NOS. 02-2254, 02-2255, 02-2267, 02-2295 & 02-2304 (Consolidated)

IN THE UNITED STATES COURT 0F APPEALS
FOR THE TENTH CIRCUIT

RIO GRANDE SILVERY MINNOW (Hybognathus amarus); SOUTHWESTERN WILLOW FLYCATCHER (Empidonax trailii Extimus); DEFENDERS OF WILDLIFE; FOREST GUARDIANS; NATIONAL AUDUBON SOCIETY; NEW MEXICO AUDUBON COUNCIL; SIERRA CLUB; and SOUTHWEST ENVIR. CENTER,
Plaintiffs-Appellees,

vs.

JOHN W. KEYS, III, Commissioner, KENNETH MAXEY, Albuquerque Area Manager; BUREAU OF RECLAMATION; GEN. JOSEPH N. BALLARD,Chief Engineer; LT. COL. RAYMOND MIDKIFF, Albuquerque District Engineer; U.S. ARMY CORPS OF ENGINEERS; the UNITED STATES; GALE NORTON, Secretary, Department of Interior; and U.S. FISH AND WILDLIFE SERVICE,
Federal Defendants-Appellants,

CITY OF ALBUQUERQUE; MIDDLE RIO GRANDE CONSERVANCY DIST.; STATE OF NEW MEXICO; & RIO CHAMA ACEQUIA ASS'N;
Intervenors-Defendants-Appellants.

Appeal From the United States District Court
For the District of New Mexico
Chief Judge James A. Parker
CIV 99-1320

BRIEF OF PLAINTIFFS-APPELLEES
(ORAL ARGUMENT IS REQUESTED)

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STATEMENT OF RELATED CASES

MRGCD v. Norton, 294 F.3d 1220 (10th Cir. 2002), and Forest Guardians v. Babbitt, 174 F.3d 1178, 1186 (10th Cir. 1999), are prior decisions of this Court addressing the Rio Grande silvery minnow, and involving some of the same parties.

Rio Grande Silvery Minnow v. Keys, 10th Cir. Nos. 02-2130 et al., Order and Judgment (Sept. 11, 2002), dismissed prior appeals by the same Appellants from the District Court's April 19, 2002 Opinion in this matter.

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STATEMENT OF ISSUES

1. Whether any part of the District Court's September 23, 2002 Order and Partial Final Judgment is justiciable on appeal.

2. If so, whether the District Court abused its discretion in ordering the Bureau to reduce contract deliveries or irrigation diversions through the federal Middle Rio Grande Project, if necessary to provide river flows to avoid jeopardizing the endangered Rio Grande silvery minnow, when:

A. The Bureau is statutorily obligated to limit diversions through its Project works to the amount of water that irrigators can reasonably beneficially use;

B. The Bureau's ownership of all Project facilities and water storage rights provides discretion over how it stores and releases water; and/or

C. The Bureau's ownership of all Project diversion dams and its 1951 Contract with the Middle Rio Grande Conservancy District ("MRGCD"), provide the Bureau with discretion to require bypass flows past one or more diversions.

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3. Further, if the September 23rd Order is ripe, whether the District Court correctly held with respect to the Bureau's San Juan-Chama Project that:

A. The Bureau has authority to release a small amount of Project water from Heron Reservoir above the estimated "firm yield," where necessary to avoid jeopardy to the endangered species, yet this would **not** reduce contract water deliveries; and/or

B. Under the relevant statutes and contracts, the Bureau has authority to reduce San Juan-Chama Project water deliveries, while still delivering a "reasonable amount" to contractors, in order to avoid jeopardy or extinction of the endangered species.

STATEMENT OF THE CASE

By any estimation, the water issues in the Middle Rio Grande that have given rise to this litigation are complex and difficult to solve. Not only is the river ecosystem in decline, but one species, the Rio Grande silvery minnow, is on the very precipice of extinction, with status quo water operations pushing it closer to its demise every day. In addition, there have been two bad droughts over the past three years. As a result, reservoirs are low and the area's water users are rightfully worried about how much water they will have next year and years after. While the parties have made strides

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towards protecting the silvery minnow and restoring river habitat, the crisis precipitated by this year's drought threatens to wipe all this out, by extirpating the last remaining minnows from the river and/or eliminating the legal incentives that have caused so many good steps to be taken.

Through three years of briefings and hearings, Chief Judge James A. Parker has charted a conservative course, attempting to protect the silvery minnow and bring about compliance with the Endangered Species Act ("ESA"), while still ensuring maximum ability to meet the needs of all the water users in the Middle Rio Grande valley. Judge Parker has not issued a sweeping proclamation that all or even much of the water in storage within the Middle Rio Grande basin must be released for the minnow, as the Intervenor-Appellants portray. Instead, Judge Parker determined that the Bureau has discretion to take specific, carefully-tailored actions relating to management of the Middle Rio Grande ("MRG") and San Juan-Chama ("SJC") Projects, based on the statutes and contracts that govern each of these two federal reclamation projects. These actions may affect water deliveries to users in the valley little or not at all.

Appellants fail to recognize that the bulk of Judge Parker's September 23rd rulings are no longer justiciable, because they addressed expected shortfalls in Middle Rio Grande flows during fall 2002 that never

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materialized. The relief ordered for 2002 thus never took effect, and is now moot. Moreover, the relief ordered for 2003 depends on weather and other conditions affecting river flows that are still uncertain. The 2003 injunction may never come into effect if flows prove adequate to meet the requirements set by U.S. Fish and Wildlife Service ("FWS").

While Appellants simply presume that the September 23rd injunction will require future action by the Bureau, they focus almost exclusively on possible future use of SJC Project water to aid the endangered silvery minnow. No one other than MRGCD disputes other key rulings by Judge Parker relating to the MRG Project, holding that because this Project is owned and operated as a federal reclamation project, the Bureau has authority to limit MRGCD's diversions to reasonable beneficial uses, and authority to require bypass flows past irrigation diversion dams to prevent river drying that could jeopardize the silvery minnow. As Federal Appellants have acknowledged, federal ownership of the MRG Project facilities and the water storage right in its El Vado Reservoir, together with the authorizing legislation and the Bureau's contracts with MRGCD, all underscore the Government's discretion over operations of these MRG Project facilities. This portion of Judge Parker's rulings certainly must be affirmed on appeal.

