No. 18-2153

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

WILDEARTH GUARDIANS

Plaintiff-Appellant,

vs.

U.S. ARMY CORPS OF ENGINEERS

Defendant-Appellee,

and

MIDDLE RIO GRANDE CONSERVANCY DISTRICT

Intervenor-Defendant-Appellee.

On Appeal from the United States District Court for the District of New Mexico,
Civil Action No. 1:14-cv-00666-RB-SCY,
Honorable Robert C. Brack, District Judge

APPELLANT'S FINAL OPENING BRIEF
(Oral Argument Requested)

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26(a), Plaintiff-Appellant WildEarth Guardians certifies to this Court that it is a nonprofit organization and that there is no parent corporation or any publicly held corporation that holds any stock in this organization.

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GLOSSARY OF TERMS

AWIA	America's Water Infrastructure Act
BA	Biological Assessment
BiOp	Biological Opinion
Bureau	U.S. Bureau of Reclamation
Compact Commission	Rio Grande Compact Commission
Corps	U.S. Army Corps of Engineers
ESA	Endangered Species Act
FWCA	Fish and Wildlife Coordination Act
FWS	Fish and Wildlife Service
RPA	Reasonable and Prudent Alternative
WRDA	Water Resources Development Act
Guardians	WildEarth Guardians

PRIOR RELATED APPEALS IN THIS COURT

None.

JURISDICTION

The district court had jurisdiction over this case pursuant to 28 U.S.C. § 1331 (federal question) and the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. § 701 *et seq*. This Court has jurisdiction under 28 U.S.C. § 1291.

This is an appeal from the amended final order and judgment of the U.S. District Court for the District of New Mexico dated August 14, 2018, which disposed of all of Appellant's claims. The notice of appeal in this case, No. 18-2153, was timely filed on October 12, 2018.

ISSUES PRESENTED

1. Whether the Corps has sufficient discretion over ongoing operations of its Middle Rio Grande dams to trigger the Endangered Species Act's requirement, 16 U.S.C. § 1536(a)(2), that the Corps consult with the U.S. Fish and Wildlife Service over the effects of its ongoing dam operations to listed species.

2. If the Corps has sufficient discretion over its ongoing Middle Rio Grande dam operations to trigger the ESA's consultation requirement, what is the proper scope of the affirmative action for consultation?

STATEMENT OF THE CASE

Beginning in the 1990s, the U.S. Army Corps of Engineers ("Corps") collaborated with interested stakeholders including the United States Fish and

Wildlife Service ("FWS"), the United States Bureau of Reclamation ("Bureau"), and the Rio Grande Compact Commission ("Compact Commission"), to exercise its discretionary authorities for the benefit of the endangered Rio Grande silvery minnow ("minnow") and Southwestern willow flycatcher ("flycatcher"). Recognizing that operation and maintenance of its Middle Rio Grande dams contribute significantly to the habitat alterations that imperil the continued existence of these two species, the Corps modified its flood and sediment control operations to mitigate the adverse impacts of those operations and to avert the imminent extinction of the minnow through the remaining five percent of its historic range and the permanent loss of flycatcher populations in New Mexico, while still meeting its flood and sediment control mandates.

The Corps is uniquely situated to provide environmental flows from its Middle Rio Grande dams in a manner that induces minnow spawning and creates riverine and riparian habitats necessary for the continued survival of both the minnow and the flycatcher. On many occasions—beginning in 1996 and continuing through 2013—the Corps exercised its discretionary authorities for operation of its Middle Rio Grande dams to provide these critical environmental flows. For over two decades, the Corps acknowledged that it could deviate from historical operation parameters for its Middle Rio Grande dams to benefit the minnow and flycatcher in a manner fully consistent with the flood and sediment

control objectives of those dams. The Corps also acknowledged that its deviations from operational parameters in the 1960 Flood Control Act resulted in significant positive benefits to listed species.

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

In the district court, Appellant WildEarth Guardians ("Guardians") alleged that the Corps violated ESA Section 7(a)(2) when it terminated consultation with FWS over the effects of its ongoing Middle Rio Grande dam operations on listed

species, and challenged as arbitrary the Corps' decision that it is not required to engage in such consultation.

LEGAL BACKGROUND

The ESA is "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation," and reflects a government policy of institutionalized caution. *Tennessee Valley Auth. v. Hill* ("*TVA*"), 437 U.S. 153, 180 (1978). Based on its review of the ESA's language, history, and structure, the United States Supreme Court has held that "Congress intended endangered species to be afforded the highest of priorities" in an effort to "halt and reverse the trend towards species extinction, whatever the cost." *Id.* at 154, 174.

Through the ESA, Congress imposes both substantive and procedural duties on federal agencies. *Nat'l Ass'n of Home Builders v. Defenders of Wildlife* ("*Home Builders*"), 551 U.S. 644, 667 (2007); *Rio Grande Silvery Minnow v. Bureau of Reclamation* ("*RGSM*"), 601 F.3d 1096, 1105 (10th Cir. 2010). Substantively, ESA Section 7(a)(2) imposes a duty on federal agencies to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any [ESA-listed species] or result in the destruction or adverse modification of habitat of such species." 16 U.S.C. § 1536(a)(2). Procedurally, ESA Section 7(a)(2) imposes a duty on federal agencies to engage in a "formal consultation" with FWS as to the biological impact of a planned or

ongoing agency action where the agency action "may affect" listed species, and may be modified by the agency for the benefit of listed species. *Id*.

Pursuant to the procedural requirements of Section 7(a)(2), "whenever a federal agency proposes an action in which it has discretion to act for the benefit of an endangered species, it must consult to insure that the action 'is not likely to jeopardize the continued existence of any endangered species or threatened species.'" *WildEarth Guardians v. U.S. Envtl. Prot. Agency*, 759 F.3d 1196, 1200 (10th Cir. 2014) (citing 16 U.S.C. § 1536(a)(2) and 50 C.F.R. § 402.03). While the procedural obligation to engage in a formal consultation with FWS under Section 7(a)(2) is broadly applicable—expressly applying by the statutory language of Section 7(a)(2) to "any action" that may affect listed species[1]—there are two important limitations on an agency's obligation to conduct a Section 7(a)(2) consultation with FWS.

First, the formal consultation requirement is triggered only in those instances where an agency is taking, or proposes to take, an action that "may affect" a listed species. *RGSM*, 601 F.3d at 1105. The "may affect" trigger is a very low threshold, and "[a]ny possible effect, whether beneficial, benign, adverse or of an

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

undetermined character, triggers the formal consultation requirement."[2] 51 Fed. Reg. 19,926, 19,949-50 (June 3, 1986); *see also California ex rel. Lockyer v. U.S. Dep't of Agric.*, 575 F.3d 999, 1018-19 (9th Cir. 2009) ("The threshold for triggering [the obligations of ESA Section 7(a)(2)] is relatively low; consultation is required whenever a federal action 'may affect' listed species or critical habitat").

Second, a Section 7(a)(2) consultation obligation attaches to an action that "may affect" a listed species only in those instances where the agency has the discretionary authority to modify the ongoing or proposed action for the benefit of listed species. *Home Builders*, 551 U.S. at 669-70; *Natural Res. Defense Council v. Jewell ("NRDC")*, 749 F.3d 776, 784 (9th Cir. 2014) ("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"). The Section 7(a)(2) formal consultation requirement is not triggered where the agency lacks the legal authority to modify its action for the benefit of listed species.

Formal consultation under ESA Section 7(a)(2) is commenced by the action agency's preparation of a Biological Assessment ("BA"). In a BA, the agency

[2] For those agency actions that have a beneficial or *de minimis* effect on listed species, there is an off-ramp to an abbreviated ESA compliance process known as "informal consultation." Informal consultation only applies where the agency determines that an ongoing or proposed action "may affect" listed species but is "not likely to adversely affect" the species, and obtains a written concurrence from FWS that the action "is not likely to adversely affect species or critical habitat. *Ctr. for Native Ecosystems v. Cables*, 509 F.3d 1310, 1321 (10th Cir. 2007); 50 C.F.R. §402.13(a); *see also RGSM*, 601 F.3d at 1105.

