.

Furthermore, the District's current consultation (Consultation #02ENNM00-2013-F-0033) with the Service via Reclamation does not include Reclamation's discretionary authority to re-operate dams and diversion structures in the Middle Rio Grande, nor does it include Reclamation's authority to reduce water deliveries to the District for the benefit of the silvery minnow or willow flycatcher. This failure by Reclamation to consult with the Service over the full scope of its discretionary authorities is in violation of section 7(a)(2) of the ESA. The current consultation is thereby arbitrarily and impermissibly narrow in scope and thus no valid and existing ITS exempts Reclamation or the District from the ESA's prohibition against the "take" of the listed species.⁷

Finally, the District has no exemption to the "take" prohibition under section 10 of the ESA, 16 U.S.C. §1539(a). The District has never prepared nor has the Service approved a HCP for the District's activities in the Middle Rio Grande and the Service has not issued an ITP to the District. Therefore, the District diverts water from the Rio Grande at its own peril as to liability under section 9 of the ESA.

V. Violations of Section 9 of the ESA

Guardians hereby puts the District on notice that it will promptly seek judicial relief if the District fails to remedy the ongoing and imminent future⁸ violations of the ESA and its implementing regulations. 16 U.S.C. §§ 1538(g).

Guardians hereby provides notice that the District is violating section 9 of the ESA, 16 U.S.C. § 1538(g), and its implementing regulations by causing ongoing and imminent future "take" without a permit authorized by law of the endangered Rio Grande silvery minnow and/or Southwestern willow flycatcher as the result of the District's past and on-going water management actions and activities, including but not limited to, its diversions of water from the Rio Grande, thereby depleting flows and dewatering the river to a significant extent and its operation of the Middle Rio Grande diversion structures.

⁷ See Guardians' Notices for additional explanation of our claims against Reclamation.

⁸ See *Colorado Environmental Coalition v. Office of Legacy Management*, 819 F.Supp.2d 1193, 1220 (D. Colo. 2011) (finding Plaintiff's pre-suit notice under the ESA was effective as to future agency actions, where the letter contained sufficient description of the challenged activities, some of which occurred after the notice letter was sent).

Guardians hereby provides notice that it will also claim that the District has no section 9 coverage for incidental take of silvery minnows at the current time because the 2003 BO has expired; the federal and non-federal parties to the 2003 BO have failed: (1) to implement the RPA as required by section 7(a)(2) of the ESA to prevent jeopardy to the listed species, (2) to comply with the level of take specified in the 2013 ITS, and (3) to implement the RPMs and non-discretionary terms and conditions of the ITS; and the District's consultation with the Service through Reclamation does not encompass the full scope of Reclamation's discretionary authority. Therefore, since the ongoing section 7(a)(2) consultation is arbitrary and impermissibly narrow in scope, there is no valid ITS that exempts the District from the take prohibition in section 9 of the ESA.

VI. Noticing Party

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

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

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

VII. Conclusion

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

Chairman, Derrick Lente, *et. al.*
August 20, 2014

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

Sincerely,

Jen Pelz
Wild Rivers Program Director

cc: Governor Martinez
Attorney General King