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With respect to the SJC Project, Appellants and amici argue that not a drop of SJC water could ever be used to benefit endangered species, even if it would not cause reductions in any contract deliveries, and even if a species would go extinct without the water. But the record shows that the Bureau may release small amounts of SJC Project water from Heron Reservoir to aid the minnow, **without reducing contract deliveries at all**. Where the Project authorizing language expressly allows SJC water to be used to benefit fish and wildlife, and the ESA and other federal statutes confirm the Bureau's authority to do so, Judge Parker was correct in ordering the Bureau to consider making such releases to prevent jeopardy to the minnow.

The SJC Project legislation, contracts, and the ESA also confirm that, in a worst case scenario, the Bureau has authority and discretion to reduce Project deliveries to contractors if water is needed to prevent jeopardy or extinction of the endangered minnow. But Plaintiffs have not argued, and Judge Parker has not held, that the Bureau can reduce or eliminate SJC contract deliveries as it wishes. Rather, the Bureau can only reduce the available supply of water where such reduction is mandated by federal law – in this case the ESA. And still it must deliver "reasonable amounts" of water to the contractors, as required by the SJC legislation and contracts.

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In sum, the District Court has correctly sought to integrate the statutory requirements of the ESA with federal and state water laws and federal contracts. Judge Parker's rulings should not be disturbed now on appeal. A reversal of his rulings would almost certainly ensure the extinction of the Rio Grande silvery minnow, rendering a total waste of the massive efforts to save it.

Affirming his rulings, by contrast, will not cause the terrible harms predicted by Appellants and their amici. Reservoirs cannot be drained and there will not be wholesale reallocation of SJC and MRG Project water to endangered species, because that was not contemplated in Judge Parker's rulings, and would not be consistent with the Projects' authorizing laws.

Moreover, saving the silvery minnow will not require large amounts of water indefinitely into the future. Once recovery efforts have proceeded so that the minnow is reestablished in other parts of the river, it will be able to survive the type of river drying that was threatened in 2002. In the meantime, it is critical that the few minnows living in the river be sustained, so that they can generate more populations to restock other parts of the Rio Grande, as the river's many habitat improvement projects begin to take hold, and the river regains some of its former vitality.

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STATEMENT OF FACTS

The Middle Rio Grande: Endangered Lifeline of New Mexico

The Rio Grande is a true "ribbon of life" running through New Mexico's arid lands, vital to human and natural communities alike. As historian William deBuys has described, historically the Rio Grande in New Mexico was a perennially flowing river, with a braided channel that would migrate across the floodplain. *Plaintiffs-Appellees' Appendix ("PlApp") 15-24; see also PlApp 33-53 & 54-61* (Bosque plan and FWS listing rule); *Albuquerque Appendix ("AApp") 2375-2386* (Biological Opinion).[1] The river supported a host of native fishes, and a cottonwood-willow forest – or "bosque" – inhabited by many bird and wildlife species. *Id.* All of these evolved in dependence upon the Rio Grande's natural flows. *Id.*

For example, high spring runoff from snowmelt would trigger massive spawning by Rio Grande silvery minnow. *Id.* As the high flows receded, the young fish would rear in shallow, slow-moving reaches of the river. *Id.* In times of low water, there were always residual pools and stretches of flowing river to sustain the fish. *Id.* The bosque itself was renewed by overbank flows during spring or summer flooding, which seeded new cottonwoods and willows. *Id.*

[1] Plaintiffs-Appellees' Appendix includes statutes and parts of the record referenced in this brief, but omitted from Appellants' appendices.

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As human populations in the Rio Grande valley grew, their use and alteration of the river increased dramatically. *Id.; AApp 1851-2010, 2226-2332* (Bureau & FWS studies). Now the MRG is controlled by a series of federal dams from head to toe. It is dewatered by irrigation diversions, and confined within narrow boundaries set by levees. *Id.* Step by step, these actions have taken a toll, drying up the river, killing much of the native bosque, and exterminating nearly half the native fish species. *Id.*

Plight of the Rio Grande Silvery Minnow

The Rio Grande silvery minnow, once one of the most abundant fish in the river, is now facing imminent extinction. The species was listed as endangered in 1994, because it has been eliminated from 95% of its historical habitat, and the majority of remaining minnows are confined to the lowest sixty miles of the MRG, below San Acacia Dam, where they are highly vulnerable to river drying. *See 59 Fed. Reg. 36,988 (7/20/94) (PlApp 54-61)* (listing rule); *Forest Guardians v. Babbitt, 174 F.3d 1178 (10th Cir. 1999); MRGCD v. Norton, 294 F.3d 1220 (10th Cir. 2002)* (both addressing silvery minnow listing and status). [2]

[2] As of 1998, over 98% of the silvery minnows in the river were found in the San Acacia reach of the river, below San Acacia Dam. *PlApp 62-71* (monitoring report, 1994-2002). Experts note that river drying in parts of this reach in recent years has decreased the minnow population there, but still "the vast majority" of the remaining species is located in the San Acacia

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Since the 1994 listing, the silvery minnow population has continued to plummet. *See AApp 68-70, 123-35, 2282-92, 2368-2375; PlApp 62-71.* As the District Court found, "[t]he alarming decline in abundance of the silvery minnow during the last eight years, from 1994 to the present, is well-documented. . . the number of silvery minnows collected in August 2002 is one of the lowest ever and 'is indicative of alarmingly small population levels.'" *Sept. 23rd Findings of Fact, ¶ 6 (AApp 124-25) (citations omitted).*

