

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

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|---------------------------|---|--------------------------|
| WILDEARTH GUARDIANS, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | No. 1:22-cv-914 -GJF-JMR |
| |) | |
| UNITED STATES FISH AND |) | |
| WILDLIFE SERVICE, et al., |) | |
| |) | |
| Federal Defendants. |) | |
| |) | |
| and |) | |
| |) | |
| MIDDLE RIO GRANDE |) | |
| CONSERVANCY DISTRICT, |) | |
| |) | |
| Intervenor-Defendant. |) | |
| |) | |

SETTLEMENT AGREEMENT

This Settlement Agreement is entered into by and between Plaintiff WildEarth Guardians, Federal Defendants U.S. Fish and Wildlife Service (“FWS”) and U.S. Bureau of Reclamation (“Reclamation”), and Intervenor-Defendant Middle Rio Grande Conservancy District (“MRGCD”) (collectively, “the Parties”), who state as follows:

WHEREAS, Plaintiff filed its “Petition for Review of Agency Action,” ECF No. 1, on November 30, 2022;

WHEREAS, Plaintiff’s Petition alleges that Federal Defendants violated various provisions of the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531-1544, in relation to Reclamation’s Middle Rio Grande operations and maintenance activities and FWS’s December 2, 2016 Biological Opinion;

WHEREAS, MRGCD was granted intervention as a Defendant on January 30, 2023, ECF No. 5;

WHEREAS, proceedings in this matter were stayed to allow the Parties to continue settlement discussions from February 6, 2023 (ECF No. 8) to April 19, 2024 (ECF No. 28) and, after an in-person Settlement Conference with the Court on May 10, 2024 (ECF No. 36), again from May 15 to present (ECF Nos. 38, 39);

WHEREAS, Plaintiff has reviewed letters dated October 31, 2024, that Reclamation and FWS exchanged identifying eight issues that Reclamation and/or FWS will consider, as appropriate, in any new ESA Section 7(a)(2) consultation on Reclamation's Middle Rio Grande operations and maintenance activities conducted pursuant to this Settlement Agreement.

WHEREAS, the Parties, through their authorized representatives, have reached a settlement that they believe is in the public interest and consider it to be a just, fair, adequate, and equitable resolution of the claims set forth in Plaintiff's Petition and "Supplemental Notice of Intent to Sue," dated on or about March 15, 2024;

THEREFORE, Plaintiff, Federal Defendants, and Intervenor-Defendant stipulate and agree to the following:

1. ESA Consultation

A. Reclamation will send a letter to FWS requesting reinitiation of ESA Section 7(a)(2) consultation on its Middle Rio Grande operations and maintenance activities within 30 days of the date of entry of this Settlement Agreement.

B. Reclamation and FWS will complete the reinitiated ESA Section 7(a)(2) consultation, and FWS will issue a new Biological Opinion, by October 30, 2028.

C. No less than 30 days before issuing a final biological assessment and final Biological Opinion, Federal Defendants will provide Plaintiff, and any member of the public who had requested them, draft versions of these documents to allow opportunities to comment. Additionally, Federal Defendants will provide status updates to Plaintiff on the progress of the consultation every six months. Following receipt of those status updates, Plaintiff may request a

meeting with Reclamation and/or FWS representatives to discuss the progress made toward completion of each action.

2. Interim Terms Pending Completion of the New Biological Opinion

A. Interim Measure 1: Implementation of Remaining Conservation Measures in the 2016 Biological Opinion

- (1) During the pendency of the reinitiated consultation, Federal Defendants will prepare a list of priorities to implement the remaining conservation measures in the 2016 Biological Opinion. Continued monitoring of species will be included as high priority. MRGCD will continue implementation of conservation measures in the 2016 Biological Opinion.

B. Interim Measure 2: Fallowing/Environmental Water Leasing, On-Farm Upgrades, and Infrastructure Efficiency Improvements for Interim Species Protection

- (1) MRGCD will pursue environmental water savings in the following acreage ranges based on verifiable reductions in irrigated acreage through MRGCD's fallowing program:
 - o 2025 irrigation season: 2,500-3,500 acres (potentially 7.5-10.5k AF)
 - o 2026 irrigation season: 2,500-3,500 acres (potentially 7.5-10.5k AF)
 - o 2027 irrigation season: 2,500-3,500 acres (potentially 7.5-10.5k AF)
 - o 2028 irrigation season: 2,500-3,500 acres (potentially 7.5-10.5k AF)
- (2) Water newly conserved through MRGCD's On-Farm Program and/or infrastructure efficiency improvement projects initiated after the settlement date may also count towards the annual acreage or acre-foot commitments described above. All water savings accounting shall be made in conformity with the protocols of MRGCD's Environmental Water Leasing Program.
- (3) If MRGCD is unable to secure environmental water savings through fallowing, on-farm projects, and/or infrastructure efficiency improvements to meet the above volumetric commitments in any given year, it will

dedicate for environmental purposes 10% of its annual San Juan Chama Project contract water allocation or equivalent volume of storeable native water.

