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LARA KATZ\*

# History of the Minnow Litigation and Its Implications for the Future of Reservoir Operations on the Rio Grande

## ABSTRACT

*At the intersection of the Endangered Species Act and the Rio Grande lies the silvery minnow. In 1996, this tiny endangered fish found itself at the heart of a drought-sparked battle over the Rio Grande between an array of interests that has resulted in a tangled morass of litigation. The history of the minnow litigation, the legislative response it provoked, and the attempts at collaborative solutions all show a system under stress. The issues brought out in the struggle between the endangered silvery minnow and the various water users along the Rio Grande go to the heart of the relationships between federal and state law; human beings and the environment; and the past, present, and future of water usage and management on the Rio Grande. This article traces the outlines of those issues in a historical examination of the minnow litigation as it relates to the Rio Grande reservoir system.*

## INTRODUCTION

Perhaps one of the most influential (and controversial) pieces of legislation in terms of its impact on Rio Grande water users and operations of the Rio Grande reservoir system – though the extent of that impact could not have been known at the time of its passage – is the Endangered Species Act (ESA).<sup>1</sup> Congress passed the ESA in 1973 for the purpose of protecting fish, wildlife, and plant species threatened with extinction. The mandate was clear: the balance was to be struck “in favor of affording endangered species the highest of priorities,” and federal agencies were to conserve endangered species “whatever the cost.”<sup>2</sup>

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1. Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2000).

2. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978). See also *Rio Grande Silvery Minnow v. Keys*, 356 F. Supp. 2d 1222, 1224 (D.N.M. 2002).

In New Mexico, the contentious litigation, swift legislative action, and forced collaborations between powerful interests that were sparked by the ESA have highlighted the need to take a hard look at the way water is used and managed on the Rio Grande. The history of the litigation, the legislative response it provoked, and the attempts at collaborative solutions all show a system under stress. The issues brought out in the struggle between the endangered species and the various water users on the Rio Grande go much deeper than the litigation itself; they go to the heart of relationships between federal and state law, human beings and the environment, and the past, present, and future of water usage and management on the Rio Grande.

### REQUIREMENTS OF THE ESA

The ESA imposes several requirements on federal agencies like the Bureau of Reclamation (BOR) and the Army Corps of Engineers (Corps). The first is an overarching duty to "conserve endangered species" and to act in furtherance of the ESA.<sup>3</sup> Under section 7 of the ESA, federal agencies are required to consult with the U.S. Fish and Wildlife Service (FWS) "to insure that any action authorized, funded, or carried out by such agency...is not likely to jeopardize the continued existence of any endangered species...or result in the destruction or adverse modification of habitat of such species which is determined...to be critical...."<sup>4</sup> According to this consultation procedure, the federal agency proposing the action must prepare a Biological Assessment "for the purpose of identifying any endangered species or threatened species which is likely to be affected" by the proposed action.<sup>5</sup> This Biological Assessment must be based on the "best scientific... data available or which can be obtained during the consultation...."<sup>6</sup> If the Biological Assessment concludes that the proposed action may affect a listed species, formal consultation under section 7 is initiated wherein the FWS reviews "all relevant information" and formulates a Biological Opinion (BO).<sup>7</sup>

The Biological Opinion assesses whether the proposed agency action is likely to jeopardize the continued existence of the listed species or have an adverse impact on its critical habitat.<sup>8</sup> If it is determined that the proposed action is likely to jeopardize the listed species, FWS must set forth

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3. 16 U.S.C. § 1531(c)(1) (2000).

4. *Id.* § 1536(a)(2).

5. *Id.* § 1536(c)(1).

6. 50 C.F.R. §§ 402.14(d), 402.14(g)(8).

7. *Id.* § 402.14(g)(1), (4).

8. 16 U.S.C. § 1536(b).

reasonable and prudent alternatives (RPAs) that will not jeopardize the species.<sup>9</sup> The FWS may determine that the agency action or implementation of the RPAs will only result in an “incidental take” of a species, in which case FWS must provide “reasonable and prudent measures” that will minimize the impact on the species.<sup>10</sup> In addition, the FWS must issue an Incidental Take Statement (ITS) specifying the conditions under which an incidental taking of the species may occur without violating section 7(a)(2) and providing immunity from prosecution under section 9 for an incidental take made in accordance with the reasonable and prudent measures outlined in the BO.<sup>11</sup>

## SUMMARY OF THE LITIGATION

### Lead Up to the Tenth Circuit Showdown

The extensive requirements placed on federal agencies by section 7 have significant implications for a reservoir system largely operated and controlled by two federal agencies, but the true force of section 7 and the Supreme Court cases construing it<sup>12</sup> was not felt on the Rio Grande until the 1994 listing of the silvery minnow as an endangered species. This small fish

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9. 50 C.F.R. § 402.14(i); 16 U.S.C. § 1536(b)(4).

10. 16 U.S.C. § 1536(b)(4).

11. 16 U.S.C. §§ 1536(b)(4), 1536(o)(2); 50 C.F.R. § 402.14(i)(v). Section 9 prohibits the “taking” of any endangered species of fish or wildlife by any “person.” The term “take” has been broadly defined and includes any action that kills or harms a member of the listed species. “Harm” includes any action that significantly modifies a listed species’ habitat, when such modification results in the death or injury of a member of the listed species by impairing “essential behavioral patterns” such as “breeding, spawning, rearing, migrating, feeding or sheltering.” The section 9 prohibition is not limited to federal agencies but applies to everyone, including individuals, corporations and other business entities, municipalities, states, and political subdivisions of states.