Background of this Litigation

Plaintiffs are local, state, and national conservation groups long concerned about balancing management of the MRG to satisfy ecological as well as human needs.[3] Plaintiffs' concerns intensified in 1996, when irrigation diversions and river drying caused the deaths of a large percentage of the remaining silvery minnow population. *See MRGCD v. Norton, 294 F.3d at 1226*; *AApp 2288-89* (both discussing 1996 drying and minnow deaths). That event precipitated years of discussions among Plaintiffs, federal agencies, and other stakeholders about ways to improve river

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reach. *Id.* Isleta reach, just upstream from the San Acacia Dam, contains far fewer silvery minnow than the San Acacia reach but much more than the Albuquerque reach, and it is not known whether any silvery minnow are located in the northern-most Cochiti reach. *Id.; Sept. 23rd Findings of Fact, ¶¶ 4-7, 32 (AApp 124-125, 131).*

[3] Plaintiffs filed numerous declarations to establish Article III standing; and no party has challenged their standing. *See Doc. Nos. 14, 46-51.*

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management. *PlApp 121-124.* But those talks failed to secure reforms needed to protect the silvery minnow and the river ecosystem on which it depends. Plaintiffs thus filed this suit in November 1999. *Doc. No. 1.*

Initial Proceedings in the District Court

In April 2000, because it appeared that there would again be large-scale river drying, Plaintiffs filed a preliminary injunction motion seeking an order compelling Federal Defendants to maintain flows in the MRG. *Doc. Nos. 43-51.* Judge Parker ordered the parties into mediation, which produced two Agreed Orders in August and October 2000. *Doc. Nos. 113, 117 & 150.* Those agreements kept the river flowing to Elephant Butte Reservoir, using SJC water leased by Albuquerque to the Bureau and then "exchanged" for native Rio Grande water by agreement with MRGCD. *Id.*

The parties briefed Plaintiffs' ESA consultation claims in spring 2001. Those claims alleged that the Bureau and Corps failed to consult with FWS over the full range of their discretionary authority under the MRG and SJC Projects. *Doc. Nos. 229, 241-43, 247-58.*

Shortly before a July 2001 hearing set to address these issues, the Federal Defendants entered into a "Conservation Water Agreement" with the State to provide added water to benefit the silvery minnow, and FWS approved the Agreement in a Biological Opinion issued June 29, 2001

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("June 29th BO"). *See AApp 2226-2359; PlApp Doc. 111-120 (CWA).* The June 29th BO imposes river flow management and other requirements intended to protect the silvery minnow from jeopardy. *AApp. 2332-41.* The June 29th BO remains the operative consultation document between FWS and the Bureau, and by its terms extends to the end of 2003. *Id., 2226.*

April 19th Opinion

On July 2, 2002, Plaintiffs filed a Second Amended Complaint to challenge the June 29th BO. *Doc. Nos. 271-72.* After briefing, the District Court issued its Memorandum Opinion and Order on April 19, 2002 ("April 19th Opinion"). *AApp 63-113.* Judge Parker upheld the BO, finding that FWS did not violate the ESA's "best available science" requirement, and was not arbitrary and capricious. *Id., 72-82.* But he also ruled the Bureau has greater discretionary authority over MRG and SJC Project operations than it had asserted during the consultation process, in several respects. *Id., 87-100.* [4]

First, Judge Parker held that the Bureau's ownership claim and the terms of its 1951 Contract with MRGCD under the MRG Project give the

[4] Judge Parker also rejected Plaintiffs' claim that the Corps has more discretion in how it operates Abiquiu and Cochiti Reservoirs. *Id., 100-103.* Plaintiffs do not concede this holding is correct; but the issue is not ripe for appellate review yet, as this Court has held. *See Order and Judgment, Rio Grande Silvery Minnow v. Keys, Nos. 02-2130 et al. (Sept. 11, 2002)* (dismissing appeals of April 19th Opinion) *(AApp 444-457).*

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Bureau discretion to alter the manner in which native Rio Grande water is stored, released, and subsequently diverted through MRG Project facilities. He also held that the Bureau has the discretion and duty to limit MRGCD to diversions only for reasonable beneficial use. *Id., 89-96.*

Second, Judge Parker held the Bureau has discretion to deliver less than the full amount of SJC water "in order to meet fish and wildlife needs, including those of the endangered silvery minnow." *Id., 96-100.* He ruled that releasing SJC water from federal storage to aid the minnow would not violate any interstate compacts, statutes, or contracts. *Id.*

While declining to overturn the June 29th BO, Judge Parker directed that future consultation over the MRG and SJC Projects should address these aspects of the Bureau's discretion. *Id., 103-107.* He also reserved ruling on Plaintiffs' "take" and "jeopardy" claims. *Id., 107-110.*

September 12th BO and Motion for Emergency Injunction

By April 2002, the Bureau "became aware of the strong possibility of severe drought conditions" in the Rio Grande basin in year 2002. *AApp 116-118, 126-127.* The Bureau requested reinitiation of consultation with FWS on August 2, 2002, because it did not expect to be able to continue meeting the June 29th BO flow targets for the remainder of 2002. *Federal Appendix ("FApp") 294.* The Bureau then amended its reconsultation request on

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August 30, 2002. *AApp 2360.* The August 30th proposal was to dry the Isleta and San Acacia reaches "immediately," and keep the Albuquerque reach wet only as long as remaining supplies of "minnow water" permitted. *AApp 2360-63.* The Bureau projected that by late September, virtually the entire Middle Rio Grande would dry below the Cochiti reach. *Id.; Sept. 23rd Findings, ¶¶ 17-19 (AApp 128-129).*

Plaintiffs filed a Motion for Emergency Injunctive Relief on September 4, 2002. *AApp 166-271.* Relying on Bureau and FWS projections about the expected river drying and resulting deaths of almost all remaining minnows, Plaintiffs' motion asserted that the Bureau would "jeopardize" and "take" silvery minnow in violation of ESA Sections 7 and 9. Plaintiffs asked Judge Parker to order the Federal Defendants to continue meeting the flow requirements of the June 29th BO, using water out of upstream federal storage (particularly Heron Reservoir) if necessary. *Id.*

