Cooperative Agreement for the Middle Rio Grande Collaborative Program Recovery Implementation Program

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COOPERATIVE AGREEMENT

FOR THE MIDDLE RIO GRANDE COLLABORATIVE PROGRAM

RECOVERY IMPLEMENTATION PROGRAM

This Cooperative Agreement (Agreement) is entered into by the U.S. Bureau of Reclamation, the U.S. Army Corps of Engineers, the U.S. Fish and Wildlife Service, the Pueblo of Sandia, the Pueblo of Santa Ana, the Pueblo of Isleta, the Santo Domingo Tribe, the New Mexico Interstate Stream Commission, the New Mexico Attorney General’s Office, the New Mexico Department of Game and Fish, the New Mexico Department of Agriculture, the City of Albuquerque, the Albuquerque-Bernalillo County Water Utility Authority, the Middle Rio Grande Conservancy District, the Assessment Payers Association of the Middle Rio Grande Conservancy District, and the University of New Mexico, hereinafter referred to individually as “signatory” and collectively as “signatories.”

I. Background

The Middle Rio Grande Endangered Species Collaborative Program (Collaborative Program) was established by Memorandum of Understanding (MOU) in 2002 as a collaborative effort consisting of federal, state, and local governmental entities, Indian Tribes and Pueblos, and non-governmental organizations to: A) act to prevent extinction, preserve reproductive integrity, improve habitat, support scientific analysis, and promote recovery of the listed species [with special emphasis on the Rio Grande silvery minnow (Hybognathus amarus) (silvery minnow) and Southwestern willow flycatcher (Empidonax traillii extimus) (flycatcher)], in a manner that benefits the ecological integrity, where feasible, of the Middle Rio Grande (MRG) riverine and riparian ecosystem; and B) exercise creative and flexible options under the Endangered Species Act (ESA) so that water use and development can proceed in compliance with applicable laws.

A Memorandum of Agreement (MOA) signed by Program participants in 2008 superseded the previous MOU, as amended. In the MOA, Program participants committed to participate in and support the Collaborative Program through May 2021.

In 2009, the Executive Committee of the Collaborative Program directed efforts to pursue implementation of the Collaborative Program through a recovery implementation

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1 This list of signatories will reflect those parties that actually join the RIP through signing this Cooperative Agreement. In this example, we listed all 16 members of the Collaborative Program.
program to enhance the focus on species recovery activities and to serve as an ESA compliance vehicle for water-related actions in the MRG.

The purpose of the MRG recovery implementation program (RIP) is: (a) to protect and improve the status of species listed pursuant to the ESA within the MRG by implementing certain recovery activities to benefit and work toward recovery of those species and their designated critical habitats, with special emphasis on the silvery minnow and flycatcher, and (b) to protect existing and future water uses while complying with applicable state and federal laws, rules and regulations, and to serve as the ESA coverage vehicle for entities that rely on the RIP as the conservation measure for the effects of water uses and management actions in the Program area.

The goals of the RIP are to:

1. Conserve and contribute to recovery of the proposed and listed species.
   - Support the development of self-sustaining populations through implementation of the RIP Action Plan and Annual Work Plan.
   - Continually identify the critical scientific and management questions and uncertainties that will be addressed through adaptive management.
   - Assist in avoiding jeopardy to the species and adverse modification of designated critical habitat within the Program area.

2. Protect existing and future water uses.
   - Provide a mechanism for ESA compliance for actions that are the subject of Reclamation’s Biological Assessment (January 16, 2013) and U.S. Fish and Wildlife Service Bosque del Apache National Wildlife Refuge’s Biological Assessment (February 22, 2013).
   - Provide a process for streamlined section 7 consultation for future water uses needing compliance with the ESA.
   - Obtain hydrologically sustainable solutions for the species.

The RIP may not impair state water rights of individuals and entities or federal reserved water rights of individuals and entities; federal or other water rights of Indian nations and Indian individuals, or Indian trust assets; San Juan-Chama Project contractual rights; other contractual or storage rights; the State of New Mexico’s ability to comply with Rio Grande Compact delivery obligations; or the Middle Rio Grande Conservancy District’s statutory obligations to its constituents. Water to be acquired or otherwise made available for endangered species benefits must be from a willing donor, seller or lessor and be used in compliance with all federal laws and treaties, as well as the laws of the State of New Mexico including, but not limited to, permitting requirements. Consistent with the above principles, the RIP will also conduct its activities in accordance with
applicable Federal laws and regulations, including those for permitting, regulatory compliance, and contracting.