Although one could envision the possibility that exercise of a water right under state law could be considered a taking, see Charles T. Dumars, *Endangered Species That Eat Prior Appropriation: Integrating the Endangered Species Act into State Water Law*, N.M. NAT. RESOURCES L. REP. 676 (n.d.), section 9 has not proven to be a significant source of enforcement power under the ESA. This is likely due to difficulties in proof of causation—when a stream is over-appropriated, leaving fish stranded, where does the responsibility lie? With the irrigator whose diversion is furthest down stream and thus is last to divert the water? With the most junior appropriator who has withdrawn the water? Further complicating matters is the fact that fish habitat in many river basins has been degraded by other practices besides irrigation such as hydropower dams, point source and non-point source pollution, timber harvests, and commercial and residential development of riparian zones. Thus, it will be very difficult for an agency bringing a section 9 enforcement proceeding to prove that irrigation itself is what is harming the fish. See Jennie L. Bricker & David E. Filippi, *Endangered Species Act Enforcement and Western Water Law*, 30 ENVTL. L. 735, 749 (2000).

12. See, e.g., *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978).

suddenly became another claimant to the then already over-appropriated waters of the river and unleashed a flood of litigation and controversy rivaling the floods of the river itself before a vast system of dams and drainage works wrestled it into submission.

The silvery minnow is often characterized as the proverbial "canary in the coalmine" for the Rio Grande ecosystem – "a symptom and a symbol of a dying river."<sup>13</sup> The river that the minnow currently inhabits bears little resemblance to the Rio Grande in its natural state, unshaped by human influence.

The Middle Rio Grande was [once] a perennially flowing river, with a braided channel that would migrate back and forth across the floodplain. It supported a dense cottonwood and willow forest, or "bosque," which provided the habitat for a wealth of native and migrating bird and wildlife species. Flow levels in the river were seasonal, with greatest flows in the late spring during peak runoff from snow melt, and in mid to late summer from rain runoff.<sup>14</sup>

This magnificent, meandering river was changed dramatically by the policies of the Reclamation Acts to bring the parched Western landscape under cultivation. The Rio Grande that exists today is a severely over-engineered river that has been "dammed, narrowed, and dewatered," causing deterioration of the surrounding ecosystem and an ever-shrinking stretch that is capable of supporting the endangered minnow.<sup>15</sup>

Once one of the most widespread and abundant species of fish in the Middle Rio Grande, the silvery minnow had been reduced to five percent of its historic range at the time that the FWS listed it as an endangered species in 1994.<sup>16</sup> In determining to list the minnow as endangered, the FWS cited, among other things, the loss and fragmentation of aquatic habitat, the narrowing of the species' range, the impacts of

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13. Statement of Liz Godfrey, Great Plains Organizer, Endangered Species Coalition, submitted for the record, Hearing, House Committee on Resources, "The Silvery Minnow's Impact on New Mexico," September 6, 2003, Serial No. 108-52, at 83 [hereinafter *Silvery Minnow Hearing*], available at <http://www.access.gpo.gov/congress/house/house12ch108.html>.

14. Statement of Alletta Belin [hereinafter *Belin Statement*], New Mexico Counsel, Western Resources Advocates, *Silvery Minnow Hearing*, *supra* note 13, at 44.

15. ALLETTA BELIN ET AL., *TAKING CHARGE OF OUR WATER DESTINY: A WATER MANAGEMENT POLICY GUIDE FOR NEW MEXICO IN THE 21ST CENTURY* 53 (2002).

16. See Joan E. Drake, *Contractual Discretion and the Endangered Species Act: Can the Bureau of Reclamation Reallocate Federal Project Water for Endangered Species in the Middle Rio Grande?*, 41 NAT. RESOURCES J. 487, 496 (2001).

irrigation withdrawals, and the dewatering of its habitat.<sup>17</sup> Since the listing, minnow populations continue to decrease and there continue to be periods of time when portions of the river dry up completely.<sup>18</sup>

As if to test the ramifications of the minnow's listing on a strained system, drought hit the Middle Rio Grande Valley in 1996 with a force that had not been felt for several decades. Late in the summer, the entire river flow was diverted at San Acacia with large associated minnow kill.<sup>19</sup> "The [BOR] initiated the San Juan-Chama supplemental water operations program, whereby San-Juan Chama water was used for irrigation and native flows were by-passed" to preserve instream flows for the minnow.<sup>20</sup>

With drought conditions growing worse from 1996 to 1999, the Department of the Interior issued its Rio Grande Silvery Minnow Recovery Plan in 1999 to prevent the extinction of the minnow. The FWS Regional Director accepted the plan and critical habitat was designated for the minnow.<sup>21</sup> This designation was challenged in *Middle Rio Grande Conservancy District v. Babbit*,<sup>22</sup> a case that was later consolidated with the silvery minnow case.