On September 12, 2002, after the first day of hearing on Plaintiffs' motion, FWS issued its BO in response to the Bureau's August 30th reinitiation request ("September 12th BO"). *AApp 2365-2404.* The September 12th BO was expressly limited to the Bureau's calendar 2002 Rio Grande management operations. *Id., 2365.*

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The September 12th BO reaffirmed the imperiled status of the silvery minnow, *id., 2368-2389*, noting that "[t]he present situation (low population numbers, the great majority of the population present below the Isleta Reach) is so severe that additional water withdrawals could result in the extinction of the species in the wild." *Id., 2376.* Because the river drying "could result in the loss of all silvery minnows within the Isleta and San Acacia Reaches," FWS concluded that the Bureau's proposal would "jeopardize the continued existence" of the silvery minnow. *Id., 2387-2389.*

Yet the September 12th BO did not propose any "reasonable and prudent alternative" to avoid jeopardizing the minnow. *Id.* Instead, it opined that releasing water from Heron Reservoir was not "prudent," because that water might be needed in 2003 or future years for "spawning spike" flows for the minnow. *Id., 2389-2391.*

After the BO was issued, Judge Parker granted Plaintiffs' motion to challenge it under the APA and ESA through the Eighth Claim For Relief in their Third Amended Complaint, *see AApp 601-634;* and the hearing on Plaintiffs' injunction motion continued on September 16 & 18, 2002. After taking testimony from agency officials, Judge Parker ruled from the bench for Plaintiffs. *PlApp 241-43.*

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September 23rd Rulings

Judge Parker issued his Order and Partial Final Judgment on September 23, 2002. *AApp 143-146.* These rulings were supported by the September 23rd Memorandum Opinion And Findings of Fact And Conclusions of Law, *id., 114-142*, as well as the April 19th Opinion.

The Partial Final Judgment entered judgment on Plaintiffs' Eighth Claim for Relief, vacating the September 12th BO as arbitrary, capricious, and contrary to the ESA's "best available science" mandate. *Id., 143-144, ¶¶ 3 & 5.*

In addition, the September 23rd Order partially granted Plaintiffs' emergency injunction motion, directing the Bureau to meet flow requirements adopted by Judge Parker from the Bureau's August 2nd proposal during the remainder of calendar 2002. *Id., ¶¶ 2, 6-11.* Contrary to Appellants' claims, Judge Parker carefully weighed the equities and granted only some of the relief requested by Plaintiffs. *AApp 121-23, 139-41.*

Further, Judge Parker ordered the Bureau and FWS to reinitiate consultation over the Bureau's 2003 operations; and in a single paragraph, ordered that the Bureau in 2003 "must reduce contract deliveries under the San Juan-Chama Project and/or the Middle Rio Grande Project, and/or must restrict diversions by [MRGCD]," but only "if necessary to meet flow

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requirements" established by FWS. *Id., ¶ 14.* These injunction rulings were based on Plaintiffs' substantive "take" and "jeopardy" claims under ESA Sections 7 and 9. *Sept. 23rd Findings and Conclusions, ¶¶ 30-37, Q-S (AApp 131-133, 140).*

Other than entering Partial Final Judgment on Plaintiffs' Eighth Claim for Relief over the September 12th BO, Judge Parker has not issued final judgment on any other of Plaintiffs' claims, including their substantive claims under ESA Sections 7 and 9.

Proceedings After September 23rd Rulings

After filing notices of appeal from the September 23rd rulings, the City and State moved for a stay pending appeal. Per order of Judges Kelly and Briscoe, the Court granted a stay on October 16, 2002. *AApp 722.*

Based on the Bureau's projections that "supplemental" water would run out by mid-October,[5] resulting in extensive drying of the Middle Rio Grande and minnow deaths as described in the September 12th BO, Plaintiffs unsuccessfully sought review of the October 16th Stay Order from Circuit Justice Breyer, and reconsideration by the merits panel of this Court.

[5] Government projections of when the river was expected to go dry kept changing. As of August 30th, the Bureau expected the river to start drying by September 12th. *AApp 2361.* On September 16th the Bureau expected drying to begin around September 26-27th. *9/16/02 Tr., pp. 90-91.* By October 16th, drying was expected the following week; and ultimately the projected drying never occurred.

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In seeking reconsideration, Plaintiffs acted on the basis of the Government's own projections about available water supplies, river drying, and effects upon the silvery minnow. Fortunately, as New Mexico has advised this Court, the Bureau's water projections turned out to be overly conservative, as the weather was cooler and wetter than expected. *See State Br. at 6-7.* Thus, the Bureau was able to continue meeting the flow requirements of the June 29th BO through the end of the irrigation season in October 2002, and river flows will continue to meet the BO requirements at least until next year's irrigation season. *Id.* As a result, the September 12th BO never took effect, and the anticipated river drying never materialized.

Nevertheless, had Plaintiffs not sought emergency injunctive relief, the Bureau would have implemented its August 30th proposal and allowed widespread river drying and minnow deaths, even though events later proved this course to be unnecessary.

SUMMARY OF ARGUMENT

Appellants fail to recognize that the September 23rd Partial Final Judgment no longer presents a justiciable issue, since the September 12th BO never took effect, and has now expired by its own terms. Likewise, the September 23rd Order imposing injunctive relief for 2002 is no longer justiciable, since flows never dropped below the June 29th BO requirements,

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and hence the injunction never took effect. And it is questionable whether Paragraph 14 of the September 23rd Order is ripe for appellate review, since it is by no means certain that the Bureau will have to restrict irrigation diversions or reduce contract deliveries in 2003, in order to meet flow requirements set by FWS.

But assuming that the September 23rd Order is justiciable, this Court reviews Judge Parker's injunction orders for abuse of discretion, and must defer to his findings of fact underlying his determination that Plaintiffs were likely to prevail on their substantive "jeopardy" and "take" claims under ESA Sections 7 and 9.

