



January 9, 2014

Via Certified Mail Return Receipt Requested

Lt. General Thomas P. Bostick, Chief
U.S. Army Corps of Engineers
441 G Street N.W.
Washington, D.C. 20314-1000

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

Lt. Colonel Antoinette R. Gant, Commander
U.S. Army Corps of Engineers
Albuquerque District
4101 Jefferson Plaza NE
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Mr. Daniel M. Ashe, Director
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John D'Antonio, District Engineer
U.S. Army Corps of Engineers
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Dr. Benjamin Tuggle, Regional Director
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RE: Notice of Intent to Sue the U.S. Army Corps of Engineers Pursuant to the Endangered Species Act Regarding its Ongoing Reservoir Operation and Water Management Activities in the Middle Rio Grande, New Mexico

Dear Lt. General Bostick, Lt. Colonel Gant, District Engineer D'Antonio, Secretary Jewell, Director Ashe and Regional Director Tuggle:

In accordance with the 60-day notice requirement of Section 11(g) of the Endangered Species Act ("ESA"), 16 U.S.C. § 1540(g), you are hereby notified that WildEarth Guardians ("Guardians") intends to bring a civil action against the U.S. Army Corps of Engineers ("Corps") for violating Sections 7 and 9 of the ESA, 16 U.S.C. §1536 and 1538: (1) by failing to initiate and/or reinstate and complete consultation with the U.S. Fish and Wildlife Service ("Service") in a timely manner concerning the effects of the Corps actions on the Rio Grande silvery minnow (*Hybognathus amarus*), Southwestern willow flycatcher (*Empidonax traillii extimus*) and their designated critical habitats, the interior least tern (*Sternula antillarum*), and the Pecos sunflower (*Helianthus paradoxus*) in the middle Rio Grande; (2) by failing to ensure that the Corps actions

are not likely to jeopardize the continued existence of the aforementioned listed species or result in the destruction or adverse modification of critical habitat; (3) by making irreversible or irretrievable commitment(s) of resources foreclosing the formulation of implementation of any reasonable and prudent alternatives; and (4) by illegally “taking” the listed species. *See* 16 U.S.C. §§ 1536(a)(2), 1536(d) and 1538(g).

I. ESA Requirements

In 1973, Congress enacted the ESA to provide “a program for the conservation of . . . endangered species and threatened species” and “a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved.” 16 U.S.C. § 1531(b). Section 2(c) of the ESA establishes that it is “ . . . the policy of Congress that all Federal . . . agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of” the ESA. 16 U.S.C. § 1531(c)(1).

To implement this policy, section 7(a)(2) of the ESA requires that each federal agency, including the Corps, consult with the Service to insure that any action authorized, funded, or carried out by the agency is not likely to 1) jeopardize the continued existence of any threatened or endangered species or 2) result in the destruction or adverse modification of the critical habitat of such species. 16 U.S.C. § 1536(a)(2). “Action” is broadly defined to mean “all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies” and includes “actions directly or indirectly causing modifications to the land, water, or air.” 50 C.F.R. § 402.02.

For federal actions, the federal agency must request from the Service a determination of whether any listed or proposed species may be present in the area of the agency action. 16 U.S.C. § 1536(c)(1). If listed or proposed species may be present, the federal agency must prepare a “biological assessment” to determine whether the listed species may be affected by the proposed action. *See id.*; 50 C.F.R. § 402.12. If the agency determines that its proposed action “may affect” any listed species or its critical habitat, the agency must engage in “formal consultation” with the Service. 50 C.F.R. § 402.14; *see also*, 51 Fed. Reg. 19,926, 19,949 (June 3, 1986) (explaining that “may affect” broadly includes “[a]ny possible effect, whether beneficial benign, adverse or of an undetermined character”).