In November of 1999, a number of environmental groups filed suit in federal district court on behalf of the minnow, charging that the BOR and the Corps of Engineers failed to complete consultations with the FWS over the full range of Middle Rio Grande operations.<sup>23</sup> The plaintiffs claimed that the failure of the federal defendants to consult with the FWS as required by the ESA jeopardized the existence of the minnow.<sup>24</sup>

Following the initiation of the lawsuit, the City of Albuquerque, the State of New Mexico, the Middle Rio Grande Conservancy District (MRGCD), and the Rio Chama Acequia Association intervened as defendants, claiming interests in the water sources that were subject to the litigation.<sup>25</sup> The City of Albuquerque and the MRGCD hold contractual rights to San Juan-Chama Project (SJCP) water in Heron Reservoir for

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17. See *id.*; Final Rule to List the Rio Grande Silvery Minnow as an Endangered Species, 59 Fed. Reg. 36,988 (July 20, 1994) (codified at 50 C.F.R. pt. 17 (2000)); Belin Statement, *supra* note 14, at 45.

18. Belin Statement, *supra* note 14, at 45.

19. *Id.* at 46.

20. Susan Kelly, Preliminary Reservoir Storage Modeling Analysis, Report from the Utton Transboundary Resources Center. Provided to the Water Acquisition and Management Subcommittee of the Middle Rio Grande Endangered Species Act Collaborative Program. Aug. 10, 2005 at A1-1, available at [http://uttoncenter.unm.edu/pdfs/Preliminary\\_Report\\_8-10-05.pdf](http://uttoncenter.unm.edu/pdfs/Preliminary_Report_8-10-05.pdf).

21. 50 C.F.R pt. 17 (1999).

22. No. CIV 99-00870, at 2-3 (D.N.M. Dec. 27, 2000).

23. Drake, *supra* note 16, at 501.

24. *Id.*

25. *Rio Grande Silvery Minnow v. Keys*, 469 F. Supp. 2d 973, 976 (D.N.M. 2002).

municipal and irrigation purposes, while native flows are subject to the water rights of Middle Rio Grande irrigators and the State of New Mexico's obligations under the Rio Grande Compact.<sup>26</sup>

Federal district court judge James Parker ordered the parties to mediate in the summer of 2000. The mandatory mediation resulted in two Agreed Orders under which the City of Albuquerque and, to a much lesser extent, the MRGCD were paid in exchange for providing water for the minnow.<sup>27</sup> At the time, Abiquiu Reservoir was nearly full and Albuquerque had no storage space or immediate need for its SJCP water. The agreements prevented drying of the San Acacia reach<sup>28</sup> and allowed the minnow to survive the drought summer of 2000 by using almost 200,000 acre feet of SJCP water to maintain a continuous flow down to Elephant Butte Reservoir in southern New Mexico.<sup>29</sup> Additionally, the orders prompted the parties to take actions to increase the captive minnow population.<sup>30</sup>

The FWS completed consultation and issued its BO in June of 2001, which the plaintiffs promptly challenged, alleging that the federal defendants failed to consult with the FWS as required by section 7(a)(2) of the ESA and that such failure had jeopardized the existence of the minnow.<sup>31</sup> The plaintiffs sought to require that the BOR exercise discretion to utilize SJCP water from Heron Reservoir and curtail deliveries to the SJC contractors in order to meet the minimum flows needed for the minnow's survival. They also wanted agency discretion to be exercised to curtail native Rio Grande water deliveries to irrigators, primarily in the MRGCD.<sup>32</sup> The court upheld the June 29, 2001 BO, basing its decision on the existence of a sufficient Reasonable and Prudent Alternative (RPA) set forth in the BO to protect the minnow from jeopardy.<sup>33</sup> However, the court also held that the BOR had discretion over the use of San Juan-Chama and native water

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26. See *Rio Grande Silvery Minnow v. Keys*, CIV 99-1320 JP/KBM (Docket Nos. 117 and 150).

27. *Rio Grande Silvery Minnow v. Keys*, 469 F. Supp. 2d 973.

28. The San Acacia reach runs from the San Acacia Diversion Dam just above Socorro down to Elephant Butte Reservoir, located about 100 miles north of El Paso. See *Endangered and Threatened Wildlife and Plants; Final Rule to List the Rio Grande Silvery Minnow as an Endangered Species*, 59 Fed. Reg. 36,988 (July 20, 1994) (codified at 50 C.F.R. pt. 17 (1999)).

29. *Drake*, *supra* note 16, at 503. Water development interests point to the year 2000 in order to illustrate the vast amount of water the minnow will require. Two-hundred thousand acre-feet is nearly four times the consumptive use of the City of Albuquerque and in 2000 the nearly-full reservoirs were significantly depleted.

30. While increasing the number of minnows in captivity may be useful to help avoid extinction of the species, the ESA requires protection of species in their native habitat. *Belin Statement*, *supra* note 14, at 46 n.2.

31. *Rio Grande Silvery Minnow v. Keys*, 469 F. Supp. 2d at 973.

32. *Id.* at 980.

33. *Id.* at 990, Opinion appealed.

in the Middle Rio Grande Project (MRGP) for ESA purposes, while the Corps did not have such discretion.<sup>34</sup>

Coinciding with the issuance of the June 29, 2001 BO, the State of New Mexico and the United States executed a Conservation Water Agreement that provided for storage of up to 100,000 acre feet of Rio Grande Compact delivery water for endangered species use and established a temporary Conservation Pool in Abiquiu Reservoir.<sup>35</sup> The Rio Grande Compact Commission approved this arrangement.

