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 REPLY BRIEF
(Oral Argument Requested)

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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
EPA	U.S. Environmental Protection Agency
ESA	Endangered Species Act
FWCA	Fish and Wildlife Coordination Act
FWS	Fish and Wildlife Service
WRDA	Water Resources Development Act
Guardians	WildEarth Guardians

INTRODUCTION

The U.S. Army Corps of Engineers ("Corps") does not dispute that its operation and maintenance of Middle Rio Grande dams harm species listed under the Endangered Species Act ("ESA"), namely the Rio Grande silvery minnow and Southwestern willow flycatcher. The Corps admitted as much in its numerous biological assessments. App. at JA 1066-69. The U.S. Fish and Wildlife Service ("FWS") reached the same conclusion in its 2003 Biological Opinion ("BiOp"). App. at JA609-610, 621-22. FWS found these harms so severe as to jeopardize the species' survival. *Id*. The Corps has discretionary authority to modify dam operations to lessen the dams' harms to listed species, as demonstrated by the Corps' numerous past actions to lessen these harms.

Despite this history, the Corps now takes the remarkable position that nothing is required of the agency under the ESA to halt jeopardy to the survival and recovery of the minnow and flycatcher. The Corps' argument is premised entirely on isolated words and phrases in the 1960 Flood Control Act, ignoring both the Act's statutory context and well-established conventions of statutory construction. The Corps also dismisses the applicability of other statutes specifically aimed at ensuring incorporation of environmental protection into the operations of Corps water management projects. These inconsistencies and errors render arbitrary both (1) the Corps' interpretation of its lack of discretion to

implement operational modifications to protect listed species, and (2) its decision to terminate formal consultation with FWS in 2013.

ARGUMENT

I. The Corps Has Discretion to Modify Dam Operations to Benefit Listed Species.

A. The Corps' Interpretations of the Relevant Statutes are Wrong.

The Corps' first erroneous interpretation is that the 1960 Flood Control Act "leaves no room for the Corps to operate the [Middle Rio Grande] projects for anything but flood and sediment control in the manner specified in the statute." Corps' Response ("Resp.") 24. Although ostensibly based on the "plain language" of the Act, *id*., the Corps' interpretation ignores the well-established canon of statutory construction proscribing "examining a particular statutory provision in isolation" because the meaning of particular 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 Corps acknowledges the first clause in the 1960 Flood Control Act's deviation provision providing "no departure from the foregoing operation schedule will be made" to support its argument that its operations are limited to flood and sediment control, and ignores the language creating the exception to the general rule. Resp. 24. Rather than explaining the effect of the deviation provision, the Corps simply ignores it. By focusing on the phrase that Middle Rio Grande dams "will be

operated solely for flood control and sediment control," and ignoring the implications of the provision allowing the Corps to deviate from normal operations "with the advice and consent of the [Compact Commission]," the Corps' interpretation impermissible renders the "deviation" provision superfluous. App. at JA1442; *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 837 (1988) ("[W]e are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law.").

The Corps is correct that the flood/sediment control limitation was driven by Congress's desire to get buy-in for Cochiti Dam from the Rio Grande Compact Commission, App. at JA1423, 1495-1501. Yet by including a provision allowing for deviation from normal operations with Compact Commission consent, Congress was also signaling its recognition that operational modifications could be necessary to meet future, as-yet unanticipated needs. And, in fact, Congress has since recognized to the need to modify dam operations to protect listed species. *See*, *e.g.*, App. at JA1510 (2008 Consolidated Appropriations Act), JA1512 (2009 Omnibus Appropriations Act); Pub. L. No. 115-270, § 1174 (America's Water Infrastructure Act of 2018).

The Corps's reliance on *Nat'l Ass'n of Home Builders v. Defenders of Wildlife* ("*Home Builders*"), 551 U.S. 644 (2007), to support its cramped interpretation of the 1960 Flood Control Act is misplaced because *Home Builders*

is distinguishable from the current case. The Corps analogizes the 1960 Flood Control Act's flood/sediment control purposes with the nine specific Clean Water Act criteria at issue in *Home Builders*. Resp. 26. The agency then argues that just as the U.S. Environmental Protections Agency ("EPA") lacked discretion to deny transferring permitting authority if the state met the seven criteria, the Corps lacks discretion to modify dam operations for anything other than one of the two statutory purposes. *Id*.