- (4) Consistent with the proposed action that is the subject of the 2016 Biological Opinion, Reclamation will continue to seek to secure environmental water in the minimum amount of 5,000 AF per year during pendency of the reinitiated consultation.
- (5) Annually, Reclamation and MRGCD will report to Plaintiff how the water was put to an environmental benefit, i.e., through diversion dam bypass, strategic outfalls, or conservation storage. To describe how the environmental water savings set forth in Paragraph 2.B.1. are met, the annual report will include a description of the water savings accounting using the protocols set forth in Paragraph 2.B.2.

3. Modification of Agreement

A. This Settlement Agreement may be modified (1) by written stipulation among the Parties filed with and approved by the Court, or (2) upon written motion filed by any Party and granted by the Court.

B. In the event of a disagreement among the Parties concerning any aspect of this Settlement Agreement, or if any Party believes that another Party has failed to comply with any term or condition of this Agreement, the Party raising the dispute or seeking enforcement will provide the other Parties with notice of the claim and provide a minimum 120-day window to remedy the alleged dispute. The Parties agree that they will meet and confer (telephonically or in-person) at the earliest possible time in a good-faith effort to resolve the dispute before seeking relief from the Court. If the Parties are unable to resolve the dispute themselves, any Party may seek relief from the Court after the minimum 120-day window has elapsed. If Plaintiff believes that Federal Defendants or Intervenor-Defendant has failed to comply with a term of this Agreement and has not sought to remedy the alleged failure after being provided notice as set forth above, Plaintiff's sole remedy will be a motion to enforce the term. Nothing related to this

Agreement will be enforceable through a proceeding for contempt of Court. No Party will be entitled to monetary damages for any breach of the Agreement.

4. Dismissal of Action

A. Upon approval of this Settlement Agreement by the Court, all counts of Plaintiff's Petition will be dismissed with prejudice. Notwithstanding the dismissal of this action, the Parties hereby stipulate and respectfully request that the Court retain jurisdiction to oversee compliance with the terms of this Agreement and to resolve any motions to modify such terms, until Federal Defendants satisfy their obligations under the Agreement. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375 (1994). Plaintiff also waives any and all claims challenging implementation of, or alleging required reconsultation of, the 2016 Biological Opinion, including the claims raised in the March 15, 2024 "Supplemental Notice of Intent to Sue."

B. The Parties agree that nothing in this Settlement Agreement extends the Court's jurisdiction to hear any dispute over the adequacy, scope, analyses, content, or conclusions that will be contained in the new draft and final biological assessment and new draft and final Biological Opinion, or any other materials relating to the ESA Section 7(a)(2) consultation processes prepared under this Agreement for Reclamation's Middle Rio Grande operations and maintenance activities. The Parties agree that any such challenges must be brought through a new judicial action and/or any applicable agency objection process, and must raise claims pursuant to law outside the context of this Agreement. In no event would any enforcement action be available through a motion for contempt.

5. Attorneys' Fees and Costs

A. Federal Defendants agree to pay Plaintiff \$41,000.00 in full and complete satisfaction of any and all claims, demands, rights, and causes of action pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d), ESA Section 11(g)(4), 16 U.S.C. § 1540(g)(4), and/or any other statute and/or common law theory, for any and all attorneys' fees, costs, and expenses incurred for or in this litigation.

B. Federal Defendants' payment as identified in Paragraph 5.A above, will be accomplished by electronic fund transfer into the Client Trust Account for WildEarth Guardians. Plaintiff's counsel will provide the appropriate account number, tax identification, and other information needed to facilitate payment to undersigned counsel for Federal Defendants. Federal Defendants will submit the paperwork for the payment within thirty (30) business days after this Settlement Agreement is approved by the Court or Plaintiff provides the necessary information as required by this paragraph to facilitate the payment, whichever is later. Plaintiff's counsel will notify undersigned counsel for Federal Defendants when payment is received.