II. Statement of Purpose and Agreement

This Cooperative Agreement establishes the RIP. Through execution of this Cooperative Agreement, signatories are committing to participate in the RIP to the extent possible with full consideration given to the RIP documents that detail RIP implementation.

To establish the foundation for a long term recovery implementation program, the RIP incorporates a Program Document that describes the RIP’s purpose and goals, its scope, the organizational structure and governance protocols for RIP implementation, and the process for the evaluation of sufficient progress. The RIP also incorporates an Action Plan that draws from a Long Term Plan inventory of beneficial activities based on the framework of the species recovery plans; an Adaptive Management Program framework for working towards recovery; and principles for ESA compliance for entities in the MRG that rely on the RIP as a conservation measure.

[The following language is provisional as the section 7 compliance process has not been completed. The RIP is not currently within the scope of the reinitiation. U.S. Fish and Wildlife Service has not conducted its analysis or made any conclusions.]

The ESA section 7 consultation addressing effects of water use and management actions considered implementation of activities under the RIP’s Action Plan (identified more specifically in annual work plans to be approved by the Executive Committee) as the conservation measure proposed by Reclamation and the U.S. Fish and Wildlife Service’s Bosque del Apache National Wildlife Refuge that minimizes adverse effects of the proposed water use and management actions described in these two agencies’ biological assessments. Based on the best available scientific and commercial information at the time of consultation and in formulating the U.S. Fish and Wildlife Service’s Biological Opinion(s) (Opinions) for those actions (2014 Opinions), the Service has concluded that implementation of that conservation measure will avoid the likelihood of jeopardy and adverse modification of designated critical habitat for the effects of the above water use and management actions. [Again, the Service has not conducted an analysis to support the above statement; this is framed here as a potential template agreement and does not predispose any conclusions by the Service.]

No measures other than those identified in the relevant Biological Opinions shall be required or imposed on a covered signatory to comply with section 7 or section 9 of the ESA with regard to that signatory’s activities unless: (a) such measures are agreed to by the Executive Committee as part of the RIP’s Adaptive Management process and fall
within the scope of anticipated future modifications of RIP actions; (b) it is a necessary change identified by the U.S. Fish and Wildlife Service and agreed to by the Executive Committee to maintain sufficient progress under the RIP and therefore continued compliance with sections 7 and 9 of the ESA; or (c) one or more of the triggers under 50 C.F.R. 402.16 have been met that indicate reinitiation of section 7 consultation is required.

Nothing in this Agreement precludes any agency from proposing the RIP as a conservation measure for purposes of future section 7 or section 10 compliance.

The signatories to this Cooperative Agreement consent to participate in good faith to implement certain beneficial recovery activities as described in the RIP documents designed to offset the effects of water-related actions in the MRG relating to species listed as threatened or endangered pursuant to the ESA and their associated habitats and to work toward the recovery of such species. Signatories who rely on the RIP as the conservation measure agree to support or facilitate implementation of the 2014 Opinions and associated Reasonable and Prudent Measures, Terms and Conditions, and Reasonable and Prudent Alternative (if any), consistent with applicable laws, regulations, and authorities. No signatory is required to take any action that would violate law or regulation, or an individual signatory’s decrees or its statutory obligations or authorizations, or any applicable limits on its legal authority. No signatory is precluded from undertaking good faith negotiations over conditions of implementation of the RIP and relevant Biological Opinions.

III. Authorities and Responsibilities

A. Federal Cooperation with States. Section 2(c)(2) of the ESA, 16 U.S.C. 1531(c)(2), states that “the policy of Congress is that federal agencies shall cooperate with state and local agencies to resolve water resource issues in concert with conservation of endangered species.” Under section 6 of the ESA (16 U.S.C. 1535), the Secretary of the Interior is directed to cooperate to the maximum extent practicable with the states in carrying out programs authorized by the ESA and to consult with the affected states before acquiring any land and water, or interest therein, for the purpose of conserving listed species. Under 31 U.S.C. 6305, an executive agency should enter a cooperative agreement when anything of value will be transferred to a state or local government to carry out a public purpose authorized by federal statute.

