

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

FOREST GUARDIANS,)
)
 Plaintiff,)
)
 v.)
)
)
 UNITED STATES BUREAU OF RECLAMATION)
 and UNITED STATES ARMY CORPS OF)
 ENGINEERS,)
)
 Defendants.)
)
 _____)

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

I. Preliminary Statement

1. This case concerns the failure of the United States Bureau and Reclamation (“BuRec”) and the United States Army Corps of Engineers (“Corps”) to comply with their mandatory procedural and substantive duties under the Endangered Species Act (“ESA”), 16 U.S.C. §1531 et seq., in connection with their actions that regulate the flow of the Pecos River south of Sumner Dam.

2. The BuRec and the Corps (hereafter collectively referred to as “BuRec”) own and operate a series of four dams and three reservoirs on the Pecos River. The United States Fish and Wildlife Service (“USFWS”) stated in 2001 that “operation of the four dams permits almost total flow-control in the river from Santa Rosa, New Mexico, downstream to the New Mexico-Texas border.”

3. The segments of the Pecos River that are controlled by the BuRec contain the only remaining populations of the Pecos bluntnose shiner, a species that was listed as a threatened species under the ESA in 1987.

4. Despite the fact that the continued survival of the Pecos bluntnose shiner depends on the BuRec’s operations of the Pecos River dams and reservoirs in a way that assures the existence of habitat for the species, the BuRec has taken actions and continues to take actions that jeopardize the

continued existence of the Pecos bluntnose shiner and that adversely modify and destroy the shiner's designated critical habitat.

5. Specifically, the BuRec operates the Pecos River dams and reservoirs in such a way that the flow of the Pecos River is characterized by an extremely irregular and unnatural hydrograph with short periods of very high flows that occur during "block releases" – made for the benefit of downstream irrigators – that alternate with long periods of critically low flows and river drying (or "intermittency"). The USFWS has determined that both the block releases and the critically low flows and intermittency that are hallmarks of the BuRec's operations of the Pecos River dams and reservoirs "are actions that adversely affect the bluntnose shiner and its critical habitat."

6. In the latest Biological Opinion ("BO") issued by the USFWS concerning the effects of the BuRec's operation of the Pecos River dams and reservoirs (issued on June 18, 2003 for the period March 1, 2003 through February 28, 2006), the USFWS determined that the "incidental take" of the shiner associated with Pecos River operations would not jeopardize the shiner so long as the percentage population of the Pecos bluntnose shiner within the shiner guild as a whole remains at 5% or more. This minimum population level has not been met since 2003.

7. With this action, the plaintiff alleges that the BuRec is in violation of Section 7 of the ESA, 16 U.S.C. §1536, for (a) failing to consult with the USFWS on the effects of its actions on the Pecos bluntnose shiner and its designated critical habitat, (b) operating the Pecos River dams and reservoirs in a way that both jeopardizes the continued existence of the shiner and adversely modifies and destroys its critical habitat, and (c) failing to use its authorities to conserve the shiner. Additionally, the plaintiff alleges that the BuRec is in violation of Section 9 of the ESA, 16 U.S.C. §1538, for engaging in Pecos River operations that result in an unauthorized "take" of Pecos bluntnose shiners.

8. As relief for the violations alleged in this action, the plaintiff seeks (1) a declaration that the BuRec is violating the ESA and (2) immediate and permanent injunctive relief commanding the BuRec to comply with the requirements of the ESA in connection with its Pecos River operations.

II. Jurisdiction and Venue

9. The Court has jurisdiction over this action under 28 U.S.C. §1331 (federal question jurisdiction), 28 U.S.C. §2201 (declaratory judgment), 28 U.S.C. §2202 (injunctive relief), 16 U.S.C. §1540(g)(1) (ESA citizen suit provision), and 5 U.S.C. §701 *et seq.*, (Administrative Procedures Act).

10. As required by the ESA, the plaintiff has provided the BuRec with sixty days' notice of its intent to commence a citizen suit in connection with the ESA violations alleged in this complaint. 16 U.S.C. §1540(g).