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

If FWS finds that a proposed action is associated with jeopardy and/or adverse modification, FWS must develop and request implementation of a Reasonable and Prudent Alternative ("RPA") which is a proposal to modify the proposed action—within the constraints of the action agency's discretionary authority—in such a way as to avoid jeopardy and/or adverse modification. 16 U.S.C. §1536(b)(3)(A). Importantly, when FWS fashions an RPA, FWS looks to the full range of an agency's discretionary authority and is not required to constrain its consideration to only those actions that the agency itself plans to implement. "[A] Federal agency's responsibility under Section 7(a)(2) permeates the full range of discretionary authority held by that agency; i.e., [FWS] can specify a [RPA] that involves the maximum exercise of Federal agency authority when to do so is necessary, in the opinion of the [FWS] to avoid jeopardy." 51 Fed. Reg. at 19,937. If the BiOp prepared in connection with an agency action is associated with

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

FACTUAL BACKGROUND

I. Authorization and Development of the Middle Rio Grande Project

To forestall economic calamity in the Middle Rio Grande region, the federal government developed the Middle Rio Grande Project "to rehabilitate and construct irrigation facilities, control flooding and sedimentation on the river, and improve the economy in the Middle Rio Grande Valley." *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 599 F.3d 1165, 1169 (10th Cir. 2010). In contemporaneously prepared proposals, the Corps and the Bureau presented the Middle Rio Grande Project to Congress for authorization. These proposals—submitted to Congress as "Reports" on the agencies' plans for their respective portions of Middle Rio Grande Project development—discuss the then dire conditions in the Middle Rio Grande which required immediate federal intervention to salvage the valley's collapsing agricultural economy, and avoid "probable abandonment of agricultural pursuits on a commercial basis within 50 years." App. at JA1342.

The Middle Rio Grande Project was thus conceived and authorized as a multiple purpose project. In its 1948 Report, the Corps stated that implementation of its proposed work on the Middle Rio Grande Project would serve several complementary purposes in addition to flood and sediment control, including power generation, watershed improvement, recreation, and fish and wildlife development. App. at JA1328 (Corps enumerates "fish and wildlife development" as one of the purposes of the Middle Rio Grande Project); App. at JA1345 (Corps states that "fish and wildlife development" is one of the "main features" of the Middle Rio Grande Project).

From the inception of Middle Rio Grande Project planning, all the stakeholders acknowledged that the Project could only be developed in strict accordance with the 1938 Rio Grande Compact ("Compact"), requiring an equitable allocation of the Rio Grande's water between the states of Colorado, New Mexico, and Texas. *See, e.g.,* App. at JA1340 (Corps' 1948 Report acknowledging that Congress could authorize Corps' Project facilities only if they were "subject to the provision that all flood-control works be operated in accordance with the Rio Grande Compact"). Ultimately, those Compact-related constraints proved to be an impediment to authorization of main stem reservoirs on the Rio Grande when the Middle Rio Grande Project was taken up by Congress in 1948. App. at JA1320, 1333.

The Compact concerns ultimately carried the day when Congress authorized the Middle Rio Grande Project in the 1948 Flood Control Act, but withheld authorization for a main stem Rio Grande dam, leaving open the possibility for future consideration of a main stem dam. App. at JA1361. The authorizing legislation also expressly requires that the Corps' physical facilities in the Middle Rio Grande Project be operated "in conformity with the Rio Grande Compact as it is administered by the Rio Grande Compact Commission." *Id.*

Project reviews by other agencies at the time also suggest that they contemplated operational changes to meet purposes in addition to flood control. In its review of the Project, the Bureau of the Budget wrote that "adjustments in the plan of operations can be made in accordance" with Compact objectives. App. at JA1317. In a similar vein, FWS commented on the Corps' 1948 Report that specific plans to achieve the Project's fish and wildlife purpose could not be developed until after the development of "final working plans for operating" Project dams and reservoirs. App. at JA1318. Nonetheless, FWS urged that "to the extent practicable the project be provided with means for maintaining fish and wildlife values at not less than present values," and that this objective be pursued in greater depth as implementation of the Project progressed. *Id.*

After the Middle Rio Grande Project's initial authorization in 1948, Middle Rio Grande interests continued to lobby for construction of a main stem dam under

the belief that existing dams along Middle Rio Grande tributaries did not provide sufficient protection from floods in the Middle Rio Grande valley. App. at JA1413-14. The Corps supported New Mexico's position, and in the late 1950s it proposed the construction of Cochiti Dam on the Rio Grande below the confluences of that river with the Jemez River and the Santa Fe River. *Id*.

On this iteration of the project, New Mexico received more support from Texas and Colorado for a main stem dam than it had previously received, primarily because New Mexico's sister states in the Compact actively participated in writing the "Reservoir Regulation Plan" ultimately incorporated into the congressional authorization for Cochiti Dam. App. at JA1415. The Compact Commission passed a resolution supporting congressional authorization of Cochiti Dam so long as the authorizing legislation incorporate the Reservoir Regulation Plan "developed through the cooperation of the States of Colorado, New Mexico, and Texas." App. at JA1423; *see also* App. at JA1415 (setting out the Reservoir Regulation Plan agreed to by the Compact states and requesting "that it be included verbatim in any bill" authorizing construction of Cochiti Dam), JA1417 (explaining that the prior controversy as to the construction of a main stem dam was resolved by adoption of an agreement concerning operation of the Corps' Middle Rio Grande facilities). *See also* App. at JA1498-99 (discussing Compact Commission interests in

authorization of Cochiti Dam and Congress's ultimate deferral to Compact Commission concerns).

In the 1960 Flood Control Act, Congress authorized the construction of Cochiti Dam, and as requested by New Mexico, Texas, and Colorado, incorporated the Compact Commission's Reservoir Regulation Plan into the authorizing legislation. App. at JA1441. The Flood Control Act expressly contemplates that the Corps might deviate from the incorporated reservoir regulation schedule at a later date, and provides that such modifications can be implemented "with the advice and the consent of the Rio Grande Compact Commission." App. at JA1442.

Thus, the Reservoir Regulation Plan set out in the authorization for Cochiti Dam is not an immutable congressional edict forever insulated from modifications. To the contrary, the authorizing legislation expressly and plainly contemplates that the Corps' operations might be modified in the future upon the advice and consent of the Compact Commission. *See* App. at JA1103 (Corps states that the authorizing legislation "provides the [Compact Commission] with the authority to approve Corps-requested departures from the reservoir operations schedule").

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

The Rio Grande silvery minnow was historically one of the most abundant and widespread fishes in the Rio Grande basin, occurring from Espanola, New Mexico, to the Gulf of Mexico. 59 Fed. Reg. 36,988 (July 20, 1994). It was also

found in the Pecos River from Santa Rosa, New Mexico, downstream to its confluence with the Rio Grande in south Texas. *Id.* According to FWS, the species presently occupies only about five percent of its historic range. *Id.* It has been completely extirpated from the Pecos River and from the Rio Grande upstream from Cochiti Reservoir and downstream of Elephant Butte Reservoir. *Id.* Currently, it is found only in the 175-mile reach of the Middle Rio Grande from Cochiti Dam to the headwaters of Elephant Butte Reservoir. *Id.*

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

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

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

The Southwestern willow flycatcher occurs in riparian habitats along rivers, streams, and other wetlands. 60 Fed. Reg. 10,694 (Feb. 27, 1995). When it listed the species as endangered in 1995, FWS noted that the range-wide population of

the flycatcher had "declined precipitously," and was in a continuing downward trend. *Id.* at 10,697. Land uses and river management actions that degrade riparian areas cause an adverse modification of flycatcher habitat. *Id.* In the flycatcher listing rule, FWS found that dams in particular negatively impact the riparian habitat required for flycatcher life phases. *Id.* at 10,700. FWS also stated that up to 90 percent of riparian areas in the southwestern United States "have been lost or modified" as a result of alterations in flow regimes, channel confinement, changes in water quality, and the floristic makeup of riparian systems. *Id.* at 10,698. FWS made its initial designation of critical habitat for the flycatcher in 1997, and amended that designation several times including, most recently, in 2013. 78 Fed. Reg. 344 (Jan. 2, 2013).