B. Recovery Plans and Teams. Under section 4(f) of the ESA, 16 U.S.C. 1533(f), the Secretary of the Interior is directed to develop and implement plans for the conservation of endangered species. The Secretary of the Interior may procure the
services of public and private agencies, individuals and institutions in developing and implementing the recovery plans. Advice from these agencies, individuals, and institutions is not subject to the Federal Advisory Committee Act, 5 U.S.C. app.2.

C. Consultation and Regulatory Certainty. Under section 7 of the ESA, 16 U.S.C. 1536, federal agencies shall use their programs and authorities in furtherance of the purposes of the ESA and ensure that their actions are not likely to jeopardize listed species or adversely modify designated critical habitat of such species. Under the Fish and Wildlife Coordination Act, 16 U.S.C. 661 et seq., federal agencies must consult with the U.S. Fish and Wildlife Service and with state wildlife agencies on the impacts to fish and wildlife resources of federal or federally licensed or permitted water projects. The authority for federal agencies to enter into this Cooperative Agreement is provided under section 1 of the Fish and Wildlife Coordination Act.

D. Operation of Federal Water Projects. The U.S. Bureau of Reclamation and the U.S. Army Corps of Engineers are charged, under separate authorities, with the operation of certain federal projects in the MRG Basin in New Mexico under applicable federal laws. Nothing in this Cooperative Agreement shall derogate from these signatories’ authorities and responsibilities.

E. Operation of Water Projects by Local Authorities. Certain RIP signatories, such as the Albuquerque-Bernalillo County Water Utility Authority and Middle Rio Grande Conservancy District, have certain legal authorities and responsibilities to deliver water to meet the legitimate and legal demands of their ratepayers and constituents. Nothing in this Cooperative Agreement shall derogate from these signatories’ authorities and responsibilities. These signatories will encourage habitat restoration and protection to the extent that the goal is consistent with maximizing water resources dedicated to uses for present and future ratepayers and constituents.

F. Applicable State Law. The New Mexico Office of the State Engineer administers state water laws and regulations. The New Mexico Department of Game and Fish has certain statutory authorities and responsibilities to protect and manage its fish and wildlife resources. The New Mexico ISC is charged with the administration of all interstate stream compacts to which the State is a party, including the Rio Grande Compact of 1938 (Compact). Implementation of the RIP pursuant to this Cooperative Agreement may not impair the State of New Mexico’s ability to comply with Compact delivery obligations. Nothing in this Cooperative Agreement shall be construed as creating federal water rights or requiring the granting of water rights to federal entities.
G. **Applicable Pueblo Law.** The Pueblo RIP signatories, pursuant to applicable Pueblo laws and inherent Pueblo sovereignty, have the authority to administer water rights, to oversee the development of water resources, and to protect and manage fish and wildlife resources within the boundaries of their Pueblos. Implementation of any conservation recommendations that involve access to or use of Pueblo lands requires the consent of the affected Pueblo. To the extent that federal agencies are involved in planning or implementing conservation measures that may affect Pueblo trust resources, government-to-government consultations is required.

H. **Trust Responsibility.**
   a. The United States has a unique legal relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes, executive orders, and court decisions. Since the formation of the Union, the United States has recognized Indian tribes as domestic dependent nations under its protection. The Federal Government has enacted numerous statutes and promulgated numerous regulations that establish and define a trust relationship with Indian Tribes.
   b. Our nation, under the law of the United States, in accordance with treaties, statutes, executive orders, and judicial decisions, has recognized the right of Indian tribes to self-government. As domestic dependent nations, Indian tribes exercise inherent sovereign powers over their members and territory. The United States continues to work with Indian tribes on a government-to-government basis to address issues concerning Indian tribal self-government, tribal trust resources, and Indian tribal treaty and other rights.
   c. The United States recognizes the right of Indian tribes to self-government and supports tribal sovereignty and self-determination.