But this flawed analogy is easily dismissed on the basis that the "if find/then shall" Clean Water Act provision at issue in *Home Builders* is distinctly different from the Flood Control Act's "must/unless" statutory purpose provision at issue here. In *Home Builders*, the EPA had no discretion on either side of its "if find/then shall" mandate—the agency was required to transfer permitting authority *if* the state met the seven criteria, and the agency could not consider any factors beyond the seven enumerated criteria for a transfer application. *Home Builders*, 551 U.S. at 671-73. Here, the Corps must operate Middle Rio Grande dams solely for flood/sediment control *unless* it receives the Rio Grande Compact Commission's consent to an operational deviation for another purpose. App. at JA1442 (creating an exception to the mandate that the Corps not depart from the statutory operational schedule). *Home Builders* does not provide relevant guidance in this context.

The Corps' second erroneous interpretation pertains to the effects of other statutes that also govern the Corps' Middle Rio Grande water management. The Corps acknowledges that the Fish and Wildlife Coordination Act and Water Resources Development Acts ("FWRA/WRDAs") provide "general authority" for the Corps to consider wildlife concerns in facility operations where doing so would be compatible with the facility's statutory purpose. Resp. 32. Yet the Corps ignores this acknowledgement when it argues that Congress's inclusion of the word "solely" in reference to the Flood Control Act's flood/sediment control purposes divests the Corps of operating Middle Rio Grande dams for any other purpose, regardless of whether this could be done without compromising flood/sediment control. *Id*. at 33-34. Such an interpretation dismissing the applicability of other water management statutes on the basis of a single word in the 1960 Flood Control Act is unreasonable.

As discussed in Guardians' Opening Brief ("Op. Brf."), the specific/general canon of statutory construction only applies where it is impossible for the agency to comply with both the specific and general statutes governing a particular activity. Op. Brf. 37-38 (citing *Adirondack Medical Center v. Sebelius*, 740 F.3d 692, 698-99 (D.C. Cir. 2014) and *Gateway Hotel, LLC, v. Amalgamated Bank*, 566 U.S. 639, 645 (2012)). "[W]hen 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." *Morton v. Mancari* 417 U.S 535, 551 (1974). The Ninth Circuit has also recognized this principle in the ESA context, holding that federal agency actions are only nondiscretionary if Congress has commanded specific action so as to make it impossible for an agency to comply with ESA Section 7 and other statutory obligations. *Natural Res. Defense Council v. Jewell ("NRDC")*, 749 F.3d 776, 784 (9th Cir. 2014); *San Luis & Delta-Mendota Water Authority v. Jewell*, 747 F.3d 581, 639-40 (9th Cir. 2014). The Corps ignores this "co-existence" principle when relying on *RadLAX*, *Mancari*, and *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976), for only the general principle that a specific statute is not controlled by a later general statute covering the same subject matter, without looking beyond this general pronouncement to courts' specific instruction concerning when this principle applies. Resp. 33.

To the extent the Corps acknowledges the FWCA, it is only with respect to the creation of the permanent pool at Cochiti Lake to benefit downstream fish and wildlife as part of the authorizing legislation to build Cochiti Dam, which the Corps implies demonstrates compliance with the FWCA. Resp. 32. But this argument misses the mark. Guardians is not arguing that the Corps' dam operations fail to comply with the FWCA. Rather, Guardians' argument is that the FWCA/WRDAs demonstrate Congress's intent that the Corps incorporate species protection into its ongoing operations, thus providing the Corps with authority to

deviate from normal operations when doing so would *not* conflict with the statutory purposes of Cochiti Dam. Op. Brf. 34-37. Regardless of the creation of Cochiti Lake's permanent pool, the FWCA/WRDAs contemplate a future need for consideration of wildlife conservation even after the Corps completes project construction. *See* 33 U.S.C. § 2316 (The Corps "*shall* include environmental protection as one of the primary missions of [the Corps] in . . . *operating*, and *maintaining* water resources projects.") (emphasis added).