III. Impacts to Listed Species from Corps' Dam Operations

Prior to water resource development actions, the Middle Rio Grande was a dynamic riparian-riverine ecosystem characterized by an active braided channel that migrated over a broad sandy floodplain up to a half-mile wide. Historically, uncontrolled floods periodically swept down the Middle Rio Grande valley and inundated the entire floodplain and adjacent areas in overbank flows that promoted and sustained the riparian ecosystem. App. at JA1036. This active channel and floodplain connection provided habitat for all life stages of the silvery minnow and various stages of vegetation along the riparian corridor used as breeding habitat by

flycatchers. *Id.*; *see also* App. at JA1051 ("[a] connected flood plain provides important larval and rearing habitats for silvery minnow as well as inundated riparian vegetation for flycatcher").

The development and operation of dams and reservoirs in the Middle Rio Grande, together with other anthropogenic factors, has dramatically changed the Rio Grande's physical shape and ecological function. Sediment retention behind Cochiti Dam continues changing the river downstream in ways that imperil continued minnow survival. Adverse minnow impacts include: (1) channel deepening and increasing disconnection from the associated flood plain; (2) channel transitioning from a sand and gravel bottom appropriate for essential minnow life phases to a coarse cobble-bottomed river that does not support minnow reproduction and survival; and (3) channel changing from a braided channel of different depths and flow rates offering diverse off-channel habitat for the minnow to a single straight channel. App. at JA1096-97. These geomorphological changes to the Rio Grande downstream of Cochiti Dam have also impaired the associated riparian areas, consequently harming the flycatcher. *Id.*

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

> Cochiti Dam on the Rio Grande started operations in 1973, retaining flood flows and the upstream sediment supply. On the Rio Jemez, [sediment retention operations began in 1980] . . . . By 1980, much of the Rio Grande downstream from Cochiti Dam had converted to a coarse gravel bedded channel, with that transition migrating downstream to its present location in the Albuquerque area today. As two major supplies of sediment were removed from the Rio Grande, rapid channel incision has occurred throughout this area of the Rio Grande. Much of the historical floodplain has become abandoned through degradation [deepening] of the channel bed, with vegetated bars constituting the majority of flooded surfaces in years with normal spring discharge.

App. at JA665; *see also* App. at JA1097-98 (Corps explains that Cochiti Dam "pointedly affected the geomorphology of the main stem" and "caused significant incision immediately downstream"), JA1046-57 (Bureau states that "[i]ncision on the Middle Rio Grande between Cochiti and Isleta has been impacted most strongly by construction of Cochiti and Jemez Canyon Dams, and these effects appear to be continuing to extend downstream"), JA969 (Bureau geomorphology study concludes that "[a]fter operations began at Cochiti Dam in 1973, the channel bed immediately began to erode and coarsen").

The Corps admits that its Middle Rio Grande dam operations affect the minnow and its critical habitat:

> Channel narrowing by encroachment of non-natives forming a single-threaded channel reduces the quantity and quality of silvery minnow critical habitat . . . Past actions have reduced the total habitat from historic conditions and altered habitat conditions for the [minnow]. Narrowing and deepening of the channel, lack of side channels and off-channel pools, and changes in natural flow regimes have all adversely affected the [minnow] and its habitat. These environmental changes have degraded spawning,

> nursery, feeding, resting, and refugia areas required for species survival and recovery.

App. at JA674. The flycatcher is similarly adversely affected by the Corps' dam operations. *See, e.g.,* App. at JA1036 (Bureau states that "[w]ater and sediment management have resulted in a large reduction of suitable habitat for the flycatcher, as a result of the reduction of high flow frequency, duration, and magnitude that helped to create and maintain habitat for this species").

Recent analyses concerning the impacts of the Corps' operations at Cochiti Dam and the Corps' other Middle Rio Grande facilities show that adverse habitat modifications such as deepening of the river channel result and armoring of the river bed are continuing and are moving downstream. App. at JA1099 (discussing deepening of the river channel), JA1036-37 (discussing channel narrowing trend in the Rio Grande and resulting degradation of aquatic habitat under the current river management regime).

Most recently, and shortly before the Corps terminated its ESA Section 7(a)(2) consultation with FWS in November 2013, the Corps acknowledged that the biological impacts of its Middle Rio Grande Project operations trigger the ESA Section 7(a)(2) requirements. App. at JA1174-75. The Corps specifically found that its Middle Rio Grande operations "would likely adversely affect" the minnow and its critical habitat. App. at JA1174. The Corps also determined that Middle Rio

Grande operations "may affect, but would not likely adversely affect" the flycatcher and its critical habitat.

IV. Corps' ESA Consultations and Modifications of Dam Operations

A. ESA Consultations.

In recognition of the fact that its Middle Rio Grande operations adversely affect listed species and their critical habitat, the Corps has formally consulted with FWS pursuant to the requirements of ESA Section 7(a)(2) repeatedly since the species were listed. App. at JA1066-69. Reflecting the fact that the Corps' Middle Rio Grande facilities and the Bureau's water operations cumulatively impact listed species, and that the Corps and the Bureau have historically considered the Middle Rio Grande Project a single and unified project of the two agencies, the Corps and the Bureau have consulted jointly with FWS in the past. App. at JA1066-68.

The last Corps consultation over dam operations carried out to completion was in 2003, and led to the issuance of a BiOp which covered the agencies' joint Middle Rio Grande operations through 2013. App. at JA1068. In the 2003 BiOp, FWS concluded that on-going operations in connection with the Middle Rio Grande Project jeopardized the continued existence of the minnow and adversely modified its critical habitat. App. at JA609-610. The BiOp also concluded that the on-going operations jeopardized the continued existence of the Middle Rio Grande flycatcher population. App. at JA621. To account for that jeopardy, FWS

incorporated an RPA into the 2003 BiOp. App. at JA622. The RPA prescribed 32 mandatory measures that the Corps and the Bureau were required to implement to ensure that their Middle Rio Grande Project operations did not "jeopardize" both species or result in "adverse modification" to critical habitat for the minnow. App. at JA620-36.

Of the various RPA elements incorporated into the 2003 BiOp, two in particular implicated the Corps' operations in connection with the Middle Rio Grande Project. Element A required an annual increase in flows between April 15 and June 15 to cue minnow spawning. App. at JA625. Element V requires a spring time release of floodwater "to provide for overbank flooding" in appropriate hydrologic conditions. App. at JA632. With the consent of the Compact Commission, and as contemplated by the 1960 Flood Control Act, the Corps implemented various deviations from normal operating criteria at Cochiti Dam to create the required "spawning spike" and overbank flows in the Rio Grande downstream of Cochiti. *See*, *e.g.*, App. at JA655 (Corps explains that "fill and spill" deviations at Cochiti Dam respond to the requirements of RPA Elements A and V).

B. Corps' Deviations in Dam Operations to Protect Listed Species.

Since the 1990s, the Compact Commission has approved various deviations from the normal regulation plans at the Corps' Middle Rio Grande dams. App. at

JA1103. The Corps initiated deviations from the Reservoir Regulation Plan set out in the 1960 Flood Control Act to benefit the minnow and the flycatcher in 1996 and 1997 shortly after the species' listing, which the Corps also implemented in 2000, 2001-2003, 2007, and 2010. App. at JA1066-69; *see also* App. at JA1506 (discussing the 2001 through 2003 deviation at Jemez Dam that "was used to store and provide conservation water to promote the recovery of the [minnow]" with the advice and consent of the Compact Commission). In 2008, the Corps approved deviations from the default Reservoir Regulation Plan to benefit the minnow and the flycatcher for years 2009-11. That authorization was extended for years 2012-13 in 2011. App. at JA1039.

The deviations that occurred in 2007 and 2010 are colloquially known as "fill and spill" deviations, and are particularly important to the continued survival of the minnow and to the conservation of critical habitat for both the minnow and the flycatcher. During such a deviation, water that would ordinarily flow through Cochiti Lake prior to, instead of during, the minnow spawning season is held back in Cochiti Reservoir for a relatively short period of up to 10 days. Upon release of the temporarily retained water during the spawning season, the simulated flood flow cues minnow spawning and provides overbank flooding to benefit the riverine-riparian system. App. at JA1039. The Corps recognizes that implementation of a "fill and spill" deviation "facilitate[s] spawning and

recruitment flows for the silvery minnow and also . . . provide[s] overbanking opportunities to benefit habitat for the [flycatcher].” App. at JA1114. These operational deviations are especially critical in the approximately 25 percent of the years in which runoff in the Middle Rio Grande basin under normal operating conditions would not result in a flood of sufficient magnitude at the appropriate time to cue minnow spawning or to recharge riparian habitat. App. at JA659-60.