I. **State Responsibilities.** Nothing herein shall affect the authority of New Mexico to manage, control and administer its water resources nor its authorities and responsibilities regarding its fish and wildlife resources.

J. **Pueblo Responsibilities.** Nothing herein shall affect the authority of the Pueblo RIP signatories to manage, control and administer their water resources nor their authorities and responsibilities regarding their fish and wildlife resources.

K. **Statement of Authorities.** The signatories hereby state that they have legal authority to enter into the Cooperative Agreement, and have legal authority to participate in the RIP.
IV. Terms and Conditions

A. Effective Date and Duration. This Cooperative Agreement shall be effective upon execution and shall remain in effect until the federally listed species in the MRG addressed in the RIP are recovered or until this Cooperative Agreement is amended pursuant to IV.D. below.

B. Approval. Government funding commitments made in this RIP are subject to approval and appropriations by the appropriate local, state, tribal and federal legislative bodies, are subject to availability of such funds, and are subject to the approval of the signatories’ governing bodies.

C. Anti-Deficiency Act. Nothing in this Agreement shall be interpreted to require any obligation or payment of funds in violation of the Anti-Deficiency Act (31 U.S.C. §1341).

D. Amendment. This Cooperative Agreement may be extended or amended by consent of the signatories. It is recognized that additional entities may in the future become members of the RIP provided they apply to the Collaborative Program Executive Committee to become a RIP signatory, are accepted in accordance with the Program By-laws, and sign this Cooperative Agreement. A signature page executed pursuant to the above procedures shall be affixed hereto and be treated as part of this Agreement. Any signatory may terminate participation in the Cooperative Agreement upon written notice to the other signatories. Upon termination, such signatory shall not be deemed to have waived or relinquished any right to challenge the legal, scientific, or technical validity of any aspect of any biological opinion or agency action based thereon by virtue of its reliance on the RIP or by virtue of its support for the RIP in other administrative or judicial proceedings.

E. No Delegation or Abrogation. Although this Cooperative Agreement sets forth a cooperative process, all signatories to this Cooperative Agreement recognize that they each have legal and statutory responsibilities that cannot be delegated, and that this Cooperative Agreement does not, and is not intended to, abrogate any legal or statutory responsibility of the signatories. All signatories agree that they have respective rights, responsibilities and obligations, and each signatory will continue to act in an independent capacity, and no signatory is to be considered the officer, agent or employee of any other signatory.

F. No Admissions by Signatories. The signatories are entering into this Cooperative Agreement on a voluntary and cooperative basis in an effort to resolve ESA species conflicts through a negotiated and mutually agreed upon basin-wide program.
Nothing herein shall constitute an admission that any ongoing water-related activities or new water-related activities have caused or will cause adverse effects to the listed species or their habitats, nor preclude any legal challenge. Nor shall anything herein change the legal standards under section 7 of the ESA.

G. **Recovery Implementation Program Modifications.** Modifications to the RIP may be made following RIP governance and decision-making protocol without requiring modification to this Cooperative Agreement.

H. **Consistency with Applicable Law.** This Cooperative Agreement is subject to and is intended to be consistent with all applicable federal, tribal, and state laws and interstate compacts. The provisions of any statutes and/or regulations cited in this Agreement contain legally binding requirements. The Agreement itself does not alter, expand, or substitute for those provisions or regulations. This Agreement does not impose legally-binding requirements on the signatories, nor does it create a legal right of action for the signatories or any third party.

I. **Agency and Partnership.** Unless expressly provided by law, personnel or volunteers of one signatory shall not be considered to be agents, partners or employees of the other signatory for any purpose, and no joint venture or principal-agent relationship shall be deemed to exist. The personnel and volunteers of one signatory are not entitled to any of the benefits that any other signatory provides for its employees or volunteers.

J. **Sovereign Immunity.** The signatories to this Cooperative Agreement do not waive sovereign immunity by entering into this Agreement and specifically retain immunity and all defenses available to them as sovereigns pursuant to tribal, state, and federal law.

K. **Legal Rights and Remedies.** Nothing in this Agreement shall be construed to alter the legal rights and remedies that each signatory would otherwise have. No signatory waives any legal rights or defenses by entering into this Agreement or participating in the process contemplated hereby. This Agreement is not a federal contract, rule, or regulation. This Agreement shall not be construed as or interpreted to be final federal agency action.