With respect to the MRG Project, only MRGCD disputes Judge Parker's ruling that the Bureau has a statutory duty to restrict MRGCD diversions to reasonable beneficial use needs. But that ruling is properly based on the Government's claimed ownership of the MRG Project, and on federal and state law. Further, Judge Parker correctly held that Bureau ownership of all MRG Project diversion dams, as well as El Vado Reservoir and its water storage rights, provides the Bureau with authority and discretion to manage reservoir releases and river diversions to help maintain adequate flows in the Middle Rio Grande for the silvery minnow.

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With respect to the SJC Project, Appellants are wrong in claiming that SJC water can never be used to avoid jeopardizing the silvery minnow, when the SJC Project legislation and other statutes, including the ESA, provide otherwise. Moreover, Judge Parker correctly held that, under federal statutory and contract law, the Bureau has discretion to release a small amount of water from Heron Reservoir for the minnow, without endangering future contract deliveries to all SJC Project contractors.

Finally, and only as a last resort, Judge Parker also did not err in holding that the relevant statutes and contracts vest the Bureau with discretionary authority to reduce SJC Project contract deliveries, if necessary to avoid jeopardy to the continued existence of the silvery minnow, while still providing a reasonable amount of water deliveries to the contractors.

Accordingly, to the extent these appeals present any justiciable issue, Judge Parker's September 23rd and April 19th rulings should be affirmed.

ARGUMENT

I. AT BEST, THIS COURT ONLY HAS JURISDICTION TO CONSIDER APPEALS OF PARAGRAPH 14 OF THE SEPTEMBER 23RD ORDER.

A. The Partial Final Judgment And 2002 Injunction Present No Live Controversies.

Article III limits this Court's jurisdiction to live controversies. *Honig v. Doe*, *484 U.S. 305, 317 (1988); Taxpayers for Animas-La Plata v.*

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Animas-La Plata, 739 F.2d 1472, 1478 (10th Cir. 1984). In addition, a case is moot when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome. *Los Angeles County v. Davis, 440 U.S. 625, 631 (1979).* By these standards, both the Partial Final Judgment invalidating the September 12th BO, and the September 23rd Order imposing injunctive relief for calendar 2002, present no live controversy before this Court; and appeals of those orders must be dismissed. *See, e.g., Spencer v. Kenna, 523 U.S. 1, 19 (1998); Preiser v. Newkirk, 422 U.S. 395, 401-02 (1975); Indianapolis School Comm'rs v. Jacobs, 420 U.S. 128 (1975)* (all dismissing appeals for lack of continuing live controversy).

As discussed above, the September 12th BO was intended as a short-term consultation replacing the June 29th BO, if necessary, for the remainder of calendar 2002. The September 12th BO expressly provided that it was only "valid until: (1) December 31, 2002, or (2) on whatever date prior to [then] base flows are commensurate with the [June 29th BO] for a minimum of 7 days without the influence of precipitation." *AApp 2396.*

As New Mexico has advised this Court, flows in the river have complied with the minimum flow requirements of the June 29th BO throughout fall 2002. *State Br. at 6-7.* Now that the irrigation season has ended, natural river flows have resumed. Hence, by its own terms, the

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September 12th BO never took effect, and will not ever take effect, regardless of any ruling from this Court. There is thus no live controversy presented by the appeals of the September 23rd Partial Final Judgment reversing that BO.

Likewise, the injunctive relief for calendar 2002 is no longer live. Judge Parker required the Bureau to release water from Heron Reservoir during 2002, if needed to meet minimum flow requirements set below those of the June 29th BO. *September 23rd Order, ¶¶ 2, 6-11 (AApp 143-145).* This relief was expressly limited to 2002. ***Id.*** But again, because of this fall's better-than-expected river flows, no releases were needed pursuant to this part of the September 23rd Order. Thus, Judge Parker's calendar 2002 injunction order never took effect, and will never take effect now.

In short, neither the Partial Final Judgment nor the September 23rd Order imposing injunctive relief for 2002 have any continuing legal force. None of the Appellants can claim to be harmed by these orders. Hence, all appeals must be dismissed for lack of a live controversy, to the extent they seek to challenge the September 23rd Partial Final Judgment or Order imposing injunctive relief for 2002.[6]

[6] In the event the Court determines to review the Partial Final Judgment, which is not addressed further in this brief, Plaintiffs respectfully refer the Court to Judge Parker's September 23rd Memorandum Opinion and the

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C. Paragraph 14 Of The September 23rd Order May Not Be Ripe For Appellate Review.

In Paragraph 14, the September 23rd Order requires the Bureau in 2003 to restrict irrigation diversions through the MRG Project, or to reduce contract deliveries through the MRG and/or SJC Projects, but only "if necessary" to meet flow requirements established through ESA Section 7 consultation with FWS. *AApp 145, ¶ 14.*[7] It is uncertain whether this injunction order will actually take effect, and hence whether appeals of Paragraph 14 are ripe for review now.

No one knows exactly what river flows will be in 2003. If there is a very large runoff, and if New Mexico uses some of its Rio Grande Compact credits to allow native water storage in 2003, as expected,[8] flow

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hearing transcript, for detailed explanation of why the September 12th BO is arbitrary, capricious, and contrary to the ESA's "best available science" requirements. *AApp 114-141; PlApp 181-240.*

[7] The September 23rd Order also requires the Bureau to reinitiate consultation with FWS. *Id.*, ¶ *12*. As this Court held in dismissing appeals of the April 19th Opinion, such an order directing future consultation is not appealable. *See Order and Judgment, Rio Grande Silvery Minnow v. Keys, Nos. 02-2130 et al. (Sept. 11, 2002) (AApp 444-457).*

[8] *See Belin Decl., filed 10/15/02 in these appeals (10th Doc. No. 1553924)* (recounting New Mexico State Engineer's public statement about waiving Rio Grande credits to allow native water storage in 2003).

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requirements established by FWS may be met. If that occurs, then Paragraph 14 of the September 23rd Order will never take effect.