11. Venue is proper in this judicial district pursuant to 28 U.S.C. §1391(e) because this is an action against agencies of the United States and because the cause of action arises in New Mexico and pursuant to 16 U.S.C. §1540(g)(3)(A) (ESA citizen suit provision).

12. There exists now between the parties hereto an actual and justiciable controversy in which the plaintiff is entitled to have a declaration of its rights and of the BuRec's obligations, and further relief, because of the facts and circumstances hereafter set out.

III. Parties

13. Plaintiff Forest Guardians is a New Mexico, non-profit corporation with its principal office in Santa Fe, New Mexico. Forest Guardians has approximately 3,000 members, most of whom reside in New Mexico and Arizona. One of Forest Guardians' main endeavors is to work towards the enhancement and restoration of riparian-wetland and aquatic ecosystems that have been impaired as a result of federal government actions, such as federal water projects. Members of Forest Guardians frequently use and enjoy the public lands and rivers of the southwestern United States, including the Pecos River, for recreational, aesthetic, and scientific activities. In pursuit of these activities, Forest Guardians' members regularly observe and enjoy wildlife, including wildlife which is dependent on New Mexico's limited riparian-wetland and aquatic ecosystems. Forest Guardians works through administrative appeals, litigation, and otherwise to assure that all federal agencies fully comply with the provisions of all pertinent federal laws, including the ESA. Forest Guardians, its staff, and its members

have a substantial interest in this matter and are adversely affected and aggrieved by the Defendant's failure to comply with the ESA. Forest Guardians brings this action on behalf of itself and its adversely affected members.

14. Defendant United States Bureau of Reclamation is an agency of the United States Department of the Interior. The BuRec owns and has control over and responsibility for the operation of Santa Rosa Dam and Santa Rosa Lake, Sumner Dam and Sumner Lake, the Fort Sumner Diversion Dam, and Brantley Dam and Lake. The BuRec's operations of the Pecos River dams and reservoirs must comply with the requirements of federal environmental law, including the ESA.

15. Defendant United States Army Corps of Engineers is a branch of the United States Army. The Corps owns and has control over and responsibility for the operation of Santa Rosa Dam and Santa Rosa Lake. The Corps' operations of Santa Rosa Dam and Lake must comply with the requirements of federal environmental law, including the ESA.

IV. Essential facts

A. Status of the Pecos bluntnose shiner and the BuRec actions that adversely affect the shiner and its habitat

16. The Pecos bluntnose shiner was listed as a threatened species under the ESA on February 20, 1987. In the Federal Register notice listing the shiner as a threatened species, the USFWS stated that "[t]he most important factor in the species' decline is reduced flow in the main channel of the [Pecos] river due to water storage, irrigation, and water diversion." 52 Fed.Reg. 5295.

17. Additionally, the February 20, 1987 listing notice states that "[t]hreatened status seems appropriate because of the severely reduced range of the species, and because of the continually increasing threats to the species' habitat." 52 Fed.Reg. 5299.

18. In the Federal Register notice that listed the shiner as a threatened species, the USFWS also formally designated critical habitat for the Pecos bluntnose shiner. The designated critical habitat is in two discontinuous stretches of the river between Fort Sumner, New Mexico and Artesia, New

Mexico. The upper stretch of designated critical habitat is 64 miles long and extends from 10 miles south of Fort Sumner to the De Baca - Chaves County line. The lower stretch of critical habitat extends 37 miles from near Hagerman to Artesia.

19. Between the two reaches of designated critical habitat is a stretch of occupied habitat that is commonly referred to as the “quality reach.” The “quality reach” extends from the lower end of the upper critical habitat reach to the Acme Gauge. According to the USFWS, the quality reach “serves as important habitat for the bluntnose shiner and supports high numbers of the species.” Significantly, the USFWS also states that the “quality reach” “may be more important to the recovery of the bluntnose shiner than designated critical habitat reaches.”