L. **Liability.** To the extent authorized by law, on behalf of itself, its officers, directors, members, employees, agents, and representatives, each signatory agrees that it will be responsible for its own acts and omissions and the results thereof and that it shall not be responsible for the acts or omissions of other signatories, nor the
results thereof. To the extent authorized by law, each signatory therefore agrees that it will assume the risk and liability to itself, its agents, employees, and volunteers for any injury to or death of persons or loss or destruction of property resulting in any manner from the conduct of the signatory’s own operations and/or the operations of its agents, employees, and/or volunteers under this Agreement. To the extent authorized by law, each signatory further releases and waives all claims against the other signatories for compensation for any loss, cost, damage, expense, personal injury, death, claim, or other liability arising out of the performance of this Agreement.

M. Notices section for points of contact. Any notices provided under this Agreement shall be given in writing to the U.S. Fish and Wildlife Service with a copy to the Executive Director of the RIP for provision to the other signatories.

N. Release of Information. Except as required by court order or ruling, no RIP signatories will release any pre-decisional material or working information or documents pertaining to the RIP to the public other than through an approved Freedom of Information Act request or comparable state law-based process, or unless the agency or agencies have already disseminated the specific materials or documents to the public. The agencies agree to inform each other if it is determined that there is a legal requirement to release any such information, and that information will include expected release date of the information. This prohibition on disclosure does not apply to the presentation or dissemination of information made in the ordinary course of business during RIP meetings at which members of the public may be present, or to the communication of RIP-generated or RIP-related scientific information with scientists or others which is engaged in for the purpose of improving species status.

O. Severability. Should any portion of this Agreement be judicially determined to be illegal or unenforceable, the remainder of the Agreement shall continue in full force and effect, and any signatory may renegotiate the terms affected by the severance.

P. Third Party Beneficiary Rights. The signatories do not intend to create in any other individual or entity the status of third party beneficiary, and this Agreement shall not be construed so as to create such status. The rights, duties and obligations contained in this Agreement shall operate only among the signatories to this Agreement, and shall inure solely to the benefit of the signatories to this Agreement. The provisions of this Agreement are intended only to assist the signatories in determining and performing their obligations under this Agreement.
Q. **Endorsement.** Nothing in this Agreement may be interpreted to imply that any signatory endorses any product, service or policy of the other signatories. No signatory will take any action or make any statement that suggests or implies such an endorsement.

R. **Nondiscrimination.** This Agreement is subject to all applicable statutes relating to nondiscrimination. Federal statutes relating to nondiscrimination include, but are not limited to: (a) Title VI of the Civil Rights Act of 1964 (P.L. 88-352); and (b) Title IX of the Education Amendments of 1972 (20 U.S.C. 1681-1683 and 1685-1686).

IN WITNESS WHEREOF each signatory has caused this Cooperative Agreement to be executed by an authorized official on the day and year set forth below by signature.

By ________________________________ Date__________________
U.S. Bureau of Reclamation

By ________________________________ Date__________________
U.S. Army Corps of Engineers

By ________________________________ Date__________________
U.S. Fish and Wildlife Service

By ________________________________ Date__________________
Governor, Santo Domingo Tribe

By ________________________________ Date__________________
Governor, Pueblo of Sandia

By ________________________________ Date__________________
Governor, Pueblo of Santa Ana

By ________________________________ Date__________________
Governor, Pueblo of Isleta

By ________________________________ Date__________________
New Mexico Interstate Stream Commission
By ____________________________________ Date__________________
New Mexico Attorney General’s Office

By ____________________________________ Date__________________
New Mexico Department of Game and Fish

By ____________________________________ Date__________________
New Mexico Department of Agriculture

By ____________________________________ Date__________________
City of Albuquerque

By ____________________________________ Date__________________
Albuquerque-Bernalillo County Water Utility Authority

By ____________________________________ Date__________________
Middle Rio Grande Conservancy District

By ____________________________________ Date__________________
Assessment Payers Association of the Middle Rio Grande Conservancy District

By ____________________________________ Date__________________
University of New Mexico