Importantly, “fill and spill” deviations at Cochiti are considered a “no cost” solution to minnow and flycatcher conservation because they provide significant environmental benefits with the use of an extremely limited amount of water. In light of the increasing scarcity of “supplemental water” sources from the San Juan-Chama Project, “fill and spill” deviations are recognized as the mitigation measure that has the most environmental benefit with the least disruption to water supplies. App. at JA656, 1077. And critically, the record shows that implementation of such deviations does not impair the Corps’ flood and sediment control operations at its Middle Rio Grande facilities, and does not result in any downstream flood threat. App. at JA684-85. The Compact Commission has exercised 1960 Flood Control Act authority to actively encourage and support the Corps in its authorization and implementation of such deviations. App. at JA1506 (Compact Commission approves deviations to operations at Jemez in 2001, 2002, and 2003), JA703

(Commission requests a deviation from normal Corps operations in 2007), JA789 (Commission supports Corps' 2009 five-year authorization for deviations).

C. Corps' Termination of "Fill and Spill" Deviations and ESA Consultation.

On November 12, 2013, the Corps informed governmental stakeholders that it would no longer exercise its discretionary authorities to operate its Middle Rio Grande dams to benefit the minnow and the flycatcher. App. at JA474-75. The Corps did not unequivocally state that it determined it lacked statutory authority to implement "fill and spill" deviations, as required by RPA Elements A and V. Rather, the Corps terminated the deviations as a policy matter. *Id.*

Two weeks later, the Corps terminated its on-going ESA Section 7(a)(2) consultation with FWS "in light of new guidance from Headquarters" mandating "careful legal review to determine whether legal principles are being implemented." App. at JA465-66. Additionally, the Corps' termination letter articulates a concern that it be able to "ensure that we can operate and maintain the [Middle Rio Grande Project facilities] to serve their Congressionally-authorized purposes" despite the fact that the Corps had (1) previously determined that "fill and spill" deviations do not interfere with flood control operations or increase flood risk, and (2) had in fact conducted such deviations without impacting flood and sediment control. *Id*.

D. Congressional Reauthorization of "Fill and Spill" Deviations.

Shortly after Guardians filed its Notice of Appeal in this case, Congress passed the America's Water Infrastructure Act of 2018 ("2018 AWIA"), which included a provision requiring the Corps to restart "fill and spill" deviations as part of its operation of Cochiti and Jemez Canyon Dams.[3] Pub. L No. 115-270, § 1174, 132 Stat. 3765, 3800 (2018). Section 1174 of the Act, termed "Middle Rio Grande Peak Flow Restoration," includes mandatory language directing the Corps to restart the temporary deviation started in 2009 after obtaining approval from two Pueblos and the Compact Commission.

STANDARD OF REVIEW

The district court's denial of Guardians' *Olenhouse* Motion is a question of law that this Court reviews de novo with no deference to the district court's legal conclusion. *New Mexico el rel. Richardson v. Bureau of Land Mgmnt.*, 565 F.3d 683, 704-05 (10th Cir. 2009).

Judicial review of the Corps' actions challenged under the ESA is governed by the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, where the reviewing court must set aside an agency action if it "fails to meet statutory, procedural or constitutional requirements or if it was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Olenhouse v. Commodity*

[3] Guardians first learned of this legislation from the Corps' counsel during a call with the Tenth Circuit mediator on February 11, 2019.

Credit Corp., 42 F.3d 1560, 1574 (10th Cir. 1994) (internal quotations omitted). Under this standard, a reviewing court must set aside agency action if:

> [T]he agency . . . relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Colo. Envtl. Coal. v. Dombeck, 185 F.3d 1162, 1167 (10th Cir. 1999) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

Agency interpretations of statutes that "appear[] in informal policy statements and opinion letters" are not entitled to *Chevron* deference. *Southern Utah Wilderness Alliance v. Bureau of Land Mgmt.* ("*SUWA*"), 425 F.3d 735, 759 (10th Cir. 2005). Instead, courts apply the *Skidmore* standard that gives some "respect" to the agency's interpretation, "but only to the extent that [it has] the power to persuade." *Id*. (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944)).

SUMMARY OF ARGUMENT

The key issue on appeal is whether the Corps has discretion to modify its dam operations to benefit listed species. The answer is yes. The Flood Control Acts (authorizing Corps facilities along the Middle Rio Grande) considered in the context of subsequent statutes governing Corps water operations show Congress's

intent that the Corps' operations may promote species protection where feasible so long as such modifications do not conflict with authorized project purposes.

Under the 1948 and 1960 Flood Control Acts, the authorized purposes of the Corps' Middle Rio Grande dams were "solely" for flood and sediment control. But the 1960 Flood Control Act included a provision allowing the Corps to deviate from "normal" dam operations with Compact Commission permission. Over the last two decades, the Corps has sought and received from the Compact Commission permission to deviate from normal operations to benefit the minnow and flycatcher. Recently, the Corps arbitrarily reversed its position that it has discretion to modify its operations for species' benefits, and now erroneously believes it lacks *any* discretion to take actions that meet goals other than flood and sediment control. The Corps' new position on discretion and ESA consultation completely disregards the Corps' prior determinations that it had some discretion to modify dam operations to benefit listed species, and that doing so would not compromise flood and sediment control purposes. Instead, the Corps arbitrarily takes a "blank slate" approach to assessing its ESA responsibilities.

The Corps' parsing of dam operations into their smallest constituent activities and assessing its discretion using this extremely narrow scope is contrary to the ESA. Courts have rejected agency attempts to avoid ESA consultation over the full scope of the agency's discretion by segmenting project actions into smaller

actions that ultimately lead to jeopardy but avoid detection through this death-by-a-thousand-cuts approach. In the past, the Corps has recognized the constellation of dam operations as part of an interrelated, interdependent single action, and has analyzed them accordingly in previous Biological Assessments. If the Court finds that the Corps has sufficient discretion to modify dam operations to benefit listed species that triggers the consultation requirement, the Court should also find that the Corps must consult over the full scope of its discretion to modify dam operations to comply with Section 7(a)(2)'s consultation requirement.

ARGUMENT

I. WildEarth Guardians Has Standing

Guardians has standing to bring this action. Standing requires a showing of injury, traceability, and redressability. *S. Utah Wilderness Alliance v. Palma*, 707 F.3d 1143, 1153 (10th Cir. 2013). An organization has standing "when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth v. Laidlaw*, 528 U.S. 167, 181 (2000).

"[E]nvironmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity."

Laidlaw, 528 U.S. at 183 (citations omitted); *see also Comm. to Save the Rio Hondo v. Lucero*, 102 F.3d 445, 450 (10th Cir. 1996). Actual environmental harm from complained-of activity need not be shown, as "reasonable concerns" that harm will occur are enough. *Id*. at 183-84. Guardians has suffered injury from the Corps' failure to consult with FWS over the effects of ongoing dam operations to listed species. Guardians' members have extensively visited and recreated in the Middle Rio Grande reaches where the minnow and flycatcher still survive, and they have plans to continue to do so regularly. *See* Pelz Decl. ¶¶ 14-15, 17-19, App. at JA180-83; Radcliffe Decl. ¶¶ 6-10, 13, App. at JA188-92.

To establish traceability in procedural cases, a plaintiff "need only trace the risk of harm to the agency's alleged failure to follow [statutory] procedures." *Lucero*, 102 F.3d at 451-52. Guardians meets this test. By failing to consult over the effects of its Middle Rio Grande dam operations to listed species, the Corps violated the ESA's procedural mandates and increased the likelihood of harm to ecosystems in the Middle Rio Grande that support listed species and are used by Guardians' members.