20. The “quality reach” has retained its ecological value for the shiner because it has been subjected to less channel modification as a result of the BuRec’s block releases than the immediately upstream critical habitat reach. However, the “quality reach” is also more subject to intermittency than the upstream and downstream critical habitat reaches – such intermittency being caused by the BuRec’s Pecos River operations – and, for this reason, the “quality reach” was not designated by the USFWS as critical habitat for the shiner.

21. In 1992, the USFWS prepared a Recovery Plan for the Pecos bluntnose shiner pursuant to the requirements of Section 4(f) of the ESA. 16 U.S.C. §1533(f). According to the Recovery Plan, “[l]oss of permanent flow and degradation of river reaches having permanent flow are the primary known threats to the Pecos bluntnose shiner.” The Recovery Plan notes that the frequency and severity of river drying events increased dramatically after the BuRec’s Pecos River dams and reservoirs were constructed: “Although intermittent conditions in downstream reaches occurred historically, they were exacerbated greatly following construction of dams on the Pecos River.”

22. According to the USFWS, “[t]he bluntnose shiner depends upon the release of water from Sumner Dam for its existence.” As noted at the outset of this complaint, the USFWS has stated that the BuRec has almost total control of the amount of water flowing in the Pecos River: “Other than unregulated tributaries entering the river between these dams, operation of the four dams permits almost

total flow control in the river from Santa Rosa, New Mexico, downstream to the New Mexico-Texas border.”

23. The flow in the “quality reach” is gauged at the Acme gauge which is at the lower end of the “quality reach.” The Pecos River was never intermittent at the Acme gauge from 1992 through 2000. However, from 2001 through 2004, there was frequent and sustained intermittence in the “quality reach.” This frequent intermittence had a severe adverse impact on populations of the shiner, and the shiner population has not recovered from that four year period during which intermittence occurred.

24. The BuRec operates its Pecos River dams and reservoirs by making “block releases” from Santa Rosa Lake and Sumner Lake downstream to Brantley Lake which is some 225 miles downstream from Sumner Lake and immediately upstream from the irrigated lands within the Carlsbad Irrigation District (“CID”). “Block releases” are releases of large volumes or “blocks” of water in a concentrated period of time. Water which is released from Santa Rosa Lake and Sumner Lake in block releases is stored in Brantley Lake before it is used by irrigators in CID.

25. The BuRec’s Pecos River operations create a cycle of brief large-volume block releases and long dry periods, both of which imperil the continued existence of the Pecos bluntnose shiner.

26. The block releases wash shiner larvae and eggs into Brantley Lake where they are not viable and cannot survive. Additionally, the block releases dramatically alter the physical channel characteristics of the Pecos River and scour the river bottom of critical sediments, thereby rendering the Pecos River unsuitable for the survival of the Pecos bluntnose shiner.

27. The BuRec also uses its Pecos River reservoirs to store water which has been acquired by the New Mexico Interstate Stream Commission (“ISC”) for purposes of meeting New Mexico’s obligations to Texas under the Pecos River Compact. The BuRec delivers the water that is stored for the ISC in the upstream reservoirs – Santa Rosa Lake and Sumner Lake – in block releases, in the same manner as the water that is stored in the upstream reservoirs for the purpose of irrigation.

28. The BuRec sometimes releases the ISC water in block releases from Santa Rosa Lake and Sumner Lake outside of CID's irrigation season, which runs from March 1 to October 31 of each year. Upon information and belief, a large block release of ISC water was released from the upstream reservoirs during November and December of 2005. The BuRec's release of the ISC water from the upstream reservoirs during the winter months increases the likelihood of intermittency in the "quality reach" during the summer and fall months.

29. The BuRec's release of irrigation water for the benefit of CID and the ISC in large "blocks" – with no or very low releases of water between such block releases – significantly increases the chances of intermittency in the "quality reach" because the block releases quickly deplete water that is stored in the upstream reservoirs. For example, in May of 2002 a large "block release" for the benefit of CID virtually emptied the upstream reservoirs. The severity and duration of subsequent intermittence in the "quality reach" during 2002 was the worst that has occurred in decades.