After formal consultation, the Service issues a biological opinion to explain whether the agency action is likely to “jeopardize” any species’ existence. 16 U.S.C. § 1536(a)(2). The biological opinion must include a summary of the information on which it is based and must adequately detail and assess how the proposed action affects listed species. 50 C.F.R. § 402.14(h). The biological opinion must also include an evaluation of the “cumulative effects on the listed species . . . “ 50 C.F.R. § 402.14(g)(3). If the action is likely to cause jeopardy, then the biological opinion shall specify reasonable and prudent alternatives that avoid jeopardy. *See* 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(h)(3). If the Service concludes that the action or the reasonable and prudent alternatives will not cause jeopardy, the Service will issue an incidental

take statement that specifies “the impact, i.e., the amount or extent, of . . . incidental taking” that may occur. *See* 50 C.F.R. § 402.14(i)(1). The ESA requires agencies to use the best available science when conducting their analysis. *See* 16 U.S.C. § 1536(a)(2).

However, an agency’s consultation duties do not end with the issuance of a biological opinion. Instead, an agency must reinitiate consultation when: 1) the amount of take specified in the incidental take statement is exceeded, 2) new information reveals that the action may have effects not previously considered, 3) the action is modified in a way not previously considered, or 4) “[i]f a new species is listed or critical habitat designated that may be affected by the identified action.” *See* 50 C.F.R. § 402.16.

After consultation is initiated (or reinitiated pursuant to one of the triggers set forth in the paragraph immediately preceding), ESA section 7(d) prohibits the agency or any permittee from “mak[ing] any irreversible or irretrievable commitment of resources” toward a project that would “foreclos[e] the formulation or implementation of any reasonable and prudent alternative measures.” 16 U.S.C. § 1536(d). The section 7(d) prohibition “is in force during the consultation process and continues until the requirements of section 7(a)(2) are satisfied.” 50 C.F.R. § 402.09.

Additionally, Section 9 of the ESA prohibits the “take” of endangered species. 16 U.S.C. § 1538(a)(1)(B). “Take” means “to harass, harm, . . . wound, kill, trap, [or] capture” an endangered species. *Id.* § 1532(19).¹ It is also unlawful for any person to “cause [an ESA violation] to be committed,” and thus the ESA prohibits a governmental agency from authorizing any activity resulting in take. *See* 16 U.S.C. § 1538(g); *see also, e.g., Strahan v. Cox*, 127 F.3d 155, 163 (1st Cir. 1997). Without a biological opinion and an incidental take statement from the Service covering the endangered species, an action agency is not authorized to “take” or jeopardize *any* members of that species.

II. Factual Background

A. Corps Withdrawal from Consultation

On November 26, 2013, the Corps provided notice to the Service of its withdrawal from Consultation #02ENNM00-2013-F-0034 regarding the Corps flood control and reservoir management activities in the middle Rio Grande. The Corps letter provided:

¹ The terms “harass” and “harm” are further defined in the ESA’s implementing regulations. “Harass” means “an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering.” 50 C.F.R. § 17.3. “Harm” means “an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering. *Id.*”

Given the[] circumstances, and in light of new guidance from Headquarters, the Corps finds it necessary to withdraw its Biological Assessment (BA), and to terminate this consultation under §7 of the Endangered Species Act (ESA).

...

Accordingly, the Corps hereby withdraws its Biological Assessment dated October 31, 2011; its amended BA dated February 15, 2013; its revised conservation measures transmitted on June 7, 2013; and all descriptions of proposed actions and determinations of potential effects. Consultation #02ENNM00-2013-F-0034 on the Corps' Reservoir Operations in the Middle Rio Grande is hereby terminated.

See Corps Letter dated November 26, 2013.