As the drought worsened in 2002, the BOR reinitiated consultation with the FWS under section 7 of the ESA, resulting in the issuance of a new BO on September 23, 2002, which the plaintiffs again challenged. This time the court agreed with the plaintiffs that the 2002 BO was arbitrary and capricious, finding that the BOR did not adequately consult on water sources that the court had previously held were available for protection of the minnow.<sup>36</sup> Further, the court found that the BO improperly stated that there was no RPA to avoid jeopardy to the species.<sup>37</sup> The court ordered the BOR to use its legal authority under the MRGP and SJCP, as determined by the April 19, 2002 ruling, to reduce contract water deliveries, if necessary, to meet flow requirements for the protection of the minnow in 2003.<sup>38</sup> However, the court also imposed its own interim flow standards, allowing the United States to meet lower flow levels than those required by the 2001 BO.<sup>39</sup> The intervenors and the federal defendants immediately appealed the September 23, 2002 findings and conclusions and injunctive orders to the Tenth Circuit Court of Appeals.

While the appeals were pending, the FWS issued a new BO on March 16, 2003, in compliance with the court's rulings. The new BO set forth two alternative proposals developed in anticipation of the Tenth

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34. *Id.* at 984–85. The City of Albuquerque, the MRGCD, the State of New Mexico, the Rio Chama Acequia Association, and the federal defendants appealed this decision; however, the Tenth Circuit dismissed the appeals of the intervenors for lack of standing and dismissed the appeal of the federal defendants for lack of interlocutory appellate jurisdiction. *Rio Grande Silvery Minnow v. Keys*, 46 Fed. Appx. 929 (10th Cir. Sept. 11, 2002) (unpublished).

35. Belin Statement, *supra* note 14, at 46.

36. *Rio Grande Silvery Minnow v. Keys*, 356 F. Supp. 2d 1222, 1235 (D.N.M. 2002). The court held that, although the BOR knew as early as April 2002 that it would be unable to meet the flow requirements of the 2001 BO for the remainder of the year and would have to reinitiate consultation with the FWS, it delayed until August 2002 to request reinitiation of consultation. *Id.* at 1225. By that time, the BOR had released and delivered nearly all of the 2002 contracted water under the SJCP and MRGP from the upstream reservoirs. *Id.*

37. *Id.* at 1235.

38. *Id.* at 1237–38.

39. *Id.*



Circuit's rulings on the issue of agency discretion: the first proposal limited BOR's discretion, while the second expanded it.<sup>40</sup>

### The Ruling

The famous Tenth Circuit ruling came down on June 12, 2003, affirming the district court's ruling regarding the BOR's discretion in a 2-to-1 opinion.<sup>41</sup> Judge John Porfilio, writing for the majority, held that the BOR had discretion to reduce previously contracted water deliveries to comply with the ESA and that the delivery contracts between the BOR and water users were not a source of perpetual and exclusive water rights.<sup>42</sup> The opinion also confirmed that diversion of water for species use was a beneficial use under state water law, a ruling that, according to one scholar, implies that the ESA acts as a federal reserved instream flow right.<sup>43</sup> If such a characterization has merit, it could have very significant implications for New Mexico as the only state "that does not recognize either a public or private right to instream flow protection under state law."<sup>44</sup> The federal defendants and intervenors petitioned for rehearing en banc. On January 5, 2004, while these petitions were pending, the Tenth Circuit dismissed the appeal as moot and vacated the June 12, 2004 opinion.<sup>45</sup>

Though it was ultimately vacated, the ruling brought to a boil the tension between state water rights and federal law that had long been simmering beneath the calm, sunlit surface of the Rio Grande reservoirs.<sup>46</sup> What was a victory for environmentalists was effectively a declaration of war for water users, the State, and politicians, with Mayor Martin Chavez going so far as to accuse the Tenth Circuit of taking water "from the mouths of Albuquerque's children."<sup>47</sup> Incensed by the perception that water rights established under state law might be at the mercy of the federal government in its mandate to save a fish, the various stakeholders in the Middle Rio

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40. *Rio Grande Silvery Minnow v. Keys*, No. CV 99-1320 JP/RHS-ACE, slip op. at 4 (D.N.M. Nov. 22, 2005) (latest ruling).

41. *Rio Grande Silvery Minnow v. Keys*, 333 F.3d 1109 (10th Cir. 2003).

42. *Id.* at 1129. Specifically, the Court held that "BOR has discretion under [the] negotiated contracts to determine the 'available water' to allocate to Intervenors and to fulfill its obligations under the ESA." *Id.*

43. See Ethan R. Hasenstein, *Frankenstein and Pitbull? Transmogrifying the Endangered Species Act and "Fixing" the San Juan-Chama Project After Rio Grande Silvery Minnow v. Keys*, 34 ENVTL. L. 1247, 1278 (2004).

44. STEVEN J. SHUPE & JOHN FOLK-WILLIAMS, *THE UPPER RIO GRANDE: A GUIDE TO DECISION-MAKING* 43 (1988).

45. *Rio Grande Silvery Minnow v. Keys*, 355 F.3d 1215 (10th Cir. 2004).

46. See Hasenstein, *supra* note 43, at 1253-54.

47. *Id.* at 1285.

Grande went to Congress to try to put a stop to the madness the Tenth Circuit had created.