C. Plaintiff agrees that receipt of the full amount specified in Paragraph 5.A above will operate as a release of any and all claims for attorneys' fees and costs that Plaintiff has incurred for or in this litigation or in relation to the March 15, 2024 "Supplemental Notice of Intent to Sue."

D. Plaintiff and its attorneys agree to hold harmless Federal Defendants in any litigation, further suit, or claim arising from the payment of the agreed-upon \$41,000.00 settlement amount pursuant to Paragraph 4.a. Under 31 U.S.C. §§ 3711, 3716; 26 U.S.C. § 6402(d); 31 C.F.R. §§ 285.5, 901.3; and other authorities, the United States will offset against the attorney fee award Plaintiff's delinquent debts to the United States, if any. *See Astrue v. Ratliff*, 560 U.S. 586 (2010).

6. Representative Authority

The undersigned representatives of Plaintiff, Federal Defendants, and Intervenor-Defendant certify that they are fully authorized by the party or parties whom they represent to enter into the terms and conditions of this Settlement Agreement and to legally bind those parties to it.

7. Compliance with Other Laws

Nothing in this Settlement Agreement will be interpreted as, or will constitute, a commitment or requirement that Federal Defendants obligate or pay funds, or take any other actions in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other applicable law. Nothing in this Agreement will be construed to deprive a federal official of authority to

revise, amend or promulgate regulations, or to amend or revise management or operations plans. Nothing in this Agreement is intended to or will be construed to amend or require amendment of any management or operations plan; to waive any obligation to exhaust administrative remedies; to constitute an independent waiver of the United States' sovereign immunity; to change the standard of judicial review of federal agency actions under the Administrative Procedure Act ("APA") or ESA; or to otherwise extend or grant this Court jurisdiction to hear any matter, except as expressly provided in the Agreement.

8. Mutual Drafting and Other Provisions

A. It is hereby expressly understood and agreed that this Settlement Agreement was jointly drafted by Plaintiff, Federal Defendants, and Intervenor-Defendant. Accordingly, the Parties hereby agree that any and all rules of construction, to the effect that ambiguity is construed against the drafting party, will be inapplicable in any dispute concerning the terms, meaning, or interpretation of this Agreement.

B. This Settlement Agreement contains all of the agreements among Plaintiff, Federal Defendants, and Intervenor-Defendant, and is intended to be and is the final and sole agreement among the Parties concerning the complete and final resolution of Plaintiff's claims. The Parties agree that any other prior or contemporaneous representations or understandings not explicitly contained in this Agreement, whether written or oral, are of no further legal or equitable force or effect. Any subsequent modifications to this Agreement must be in accordance with Paragraph 3.A.

C. This Settlement Agreement is the result of compromise and settlement, and does not constitute an admission, implied or otherwise, by Plaintiff, Federal Defendants, or Intervenor-Defendant to any fact, claim, or defense on any issue in this litigation. This Agreement has no precedential value and will not be cited in any other litigation.

8. Force Majeure

The Parties understand that notwithstanding their efforts to comply with the commitments contained herein, events beyond their control may prevent or delay such compliance. Such events may include natural disasters as well as unavoidable legal barriers or

restraints, including those arising from actions of persons or entities that are not party to this Settlement Agreement. Force majeure will not continue beyond the circumstances and conditions that prevent timely performance, and will not apply if alternative means of compliance are available. The Party claiming force majeure will have the burden of proof in proceedings to enforce or modify the Settlement Agreement.

9. Effective Dates

The terms and agreements contained in this Settlement Agreement do not go into effect unless and until the District Court enters an order approving this Settlement Agreement. The Parties request the Court to retain jurisdiction for the sole purpose of enforcing the Agreement or resolving any disputes concerning its implementation. The Parties obligations contained in this Settlement Agreement terminate and become unenforceable upon FWS's issuance of the new Biological Opinion contemplated in Paragraph 1.B.

The undersigned parties hereby consent to the form, substance, and entry of the foregoing Settlement Agreement.

Respectfully submitted this 15th day of November, 2024,

*/s/ Samantha Ruscavage-Barz (by permission
11/15/2024; original signature preserved by Party)*

Samantha Ruscavage-Barz

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/s/ Andrew A. Smith (11/15/2024; original signature
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/s/ Christina J. Bruff (by permission 11/18/2024;
original signature preserved by Party)

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