The Corps reasoning for its withdrawal included (1) the Service's unwillingness to separate the Corps actions from those of other federal agencies and their non-federal partners and issue an agency-specific biological opinion to the Corps; (2) the Corps exclusion from all discussions regarding the concurrent consultations between the Service and the other federal agencies and non-federal partners; and (3) the Corps need to critically evaluate the Corps biological assessment to ensure it complies with legal guidance provided by its Chief Counsel on June 14, 2013, specifically whether the Corps actions are "wholly non-discretionary and/or part of the environmental baseline." *See Id.*

The Corps withdrawal comes seven-months after the Service reinitiated formal consultation, on February 22, 2013, with the Corps, the Bureau of Reclamation ("Reclamation") and other non-federal parties (Consultation #02ENNM00-2013-F-0033) and the Bosque del Apache National Wildlife Refuge (Consultation #02ENNM00-2013-F-0035). Prior to the Corps withdrawal, the Service planned to issue its biological opinion before the 2014 irrigation season in the middle Rio Grande which commences on March 1. In light of the Corps withdrawal it is now questionable whether the Service can meet the March 1 deadline, which will only further delay the implementation of new measures in the middle Rio Grande to prevent jeopardy to the silvery minnow, willow flycatcher, sunflower and least tern.

Notably, this is not the first time in the history of the Corps consultations with the Service in the middle Rio Grande that the Corps has withdrawn from consultation. *See* June 2001 *Programmatic Biological Assessment of Bureau of Reclamation's Discretionary Action Related to Water Management, U.S. Army Corps of Engineers Water-Operation Rules, and Related Non-Federal Actions on the Middle Rio Grande, New Mexico* at 7. On November 16, 2000, the Corps notified the Service of its intent to withdraw from consultation in a failed attempt to have its discretionary actions be segregated from those of Reclamation and other stakeholders in the middle Rio Grande. *Id.* The Corps revisits this argument almost a decade later in its most recent

withdrawal, but adds the even more troubling assertion that its withdrawal is at least in part due to its need to reevaluate whether the Corps actions are “wholly non-discretionary and/or part of the environmental baseline” and whether its actions are subject to the mandates of the ESA. *See* Corps Letter dated November 26, 2013.

As of November 26, 2013, the Corps is therefore in violation of section 7(a)(2) of the ESA: (1) by failing to timely initiate or reinstate and complete consultation with the Service regarding the ongoing impacts of its discretionary flood control and reservoir management operations on the silvery minnow and willow flycatcher and their designated critical habitats, and the least tern, and sunflower in the middle Rio Grande; and (2) by failing to insure that the Corps’ ongoing flood control and reservoir management activities in the middle Rio Grande are not likely to jeopardize the continued existence of the silvery minnow, willow flycatcher, least tern, or sunflower, or result in the destruction or adverse modification of the minnow and flycatcher’s critical habitats. 16 U.S.C. § 1536(a)(2). The Corps’ continuation of its ongoing flood control and reservoir management activities—actions that in 2003 the Service concluded do cause jeopardy to the continued existence of the silvery minnow and/or willow flycatcher and adversely modify critical habitat of the minnow—are likely to result in future and imminent “take” of the silvery minnow and/or flycatcher in violation of section 9 of the ESA. 16 U.S.C. § 1538(g).

B. Corps Consultation History in the Middle Rio Grande

Despite the assertion by the Corps that it may no longer be subject to the mandates of the ESA, the Corps actions over the past 15 years tell a different story. The Corps and other federal agencies in the middle Rio Grande began consulting with the Service over their water management activities in the middle Rio Grande in the mid-1990s upon the Service’s listing of the Rio Grande silvery minnow and the Southwestern willow flycatcher as “endangered” on July 20, 1994 and February 27, 1995, respectively.² From 1998 to 2001, the Corps submitted several biological assessments to the Service—two jointly with Reclamation (May 1998 and October 1999) and one separately (June 2001)—to initiate consultation and evaluate the impact of their actions on the listed species. On June 29, 2001, the Service issued a final biological opinion finding jeopardy to the listed species and provided a reasonable and prudent alternative and incidental take statement (“2001 Biological Opinion”). The Service’s 2001 Biological Opinion was effective through December 31, 2003.