30. The long dry periods between block releases, which have become more significant and of longer duration in recent years, kill some of the remaining populations of Pecos bluntnose shiners and result in ecological stress to the populations and individuals that survive. Because of the shiner's life cycle, it takes many years for shiner populations to rebound from one year of intermittency. Multiple successive years of intermittence – such as occurred between 2001 and 2004 – imperil the shiner's continued survival.

31. The BuRec's operations on the Pecos River changed dramatically in 1989 in a way that exacerbated the adverse effect of Pecos River operations on the Pecos bluntnose shiner. In 1989, construction of the BuRec's Brantley Dam and Lake was completed. Brantley Dam replaced the McMillan Dam which was smaller and supported a smaller reservoir.

32. The construction of Brantley Dam and Lake enables the BuRec to make larger and less frequent block releases from the two upstream reservoirs – Santa Rosa Lake and Sumner Lake – which serve as the BuRec's primary storage reservoirs for water that is delivered to CID.

33. According to the USFWS, this situation “exacerbated intermittency and long-term drying of the river channel.” As a result, the BuRec entered into a formal Section 7 consultation with the USFWS in 1991 to assess the impacts of its Pecos River operations on the Pecos bluntnose shiner.

34. The 1991 formal Section 7 consultation concluded with the USFWS’s issuance of BO in August of 1991. The August 1991 BO concluded that the BuRec’s Pecos River operations jeopardized the continued existence of the Pecos bluntnose shiner. In the August 1991 BO, the USFWS “found that the timing of releases of water from upstream storage facilities (large blocks of water for expedient delivery down the channel followed by extensive drying of the river channel) was likely to jeopardize the continued existence of the bluntnose shiner.”

35. As a result of the August 1991 jeopardy opinion, an intensive study effort was undertaken by the USFWS, the BuRec, CID, and the New Mexico State Engineer to assess the biological and physical impact of dam operations on the Pecos bluntnose shiner. As a result of the coordinated study required by the 1991 jeopardy opinion, it was determined in 1998 that a target flow of 35 cfs should be provided at the Acme Gauge in order to assure the continued survival of the shiner.

36. From 1998 through the irrigation season of 2003, the BuRec operated the Pecos River facilities in roughly the same manner that it commenced in 1998 – bypassing inflows into the upstream reservoirs when they were available in an attempt to provide a target flow of 35 cfs at the Acme Gauge in order to secure habitat for the Pecos bluntnose shiner and limiting the number, frequency, and duration of block releases.

37. Collaborative studies by the USFWS and the BuRec prepared after issuance of the 1998 recommendations indicate that the 35 cfs target flow at the Acme Gauge is insufficient to assure the continued survival of the Pecos bluntnose shiner. In particular, a draft report by the USFWS released in June of 2000 indicates that a minimum flow of 71 cfs at the Acme Gauge is needed to maintain adequate habitat for the Pecos bluntnose shiner.

38. The conclusions of the USFWS’s June 2000 report formed the basis of a declaration executed by a high-level employee of the USFWS — the Regional Director’s Special Assistant for

Special Issues – on October 11, 2000. The declaration (prepared for previous litigation concerning the imperiled status of the Pecos bluntnose shiner) states, in pertinent part, as follows:

Preventing further endangerment of the Pecos bluntnose shiner in the wild depends on maintaining a flowing river. Until recently, the Service [USFWS] has maintained that the survival and recovery of the Pecos bluntnose shiner required at least 35 cfs at the Acme Gauge. Based on a recent multi-year study of the effects of flows on Pecos River habitat by the U.S. Fish and Wildlife Service's Fishery Resources Office, under contract to the Bureau of Reclamation, it is now believed that a minimum flow of 71 cfs should be maintained at the Acme Gauge. This new minimum is needed to build and maintain the river habitat that the fish needs to support all of its life stages.