Here, the record shows that it is possible for the Corps to act to benefit listed species in a manner different from normal operating procedures and *not* compromise or undermine its purposes mandated by the 1960 Flood Control Act. Op. Brf. 36-37 (describing, with record citations, past Corps deviations from normal operations). But the Corps ignores its own prior practice of operational deviations as well as its position that it could do so without undermining flood/sediment control purposes, and fails to explain why it can no longer comply with the 1960 Flood Control Act, FWCA/WRDAs, and the ESA. Instead, the Corps focuses on the word "solely" in the Flood Control Act to reach the narrow interpretation that the Act "confin[es]" dam operations exclusively to statutory purposes. The Corps' interpretation of its discretion under the 1960 Flood Control

Act is inconsistent with case law governing statutory interpretation and should be rejected.[1]

B. The Corps' Unilateral Discretion Theory is Wrong.

The Corps argues that because it must receive Compact Commission permission to deviate from normal dam operations, the agency lacks "unilateral discretion" to modify dam operations to benefit listed species, and this lack of unilateral discretion excuses the Corps from complying with the ESA's consultation requirement. Resp. 27. To support this argument, the Corps states that "[c]ourts have consistently held that federal agencies have no duty to consult regarding actions that the agencies could not take without the consent or agreement of a third party." *Id*. But the Corps is wrong. Although it refers to "consistent" precedent on the issue of supposed 'unilateral' discretion, it fails to cite to even a single case in which a court has found that *only* unilateral agency actions are subject to ESA requirements. Both cases the Corps cites for support of its unilateral discretion theory deal with whether agencies can unilaterally modify existing licenses or permits when they have not reserved the authority to do so and are, therefore, easily distinguished from the current case.

In *Platte River Whooping Crane v. FERC*, 962 F.2d 27, 33 (D.C. Cir. 1992), plaintiff challenged FERC's issuance of an annual license to a private hydroelectric

[1] To the extent the Corps' interpretation of the Flood Control Act is entitled to any deference, only *Skidmore* deference is appropriate. *See* Op. Brf. 38-39.

facility without adding new conditions that would protect listed species. The gist of plaintiff's ESA Section 7 claim was not that FERC was required to consult with FWS over issuance of the annual licenses, but rather that Section 7 required FERC to place new conditions for species protection on annual licenses to prevent jeopardy. *Id*. at 33-34. The statutory scheme for licensing, however, only authorized FERC to add new conditions when it issued a *new* license to a facility. *Id*. at 30. If a facility's license expired before FERC issued a new license, the Federal Power Act authorized FERC to issue year-to-year annual licenses "under the terms and conditions of the existing license until . . . a new license is issued." *Id*. (citation omitted). Absent a reopener provision in the existing license, FERC could modify annual license terms *only* "upon mutual agreement" of the private licensee. *Id*. at 32. The facility at issue did not have a reopener provision in its existing license, therefore FERC could only add wildlife protection conditions to the facility's annual license if the facility consented, which it did not. *Id*. at 33. Thus, the ESA's no-jeopardy mandate did not expand FERC's authority to go beyond conditions in the facility's existing license when issuing interim, annual licenses. *Id.* at 34.

Envtl. Prot. Info. Ctr. v. Simpson Timber Co., 255 F.3d 1073 (9th Cir. 2001) ("*EPIC*"), is also a case about an agency's ability to unilaterally amend a private party's permit where the agency did not reserve the right to do so. There, FWS

issued an incidental take permit for the northern spotted owl to a timber company prior to the listing of two new species in the project area. *Id*. at 1074-75. Plaintiff argued that FWS was required to reinitiate consultation over the permit to add new protections for the newly-listed species. *Id*. But the court found that FWS retained discretionary control over the permit only insofar as the timber company's actions affected the spotted owl; FWS had not reserved any future discretion to impose conditions to protect newly-listed species. *Id*. at 1081-82. Thus, the court held that FWS did not have to reinitiate consultation related to the permit's impacts on newly-listed species.