Pursuant to litigation surrounding the 2001 Biological Opinion and a subsequent 2002 biological opinion, the District Court ordered Reclamation and the Corps to reinstate

² *See* Rio Grande silvery minnow listing and critical habitat designation rules at 59 Fed. Reg. 36988 (7/20/94); 64 Fed. Reg. 36,274 (7/6/99). *See* Southwestern willow flycatcher listing and critical habitat designation rules and revisions at 60 Fed. Reg. 10694 (2/27/95); 62 Fed. Reg. 39129 (7/22/97); 62 Fed. Reg. 44228 (8/20/97); 70 Fed. Reg. 60886 (10/19/2005); 78 Fed. Reg. 344 (1/3/13).

consultation in 2003. The Corps and Reclamation jointly submitted a biological assessment initiating Consultation #2-22-03-F-0129. On March 17, 2003, the Service issued its *Biological and Conference Opinions on the Effects of Actions Associated with the Programmatic Biological Assessment of the Bureau of Reclamation's Water and River Maintenance Operations, Army Corps of Engineers' Flood Control Operations, and Related Non-Federal Action on the Middle Rio Grande, New Mexico* ("2003 Biological Opinion"). The 2003 Biological Opinion evaluated the impacts of federal and related non-federal water management, river maintenance and flood control operations on the listed species in the middle Rio Grande of New Mexico. *Id.* at 5-20. The Service again concluded in its 2003 Biological Opinion that the agencies water management activities "are *likely to jeopardize* the continued existence of the silvery minnow and the flycatcher and adversely modify critical habitat of the silvery minnow." *Id.* at 84-88 (emphasis added).

As a result of its "jeopardy" determination, the Service developed a reasonable and prudent alternative ("RPA"), an Incidental Take Statement ("ITS"), Reasonable and Prudent Measures, and Conservation Recommendations. *Id.* at 87-111. The purpose of the RPA was to detail a number of actions that, if implemented together, would mitigate the significant negative effects on the listed species and alleviate jeopardy by ensuring successful reproduction and survival of the species. *Id.* at 88. Those mandatory actions included: (1) water operations elements, including a spawning spike to cue reproduction in the silvery minnow (Element A), management of available water to create habitat and allow species to persist in less than ideal conditions (Element B), and maintenance of minimum flows in the river during certain times of the year depending on the hydrologic conditions that year (Elements E to N); (2) habitat improvement elements, including restoring river connectivity to allow upstream movement of silvery minnow throughout the Middle Rio Grande (Element R), creating riparian habitat and low velocity in-channel aquatic habitat throughout the action area (Element S), increasing the safe channel capacity of the river near San Marcial to allow for essential flooding flows (Element U), and completing the Cochiti environmental baseline study and investigating feasibility of sediment transport from Cochiti Lake (Element W); (3) water quality elements; and (4) reporting elements, among other requirements. *Id.* at 87-102.

The 2003 Biological Opinion remained valid for a 10-year term ending on February 28, 2013. The 2003 Biological Opinion, however, also contained a very specific provision detailing the circumstances regarding reinitiation of formal consultation. This provision included the four circumstances set forth in 50 C.F.R. § 402.16; several species-specific triggers for reinitiation, and a provision providing a means for continued compliance with the ESA upon expiration of the Biological Opinion. The reinitiation notice provided "[c]onsultation must be reinitiated prior to the expiration of this biological opinion *to ensure continued compliance with sections 7 and 9 of the ESA.*" *Id.* at 110 (emphasis added).

On October 31, 2011, more than a year prior to expiration of the 2003 BO, the Corps submitted a biological assessment to the Service pursuant to its obligation under section 7(a)(2) of the ESA. The Corps requested that the Service consult with the Corps separately from other

stakeholders in the middle Rio Grande and issue a separate biological opinion focused only on the Corps activities. At that time, the Service did not agree to issue a separate biological opinion or to separately consult with the Corps.