39. After the new information on the need for augmented flows at the Acme Gauge was developed, the BuRec commenced a formal Section 7 consultation with the USFWS concerning the effects of Pecos River dam operations on the Pecos bluntnose shiner during the 2001 irrigation season. During the course of that consultation, the BuRec proposed to target a flow of 35 cfs at the Acme Gauge, despite the fact that new information indicates that the 35 cfs target flow is inadequate to assure the survival and recovery of the Pecos bluntnose shiner.

40. On May 21, 2001, the USFWS issued its Biological Opinion ("BO") concerning the effects of the BuRec's Pecos River dam operations during the 2001 irrigation season. The analysis incorporated into that BO is premised on BuRec's representation that it would target a flow of 35 cfs at the Acme Gauge, even though the 35 cfs target flow has been discredited by USFWS biologists.

41. The May 21, 2001 BO on 2001 irrigation season operations concluded that Pecos River dam operations would not jeopardize the continued survival of the Pecos bluntnose shiner. This finding was based upon the assumptions that "Reclamation's action will improve the base flow conditions in the Pecos River" and that the BuRec would target a monthly average flow of 35 cfs at the Acme Gauge.

42. Additionally, the USFWS's May 21, 2001 BO permitted the BuRec to cause the incidental take of individual Pecos bluntnose shiners as a result of its Pecos River operations upon the condition that BuRec "ensure that a monthly average of 35 cfs is maintained throughout the irrigation season" at the Acme Gauge.

43. During the 2001 irrigation season, the BuRec failed to comply with the BO, and allowed the flow of the Pecos River at the Acme Gauge to fall far below a monthly average of 35 cfs.

44. There were many days during the 2001 irrigation season when the Pecos River was dry at the Acme Gauge and, according to the USFWS, this has not occurred since 1991. At the Acme Gauge, there were no flow or almost no flow conditions (less than 5 cfs) for approximately 30 days during the 2001 irrigation season.

45. Clearly, during the 2001 irrigation season, the BuRec did not operate the Pecos River dams and reservoirs in the manner which was contemplated by the USFWS in the May 21, 2001 BO.

46. Intermittency was even more prolonged during the 2002 irrigation season, and was exacerbated by the May 2002 “block release” described above which emptied the upstream reservoirs. While there were four days of intermittence at the Acme gauge in 2001, there were 50 days of intermittence in 2002.

47. There were 45 days of intermittence and 8 days of intermittence at the Acme gauge in 2003 and 2004 respectively.

48. For the irrigation season of 2002, the BuRec failed to comply with its mandatory duty under the ESA to consult with the USFWS as to the effects of its Pecos River operations on the Pecos bluntnose shiner. Accordingly, the USFWS did not issue a BO for the 2002 irrigation season.

49. The USFWS issued a BO for the 2003, 2004, and 2005 irrigation seasons on June 18, 2003.

50. The BO that the FWS issued on June 18, 2003 is arbitrary and capricious, as it is not based on the best available science as required by the ESA. For example, the BO allows the BuRec to decrease flows at the Acme Gauge below 35 cfs in “dry” and “average” years without any scientific or ecological justification for allowing such a decrease. Additionally, the BO fails to account for the fact that intermittency in the Pecos River constitutes an adverse effect to critical habitat that precludes the recovery of the shiner.

51. The 2003 BO requires that the BuRec reinstate formal consultation when the population of the Pecos bluntnose shiner drops below 5% of the total population of the shiner guild in the Pecos River. Although the Pecos bluntnose shiner population dropped below this threshold in 2003, the BuRec did not reinstate formal consultation with the USFWS until December of 2005, and only then for purposes of the 2006 irrigations season.

52. In December of 2005, the BuRec submitted a Biological Assessment (“BA”) to the USFWS to initiate consultation with the USFWS as to the effect of its Pecos River operations during the irrigation season of 2006. The BA fails to note that the BuRec had violated the terms of the 2003 BO’s incidental take statement for each of the three years that the BO was in effect.