### HOUSE COMMITTEE ON RESOURCES HEARING ON THE MINNOW'S IMPACT ON NEW MEXICO

On September 6, 2003, as an inconspicuous rider attached to an appropriations bill wound its way through Congress in Washington, the House Committee on Resources held a hearing in Belen, New Mexico to address the silvery minnow's impact on New Mexico.<sup>48</sup> Representatives of a wide array of interests—many of them directly involved in the litigation—participated and voiced their opinions about the ruling. While the environmental groups may have had the ear of the Tenth Circuit, it was clear from the Hearing that, outside of the courtroom, the political powers that be were arrayed against them.

All of the committee members were uniformly critical of the broad prescriptions of the ESA for protecting wildlife at all costs and voiced their opinions that the needs of the community should come before those of endangered species. Several of the congressional representatives echoed the sentiment of Chairman Richard Pombo of California that “[Congress] never dreamed that [the ESA] would turn into a tool used by vocal and well-funded special interest groups seeking to impose court-ordered Federal land and water use controls on the majority of Americans.”<sup>49</sup>

All but one of the witnesses at the hearing strongly opposed the Tenth Circuit ruling. These witnesses represented the perspectives of the State, the Albuquerque Business Task Force, the Pueblo of San Felipe, the New Mexico Cattle Growers' Association, the New Mexico Farm and Livestock Bureau, and the MRGCD. There was general consensus among these participants that the decision had created an unacceptable uncertainty for water rights holders and had placed the needs of the species above human needs. Why, they asked, should the species not be required to share

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48. Silvery Minnow Hearing, *supra* note 13. For a discussion of the rider and the various options proposed, see Hasenstein, *supra* note 43, at 1285-86.

49. Silvery Minnow Hearing, *supra* note 13, at 5. See also Statement of Senator Pete V. Domenici, *id.* at 15. Domenici stated that, in passing the ESA, Congress “did not envision the ESA as a tool to exert an all encompassing power and control over state water supplies and public lands”; George Renner, representing the Central Arizona Water Conservation District also raised concerns over the ruling's impact on all Western states, stating that the ruling “turns Western water law on it's head and injects intolerable uncertainty into settled contractual expectations.” Statement of George Renner, President, Board of Directors, Central Arizona Water Conservation District, *id.* at 80.

shortages along with all the other claimants in order to cope with drought conditions?<sup>50</sup>

The State Engineer, John D'Antonio, attacked the ruling, arguing that it went far beyond the previous Ninth Circuit cases relied upon by the Tenth Circuit in "allow[ing] the U.S. to seize water promised to others under perpetual contracts, contracts executed decades ago, which have been consistently honored up to now, and upon which the users are critically dependent."<sup>51</sup> D'Antonio worried about the uncertainty produced by the ruling for farmers, municipalities, and individuals who would no longer have "any assurance of how much water they may get, or when."<sup>52</sup> This uncertainty in the legal right to use, D'Antonio posited, was "fatal to efficient markets, to mitigation of shortages, to the ability of farmers and other users to plan for the upcoming year, and to preservation of value."<sup>53</sup> D'Antonio was also concerned that the ruling had chilled efforts to collaborate among the various parties to reach a long-term solution that balanced the needs of water users and the minnow.<sup>54</sup>

Biologist Thomas A Wesche, representing the MRGCD, highlighted the lack of adequate research on the minnow and questioned whether the cause of the minnow's decline was actually from lack of water or something broader. Wesche stated that "history does not support the assertion that intermittency, river drying, and reduced flows are the principal causes for the current status of the silvery minnow."<sup>55</sup> According to Wesche, the solution was not to simply release large amounts of water into the river. Rather, a more comprehensive approach would be needed — one that would recognize the effects of over-engineering (i.e., making the river narrower, faster, and deeper) and emphasize river-wide habitat enhancement measures. The March 2003 BO, in Wesche's view, set forth just such a "holistic approach."<sup>56</sup>

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50. See, e.g., Statement of Jessica Sanchez on behalf of the New Mexico Cattle Growers' Association, New Mexico Farm & Livestock Bureau and Rio Grande Water Users, Silvery Minnow Hearing, *supra* note 13, at 19–21.

51. Statement of John D'Antonio, New Mexico State Engineer, Silvery Minnow Hearing, *supra* note 13, at 40.

52. *Id.*

53. *Id.*

54. *Id.* Interestingly, this same concern was voiced by Alletta Belin with regard to the appropriations rider itself. See Letter to Richard Pombo, Sept. 26, 2003, Silvery Minnow Hearing, *supra* note 13, at 55, stating that the provision, "by taking all water users totally 'off the hook' for Endangered Species Act compliance, would greatly undercut incentives for negotiated water solutions that meet BO requirements" the following year.

55. Statement of Thomas A. Wesche, Biologist for the MRGCD, Silvery Minnow Hearing, *supra* note 13, at 60.

56. *Id.* at 61.

Alletta Belin, New Mexico counsel for Western Resource Advocates and counsel for the plaintiffs in the minnow litigation, was the lone voice in favor of the ruling.<sup>57</sup> Belin emphasized the heavy involvement of the federal government in the Middle Rio Grande, both in terms of money spent and control of operations, and the benefits reaped by all water users from this involvement.<sup>58</sup> Further, she pointed out that the water rights at issue in the case were derived from federal contracts promising that “water would be provided to the extent available and consistent with federal law—including the ESA.”<sup>59</sup> The contractors did not get an absolute guarantee that a set amount of water would be delivered every year, and if they proceeded with that assumption, it was “simply wishful thinking.”<sup>60</sup>

The divergent views presented at the Hearing made it clear that the Tenth Circuit’s ruling was not likely to hold up in the swirling political tensions over the minnow and the waters of the Rio Grande. Indeed, just a few months after that hearing, the legislative attack on the ruling was successfully carried out.