Because both of these cases deal with the issue of agency authority to unilaterally amend private-entity licenses and permits, and such licenses or permits are not at issue here, these cases are inapplicable. Nor do these cases support the Corps' broad proposition that an agency must be able to act unilaterally to be subject to ESA requirements. Here, in the 1960 Flood Control Act Congress reserved discretion for the Corps to deviate from normal operations "with the advice and consent of the [Compact Commission]." App. at JA1442. Interpreting this provision as an obstacle to modifying dam operations for any reason would render this provision meaningless. *Mackey*, 486 U.S. at 837 (cautioning against piecemeal interpretations that render certain provisions meaningless); *United States v. Heckenliable*, 446 F.3d 1048, 1051 (10th Cir. 2006) (holding that judicial

constructions of statutes "must give practical effect to Congress's intent, rather than frustrate it").

Moreover, unlike *Whooping Crane* and *EPIC* where private third parties would not agree to license or permit modifications, here the Compact Commission has *not* indicated that it will withhold its agreement to operational modifications that benefit of the minnow and the flycatcher. To the contrary, the record shows that the Commission has not only acceded to the Corps' past operational deviations—it has also *encouraged* the Corps to deviate from the default operating schedule for the benefit of the listed species and their critical habitats. App. at JA703, 709, 1506. Also unlike *Whooping Crane*, here it is the Corps—*not* a regulated third party—that refuses to take action for the benefit of listed species. App. at JA474-75. Case law regarding an agency's authority under the ESA to obligate a recalcitrant private party to modify its actions for the benefit of listed species is simply not relevant here.[2]

[2] Related to its unilateral discretion theory, the Corps raises the non sequitur that the agency is not required to consult over an action it is not proposing to take. Resp. 30. As explained more fully on pp. 17-18 below, this argument is not relevant to the issue of whether the Corps has discretion to act for the benefit of listed species.

C. The Corps Remaining Arguments for a Lack of Operational Discretion Lack Merit.

1. The 2009 Omnibus Appropriations Act Was Not the Source of the Corps' Deviation Authority.

The Corps asserts that it undertook previous deviations pursuant to a "special congressional study authority" included in the Omnibus Appropriations Act of 2009 that did not provide the Corps with "open-ended" discretion to act for the benefit of listed species beyond the study time period. Resp. 35. But the Corps' implication that without further congressional authorizations, the Corps lacks discretion to deviate from normal operations overstates the legal force of such authorizations. Only Compact Commission approval is necessary for the Corps to deviate from normal operations.[3] App. at JA1442.

The 2009 Omnibus Act provided funding for the Corp to exercise discretion it already had with respect to operational deviations; it was not a new grant of authority to the Corps. App. at JA1512. By funding the deviations to protect the minnow and flycatcher, Congress ratified the Corps' position at that time that it had discretion to deviate from normal operations. *See Young v. Tennessee Valley*

[3] To support its argument that the Omnibus Act did not repeal the statutory purposes of flood/sediment control or grant the Corps "open-ended" discretion to deviate from normal operations, the Corps cites *Home Builders*, 551 U.S. at 662, for the principle that repeals by implication are not favored. Resp. 35-36. This argument is a distraction and not relevant because the Corps does not need further authorizations to deviate from normal operations once the agency received approval from the Compact Commission.

Authority, 606 F.2d 143, 147-48 (6th Cir. 1979) ("Appropriation by Congress of funds for agency action in the face of a construction placed upon an enabling act by the agency has the effect of ratifying the agency action when the agency construction is consistent with the purpose of the legislation."). With passage of the America's Water Infrastructure Act of 2018 ordering the Corps to restart "fill and spill" deviations at Cochiti Dam, Congress continues to recognize the Corps' discretion to implement such deviations without compromising the 1960 Flood Control Act's flood/sediment control functions. Pub. L. No. 115-270, § 1174. Thus, congressional authorizations for operational deviations at Cochiti Dam does not confer on the Corps discretion that it did not already have under the 1960 Flood Control Act.

2. The Corps Has Not Adequately Explained Its Change in Position on Section 7 Consultation.

The Corps argues that its prior joint consultations with Reclamation do not support Guardians' argument that the Corps changed its position on the scope of its operational discretion that triggers the ESA Section 7 consultation requirement. Resp. 36; Op. Brf. 40-42. Instead, the Corps surprisingly asserts that its termination of consultation with FWS in 2013/2014 is not a change in the agency's position that it is required to consult over dam operations. Resp. 36. Although the Corps says it chose to consider only its own actions in Middle Rio Grande water management apart from those of Reclamation, and does not consider this change in

analytical scope a change in the agency's position, *id*., the Corps' decision to terminate formal consultation with FWS after producing a biological assessment encompassing all of the Corps' operational activities in the aggregate is a significant policy change that requires explanation.[4] *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009) (requiring a "reasoned explanation" for an agency's policy shift).