Redressability is satisfied by showing that a plaintiff's "injury would be redressed by a favorable decision requiring the [agency] to comply with [statutory] procedures." *Lucero*, 102 F.3d at 452. Guardians' injuries would be redressed by a favorable result in this suit because the Corps would be forced to consult with

FWS over the impacts of dam operations to listed species, and mitigate any adverse effects to listed species to avoid jeopardy. Pelz Decl. ¶¶ 21-22, App. at JA184; Radcliffe Decl. ¶ 14, App. at JA192.

II. The Corps Violated Its Section 7 Procedural Duty to Consult with FWS Regarding Dam Operations Because the Corps Has Discretion to Modify Dam Operations to Benefit Listed Species

To ensure that a federal agency complies with its substantive duty to prevent jeopardy to listed species and adverse habitat modification of species' habitat, Section 7(a)(2) imposes on agencies a procedural duty to formally consult with FWS over the impacts of the agency action on listed species. 16 U.S.C. § 1536(a)(2); *see also RGSM*, 601 F.3d at 1105 ("The procedural obligation ensures that the agency proposing the action . . . consults with the FWS to determine the effects of its actions on endangered species and their critical habitat"). The formal consultation requirement is triggered where an agency action: (1) "may affect" a listed species,[4] and (2) the action is one "in which [the agency] has discretion to act for the benefit of any endangered species." *WildEarth Guardians*, 759 F.3d at 1200 (citing 16 U.S.C. § 1536(a)(2), 50 C.F.R. § 402.03).

A. The Relevant Statutes Support Corps Discretion.

The second triggering factor for formal ESA consultation—agency discretion—is at issue here. To determine whether the Corps has discretion to

[4] Thee is no dispute that Corps operations may affect the minnow and flycatcher. *See* App. at JA1104, 1124, 1174.

manage its Middle Rio Grande dams to benefit the minnow and flycatcher requires applying the canons of statutory construction[5] to a series of statutes governing Corps water operations. The relevant statutes include: the 1948 and 1960 Flood Control Acts; the 1958 Fish and Wildlife Coordination Act ("FWCA"); and the 1986, 1990, and 1996 Water Resources Development Acts ("WRDAs"). When applying the established statutory construction principle that "statutes dealing with the same subject matter must be read together and harmonized where possible," *Dep't of Water & Power of City of Los Angeles v. Bonneville Power Admin.*, 759 F.2d 684, 693 n.13 (9th Cir. 1985), the result is that Congress used the FWCA/WRDAs to expand the modicum of discretion it gave to the Corps in the Flood Control Acts. Moreover, in the 2018 AWIA, Congress explicitly directed the Corps to restart deviations from normal dam operations to benefit listed species.

1. The Corps Has Discretion Under the Flood Control Acts.

The starting point in cases involving construction of a statute is the statutory language itself. *U.S. v. State of Colorado*, 990 F.2d 1565, 1575 (10th Cir. 1993) (citing *Hallstrom v. Tillamook County*, 493 U.S. 20, 25, 28-29 (1991)). The relevant language from the Flood Control Acts implicating the Corps' discretion is quoted below:

[5] As discussed more fully in Section II.B below, to the extent the Corps' interpretation of the Flood Control Acts is entitled to any deference, only *Skidmore* deference is appropriate.

Statute	Citation	Relevant Language
1948 Flood Control Act	Public Law 80-858 App. at JA1353-65	At all times when New Mexico shall have accrued debits as defined by the Rio Grande Compact 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, and at all times all project works shall be operated in conformity with the Rio Grande Compact as it is administered by the [Compact Commission].
1960 Flood Control Act	Public Law 86-645 (emphasis added) App. at JA1429-52	[R]eservoirs constructed by the Corps of Engineers as a part of the Middle Rio Grande Project will be operated solely for flood control and sediment control, as described below . . . (d) All reservoirs of the Middle Rio Grande project will be operated at all times in the manner described above in conformity with the Rio Grande compact, and no departure from the foregoing operation schedule will be made *except with the advice and consent of the [Compact Commission]* . . .

The Flood Control Acts authorized the Middle Rio Grande Project in general (1948) and construction of Cochiti Dam in particular (1960) to control flooding and sediment accumulation in that reach. As discussed above, the Acts were crafted against the backdrop of the need to comply with the Rio Grande Compact. Importantly, the 1960 Flood Control Act included a provision allowing the Corps to deviate from the incorporated Reservoir Regulation Plan at a later date, providing such modifications be implemented "with the advice and the consent of the Rio Grande Compact Commission." App. at JA1442; *see also* App. at JA1103 (Corps statement recognizing same).

The Corps now asserts that it lacks any discretion to modify dam operations to benefit listed species because of the narrow purposes the Flood Control Acts prescribed to dam operations. Op. at 8-9 (App. at JA303-04) (discussing Corps' interpretation of Flood Control Acts). The district court agreed with the Corps' interpretation. *Id*. at 22-25 (App. at JA317-20). The Corps and the district court erred by basing their interpretations of agency discretion on isolated phrases and sections in the 1960 Flood Control Act, rather than following the Supreme Court's dictate that "a reviewing court should not confine itself to examining a particular statutory provision in isolation" because "[t]he meaning—or ambiguity—of certain words or phrases may only become evident when placed in context." *Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000) (citations omitted).

The district court based its interpretation of Corps discretion on two provisions of the 1960 Flood Control Act: (1) that Middle Rio Grande facilities be operated solely for flood and sediment control, and (2) that dam releases be limited "to the amounts necessary to provide adequate capacity for control of subsequent summer floods." Op. at 24-25 (App. at JA319-20). In a single sentence the district court dismissed the effect of the "deviation" provision in the 1960 Flood Control Act with the statement that "the enumerated permissible deviations . . . have nothing to do with the environment." *Id*. at 25 (App. at JA320). Yet the deviation

provision does not include *any* "enumerated permissible deviations." Rather the provision is generally worded to prohibit "departure" from the operating schedule "except with the advice and consent of the [Compact Commission]." App. at JA1442. Not only did the district court improperly analyze the 1960 Act, it also improperly added language to the Act that Congress did not intend.

The 1960 Flood Control Act clearly contemplated a future need to deviate from operational parameters, and required Compact Commission permission to do so because of the Commission's active role in writing the operations plan incorporated into the Act. *See* p. 11 *supra*. *Creppel v. U.S. Army Corps of Engineers*, 670 F.2d 564, 572-73 (5th Cir. 1982), pointedly describes why Congress left significant discretion to the Corps in the operational evolution of a Corps facility:

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

Thus, the Corps can modify dam operations as project needs evolve, subject only to the constraint that any operational modifications still "serve the original purpose of the project" and receive the Compact Commission's consent.

Finally, in the 2018 AWIA Congress recognized the Corps' continuing discretion to deviate from normal operations with Compact Commission

permission pursuant to the 1960 Flood Control Act, and mandated that the Corps continue to exercise that discretion to benefit listed species. § 1174, 132 Stat. at 3800. The language of the 2018 AWIA shows that Congress was aware of both the deviation provision and its requirement for Compact Commission approval. Even absent this congressional imprimatur, the plain language of the Flood Control Act supports a conclusion that the Corps has the requisite operational discretion to trigger ESA Section 7(a)(2)'s consultation requirement.

2. The Fish and Wildlife Coordination Act and Water Resources Development Acts Also Confer Discretion on the Corps.

It is also an established principle of statutory construction that statutes must be read as a whole and in relation to one another. *See U.S. v. State of Colorado*, 990 F.2d at 1575 (10th Cir. 1993) (noting the court's obligation to construe statutes harmoniously); *Bonneville Power Admin.*, 759 F.2d at 693 n.13 ("statutes dealing with same subject must be read together and harmonized where possible") (citation omitted). Thus, "[w]hen two related statutes conflict, courts have a duty to construe them harmoniously and give each effect." *Morton v. Mancari*, 417 U.S. 535, 551 (1974); *see also Negonsott v. Samuels*, 933 F.2d 818, 819 (10th Cir. 1991) ("statutes should be construed so that their provisions are harmonious with each other"). There is a strong presumption against one statute appealing or amending another by implication, and "when two statutes are capable of coexistence, it is the

duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Mancari*, 417 U.S. at 550-51.