### THE RIDER

In an attempt to provide a quick fix to the Tenth Circuit’s ruling, New Mexico Senators Jeff Bingaman and Pete Domenici attached a rider<sup>61</sup> to the Energy and Water Development Act of 2004 that purported to divest the BOR of its newly acknowledged discretion.<sup>62</sup> The rider, initially passed

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57. There were a few written statements submitted for the record that backed up Belin’s position, but she was the only individual who appeared in person on behalf of the minnow and in support of the strict regulatory regime of the ESA.

58. Statement of Alletta Belin, *supra* note 14, at 44–49.

59. *Id.* at 47.

60. *Id.* at 49.

61. The U.S. Senate website defines “rider” as an “[i]nformal term for a nongermane amendment to a bill or an amendment to an appropriations bill that changes the permanent law governing a program funded by the bill.” *available at* [http://www.senate.gov/reference/glossary\\_term/rider.htm](http://www.senate.gov/reference/glossary_term/rider.htm).

62. The text of the rider provides as follows:

Sec. 208 (a) Notwithstanding any other provision of law, the Secretary of the Interior, acting through the Commissioner of the Bureau of Reclamation, may not obligate funds appropriated for the current fiscal year or any prior Energy and Water Development Appropriations Act, or funds otherwise made available to the Commissioner of the Bureau of Reclamation, and may not use discretion, if any, to restrict, reduce, or reallocate any water stored in Heron Reservoir or delivered pursuant to San Juan-Chama Project contracts, including execution of said contracts facilitated by the Middle Rio Grande Project, to meet the requirements of the Endangered Species Act, unless such water is acquired or otherwise made available from a willing seller or lessor and the use is in compliance with the laws of the State of New Mexico, including, but not limited to, permitting requirements.

as a stopgap measure in the immediate aftermath of the Tenth Circuit's ruling,<sup>63</sup> was later established as a permanent limit on the BOR's discretion in the Consolidated Appropriations Act of 2005.<sup>64</sup> Further, the provision effectively fixed the March 17, 2003 Biological Opinion as the "law of the river" for the next ten years.<sup>65</sup>

Because of the method chosen by the New Mexico Senators, the legislative history is sparse and limited to a few statements made by Senators Bingaman and Domenici on the floor of the Senate without any debate. These statements are essentially the same as those made by many of the opponents of the Tenth Circuit's ruling at the Belen Hearing, though the hearing was held later. In the Senators' view, the ruling was erroneous and needed to be redressed with regard to the BOR's discretion over SJCP water. As Senator Bingaman stated:

San Juan Chama Project water is not native to the Rio Grande basin. It is water that originates in the San Juan River basin, and is brought over as a supplemental water supply for use in the Rio Grande basin. Use of this water – quite simply – has not caused the decline of the Rio Grande silvery minnow, nor does it further jeopardize the existence of that species. The Court's decision, however, disregards these facts....<sup>66</sup>

As for the provision establishing the March 2003 BO as the law of the river for ten years, Senator Bingaman recognized that such federal legislation "is not insignificant."<sup>67</sup> However, it was his conviction that such legislation was needed to provide "some level of certainty for water users" and to stop the "endless cycle of litigation over water operations in the

Energy and Water Development Act of 2004, Pub. L. No. 108-137, 117 Stat. 1827, 1830 (2003). *Id.* at 1849. Section 208(b) further provides that

[c]omplying with the reasonable and prudent alternatives and the incidental take limits defined in the Biological Opinion released by the United States Fish and Wildlife Service dated March 17, 2003 combined with efforts carried out pursuant to Public Law 106-377, Public Law 107-66, and Public Law 108-7 fully meet all requirements of the Endangered Species Act (16 U.S.C. 1531 et seq.) for the conservation of the Rio Grande Silvery Minnow (*Hybognathus amarus*) and the Southwestern Willow Flycatcher (*Empidonax trailii extimus*) on the Middle Rio Grande in New Mexico.

*Id.*

63. See Hasenstein, *supra* note 43, at 1285–86.

64. See Consolidated Appropriations Act of 2005, Pub. L. No. 108-447, § 205, 118 Stat. 2809 at 2949 (2004).

65. *Id.*

66. Senate Energy and Water Appropriations Act, S. 149, 108th Cong. § 205 at 10,896–97 (2003).

67. *Id.* at 10,897.

Middle Rio Grande.”<sup>68</sup> Furthermore, the BO would “ensure compliance with the ESA” and “should serve to improve water-supply and habitat conditions in the Middle Rio Grande.”<sup>69</sup> Bingaman expected that the BOR would not stop at mere compliance with the March 2003 BO, but would “aggressively pursue other actions to promote the recovery of endangered species in the Middle Rio Grande, including support for the efforts of the Middle Rio Grande Endangered Species Act Collaborative Program.”<sup>70</sup> Such pursuits now have to take place within greatly confined limits, however, because the legislation has foreclosed several major possibilities for river management and water supply for the minnow.