"A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States, 523 U.S. 296, 300 (1977).* Here, the injunctive relief of Paragraph 14 is contingent upon 2003 flows dropping below those required by FWS, an event that may not occur at all. Paragraph 14 thus could never take effect, just as the injunction for 2002 never did. Hence, the appeals relating to Paragraph 14 of the September 23rd Order may not be ripe for appellate review at this time.

II. APPLICABLE LEGAL STANDARDS.

A. This Court Reviews The District Court's Injunction Rulings For Abuse Of Discretion.

Assuming the September 23rd Order is justiciable, the applicable standard of review is not simply a *de novo* standard as asserted by Appellants. Instead, the District Court's injunctive relief is reviewed for abuse of discretion. *Dominion Video Satellite, Inc. v. EchoStar Satellite Corp., 269 F.3d 1149, 1153 (10th Cir. 2001); MRGCD v. Norton, 294 F.3d at 1225.* Under this standard, this Court defers to the District Court's findings of fact, unless clearly erroneous. *Id., Prairie Band of Potawatomi*

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Indians v. Pierce, 253 F.3d 1234, 1243 (10th Cir. 2001). Abuse of discretion also exists if the District Court committed clear error of law. *Id.*

Further, the injunctive relief in the September 23rd Order is based on Plaintiffs' substantive ESA claims that the Bureau's failure to meet required river flows would cause widespread minnow deaths in violation of ESA Section 9's "take" prohibition, and "jeopardize" the minnow in violation of ESA Section 7(a)(2). *Sept. 23rd Findings and Conclusions, ¶¶ 30-37, Q-S (AApp 131-133, 140).* These claims do not arise under the APA, but under the ESA citizen suit provision, which expressly authorizes injunctive relief. *See 16 U.S.C. § 1540(g)(1)(A).*

Thus, the APA appellate review standard cited by Appellants does not apply to Judge Parker's injunction. The District Court heard testimony and weighed equities in issuing its forward-looking relief, and is entitled to deference on both scores in applying the ESA's injunction and substantive standards, discussed below.

B. Injunctive Relief Under The ESA.

In enacting the ESA, "Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities, thereby adopting a policy which it described as 'institutionalized caution.'" *TVA v. Hill, 437 U.S.*

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153, 194 (1978). "The plain intent of Congress in enacting [the ESA] was to halt and reverse the trend toward species extinction, whatever the cost," and "require[s] agencies to afford first priority to the declared national policy of saving endangered species." *Id., at 184-85.*

Injunctive relief under the ESA must "vindicate the[se] objectives" and serve the "purpose and language of the statute." *Weinberger v. Romero-Barcelo, 456 U.S. 305, 313-14 (1982).* Hence, in judicial fashioning of injunctive relief under the ESA, Congress has directed that the interest of protecting endangered species outweighs most other equitable considerations, including expenditure of "extraordinary" financial or practical resources. *See TVA v. Hill, 437 U.S. at 173-94; Strahan v. Coxe, 127 F.3d 155, 160 (1st Cir. 1997), cert. denied 525 U.S. 830 (1998); National Wildlife Federation v. Burlington Northern R.R., 23 F.3d 1508, 1511 (9th Cir. 1994); NWF v. Marsh, 721 F.2d 767, 786 (11th Cir. 1983)* (all addressing ESA modified injunction standard).[9]

The range of injunctive relief that courts have ordered under the ESA is thus broad, and includes enjoining water deliveries through Reclamation projects, *NRDC v. Houston, 146 F.3d 1118 (9th Cir. 1998), cert. denied 119*

[9] *See also Catron County v. USFWS, 75 F.3d 1429, 1439 (10th Cir. 1996)* ("an environmental injury usually is of an enduring or permanent nature seldom remedied by money damages and generally considered irreparable") *(citing Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 545 (1987)).*

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S.Ct. 1754 (1999); enjoining irrigation diversions which "entrain" listed fish, *U.S. v. Glenn-Colusa Irrigation Dist., 788 F. Supp. 1126 (E.D. Cal. 1992)*; halting closure of a reservoir which would destroy habitat of endangered fish, *TVA v. Hill, supra*; and stopping ongoing federal actions pending completion of Section 7 consultation. *Thomas v. Peterson, 753 F.2d 754, 765 (9th Cir. 1985); PRC v. Thomas, 30 F.3d 1050 (9th Cir. 1994), cert. denied 514 U.S. 1082 (1995); Conner v. Burford, 836 F.2d 1521, 1533 (9th Cir. 1988), cert. denied 489 U.S. 1012 (1989).*

C. ESA Section 9 Requirements.

Because Judge Parker's injunctive relief rested, in part, on Plaintiffs' "take" claims, the substantive standards of ESA Section 9 must be considered in any review of the September 23rd Order.

ESA Section 9 prohibits any "person" from unauthorized "take" of listed endangered species. *16 U.S.C. § 1538(a).* "Person" includes federal agencies and officials. *16 U.S.C. § 1532(13).* "Take" means to kill, injure, capture or otherwise harm listed species, including through "significant habitat modification or degradation where it actually kills or injures wildlife." *See 16 U.S.C. § 1532(19); 50 C.F.R. § 17.3; Babbitt v. Sweet Home, 515 U.S. 687 (1995).*

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An injunction is proper under ESA Section 9 if the plaintiff demonstrates an "imminent threat" of future harm to the listed species. *Marbled Murrelet v. Babbitt, 83 F.3d 1060, 1064 (9th Cir. 1996); Forest Conservation Council v. Rosboro Lumber Co., 50 F.3d 781, 783 (9th Cir. 1995).* Whether an agency action will result in prohibited "take" is determined de novo by the district courts. *See Palila v. Hawaii Dept. of Land, 649 F. Supp. 1070 (D. Hawaii 1986), aff'd 852 F.2d 1106 (9th Cir. 1988); Sierra Club v. Yeutter, 926 F.2d 429, 438 (5th Cir. 1991).*

D. ESA Section 7 Requirements.

ESA Section 7(a)(2) commands that federal agencies "shall. . . insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species. . . ." *16 U.S.C. § 1536(a)(2).* "Jeopardize" means "to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." *50 C.F.R. § 402.02.*

To avoid jeopardizing listed species, ESA Section 7(a)(2) imposes procedural requirements that federal agencies must "consult" with FWS, including through preparation of Biological Assessments and Opinions, to

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evaluate the likely effects of their ongoing or proposed actions and develop alternatives to minimize harm and avoid jeopardy to listed species. *16 U.S.C. § 1536(a)(2); 50 C.F.R. Part 402.*

Federal "actions" subject to the ESA Section 7 jeopardy and consultation mandates are defined broadly:

> *Action* means all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States . . . Examples include, but are not limited to: . . .(d) actions directly or indirectly causing modifications to the land, water, or air.