Here, the FWCA/WRDAs also govern Corps water management in the Middle Rio Grande. In 1958, Congress amended the FWCA in part

> to provide that wildlife conservation shall receive equal consideration and be coordinated with other features of water-resource development programs through the effectual and harmonious planning, development, maintenance, and coordination of wildlife conservation and rehabilitation . . . .

Public Law 85-624 (Aug. 12, 1958); *see also* 16 U.S.C. § 661. The Act goes on to state that:

> Federal agencies authorized to construct or operate water-control projects are authorized to modify or add to the structures and operations of such projects, the construction of which has not been substantially completed on the date of enactment of the Fish and Wildlife Coordination Act . . . in order to accommodate the means and measures for such conservation of wildlife resources as an integral part of such projects.

16 U.S.C. § 662(c). Congress explicitly required compliance with the FWCA "for projects authorized by a specific Act of Congress before" enactment of the FWCA where operational modifications for wildlife conservation could be undertaken that were "compatible with the purposes" of project authorization. 16 U.S.C. § 662(c). This language indicates that Congress was aware of existing Flood Control Acts authorizing Corps water projects for specific purposes, and intended that the Corps operate those projects to accommodate species conservation where it could do so without conflicting with authorized purposes. *See TVA*, 437 U.S. at 181-83

(overview of ESA legislative history showing Congress's awareness that ESA obligations could conflict with scope of agency authority authorized by statute, and Congress's choice that species protections are paramount).

The Water Resources Development Act ("WRDA") of 1986, 33 U.S.C. § 2294, specifically authorizes the Corps "to review the operation of [existing] water resources projects . . . to determine the need for modifications in the structures and operations of such projects for the purpose of improving the quality of the environment in the public interest." 100 Stat. 4251. When Congress modified the WRDA in 1990 to broaden its scope and allocate continuing funding for its implementation, Congress stressed that "it is imperative for the [Corps] to incorporate environmental enhancement advances in all water resources projects," S. Rep. No. 333, 101st Cong., 2nd Sess § 322 (1990), 1990 WL 258953, building on its previous directive that the Corps "*shall* include environmental protection as one of the primary missions of [the Corps] in planning, designing, constructing, operating, and maintaining water resources projects." 33 U.S.C. § 2316 (emphasis added). In the 1996 WRDA, Congress again stressed its intent that the Corps utilize its physical facilities for "aquatic ecosystem restoration" when such project "will improve the quality of the environment and is in the public interest." 33 U.S.C. § 2330(a).

In the FWCA/WRDAs, Congress gave the Corps authority to incorporate environmental protections into its water operations where doing so would not impede the purposes for which the water project was authorized. The district court erred in summarily dismissing this conferral of authority based on the court's unsupported assumption that any operational modifications taken for purposes *other than* flood or sediment control would *per se* "conflict" with these authorized purposes. Op. at 34-36 (App. at JA329-31). The record contradicts the district court's assumption. The district court also ignored the well-established canon that "when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intent to the contrary, to regard each as effective." *Mancari*, 417 U.S at 551.

The record shows that it is possible for the Corps to comply with the directives of *both* the Flood Control Act and the FWCA/WRDAs, and that the Corps has done so in the past. In 2009, the Corps proposed a five-year strategy that "entails a range of flexible water operations at Cochiti Lake and Jemez Canyon Dam to provide suitable flows for [minnow] recruitment and support continued development of riparian habitat for [flycatcher] nesting." App. at JA654 (Final Environmental Assessment for five years of operational deviations). The primary strategy to achieve these goals was deviations in flood control operations at both dams. *Id*. The Corps chose to pursue a long-term deviation strategy "[d]ue to the

success of the 2007 deviation which showed a ten-fold increase in [minnow] population." *Id*. In terms of the impacts of seasonal deviations, the Corps concluded that fill and spill deviations "[would] not impair the existing flood control regulation/operation of the project." App. at JA685. Thus, any assumptions that dam operations for flood/sediment control and species protection are mutually exclusive are not born out by the record. Congress also recognized the compatibility of operational deviations with the Flood Control Act in when it mandated in the 2018 AWIA that the Corps restart such deviations. Because it is possible for the Corps to meet the mandates of *both* the Flood Control Act *and* the FWCA/WRDAs, the Corps must do so.

Finally, the Corps and the district court erred in dismissing the applicability of the FWCA/WRDAs to the Corps' dam operations based on the canon that a specific statute is not controlled by a general one. Op. at 33-34 (App. at JA328-29). However, the specific/general canon applies only where it is impossible to comply with both statutes. *Adirondack Medical Center v. Sebelius*, 740 F.3d 692, 698-99 (D.C. Cir. 2014) ("The [specific/general] canon is impotent . . . unless the compared statutes are 'irreconcilably conflicting'.") (citation omitted). The Supreme Court recognized that the specific/general canon is "most frequently applied" to resolve contradictions between specific and general statutes when compliance with both is impossible. *RadLAX Gateway Hotel, LLC, v.*

Amalgamated Bank, 566 U.S. 639, 645 (2012) (quoting *Mancari*, 417 U.S. at 550-51). As discussed above, the record shows, and the Corps has admitted for nearly two decades, that the agency can comply, and in fact has done so through operational deviations, with the 1960 Flood Control Act, the FWCA/WRDAs, and the ESA's consultation mandate. Thus, the specific/general canon is not applicable here.

B. The Corps' Interpretation of the Scope of its Discretion is Arbitrary Because the Corps Has Not Adequately Explained its Abrupt Reversal on this Issue.

1. The Corps' Discretion Interpretation is Not Entitled to Deference or, Alternatively, Only *Skidmore* Deference is Appropriate.

The Corps' discretion interpretation in the 2014 Reassessment supporting its decision to terminate consultation in 2013 is not entitled to deference. In considering an agency interpretation, courts evaluate the circumstances of its adoption and whether it reflects a consistent agency position. *SUWA*, 425 F.3d at 759-60. An inconsistently applied statutory interpretation deserves much less weight than one applied consistently. *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993); *SUWA*, 425 F.3d at 759-60. The Corps' abrupt reversal of its consistently-held position that it retains sufficient discretion over dam operations to trigger the ESA's consultation requirement did not address why the Corps was mistaken in its prior decades-old policy. But the Corps was not acting on a blank

slate in 2013/2014, so the Corps' failure to explain the need to reverse its historical policy and practice counsels against attributing any deference to the Corps.

To the extent the Corps' interpretation of its discretion under the 1960 Flood Control Act may be entitled to any deference, *Skidmore* deference would be applicable. Under *Skidmore*, a court reviews and agency's interpretation of a statute considering "the degree of the agency's care, its consistency, formality, and relative expertness, and . . . the persuasiveness of the agency's position." *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) (citing *Skidmore*, 323 U.S. at 139-40). The district court correctly decided that the Corps's interpretation of its discretion in the 2014 Reassessment was not entitled to *Chevron* deference because the Reassessment is a "non-binding interpretation outsider of adjudication or notice-and-comment rulemaking." Op. at 20 (App. at JA315) (citing *Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000)).

2. The Corps Arbitrarily Concluded That It Lacked Discretion to Modify Operations.

In its 2013 consultation termination and 2014 Reassessment Report, the Corps reversed its nearly two decades-old position that it has discretion to operate its dams to benefit listed species, and that doing so would not undermine or conflict with flood and sediment control purposes. Although an agency may change its mind, where an agency modifies or overrides longstanding precedents or policies, it "has a duty to explain its departure from prior norms." *Atchinson v.*

Wichita Board of Trade, 412 U.S. 800, 808 (1973); *see also Utahns for Better Transp. v. U.S. Dep't of Transp.*, 305 F.3d 1152, 1165 (10th Cir. 2002) (accord). "[A] reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009).

Here, there is no question that the Corps reversed its position on ESA consultation over dam operations after it terminated its consultation with FWS in 2013. What is at issue is whether the Corps provided the requisite "reasoned explanation" for its new position on consultation. *Id*. The record shows that it has not done so.

