



Summer 2007

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Recommended Citation

Michael Connor, *Commentary on History of the Minnow Litigation and Its Implications for the Future of Reservoir Operations on the Rio Grande*, 47 NAT. RES. J. 693 (2007).

Available at: <https://digitalrepository.unm.edu/nrj/vol47/iss3/10>

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Commentary on “History of the Minnow Litigation and Its Implications for the Future of Reservoir Operations on the Rio Grande”

Lara Katz’ article on the history of the silvery minnow litigation¹ accurately describes the complex issues involved when the Endangered Species Act (ESA) crosses swords with traditional water uses. These issues have been front and center in the Middle Rio Grande region for over a decade now. Katz’ article, however, while providing a good summary of the litigation and related background, presents one view of the “minnow rider” and the effect of the legislation.² As the staff person primarily responsible for advising Senator Bingaman on water-related issues, I was involved in the rider’s development and have a different perspective on its value.

As noted in the article, the rider was driven in large measure by the view that the Tenth Circuit’s holding that the Bureau of Reclamation could unilaterally reallocate San Juan-Chama Project water away from project contractors for minnow flows was highly questionable. Section 7 of the ESA is intended to ensure that federal agencies do not take actions likely to jeopardize the continued existence of endangered species. Diversion of water from the San Juan River basin to supplement water supplies in the Rio Grande does not jeopardize the Rio Grande silvery minnow. Accordingly, there appeared to be no basis for the court to decide that the Bureau of Reclamation (Reclamation) could simply usurp the contract rights of project contractors. Most important, though, the decision made little

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1. Lara Katz, *History of the Minnow Litigation and Its Implications for the Future of Reservoir Operations on the Rio Grande*, 47 NAT. RESOURCES J. 675 (2007).

2. Energy and Water Development Act of 2004, Pub. L. No. 108-137, 117 Stat. 1827 (2003). In addition to criticizing the substance of the rider, the article also criticizes the legislative process as one devoid of deliberative debate. The rider’s development, however, was anything but secretive. While it is unfortunate that there was never a formal hearing on the provision, the rider was included in the Senate version of the 2004 Energy and Water Appropriations bill that was unanimously reported by the Appropriations Committee on July 17, 2003. The full Senate took up the bill and passed it by a unanimous vote on September 16, 2003, and the final conference report was passed by both the House and the Senate on November 18, 2003. At each stage of the legislative process there were discussions with stakeholders in the Middle Rio Grande region and various national organizations that were interested and were lobbying the issue.

sense from a policy perspective. The minnow's endangered status was the result of decades of modifications to the natural hydrology of the Rio Grande. Allowing Reclamation to reallocate water away from San Juan-Chama contractors would simply penalize entities not primarily contributing to the minnow's status. This, in turn, would result in little incentive to fundamentally change the manner in which native Rio Grande water is stored and used.

With that as background, Senators Bingaman and Domenici worked together to craft a legislative provision that would yield a better result – one that would bring a better balance of human and environmental needs by providing some level of certainty for water users but still necessitating changes in the way water is used in the Middle Rio Grande. Accordingly, Reclamation's discretion to provide water for the minnow's target flows was limited only with respect to using San Juan-Chama water, not native Rio Grande water.³ The rider did not provide an exemption from the ESA, and improvements in both habitat and infrastructure would be necessary for water uses to continue in compliance with the ESA.

The most important issue was whether the biological opinion would promote the improvements necessary to improve the overall health of the river. Katz' article acknowledges Senator Bingaman's view that Reclamation needed to aggressively act to promote recovery of the silvery minnow, even after enactment of the rider, but the article states that the rider has foreclosed several possibilities for river management. I disagree. As a threshold matter, the only options the rider cut off were the unilateral taking of San Juan-Chama water to meet the minnow target flows and litigation over the sufficiency of the biological opinion developed by the U.S. Fish and Wildlife Service.⁴ On the latter point, Senator Bingaman best articulated the reasons that legal protection for the biological opinion was appropriate:

[I]t is important to keep in mind that compliance with the biological opinion not only ensures compliance with the ESA, but should serve to improve water-supply and habitat

3. Importantly, the rider expressly preserved the use of voluntary transactions to acquire San Juan-Chama Project water to meet target flows, preserving a tool that had been in place since 1996. See CONG. REC. S10897 (Aug. 1, 2003).

4. The Katz article correctly notes that the rider was initially a stopgap measure that protected the biological opinion (BiOp) for a 2-year period but was later amended to provide legal protection for ten years, the effective period of the BiOp. Senator Bingaman did not support the amendment because, unlike the initial rider, the amendment was never discussed with the involved parties. See CONG. REC. S11746 (Nov. 20, 2004). Similarly, Senator Bingaman did not support a subsequent amendment that extended legal protection to any amendments to the BiOp. See CONG. REC. S12748 (Nov. 14, 2005).

conditions in the Middle Rio Grande. The Biological Opinion contains a reasonable and prudent alternative, or "RPA", that emphasizes a broad approach to conserving endangered species in the Middle Rio Grande. It requires minimum river flows based on the annual available water supply, and includes spring releases to trigger silvery minnow spawning activity. The RPA also contains No. 1, requirements for significant habitat improvements, including fish passage at the San Acacia diversion dam; No. 2, population enhancement activity; and No. 3, water quality improvements in the basin.

As a fall-back, to ensure continued survival of the silvery minnow if the RPA does not significantly improve its status, the legal coverage provided by the biological opinion lapses if minnow mortality exceeds the limits defined in the opinion's incidental take statement. In that event, the federal agencies will need to re-consult with the U.S. Fish & Wildlife Service to ensure that the survival of endangered species is not jeopardized.⁵

Activity in the aftermath of the rider illustrates that it did not, in fact, cut off options for improved river management. Without the distraction of litigation, the federal agencies, the State of New Mexico, water users, Pueblos, and other interested parties have explored a wide range of options to better balance water use with environmental needs. Senators Bingaman and Domenici have also continued their support for improving the situation in the Middle Rio Grande. Significant federal funding has been provided over the last five years for water acquisition and other activities directed by the collaborative program. Additionally, over four million dollars in federal grants have been provided to partner with state and local resources to implement water conservation and efficiency projects within the Middle Rio Grande Conservancy District. Most recently, Congress overrode a Presidential veto to enact the Water Resources Development Act, which contained several new authorities for the Corps of Engineers, allowing it to take a more active role in pursuing habitat improvement projects and modified reservoir operations that will improve the health of the Rio Grande.⁶

Much work remains to be done. And I agree with Katz' assessment that, "[i]f the river is going to sustain both its human and non-human dependents, creative strategies that go beyond existing management

5. CONG. REC., *supra* note 3.

6. See Water Resources Development Act of 2007, Pub. L. No. 110-114, §§ 3117, 3118 & 5056.

practices, legislative authorizations, and legal frameworks will be needed."⁷ In my opinion, the infamous "minnow rider" did not distract from that goal. It was narrowly tailored to address some of the specific problems associated with the litigation and to allow the parties involved to work together in a more constructive manner on long-term solutions. Granted, this point may not have been reached without the litigation preceding it. Nonetheless, the courts are not the most efficient forum for the problem-solving and creative strategies that are best left to the parties who have a stake in the outcome. The same thing can sometimes be said about the legislative process. Fortunately, the minnow rider left ample opportunity for creative long-term solutions to come together — hopefully, before a new round of litigation or a new ESA-related crisis occurs.

7. Katz, *supra* note 1, at 16.