50 C.F.R. § 402.02. Consultation must address all aspects of federal agency actions, meaning direct and indirect impacts, and effects of other activities that are interrelated or interdependent, including private actions. *Id.; Riverside Irr. Dist. v. Andrews, 758 F.2d 508 (10th Cir. 1985)* (Corps properly considered "indirect" effects of dam in dewatering critical stream habitat).

Where a species is listed after an action has been taken, consultation must occur "where discretionary Federal involvement or control over the action has been retained or is authorized by law." *50 C.F.R. § 402.16; PRC v. Thomas, 30 F.3d at 1054-55.*

Most relevant here, the ESA Section 7 jeopardy and consultation provisions apply to ongoing federal reservoir or water operation activities, as

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many cases reflect. *See*, *e.g.*, *Bennett v. Spear, 520 U.S. 154 (1997)* (consultation over operation of Bureau's Klamath Project); *Idaho Dept. of Fish and Game v. NMFS, 56 F.3d 1071 (9th Cir. 1995)* (consultation over Columbia River hydrosystem operation); *O'Neill v. U.S., 50 F.3d 677 (9th Cir.), cert denied 116 S.Ct. 672 (1995)* (Bureau consultation over water deliveries through Central Valley Project); *Pyramid Lake Paiute Tribe v. Dept. of Navy, 898 F.2d 1410 (9th Cir. 1990)* (consultation over federal water uses on Carson-Truckee Project); *NRDC v. Houston, supra,* (consultation over San Joaquin Basin Project); *Klamath Water Users Protective Association v. Patterson, 204 F.3d 1206 (9th Cir. 2000)* (further consultation over Klamath Project).

III. JUDGE PARKER CORRECTLY RULED THAT THE BUREAU HAS DISCRETION TO LIMIT IRRIGATION DIVERSIONS OR WATER DELIVERIES THROUGH THE MIDDLE RIO GRANDE PROJECT.

The opening and amicus briefs focus almost exclusively on Judge Parker's ruling that the Bureau has discretion, if necessary, to use some SJC Project water to aid the silvery minnow. But the SJC Project is only one part of the equation affecting Middle Rio Grande river management, and only part of Judge Parker's rulings.

Equally important is the MRG Project, which includes El Vado Reservoir and the three irrigation diversions below Cochiti Reservoir that

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serve MRGCD. *See Fed. Brief, pp. 10-12* (describing MRG Project). As Judge Parker held in the April 19th and September 23rd Opinions, the Bureau's ownership and authority over the MRG Project requires it to consult with FWS under ESA Section 7, to ensure that water storage, releases, and diversions do not jeopardize any endangered species. In addition, the September 23rd Order directed the Bureau to restrict irrigation diversions or water deliveries through the MRG Project, if necessary to maintain river flows needed to avoid causing unlawful "take" and "jeopardy" in violations of ESA Sections 7 and 9.

Intervenor-Appellants New Mexico, Albuquerque, and Rio Chama Acequia Association do not challenge any of Judge Parker's rulings concerning the Bureau's ownership and discretionary authority over the MRG Project. While Federal Appellants contest his ruling that the Bureau may limit deliveries of stored water to MRGCD, they do not object to other holdings – including that the Bureau has discretion to decline to store water at El Vado Reservoir, require bypass flows past the irrigation diversion dams, or restrict MRGCD's diversions, based on the Bureau's claimed ownership of the MRG Project and the requirement that federal reclamation projects are limited to reasonable beneficial water uses. *See Fed Brief, pp. 10-12, 22-29.*

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Thus, only MRGCD argues that the Bureau has no discretionary authority in operating the MRG Project to prevent jeopardy or unlawful take of the silvery minnow. MRGCD asserts it owns all MRG Project facilities and water rights, and is not subject to the Reclamation Act or other federal legal requirements. The following discussion underscores why these arguments are meritless.

A. The Court Must Presume That The Federal Government Owns All The Facilities Of The Middle Rio Grande Project.

Judge Parker has not yet adjudicated MRGCD's cross-claims for quiet title of MRG Project works. As discussed below, the record demonstrates federal ownership of all MRG Project facilities and water storage rights beyond any reasonable dispute. More importantly for present purposes, the United States has asserted ownership. Hence the Quiet Title Act requires the federal courts to presume that the facilities are federal, at least until MRGCD's quiet title claims are resolved.