On February 15, 2013, the Corps amended and submitted a revised *Biological Assessment of the U.S. Army Corps of Engineers Reservoir Operation on the Middle Rio Grande of New Mexico* (“Corps 2013 BA”). The Corps requested the Service initiate consultation regarding “the effects of the Corps’ continuing, discretionary reservoir operation action on Federally listed species, and designated critical habitat within the middle Rio Grande valley of New Mexico.” The Corps 2013 BA specifically defined the proposed action under review as:

The proposed action in this Section 7 consultation includes the Corps’ discretionary flood risk operation (a.k.a., “flood control”), San Juan-Chama water storage, maintenance operations at Corps-managed reservoirs in the middle Rio Grande valley, and the conduct of deviation in the flood regulation schedule of Cochiti and Jemez Canyon dams through July 15, 2013. The proposed actions are described in detail in Chapter 3 of the BA.

Id. In addition, the Corps 2013 BA cited the “reinitiation notice” provision of the 2003 Biological Opinion stating that “[t]he Corps is reinitiating Section 7 consultation because the 2003 Biological Opinion will expire on February 28, 2013. Reinitiation of consultation through the Corps’ submittal of this BA *provides continued compliance under the ESA.*” Corps 2013 BA at 1 (emphasis added). The Corps also referenced its duty to reinitiate consultation with the Service “as required by ESA §7 and 50 C.F.R. § 402.16” in a letter it sent to Guardians on June 14, 2013.

Over the past several decades, the Corps has acknowledged its obligations under the ESA including its duty to consult with the Service concerning its actions in the middle Rio Grande. In its 2013 biological assessment, the Corps stated that nothing in its water control plans have changed since 1996. Corps 2013 BA at 2. As of the date of this notice, the Corps retains the discretionary authority it described in the Corps’ prior biological assessments, as well as additional authority that may not be detailed in those documents. Therefore, the Corps’ failure to consult regarding its ongoing discretionary action in the middle Rio Grande is in violation of section 7 of the ESA. 16 U.S.C. § 1536(a)(2). Further, since withdrawing from consultation on November 26, 2013, the Corps is no longer protected by the incidental take statement in the 2003 Biological Opinion and any ongoing actions are likely to result in the taking of the silvery minnow and/or willow flycatcher in violation of section 9 of the ESA. 16 U.S.C. § 1538(g).

C. The Corps Discretion Includes Ability to Deviate from its Water Control Manuals

The Corps retains flexibility in its reservoir operations in the middle Rio Grande. The Corps’ Water Control Manuals specifically provide discretionary authority for the Corps to

“deviate” from normal operations pursuant to its manuals. For example, the Corps’ Water Control Manual for Cochiti Lake provides:

7-15. Deviation from Normal Regulation. The District Engineer is occasionally requested to deviate from normal regulation of the reservoir. Prior approval for a deviation is obtained from the Southwestern Division Office (SWD) except as noted in subparagraph 7-15a below. Deviation requests usually fall into the following categories:

.....

c. **Planned Deviations.** Planned deviations provide the mechanism to modify the Water Control Plan for longer periods of time. Each situation should be analyzed on its merits. Sufficient data on flood potential, reservoir and watershed conditions, possible alternative measures, benefits to be expected, and probable effects on other authorized and useful purposes will be presented by letter, telephone or electronic mail to the SWD, along with recommendations for review and approval.

Cochiti Lake Water Control Manual dated May 1996 at 7-7.