The record belies the Corps' assertion that it has not changed its position on the need to consult. Until the Corps terminated consultation with FWS in 2013/2014, the agency consistently took the position that it had discretion for operational deviation to protect listed species, implemented deviations for that purpose, and consulted with FWS over impacts to listed species from dam operations. *See* Op. Brf. 40-41 and record citations therein. Then the Corps reversed its decades-old position that it was required to formally consult with FWS over dam operations when FWS expressed unwillingness to issue a separate BiOp for the Corps that did not include consideration of Reclamations actions. App. at JA465-66. As detailed in Guardians' Opening Brief, the Corps' 2014

[4] The Corps' assertion that it has not changed its prior position on Section 7 consultation where the record clearly shows that it has violates the first *Fox* factor that the agency display an "awareness that it is changing position." *Fox*, 556 U.S. at 515-16. This admission in and of itself renders the Corps' change in its consultation position arbitrary and not entitled to any deference.

Reassessment does not sufficiently explain the agency's policy reversal. Op. Brf. 41-46.

The Corps implies that even if it did change its position with respect to consultation, it does not matter for ESA Section 7 purposes under *Home Builders*. Resp. 36-37. But the Corps misrepresents *Home Builders*' holding on this issue. There, the Supreme Court spoke to the EPA's change in position regarding whether Section 7 consultation was required to correct the appellate court's error. *Home Builders*, 551 U.S at 657-58. The Ninth Circuit had ruled that EPA's transfer of permitting authority was arbitrary because the agency had taken positions on Section 7 consultation that were "internally inconsistent." *Id*. at 658. The Supreme Court reaffirmed the principle that an agency can change positions "as long as the proper procedures were followed," and went on the examine whether EPA had done so. *Id*. *Home Builders* did not repudiate any of the case law holding that an agency must adequately explain the reasons for changing a long-standing position. Thus, the Corps must still provide a reasoned explanation for its departure from prior norms. *Fox*, 556 U.S. at 516; *Atchinson v. Wichita Board of Trade*, 412 U.S. 800, 808 (1973). For all of the reasons detailed in Guardians' Opening Brief (which the Corps does not fully dispute), the Corps does not provide the requisite reasoned explanation for its change in position in the 2014 Reassessment. Op. Brf. 39-46.

II. The Corps Cannot Segment Its Discretionary Authority to Minimize Impacts to Listed Species from Dam Operations.

If the Court finds that the Corps has discretion to modify dam operations to benefit the minnow and flycatcher, the Court should then find that the aggregate of ongoing dam operational activities is the proper scope for ESA consultation rather than condoning the Corps' activity-by-activity approach. Op. Brf. 49-52.

The Corps initially argues that Guardians forfeited this argument relating to the proper scope of ESA Section 7 consultation by not raising it in the district court. Resp. 18-19. However, this Court "will entertain forfeited theories on appeal," and will reverse a district court's judgment on a forfeited theory where there is plain error. *Richison v. Ernest Group, Inc.*, 634 F.3d 1123, 1128 (10th Cir. 2011).[5] Although none of the parties raised the issue of the proper scope of a formal Section 7 consultation below, the district court indirectly ruled on this issue by relying on the Corps' 2014 Reassessment and accepting the Corps' analysis frame where the agency assessed its discretion on an activity-by-activity basis for 13 operational activities. Op. at 7-17 (JA 302-312) (describing each activity), Op. at 21- 31 (JA316-26) (assessing Corps discretion for each of the 13 operational activities in isolation); *see also* Op. Brf. 51. The district court considered the 2014 Reassessment as "critically important" for resolving Guardians' claims, and the

[5] A waived argument is one that "was intentionally relinquished or abandoned in the district court," while a forfeited argument is one that "simply wasn't raised before the district court." *Richison*, 634 F.3d at 1127-28.