For nearly two decades prior to the 2013 termination, the Corps had consulted with FWS over its Middle Rio Grande dam operations, including joint consultations with the Bureau of Reclamation "to minimize impacts to the silvery minnow and flycatcher." App. at JA498-516 (2001 Joint Biological Assessment); JA517-34 (2003 Joint Biological Assessment); *see also* App. at JA1065-70 (2013 Amended Biological Assessment detailing history of Corps consultations, including consultations over deviations). In its biological assessments, the Corps acknowledged that dam operations were governed by the operating criteria in the 1960 Flood Control Act, and that it could deviate from normal operating criteria with Compact Commission concurrence. App. at JA501-02, 528, 1081; *see also*

App. at JA654 (EA for 5-year deviation plan). In fact, the Corps implemented several operational deviations to create the "fill and spill" conditions "conducive to the spawning and recruitment" of the minnow. App. at JA1069. Thus, the record shows that up until late 2013/early 2014, the Corps *consistently* took the positions that: (1) the deviation provision in the 1960 Flood Control Act imparted some discretion to the Corps to modify dam operations to benefit listed species, and (2) it could and did implement operational deviations such as "fill and spill" without undermining flood and sediment control purposes mandated by Congress.

The Corps' conclusion in the 2014 Reassessment that it lacks discretionary operational control sufficient to trigger the ESA's consultation requirement completely "disregard[ed] facts and circumstances" that formed the basis of its prior policy regarding operational discretion. *Fox*, 556 U.S. at 516. The 2014 Reassessment does not consider several circumstances that formed the basis for the Corps' prior consultation policy including: (1) the Flood Control Act provision allowing operational deviations with Compact Commission approval; (2) the Corps' past practice of seeking Commission approval for operational deviations to benefit listed species; (3) the Commission's prior requests that the Corps' deviate from normal operations for species benefits; and (4) the Corps' prior determinations that operational deviations would not conflict with the Flood Control Act. Neither does the Corps provide any discussion of the implications of

the FWCA/WRDAs on its operational discretion. *Fox* stands for the principle that an agency cannot sweep several years of past practice under the rug and start from a blank slate. The Corps' failure to explain, or even acknowledge, its prior findings underlying its pre-2014 consultation policy renders its change in position arbitrary.

The 2014 Reassessment's conclusions relating to Corps discretion are based solely on a cramped interpretation of the Flood Control Acts taken out of context, and on citations to inapposite cases. *See*, *e.g.*, App. at JA352-58. As discussed above, courts have rejected interpretations based on selective choosing and discarding of portions of statutes. Moreover, none of the cases the Corps cites are controlling on the issue of the Corps' discretion. First, the Corps cites *Home Builders*, 551 U.S. at 655, for the principle that "the ESA's requirement would come into play only when and [*sic*] action results from the exercise of agency discretion." App. at JA348 n.16. In *Home Builders*, the Supreme Court found that agency discretion is eliminated in cases where Congress specifically mandates certain agency decisions based on enumerated criteria that deprive the agency of all discretion to modify its action to protect listed species once the enumerated criteria are met. *Id*. at 661-62. Unlike *Home Builders* where the relevant statute imposed nine exclusive criteria that, if met, required the Environmental Protection Agency to approve a transfer application, the Corps here can deviate from the operational criteria set out in the 1960 Flood Control Act, with Compact

Commission approval. As discussed above, the Corps has routinely exercised its judgment to implement "fill and spill" deviations to benefit listed species, and found that doing so did not conflict with flood and sediment control purposes. Because the Corps has "some discretion" to deviate from normal operations to benefit listed species, it is required to consult with FWS over its dam operations. *NRDC*, 749 F.3d at 779 ("Section 7(a)(2) consultation is required so long as the federal agency has 'some discretion' to take action for the benefit of a protected species.") (citations omitted). Thus, *Home Builders* does not control here.

Second, the Corps' Reassessment cites to *Rio Grande Silvery Minnow v. Keys*, 469 F. Supp. 2d 973, 996-99 (D.N.M. 2002), *vacated as moot*, for its holding that the Corps was not subject to the ESA's consultation requirement. App. at JA348 n.18. However, *Keys* related specifically and exclusively to the issue of whether the Corps' 1960 Flood Control Act "emergency" deviation authority to protect dam safety or "avoid other serious hazards" vested the agency with the discretionary authority to operate its facilities to benefit listed species. *Keys*, 469 F. Supp. 2d at 997-98. *Keys* concluded that because "[e]mergency deviations are described as sudden and unexpected," and "[a] water release for the minnow would likely be a more protracted event," the Corps did not have sufficient discretion to act to benefit listed species under the emergency provision to trigger the consultation requirement. *Id*. *Keys* recognized that the Corps had discretion to

deviate from normal operations "if a deviation is approved by the Rio Grande Compact Commission," but did not address whether this provision vested the Corps with sufficient discretion to trigger the consultation requirement. *Id*. at 996. *Keys* is neither controlling nor persuasive here.

Finally, the Corps' Reassessment cites two Eighth Circuit cases for the principle that Flood Control Act priorities for Corps operations are "dominant and ESA considerations secondary." App. at JA348 and n.19. Yet both *In re Operation of the Missouri River System Litigation*, 421 F.3d 618, 631 (8th Cir. 2005), and *South Dakota v. Ubbelohde*, 330 F.3d 1014, 1019-20 (8th Cir. 2003), support Guardians argument here that if the Corps *can* deviate from normal operations to benefit listed species without undermining its authorized flood and sediment control purposes as the Corps has done in the past, then the Corps has sufficient discretion to trigger the ESA's consultation requirement. *NRDC*, 749 F.3d at 784 ("Whether an agency must consult does not turn on the *degree* of discretion that the agency exercises regarding the action in question, but on whether the agency has any discretion to act in a manner beneficial to a protected species or its habitat."). Neither *Missouri River* nor *Ubbelohde* can be interpreted as relieving the Corps from its ESA consultation responsibility in the current case.

Finally, all of the cases the Corps relies on to support its new position that it lacks any operational discretion that would trigger the ESA's consultation

requirement pre-date the Corps 2009 decision to implement a five-year deviation. Based on the success of a 2007 operation deviation that resulted in "a ten-fold increase in [minnow] population," in 2009 the Corps proposed "a 5-year strategy that entails a range of flexible water operations at Cochiti Lake and Jemez Canyon dams to provide suitable flows for [minnow] recruitment and . . . development of riparian habitat for [flycatcher] nesting." App. at JA654. The Corps indicated it would seek Compact Commission approval for the deviation, and that the deviation would not undermine statutory purposes. App. at JA684-85. To the extent that the Corps may try to justify its 2013/2014 consultation policy change on the basis of a change in the law as represented by *Home Builders* or other cases cited in the Reassessment, the Corps' continued implementation of deviations and programmatic consultation with FWS two years after *Home Builders* renders such a justification hollow.

The record demonstrates that the Corps' change in its consultation policy was prompted by its dissatisfaction with FWS's unwillingness to separate Corps operations from those of Reclamation and other non-federal parties and issue a separate BiOp for the Corps. App. at JA465-66.[6] The Corps' change in position

[6] When the Corps terminated consultation with FWS in November 2013, it alluded to guidance from the Corps' Chief Counsel ("Stockdale Memo") that it obtain an agency-specific BiOp limited to those activities over which the Corps has discretionary control and addressing "only those impacts directly attributable to the Corps actions." App. at JA466. But the Stockdale Memo does not say that the

was not based on a change in the law or facts related to its Middle Rio Grande water operations. The gaps in the Corps' reasoning, particularly with respect to past findings that it could comply with both Flood Control Act and ESA mandates, establish that the Corps' change in position was arbitrary. *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2119-20 (2016) (rejecting agency decision that "gave little explanation for its decision to abandon its decades-old practice").