The Corps has exercised this authority in the middle Rio Grande in at least two significant contexts: (1) determining the safe channel capacity of the Rio Grande, and (2) providing flows downstream of Cochiti dam to benefit the endangered silvery minnow and willow flycatcher. First, the Corps reported utilizing its deviation authority during a seventeen-year period between 1979 and 1996 to experiment with the maximum channel capacity of the Rio Grande. The Corps 2013 BA provides:

Prior to 1996, the maximum safe channel capacity at Albuquerque was 5,000 cfs. Between 1979 and 1996, the Corps experimentally exceeded this capacity in several years through a series of year-long deviations in flood-control operations. Water control manuals for Rio Grande basin flood-control reservoirs were modified in 1996 to reflect the formal increase in the operational channel capacity to 7,000 cfs at Albuquerque (USACE 1996c).

Corps 2013 BA at 15. This deviation is significant discretionary authority the Corps has in operating its reservoirs.

Similarly, the Corps has demonstrated its authority to deviate from its Water Control Manuals to provide benefits to listed species and the environment below Cochiti Reservoir on several occasions. As recognized in its 2013 BA, in 2000, the Corps deviated from its normal operations at Jemez Canyon Reservoir by releasing water from the sediment retention pool into the river in order to reduce the risk of extinction for the silvery minnow during a drought period.

Corps 2013 BA at 3. From 2001 to 2003, the Corps deviated from its water control plans at Abiquiu and Jemez Canyon Reservoirs to store water and later release to benefit listed species. *Id.* at 4. In 2007 and again from 2009-2013, the Corps planned to deviate from its water control plan for Cochiti Lake to provide a spawning and/or overbanking peak flows below Cochiti Lake. The Corps actually modified its operations in 2007 and again in 2010 by storing spring flows in Cochiti for a limited period of time so a larger more natural peak flow could be released several weeks later. In 2010, for example, “the Corps initiated action to provide for overbanking flows” providing 5,300 cubic feet per second for 2.5 days at Albuquerque. *See 2010 Rio Grande Basin Report* at 5. In order to carry out this deviation, the Corps began its temporary storage of water on April 19, 2010 and reached a maximum storage of 29,000 acre-feet on May 13. The Corps began releasing water on May 17. The deviation was completed by May 26 and all temporarily stored water was evacuated from Cochiti Lake.

These planned deviations were conducted to either provide water as a base flow for the river (in the case of the 2000 and 2001-2003 deviations) or create a spawning spike and/or overbanking flows for the silvery minnow and willow flycatcher (2007 and 2009-2013 deviations). Such peak flows serve to trigger spawning in the minnow and provide overbank flows that support creation of nesting habitat for the flycatcher. The 2007 deviation successfully created a ten-fold increase in the silvery minnow population. The Service determined that such a spawning spike and overbanking flows play a key role in alleviating jeopardy from the minnow and flycatcher and included a spawning spike as Element A of the RPA for the 2003 Biological Opinion. *See 2003 Biological Opinion* at 87-102.

After the 2013 irrigation season, the Corps now insists that it does not have discretion to deviate from its normal reservoir operations to create a spawning spike for the minnow in 2014 and beyond. *See Corps Letter* dated November 12, 2013. Not only is this position contrary to the seventeen-year deviation it conducted to determine the safe channel capacity of the Rio Grande below Cochiti Lake, but also contrary to the plain reading of the discretion provided in its manuals. Despite its contention, the Corps retains discretionary authority to act on behalf of the listed species through “deviation” from its Water Control Manuals.

D. Corps Ability to Deviate is a discretionary action that requires consultation

Based on the foregoing discussion of the Corps discretionary authority to deviate from its Water Control Manuals, if the Corps reinitiates consultation with the Service, this authority to deviate from its Manual must be part of the consultation. The Corps included as part of its proposed actions for the Corps 2013 biological assessment “the conduct of deviation in the flood regulation schedule of Cochiti and Jemez Canyon dams through July 15, 2013.” Corps 2013 BA at 1. The Corps discretionary authority regarding such “deviation” from normal reservoir operations does not end on July 15, 2013 as the Corps appears to claim it does. The Corps must consult regarding the full extent of its discretionary authority and to fail to do so is in violation of section 7 of the ESA. 16 U.S.C. § 1536.