By using a rider on an appropriations bill as the vehicle for curtailing the BOR’s discretion, Senators Domenici and Bingaman were able to legislatively overrule the Tenth Circuit—at least with regard to SJCP water—without the depth of deliberative debate entailed by substantive policy making.<sup>71</sup> Further, by fixing the March 2003 BO for ten years, the Senators cut off the consultation process, leaving little room for evolving approaches to managing the system in response to unexpected changes or new and pressing issues that history counsels arise time and again.

### CURRENT STATE OF THE LITIGATION

The effect of the rider has been to take San Juan Chama Project water off the table in negotiations between the various stakeholders seeking a solution for the minnow. While one could envision several ways that such a rider could be challenged, both substantively and procedurally,<sup>72</sup> an examination of these potential challenges goes beyond the scope of this legislative history. Further, such an examination would amount to little more than an academic exercise, given that the plaintiffs have agreed, pursuant to a settlement agreement with the City of Albuquerque, not to

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68. *Id.*

69. *Id.*

70. *Id.*

71. Hasenstein, *supra* note 43, at 1286. Alletta Belin echoed this concern at the Belen Hearing, stating that “[r]eversing the Tenth Circuit’s holding by way of back room appropriations riders that are strongly opposed by important stakeholders and that never receive any public scrutiny or congressional debate does not serve the full panoply of public interests at stake in this case.” Statement of Alletta Belin, *supra* note 14, at 47. For a discussion of how riders can circumvent the deliberative processes involved in substantive policy making, see Jason M. Patlis, *Riders on the Storm, or Navigating the Crosswinds of Appropriations and Administration of the Endangered Species Act: A Play in Five Acts*, 16 TUL. ENVTL. L.J. 257, 263-70 (2003).

72. See generally Patlis, *supra* note 71; Jaques B. LeBoef, *Limitations on the Use of Appropriations Riders by Congress to Effectuate Substantive Policy Changes*, 19 HASTINGS CONST. L.Q. 457, 458 (1992).

challenge the legislation. In return, the City has agreed to set aside storage space in Abiquiu Reservoir for 30,000 acre-feet of water as an "environmental pool" where Plaintiffs can store water legally acquired from voluntary purchases, leases, and donations.<sup>73</sup> Under this agreement, the Plaintiffs also agreed to dismiss all claims regarding the SJCP or SJCP water in the minnow litigation and to refrain from bringing any future claims under the ESA seeking use of SJCP water for protection of federally listed species in the Rio Grande Basin or federal consultation regarding such use of SJCP water.<sup>74</sup> The district court approved the settlement and granted the Plaintiff's and the City's joint motion for partial dismissal in its November 22, 2005 Memorandum Opinion.<sup>75</sup>

The Tenth Circuit Opinion gave the BOR discretion over both SJCP water and native flows, but the rider only curtailed such discretion with regard to SJCP water.<sup>76</sup> Two district court rulings following the Tenth Circuit's vacatur have significant implications for storage, release, and diversions of Middle Rio Grande water. First, the court declared the United States owner of El Vado, Cochiti, Agnostura, Isleta Pueblo, and San Acacia area diversion and irrigation works, along with State Water Rights Permit No. 1690, rejecting MRGCD's cross-claim to quit title to these properties in MRGCD.<sup>77</sup> Second, Judge Parker refused the request of the Defendants and Intervenor to vacate his prior rulings, interpreting Congress's passage of the riders addressing SJCP water while remaining silent as to MRGP water to mean that "Congress deliberately left the issue of discretion over MRGP water for decision by the federal agencies and the courts."<sup>78</sup> Appeals of both rulings are currently pending in the Tenth Circuit and the question now is,

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73. Settlement Agreement Between *Silvery Minnow v. Keys* Plaintiffs, the City of Albuquerque and the Albuquerque-Bernalillo County Water Utility Authority (on file with author). As part of this settlement, the City also agreed to provide \$225,000 toward the funding of a pilot water leasing program for the Middle Rio Grande area through agricultural forbearance and the Plaintiffs agreed to contribute \$25,000 to this program through voluntary contributions. This funding is to be used to secure additional state and federal funding on a 75/25 matching basis to secure \$1 million for the water leasing program. *Id.* Under this agreement, the Plaintiffs also agreed not to challenge the lawfulness or validity of the February 13, 2004 Biological Opinion for the Albuquerque Drinking Water Project; however, the Plaintiffs are not prohibited from bringing any claims for violations of that Biological Opinion or reinitiation of consultation if violations occur. *Id.*

74. *Id.*

75. *Rio Grande Silvery Minnow v. Keys*, No. CV 99-1320 JP/RHS-ACE, slip op. at 1-2 (D.N.M. Nov. 22, 2005).

76. Kelly, *supra* note 20, at A1-5.

77. *Rio Grande Silvery Minnow v. Keys*, No. CV 99-1320 JP/RHS-ACE, slip op. (D.N.M. July 25, 2005).

78. *Rio Grande Silvery Minnow v. Keys*, No. CV 99-1320 JP/RHS-ACE, slip op. at 7 (D.N.M. Nov. 22, 2005).

to what degree will the Tenth Circuit be influenced by its former reasoning and the subsequent legislative response in deciding those appeals?