53. The USFWS has still not issued a BO for the 2006 irrigation season. Nonetheless, the BuRec made a large “block release” of water for the benefit of CID for an eight day period beginning on February 20, 2006. This “block release” constitutes an irreversible commitment of resources that will limit the BuRec’s options to avoid and/or minimize intermittency during the summer and fall of 2006.

B. The BuRec’s discretionary authorities with respect to the Pecos River dams and reservoirs

54. As noted above in this complaint, the BuRec and the Corps operate four dams and three reservoirs on the Pecos River. Collectively, these facilities – except for the Fort Sumner Diversion Dam – are referred to as the Carlsbad Project.

55. The Carlsbad Project was authorized by the Secretary of the Interior in 1905. In exchange for a payment of \$150,000, the irrigators within the area that is now served by CID (then known as the Pecos Irrigation and Improvement Company) conveyed their water rights and the remains of a dilapidated irrigation system to the United States government.

56. Over the years, the United States government has invested hundreds of millions of dollars in the construction and maintenance of the various dams and reservoirs that now constitute the Carlsbad Project.

57. Construction of Sumner Dam was authorized in 1935, and the BuRec began construction of the dam in 1936. The dam was finished in 1937.

58. In 1939, when enacting amendments to the Flood Control Act of 1937, Congress stated that the purposes of Sumner Dam were “controlling floods, regulating the flow of the Pecos River, [and] providing for storage and for delivery of stored waters” 33 U.S.C. §706.

59. Santa Rosa Dam was authorized by Congress pursuant to the Flood Control Act of 1954. The Army Corps of Engineers constructed Santa Rosa Dam, which was intended to serve the purposes of flood control and irrigation.

60. Brantley Dam was built as a replacement for McMillan Dam, when studies conducted by the BuRec in the 1950s and 1960s showed that major floods in the Pecos River would exceed McMillan Dam’s spillway capacity, and posed a risk of catastrophic failure.

61. Congress authorized the construction of Brantley Dam in 1972, and construction began in 1984. Construction was completed in 1989.

62. The construction of Brantley Dam was intended to serve the irrigation needs of the CID, as well as the purposes of flood control, recreation, and wildlife habitat.

63. Upon information and believe, the United States government continues to own the water rights that are used by the irrigators in the CID, and also owns the storage rights in Santa Rosa Lake, Sumner Lake, and Brantley Lake.

64. Additionally, the BuRec owns and operates Santa Rosa Dam, Sumner Dam, and Brantley Dam.

65. CID’s contract with the BuRec contemplates that the irrigators within CID will not receive a full allotment of water (as determined by their water rights under New Mexico law) in those years where water is scarce. In pertinent part, the “shortage” provision provides as follows: “On account of drought, errors in operation, or other causes, there may occur at times a shortage during any year in the quantity of water available to the [Carlsbad Irrigation] District”

66. Furthermore, CID's contract with the BuRec states that "[s]torage and release of water in [the dams] shall at all times be in accordance with the constitution and laws of the United States of America"

67. Congress authorized the construction of the Fort Sumner Diversion Dam in 1949, and construction of the diversion dam was completed in 1951. The purpose of the diversion dam is to divert water from the main stem of the Pecos River into the irrigation system that is owned by FSID.

68. The Bureau of Reclamation owns the Fort Sumner Diversion Dam.

69. FSID's 1948 contract with the BuRec, which authorizes FSID to operate the Fort Sumner Diversion Dam (which, as noted above, is owned by the BuRec) provides that the BuRec may take over operation of the diversion dam upon six months' written notice. On June 29, 2000, the BuRec provided written notice to FSID that it would take over operations of the diversion dam in its efforts to conserve the Pecos bluntnose shiner, but the BuRec has not yet acted to take over operations.

C. The mandatory requirements of the Endangered Species Act

70. The ESA was enacted, in part, to provide a "means whereby the ecosystems upon which endangered species and threatened species depend may be conserved" 16 U.S.C. §1531(b).

71. In order to fulfill this purpose, Federal agencies are required to engage in consultation with the USFWS to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the adverse modification of habitat of such species" 16 U.S.C. §1536(a)(2). This consultation process is known as "formal Section 7 consultation."

