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Shortage and Tension on the Upper Río Grande: Protecting Endangered Species during Times of Drought, Comments from the Perspective of the Middle Río Grande Conservancy District

Looking back at the drought of 1996 and at the efforts to protect endangered species in the midst of the drought, the most glaring fact remains that the water managers and users of the Río Grande were in crisis management. In fact, despite some efforts, if the drought had manifested with equal or greater intensity in 1997, we would have remained in crisis management. Hence, as we move forward and examine lessons learned, the most vital premise we must return to is the imperative for balance as we undertake the precarious task of allocating water to protect endangered species, serve traditional uses, and provide for an ever increasing urban populace. This balance must be struck amidst the growing conflict between urban and agricultural water users and water use by the plants and wildlife of the natural environment. This is a conflict not just between users and uses but also between values. The danger in seeking this elusive balance, a danger exacerbated by crisis management, is to swing too far in one direction. We must be wary of this tendency.

Balance, as defined in the context of endangered species in the Upper Río Grande must mean a sharing of shortages among all users system wide—from Colorado to Texas—including the Río Grande Silvery Minnow. This approach certainly was not adequately or equitably adopted in 1996, and to date a mechanism for such sharing has not been properly addressed. There are two practical impediments to achieving this essential balance, both of which were present in the summer of 1996. First, there is no clearly defined process or adequate forum within which to allow the institutions and water managers to fashion this balance; and second, there persists a continued lack of sufficient knowledge about the river system.

With regard to the first impediment, under the current Endangered Species Act there exists no process or forum for the necessary system-wide dialogue and shortage sharing. Hence, other than the force of threatened prosecution against water users for "take" of an endangered species, there

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is no process or forum to address the respective obligations of federal, state, and private water users vis-à-vis protection of an endangered species. Much, if not all, of the fault for this flaw lies with the Endangered Species Act itself. As currently drafted, the Act addresses a single species at a time and waits until that species is in crisis to attempt its protection. Moreover, the Act is not based on local planning or water management and does not currently take such vital issues into account. Rather, the Act encourages ad hoc decision making at the federal level, often after it is too late. In essence, the Act itself is premised on crisis management from the top down.

With regard to our lack of knowledge of the Río Grande system, we are lacking knowledge in two crucial arenas: (1) river transmission losses, and (2) the biological needs of the Río Grande Silvery Minnow in terms of flow regime. Before the water managers and users can hope to effectively protect the minnow, or any other river species, resources must be dedicated to ensuring that we determine the answers to these critical questions. With this as a context, it is important to ascertain what could have been done differently in 1996, and what could be done in the future.

As the spring of 1996 approached, it became clear to all water managers that a drought was inevitable, yet there were little or no collective water management efforts. In retrospect there was an appalling lack of discussion and communication regarding the views of the various managers and institutions, including the United States Fish and Wildlife Service, as to what the respective responsibilities or obligations of the players were to the river, to the fish, and to their constituents. The very crucial question—if there were to be a drought, how much water would the minnow need and where would such water come from?—was neither adequately asked nor answered.

There was some discussion in the fall of 1995 regarding the timing of releases from Abiquiu Reservoir. However, as a result of perceived Río Grande Compact constraints, these releases were not optimally used to provide water for the minnow. Flood flows were timed for release to be fully evacuated just at the commencement of the irrigation season for the Middle Río Grande Conservancy District (Conservancy). When the flood flows from Abiquiu ceased, the Conservancy continued to provide irrigation water to its farmers pursuant to its state water permits, as it has done for over sixty years. As the river does in every dry year, the river ran dry below one of the Conservancy's diversion structures. The water was being put to beneficial use for agriculture, but because the Conservancy was, practically speaking, the last man on the ditch, the United States Fish and Wildlife Service turned its full attention and the force of the Endangered Species Act against the Conservancy. This was done despite the fact that upstream reservoirs, both Heron and Abiquiu, sat full of federal water available for water skiers but not for minnows in the middle valley. The

Conservancy, as only one of many water users on hundreds of miles of river, was left holding the bag.

The Conservancy's response was unequivocal—it would do its part to protect the minnow and abide by the Endangered Species Act, but it alone could not and would not be responsible for providing all the water for the minnow to the detriment of its farmers. Rather, there must be a sharing of shortages system-wide. First and foremost, however, the protection of the minnow is a federal responsibility and the Act mandates that federal agencies protect and conserve such species. Hence, to the extent that there was federally owned or controlled water in the system which was not otherwise being put to beneficial use, this water must be utilized to protect the minnow first, prior to using water held under state permits that was being put to beneficial use.

In the summer of 1996, after a rocky start and threats of civil and even criminal prosecution against the Conservancy, the water managers hobbled through the drought. Ultimately, over 50,000 acre-feet of water were provided for the minnow. This water came from a variety of sources, including federal contract water and Conservancy water. In 1997, a "wet" year in what may well be a continuing drought, approximately 20,000 acre-feet were provided to the minnow.

Given the problems and reactions in 1996, what remains to be accomplished? There must be a more concerted effort toward the elusive balance if endangered species are to be protected, as well as a continued support of existing agricultural uses and an ever-increasing municipal demand. The pendulum must not be allowed to swing too far in the direction of environmental protection without evaluating the impacts on other aspects of our culture and heritage, namely the agricultural community. To this end, there must be a reconciliation of seemingly opposing views of municipal use versus agricultural use versus environmental use.

Steps to be taken could include the following:

1. Federal agencies must step up to the plate and take full responsibility for protection of the minnow. This protection must include the use of federal water in the system and may necessitate reauthorization of upstream reservoirs to ensure that the water stored there can be released as necessary for the minnow.
2. There must be a more equitable sharing of shortages both on the system and between users. Municipal groundwater pumpers, whose effects of water use on the river are delayed, must contribute equitably to protection of the minnow with farmers who utilize surface water. Similarly, the minnow itself must share in shortages in dry years. A paradigm for shortage sharing needs to be established before the fact of a drought actually hits the river system and its users.

3. We must establish a forum or process that will enable water users and managers to work through the complex issue of shortage sharing and protection of endangered species. Initially it was thought that the Río Grande Silvery Minnow Recovery Team could serve as such a process and forum, but that team and plan have not been given the requisite authority or control by the Fish and Wildlife Service. A process or forum outside of Section 7 consultation,¹ but which provides the binding legal basis for taking actions under the Act without threat of prosecution, is imperative.

1. Generally, section 7 consultation is required by the Endangered Species Act when a federal agency takes an action that may affect an endangered or threatened species. *See* 16 U.S.C. § 1536 (1994). Section 7 requires the federal agency to "consult" with the U.S. Fish and Wildlife Service for purposes of determining whether the action will jeopardize the continued existence of a listed species or result in destruction or adverse modification of critical habitat. That process does not provide for the kind of stakeholder involvement necessary to address water issues on the Río Grande vis-à-vis endangered species. Section 10 of the Act, 16 U.S.C. § 1539 (1994), provides for "Habitat Conservation Planning," which can result in the granting of a permit allowing "take" of a species under certain limited circumstances. Section 10, as currently drafted, also likely provides insufficient means to address the needs of providing water for endangered species on the Río Grande given the complexity of the river system, the multitude of users, and the extensive federal involvement. However, Section 10 planning is worth exploring if it were approached in a manner that included all system users and the federal agencies.