### THE FUTURE OF RESERVOIR OPERATIONS AFTER THE MINNOW LITIGATION

The litigation was not the beginning of the clash of interests over the water in the Rio Grande, nor is it the end. However, perhaps more than any other prior event, the minnow listing and ensuing battle in both the federal courts and Congress forced all the divergent interests to take steps toward negotiated solutions. The establishment of the Middle Rio Grande Endangered Species Act Collaborative Program (MRGESACP) has been one step in this process.

Established in January of 2000, the goal of the MRGESACP was to bring together diverse stakeholders "to strive for the survival and recovery of threatened and endangered species in the Middle Rio Grande while simultaneously protecting existing and future uses" of water.<sup>79</sup> The Domenici-Bingaman rider allocated funding for the Program and established a seven-member committee "to improve the efficiency and expedience of projects sponsored by the [MRGESACP]."<sup>80</sup> The committee was to be comprised of one member from the BOR, one member from the FWS, and one member at large representing each of the following entities: other federal agencies, state agencies, municipalities, universities, environmental groups, agricultural communities, Middle Rio Grande Pueblos, and the MRGCD.<sup>81</sup> The Program brings these groups together to seek short and long-term solutions to endangered species recovery with the goal that by promoting such recovery, water users' plans will not be imperiled by the legal obligations of the federal government to protect those species.<sup>82</sup>

The Water Acquisition and Management Subcommittee (WAM) was formed under the MRGESACP to address the challenging task of obtaining sufficient water and adjusting water management and operations to meet minimum flows for the minnow.<sup>83</sup> Short of a complete and permanent deviation from historic drought patterns, the only real long-term possibility for accommodating the needs of both water users and

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79. Middle Rio Grande Endangered Species Act Collaborative Program, Overview 1, available at <http://www.usbr.gov/uc/albuq/rm/mrg/fact/collabprog.pdf>.

80. Federal, *Bush Signs Bill with Domenici-Bingaman Effort on Middle Rio Grande Silvery Minnow Solution*, WATER STRATEGIST Dec. 1, 2003, available at [http://www.waterchat.com/News/Federal/03/Q4/fed\\_031205-02.htm](http://www.waterchat.com/News/Federal/03/Q4/fed_031205-02.htm) (last visited Nov. 4, 2007).

81. Kelly, *supra* note 20, at 3.

82. *Id.* at 4.

83. *Id.*



endangered species is optimization of reservoir management. As stated in the WAM Background Paper on Storage and Management of Program Water, "There's essentially no more water to be had—it's a matter of shifting allocations and optimizing the management of existing storage capacity we already have."<sup>84</sup> Thus, WAM undertook a project to model various reservoir operation scenarios to see if changes in operations and/or authorizing legislation could create potential water gains. These gains could then be managed to ensure that water would be available to the species without impairing existing rights.<sup>85</sup>

The ultimate goal was to model these scenarios to see which worked best in terms of making water available for the minnow while protecting existing rights. However, the decision to model had to be made by a consensus of all members involved in the MRGESACP.<sup>86</sup> Each proposed scenario raised objections to modeling it by one or more major stakeholders.<sup>87</sup> Thus, the modeling project was ultimately abandoned.<sup>88</sup>

If the river is going to sustain both its human and non-human dependents, creative strategies that go beyond existing management practices, legislative authorizations, and legal frameworks will be needed. WAM's modeling project began the crucial process of looking forward; however, for any idea to actually bear fruit (or water, as the case may be), all of the critical stakeholders have to be willing to come to the table. The abandonment of the modeling project evidences the deep divides that will have to be surmounted. In many ways, the clash of interests has resulted in a myopic planning process that can only be responsive to immediate needs or crisis situations. A sense of vision and a willingness to honestly and completely examine all the possibilities still seem to be lacking.

### SOME CONCLUDING REMARKS

The saga that is playing out on the Rio Grande was not caused by the minnow or environmentalists; the listing of the minnow in conjunction with the recognition of the true nature of historical drought patterns merely brought the real problems of past water use and management practices to public attention. The minnow litigation has at least proven that the rigid doctrines of Western water law are deeply entrenched, and people trying to live in a parched, drought-ridden environment do not simply hold hands

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84. Water Acquisition and Management Plan, Program Review Draft, C-58, § 5.0 (Feb. 9, 2004).

85. See Kelly, *supra* note 20, at 6.

86. *Id.* at 16.

87. *Id.*

88. *Id.* at 23.

and freely share their water. William Turner, Trustee of Lion's Gate Water, in his statement submitted for the Hearing record, eloquently characterized the reality of the situation as a "struggle...among multiple hydrohegemony for control of the same drops of water, no matter how politely they behave."<sup>89</sup> Turner criticized what he perceived as the failure of various stakeholders to think outside the box, chiding that "[w]e must face reality. We are dealing with a finite resource and all of the suggestions to date are zero sum games. That is, there are winners and there are losers."<sup>90</sup>

While such characterizations of the struggles over Rio Grande water may overstate the matter somewhat, particularly given the many successful collaborative efforts that have resulted from the litigation, they should certainly impress an important notion upon those working toward a healthy river that serves the needs of all those dependent on it – both human and otherwise. What may be required for a truly long-term solution is a more fundamental overhaul of the entire system – physically, politically, and legally. Whether such a shift is possible for the Rio Grande, whose waters run deep into the souls of the people who have built their cities and livelihoods around it, is the ultimate question.

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89. Statement of Dr. William M. Turner, Trustee, Lion's Gate Water, Silvery Minnow Hearing, *supra* note 13, at 99.

90. *Id.*