72. As used in the ESA, agency "action" includes those "actions directly or indirectly causing modifications to the land, water, or air." 50 C.F.R. §402.02(d).

73. The BuRec's operation of the Pecos River dams and reservoirs discussed above constitutes on-going agency action within the meaning of the ESA.

74. Despite the fact that the 2006 irrigation season has already commenced, and despite the fact that the BuRec has already made a large “block release” of water for the benefit of CID during this irrigation season, the BuRec has yet to complete a formal Section 7 consultation with the USFWS. The BuRec’s operation of the Pecos River dams and reservoirs constitutes an irreversible and irretrievable commitment of resources – as the BuRec’s decision to release water from the upstream reservoirs to Brantley Lake makes this water permanently unavailable for conservation of the Pecos bluntnose shiner.

75. The failure of the BuRec to complete a timely consultation pursuant to Section 7 of the ESA – or any consultation at all – is now a routine matter.

76. Winter operations seasons begin on November 1 of each year. For the winter of 1998-1999, the required Section 7 consultation was not completed until November 17, 1999. For the winter of 1999-2000, the required Section 7 consultation was not completed until April 5, 2000, more than a month after the end of the winter operations season. Section 7 consultation for the 2000-2001 winter operations season was not completed until January 25, 2001. For the 2001-2002 winter operations season, Section 7 consultation was not completed until March 15, 2002, once again after the winter operations season had concluded.

77. Irrigation seasons begin on March 1 of each year. For the 1999 irrigation season, the BuRec failed to complete a Section 7 consultation. For the 2000 irrigation season, the BuRec failed to complete a Section 7 consultation. For the 2001 irrigation season, the BuRec completed its Section 7 consultation on May 21, 2001, almost three months after initiation of the irrigation season. For the 2002 irrigation season, the BuRec failed to complete a Section 7 consultation, as noted above in this complaint.

78. For the period March 1, 2003 through February 28, 2006, the BuRec formally consulted with the USFWS, and received a BO on June 18, 2003 – almost four months after the beginning of the period under consultation.

79. Currently, all of the BuRec’s Pecos River operations are being conducted without the benefit of the BO that is affirmatively required by the ESA.

80. Failure of the BuRec to complete its Section 7 consultations in connection with Pecos River operations in a timely manner poses a risk that the species will not survive or recover.

81. Section 7(a)(1) of the ESA requires all federal agencies to use their authorities to conserve species that are listed for protection under the ESA. 16 U.S.C. §1536(a)(1).

82. In connection with its Pecos River operations, the BuRec has failed to implement measures that it knows would assist in the survival and recovery of the Pecos bluntnose shiner. Indeed, instead of taking measures to pro-actively conserve the Pecos bluntnose shiner, the BuRec operates the Pecos River dams and reservoirs in ways that imperil the continued existence of the shiner and that degrade its habitat.

83. Almost twenty years after its listing as a threatened species, the Pecos bluntnose shiner is no closer to recovery and de-listing because the BuRec has failed to use its full authority to conserve the species. Indeed, the population of the shiner has been in a precipitous decline over the last four to five years and the species remains threatened with extinction because the BuRec does not comply with its mandatory duty to use its authorities to assist in the conservation and recovery of the shiner.

84. Section 9 of the ESA and its implementing regulations prohibit any person, including any federal agency, from "taking" a threatened species. See 16 U.S.C. §1538(a)(1); 50 C.F.R. §227.21. Taking is defined broadly under the ESA to include harming, harassing, or killing a protected species either directly or by degrading its habitat sufficiently to significantly impair essential behavioral patterns. See U.S.C. §1532(19); 50 C.F.R. §17.3.

85. A federal agency may take a listed species incidental to an otherwise lawful activity only after obtaining an incidental take statement from the USFWS at the conclusion of a formal Section 7 consultation. See U.S.C. §1536(b)(4). The USFWS must specify in the incidental take statement "those reasonable and prudent measures . . . necessary or appropriate to minimize" the impact of the incidental taking and mandatory terms and conditions to implement those measures. See id.