III. If the Court Finds that the Corps Has Discretion to Act for the Benefit of Listed Species, Then the Court Should Also Find That the Corps' Dam Operations are the Proper Scope of the Affirmative Action for Consultation

A. Dam Operations Constitute Ongoing Affirmative Action.

Operating and maintaining the dams' ongoing existence in their current configurations is an affirmative action within Congress' intended broad ESA section 7 definition "encompassing all activities or programs of any kind authorized, funded, or carried out, in whole or in part" by the agency including actions directly or indirectly causing modifications to the land, water, or air. *Karuk Tribe of California v. U.S. Forest Service*, 681 F.3d 1006, 1021 (9th Cir. 2012). Even though the agency built the dams before the ESA's enactment and the

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Corps lacks discretion to deviate from normal operations or that doing so would create a *per se* conflict with the 1960 Flood Control Act; rather, it discusses the importance of having an agency-specific BiOp and notes that "[i]f the Corps cannot implement the [Reasonably Prudent Alternative] that is recommended in the final biological opinion, the Corps must otherwise ensure that it is not violating the ESA." App. at JA468-73.

minnow and flycatcher ESA listing, operating and maintaining the dams today in their current configuration still constitutes ongoing "affirmative" agency action. "The 'ongoing construction and operation of a dam,' for example, is sufficient to trigger consulting obligations because the operation of a dam is an affirmative act." *Id*. at 1021 (citing *TVA*, 437 U.S. at 173–74). The "ongoing operation" of the dam in *TVA* was maintaining the Tellico Dam's existence and allowing it to impound the river flow. *Id*. Tellico Dam's harm to the snail darter did not come from building the dam, but from maintaining the dam's ongoing passive existence, thereby allowing it to flood endangered snail darter habitat.

The Corps' Middle Rio Grande dams are analogous. Although authorized and constructed before the ESA's enactment, their operation is an ongoing affirmative agency action directly and indirectly causing modifications to the Rio Grande's channel that is likely to adversely affect listed species. Thus, ESA Section 7 requires the Corps to formally consult with FWS about this action. Just as TVA was required to not allow the Tellico Dam to impound the river flow when this would jeopardize the snail darter's survival, the Corps must be required to take steps within its discretionary authority to prevent dam operations from jeopardizing listed species. Consultation with FWS will provide the Corps with the necessary guidance on what steps it should take. *See*, *e.g.*, *Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1055 (9th Cir. 1994) ("Congress foresaw that § 7 would, on

occasion, require agencies to alter ongoing projects in order to fulfill the goals of the Act") (citing *TVA*, 437 U.S. at 186).

B. The Corps Impermissibly Segmented Dam Operations into Multiple Smaller Actions and Assessed its Discretion in a Piecemeal Fashion.

In its 2014 Reassessment of its discretion over dam operations, the Corps (1) segregated dam operations into 13 individual activities, (2) evaluated whether each activity in isolation was "discretionary" versus "non-discretionary", and (3) concluded that it need consult with FWS for only two operational activities[7] it found to be "discretionary." App. at JA352-73. In the context of water operations, however, courts have explicitly found it improper to segregate discretionary from non-discretionary activities and to limit consultation to discretionary activities under the ESA because "the effects of a particular Federal action are intended to be evaluated not simply on their own, but as they affect the species in combination with other processes and activities." *In re Consolidated Salmonid Cases*, 791 F. Supp. 2d 802, 848 (E.D. Calif. 2011) (citing *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv. ("NWF v. NMFS")*, 524 F.3d 917, 930 (9th Cir. 2008)). Thus, the Corps' attempt to avoid programmatic ESA consultation relating to its dam operations is contrary to the ESA, its implementing regulations, and case law.

[7] The two activities for which the Corps asserts it retains discretion are the manner in which inspections are performed at Abiquiu Dam and the manner in which sediment will be flushed from Jemez Canyon Dam. App. at JA360-61.

First, the Corps' manufactured distinction between discretionary and non-discretionary actions subject to consultation focuses on the single word "discretionary" in 50 C.F.R. § 402.03 to reach an erroneous interpretation that consultation is only required for the specific component of an operational action for which residual discretion exists. App. at JA348-49, 360-61. But nothing in the ESA or case law supports the Corps' interpretation. The regulation provides that "Section 7 . . . appl[ies] to all actions where there is discretionary Federal involvement or control." The regulation merely confirms that consultation is required. It does not limit the *scope* of consultation to the discretionary component of the Corps' actions.

Notably, the Corps' interpretation of the limited scope of consultation is inconsistent with the ESA regulations defining the framework for a jeopardy analysis. Those regulations require consideration of the effects of an action in an aggregate context that includes the action's direct and indirect effects added to the environmental baseline, along with cumulative effects from non-federal activities. 50 C.F.R. §§ 402.02, 402.14(g)(4). In addition, the ESA Consultation Handbook emphasizes that a jeopardy determination must analyze the "aggregate effects of the . . . environmental baseline, effects of the action, and cumulate effects in the action area . . . viewed against the status of the species." App. at JA485. With respect to the Corps' ongoing water operations, the Handbook requires the Corps

to determine "the total effects of all past activities," including the effects of past dam operations, added to the effects of the proposed discretionary action. App. at JA482-83.

Second, prior litigation over the scope of ESA consultation unequivocally rejected parsing an action for consultation into its constituent discretionary elements that will be considered and its nondiscretionary elements that will not. In *NWF v. NMFS*, plaintiffs challenged a biological opinion addressing the effects of ongoing Columbia River dam operations on listed fish wherein NMFS "segregated its analysis" by first considering only the "net effect" of discretionary actions on listed species, and considering "additional context" such as the aggregate effects only if discretionary actions would affect listed species. *NWF v. NMFS*, 524 F.3d at 926. The Court held that "neither the ESA nor *Home Builders* permits agencies to ignore potential jeopardy risks by labeling parts of an action nondiscretionary," sweep nondiscretionary actions into the environmental baseline, and then exclude those actions from a jeopardy analysis. *Id*. at 928-29. A jeopardy analysis cannot be limited to individual discretionary actions in a vacuum; rather, the agency action subject to review must be considered "within the context of other existing human activities that impact listed species." *Id*. at 930 (citation omitted). *See also San Luis*

& Delta–Mendota Water Auth. v. Jewell, 747 F.3d 581, 639 (9th Cir. 2014) (accord).[8]

The Corps' Biological Assessments for Middle Rio Grande dam operations have evaluated "the effects of the Corps' continuing, discretionary reservoir operation actions on Federally listed species" as part of a "comprehensive evaluation of cumulative effects of water management activities in the middle Rio Grande valley," rather than on an activity-by-activity basis as the Corps now asserts is all that it needs to do. *See*, *e.g.*, App. at JA1064 (2013 Amended BA for Corps' Middle Rio Grande Reservoir Operations); *see also* App. at JA794-1020 (2011 BA), App. at JA517-534 (2003 BA). The 2013 Amended BA evaluated the effects of seven categories of "discretionary reservoir operation activities" on listed species and, for some of these actions, reached "may affect, would likely adversely affect" conclusions for the minnow, flycatcher, and their critical habitats. App. at JA1084-85 (describing proposed actions), App. at JA1174-75 (summary of effect determinations). Since the listing of the minnow and flycatcher over two decades ago, the Corps has recognized the need to consult with FWS over the full scope of

[8] The district court relied on the 2014 Reassessment in deciding whether the Corps was required to consult with FWS over ongoing dam operations. Op. at 7 (App. at JA302) (noting "the information here is critically important in resolving this matter"). However, the district court simply accepted the Corps' analytical frame segmenting its analysis of its discretion for 13 operational activities without considering: (1) whether this type of segmentation was allowed under the ESA, and (2) the Corps' practice of doing the opposite in prior Biological Assessments.

its discretionary authority for ongoing water operations, and has done so in its BAs. *See* App. at JA1065-70 (discussing history of Corps consultations with FWS). Yet the Corps is now reversing decades of its own practice of consulting with FWS over the full scope of its discretionary authority and taking the position that if consultation is required, it will be limited to the effects of maintenance activities at Abiquiu Dam and basin flushing at Jemez Canyon Dam. This piecemeal approach is contrary to law.

CONCLUSION

For the reasons discussed above, Guardians respectfully requests that the Court (1) declare that the Corps violated the ESA by failing to consult with FWS over its ongoing dam operations; and (2) order the Corps to resume formal consultation with the FWS over the full scope of its authority with respect to ongoing dam operations.

STATEMENT REGARDING ORAL ARGUMENT

Because this case involves complex issues regarding interpretation of Flood Control Acts, related Corps operations statutes, and the ESA Guardians believes that argument would be beneficial.

RESPECTFULLY SUBMITTED this 18th day of June, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on June 18, 2019, a copy of this APPELLANT'S FINAL OPENING BRIEF was filed with the Clerk of the Court via the CM/ECF system, which will send notification of such filing to other participants in this case.

/s/ Samantha Ruscavage-Barz