III. Violations of the ESA

Guardians hereby puts the Corps on notice that it will promptly seek judicial relief under the ESA if the Corps fails to immediately seek initiation and/or reinitiation of consultation, or if the Corps fails to consult fully over all aspects of its ongoing actions and discretionary authority on the middle Rio Grande affecting the listed species. 16 U.S.C. §§ 1536(a)(2).

A. Violation of Section 7(a)(2) of the ESA

Guardians hereby puts the Corps on notice that it is violating section 7 of the ESA, 16 U.S.C. § 1536(a)(2), and its implementing regulations, 50 C.F.R. § 402 *et seq.*: (1) by failing to timely initiate or reinitiate and complete consultation with the Service regarding the ongoing impacts of its discretionary flood control and reservoir management operations on the silvery minnow, willow flycatcher, and other listed species; (2) by failing to timely initiate or reinitiate and complete consultation with the Service regarding the ongoing impacts of its discretionary actions in the middle Rio Grande on the silvery minnow and/or willow flycatcher's designated critical habitats in the middle Rio Grande; (3) by failing to insure that the Corps ongoing actions in the middle Rio Grande are not likely to jeopardize the continued existence of the silvery minnow, willow flycatcher or other listed species; and (4) by failing to insure that the Corps ongoing actions in the middle Rio Grande are not likely to result in the destruction or adverse modification of the designated critical habitat of the silvery minnow and/or willow flycatcher. 16 U.S.C. § 1536(a)(2).

Guardians hereby puts the Corps on notice that its withdrawal from consultation concerning its actions in the middle Rio Grande is likely to result in a delay in the Service's issuance of a new biological opinion prior to the 2014 irrigation season. Such delay of the ongoing consultation will likely mean the Service's inability to provide a timely, adequate and complete plan to meaningfully prevent "jeopardy" to the silvery minnow, willow flycatcher or other listed species or their designated critical habitat for the 2014 irrigation season and beyond.

B. Violation of Section 7(d) of the ESA

In the event that the Corps initiates or reinitiates consultation with the Service, Guardians hereby provides notice that the Corps has violated and continues to violate section 7(d) of the ESA, 16 U.S.C. § 1536(d), by making irreversible or irretrievable commitment(s) of resources which have the effect of foreclosing the formulation of implementation of any reasonable and prudent alternatives which would not violate ESA subsection 7(a)(2), 16 U.S.C. § 1536(a)(2).

C. Violation of Section 9 of the ESA

Guardians hereby provides notice that the Corps is violating section 9 of the ESA, 16 U.S.C. § 1538(g), and its implementing regulations by causing ongoing and imminent future "take" of the endangered silvery minnow and/or willow flycatcher as direct result of the Corps'

actions in the middle Rio Grande and/or by destroying or adversely modifying critical habitat of the listed species as defined in 50 C.F.R. § 402.02, without a permit authorized by law.

IV. Noticing Party

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

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

WildEarth Guardians
516 Alto Street
Santa Fe, New Mexico 87501
(303) 884-2702

V. Conclusion

One of the purposes of the ESA citizen suit provision, 16 U.S.C. § 1540(g), is to encourage discussions among parties in order to avoid potential litigation. We encourage the Corps to seriously consider the concerns detailed in this notice and ask that the Corps discuss the steps that may taken going forward to remedy these legal violations. However, if the aforementioned violations of the ESA are not remedied within 60 days of the date of this letter, we intend to file a citizen's suit in federal court seeking preliminary and permanent injunctive relief, declaratory relief, and attorneys' fees and costs concerning these violations. If you believe any of the above information is incorrect, have any additional information that might help avoid litigation, or wish to discuss this matter further, please feel free to contact me at the phone or email address listed below.

Sincerely,

Jen Pelz
Wild Rivers Program Director
jpelz@wildearthguardians.org
303-884-2702