86. The BuRec's Pecos River operations, including operations during the 2006 irrigation season, "takes" Pecos bluntnose shiners as a result of block releases and habitat modification and degradation.

87. Currently, the BuRec is taking Pecos bluntnose shiners without first allowing the USFWS the opportunity to prepare an incidental take statement containing reasonable and prudent measures intended to minimize take.

V. Causes of action

First Cause of Action

(Violation of the procedural requirements of Section 7(a)(2) of the ESA)

88. The plaintiff incorporates the preceding paragraphs by reference, as if fully set out herein.

89. The BuRec's failure to complete, a Section 7 consultation with the USFWS concerning the effects of its 2006 irrigation season operations on the Pecos River constitutes a violation of the ESA.

Second Cause of Action

(Violation of the substantive requirements of Section 7(a)(2) of the ESA)

90. The plaintiff incorporates the preceding paragraphs by reference, as if fully set out herein.

91. The BuRec's 2006 irrigation season operations of the Pecos River dams and reservoirs is jeopardizing the continued existence of the Pecos bluntnose shiner, and adversely modifying and destroying designated critical habitat for the shiner.

Third Cause of Action

(Violation of Section 7(a)(1) of the ESA)

92. The plaintiff incorporates the preceding paragraphs by reference, as if fully set out herein.

93. The BuRec is failing to utilize its discretionary authorities over the Pecos River dams and reservoirs in a manner that conserves the Pecos bluntnose shiner.

Fourth Cause of Action

(Violation of Section 9 of the ESA)

94. The plaintiff incorporates the preceding paragraphs by reference, as if fully set out herein.

95. The BuRec's 2006 irrigation season operation are resulting in the take of Pecos bluntnose shiners in violation of Section 9 of the ESA, since the BuRec does not have an incidental take permit authorizing it to take shiners.

VI. Request for Relief

To redress the violations of law set forth in this complaint, the plaintiff seeks the following relief in connection with the Bureau of Reclamation's and the Army Corps of Engineers' Pecos River operations during the 2006 irrigation season:

1. A declaration that the Bureau of Reclamation and the Army Corps of Engineers are in violation of Section 7(a)(2) of the ESA for having failed to complete a Section 7 consultation that assesses the effect of their Pecos River operations during the 2006 irrigation season on the Pecos bluntnose shiner.

2. A declaration that the Bureau of Reclamation and the Army Corps of Engineers are in violation of Section 7(a)(2) of the ESA for taking actions in connection with the 2006 irrigation season operations that jeopardize the continued existence of the Pecos bluntnose shiner and that adversely modify and destroy the shiner's designated critical habitat.

3. A declaration that the Bureau of Reclamation and the Army Corps of Engineers are in violation of Section 7(a)(1) of the ESA for failing to utilize their discretionary authorities to conserve the Pecos bluntnose shiner during the 2006 irrigation season.

4. A declaration that the Bureau of Reclamation and the Army Corps of Engineers are in violation of Section 9 of the ESA for causing take of Pecos bluntnose shiners without an incidental take permit that authorizes such take during the 2006 irrigation season.

5. An order enjoining the Bureau of Reclamation and the Army Corps of Engineers to immediately cease from taking any and all actions that adversely affect the Pecos bluntnose shiner and/or its critical habitat pending completion of a Section 7 consultation.

6. An order enjoining the Bureau of Reclamation and the Army Corps of Engineers to immediately utilize their discretionary authorities to conserve the Pecos bluntnose shiner.

7. An order enjoining the Bureau of Reclamation and the Army Corps of Engineers to immediately cease from taking any and all actions that take Pecos bluntnose shiners until such time as the agencies have acquired an incidental take permit for such take.

8. Any and all other relief, including interim injunctive relief, that the Court deems just and proper.

9. An order awarding the plaintiff its attorneys' fees and costs for the prosecution of this action.

Dated: _____

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