"lynchpin" of the Corps' conclusion that it lacks any discretion to modify dam operations. Op. at 7 (JA302), 18 (JA313). In accepting the Corps' segmented analytical framework, the district court did not consider the case law holding it impermissible to segregate discretionary from non-discretionary water operation activities to prevent the type of narrow consultation over minor activities in isolation that dilute the effects of the broader agency action—like Middle Rio Grande dam operations—on listed species. Op. Brf. 48-51. Because the district court's error undermines ESA and precedential directive that the Corps consider the effects of dam operations on listed species in the aggregate, Op. Brf. 46-51, this Court can reverse the district court on the issue of the scope of ESA consultation over dam operations.

If the Court reaches the substance of the scope-of-consultation issue, the crux of Guardians' argument is that the Corps' actions related to *operating and maintaining* existing Middle Rio Grande dams is the affirmative agency action subject to consultation under ESA Section 7. Op. Brf. 46-47 (citing *Karuk Tribe of California v. U.S. Forest Service*, 681 F.3d 1006, 1021 (9th Cir. 2012)). The Corps fundamentally misunderstands this argument when it asserts that Guardians is asking the agency to consult over "unspecified actions" that "the Corps has not proposed to take" such as deviations from the 1960 Flood Control Act's operational parameters. Resp. 21. But Guardians is not alleging that the Corps must

consult with FWS over the impacts of operational deviations on the minnow and flycatcher. Rather, Guardians argues that the Corps' ongoing dam operations, which the Corps has admitted adversely affect the minnow and flycatcher, JA674, 1174-75, trigger ESA Section 7's consultation requirement. Op. Brf. 47; *see also* JA160-61 (*accord* Guardians' opening brief in district court). Because the Corps' response that it is not required to consult over actions it is not planning to take is not relevant to the issue of the scope of the ESA consultation it must undertake relative to its dam operations, this argument lacks merit.[6]

If the Court finds that the Corps has discretion to act for the benefit of listed species and therefore must consult with FWS pursuant to ESA Section 7, but

[6] For the same reason, the cases the Corps relies on for the principle that it does not have to consult over actions it is not planning to take are also not instructive to the issue of the scope of the ESA consultation here. Resp. 21. In *WildEarth Guardians v. U.S. Envtl. Prot. Agency*, 759 F.3d 1196, 1198 (10th Cir. 2014), EPA promulgated a plan to limit nitrogen oxide and particulate emissions at a power plant. Plaintiff alleged EPA violated the ESA when it failed to consult over the effects of the plant's mercury and selenium emissions on listed fish. *Id*. The Court held that because EPA was only proposing to regulate nitrogen oxides and particulates with the challenged plan, it was not required to consult over the effects of other emissions not being regulated by the plan, even if EPA had the authority to regulate other emissions through a different action. *Id*. at 1209-10. In *Forest Guardians v. Forsgren*, 478 F.3d 1149, 1151 (10th Cir. 2007), plaintiff challenged the U.S. Forest Service's failure to consult over a Forest Plan's effects on Canadian lynx. The Court held that consultation was not required because the plan merely allowed, rather than authorized the implementation of, certain activities on Forest Service lands that could affect the lynx. *Id*. at 1157-58. ESA Section 7 consultation would be required when a specific proposed action required Forest Service approval to implement. *Id*. at 1158. Because the 1960 Flood Control Act orders the Corps to operate and maintain Middle Rio Grande dams, the Act is not analogous to either an emissions control plan or a forest planning document.

passes on the issue of the scope of that consultation, the Court can still grant meaningful relief by ordering the Corps to resume its 2013 formal consultation with FWS that the agency permanently terminated in 2014.

CONCLUSION

For the reasons discussed above and in Guardians' Opening Brief, 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.

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 REPLY BRIEF was filed with the Clerk of this Court via the CM/ECF system, which will send notification of such filing to other participants in this case.

/s/ Samantha Ruscavage-Barz

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,542 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Mac, Version 14.5.7, in 14 point font and in Times New Roman.

Dated this 18th day of June, 2019.

/s/ Samantha Ruscavage-Barz

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

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/s/ Samantha Ruscavage-Barz