1. Middle Rio Grande Project plan and statutes.

In 1947 and 1948, the Bureau and the Corps released coordinated studies proposing a MRG Project plan to reconstruct and expand irrigation facilities in the Middle Rio Grande and to develop flood/sediment control facilities. *AApp 89-90; MRGCD Appendix ("MApp") 177-200.* Congress approved the MRG Project in the 1948 and 1950 Flood Control Acts,

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expressly adopting the Project plan. *Pub. L. 80-858 (June 30, 1948); Pub. L. 81-516 (May 17, 1950) (PlApp 1-6).*

Contrary to MRGCD's contention, the MRG Project is not just a flood control project, but is expressly authorized as a federal Reclamation Act project. *See P.L. 80-858, Title II, § 203 (PlApp 2)* ("in carrying out the provisions of this Act, the Secretary of the Interior shall be governed by and have the powers conferred upon him by the Federal reclamation laws"). As a reclamation project, the MRG Project was intended both to rescue MRGCD from financial insolvency, and to rebuild, improve, and expand the irrigation storage and delivery system, as the Bureau's 1947 study described in detail. *AApp 90; MApp 177-200.*[10]

The MRG Project plan approved by Congress thus provided that the Bureau would retire all MRGCD's existing debts, undertake construction and improvement of irrigation storage and delivery facilities, and acquire

[10] MRGCD incorrectly asserts that the MRG Project is a highly unusual reclamation project because the Bureau reconstructed and expanded facilities that had originally been constructed privately. In fact it was common for reclamation projects to be instituted where lands and water rights were privately owned and pre-existing irrigation works were privately constructed. As noted in *United States v. Tulare Lake Canal Co., 535 F.2d 1093, 1143 (9th Cir. 1976)*: "[T]he lands, the water rights, and the canals and other irrigation works were privately owned. In these respects Pine Flat does not differ from the typical reclamation project. It is usually true that most of the land included in a reclamation project is privately owned; it is usually true that the private lands are already under irrigation through facilities developed at private expense."

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and manage all parts of the existing irrigation storage, diversion, and delivery works. *See MApp 185-186, 189-191, 198-200.* In return for federal bailout and improvement of the system, MRGCD was required to transfer **all** its assets and management of the system to the federal government, and repay a portion of project costs over time. *Id.; AApp 90.*

2. 1951 Contract and transfers.

The Bureau and MRGCD entered into a 1951 Contract to implement the MRG Project. *FApp 1-23.* The 1951 Contract specifies that the United States holds title to all physical works which the Bureau "constructed" as part of the MRG Project. *FApp 15, ¶ 29.* "Construction" is defined to include all facilities either built new or rehabilitated by the Bureau, such as the three existing diversion dams (Angostura, Isleta, and San Acacia), and El Vado Dam. *FApp 4, ¶ 8.*

In addition to recognizing federal ownership of all works "constructed" by the Bureau, the 1951 Contract provides that MRGCD would convey to the Bureau "title . . . [to] such of the District works . . . as shall be required to be conveyed to the United States as determined by the contracting officer." *FApp 13-14, ¶ 26.* The 1951 Contract specifies that federal ownership of all Project works continues even if MRGCD assumed operation and maintenance of any of the works. *FApp 3-5, 15, ¶¶ 8, 29.*

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The 1951 Contract further provides that "any and all [water right] filings made in the name of the District" are "to be assigned to the United States for beneficial use in the project and for Indian lands in the project area." *FApp 14-15, ¶ 28.* The Bureau also owns all "return flow" and "seepage" from the Project facilities, *id.*, which is important in light of MRGCD's excessive diversions and large return flows back to the river.

Contrary to MRGCD's claim that it obtained title to all Project assets when it supposedly paid off its project costs recently, the Contract also specifies that federal ownership will continue until MRGCD has repaid its share of the Project, **and** Congress enacts a transfer of title to MRGCD. *FApp 13-15, ¶¶ 26 & 29.* This requirement for Congressional action to transfer title has been part of federal reclamation law for a century, though it is ignored in MRGCD's brief. *See 43 U.S.C. §§ 491 and 498.* [11]

Pursuant to the 1951 Contract, MRGCD conveyed to the United States all of the District's existing works and structures, together with the right to construct, reconstruct, operate, and maintain them. *AApp 90*; *MApp 176, 929-950.* In 1963, MRGCD transferred its water storage rights in El

[11] Before this litigation began, however, MRGCD's chief executive acknowledged to the New Mexico legislature that Congressional action is required to transfer any Project facilities to MRGCD. *See PlApp 140-141*.

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Vado under Permit 1690 to the Bureau, *FApp 50-56*; it later also transferred El Vado Dam and Reservoir to the U.S in a separate deed. *MApp 951-953.*

In the mid-1950's, MRGCD transferred operation and maintenance of all project works to the Bureau, as anticipated in the 1951 Contract. *FApp 24-28.* Twenty years later, the Bureau transferred operation and maintenance of diversion works back to MRGCD. *Id., 45-46; MApp 259-60; PlApp 137-138.* But MRGCD manages those works pursuant to Paragraph 13 of the 1951 Contract, which provides that MRGCD acts as the United States' "agent" when it operates Project works, a relationship that the Bureau can revoke upon notice to MRGCD. *FApp 7-9, ¶ 13.* The United States has never transferred operation and maintenance of El Vado Dam and Reservoir and certain other "reserved works" to MRGCD, and thus still operates them. *FApp 45-46; PlApp Doc. 17.*

Finally, although MRGCD now claims to have fully paid off its share of the Project,[12] Congress has never transferred title of any MRG Project works to MRGCD.

[12] Federal costs for work on the Middle Rio Grande Project were about $75 million. Of that, about $39,000,000 was for work by the Corps and $35,500,000 was for work by the Bureau. MRGCD repaid the government $15,710,392, without interest, over a more than forty year period. *PlApp 125-136.*

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3. Application of the Quiet Title Act, 28 U.S.C. § 2409a.

The United States has asserted ownership and control over all MRG Project works, pursuant to the 1948 and 1950 Flood Control Acts and implementing contracts and transfers cited above. Contrary to MRGCD's claim that the United States did not assert federal ownership until after this litigation started, the 1951 Contract and subsequent transfers all reflect the United States' ownership claims. Further, the United States has reaffirmed its ownership, including in the June 19, 2000 memorandum of the Interior Solicitor cited by MRGCD, *MApp 572*; in the federal government's 2001 Biological Assessments and Opinions concerning the Middle Rio Grande, *AApp 1865-1872 & 2237-39*; and in its briefings in this case. *Fed. Brief, pp. 10-12.*

Because the United States claims ownership of all MRG Project works, the Quiet Title Act comes into operation. Under it, the courts are required to presume that the federal government owns disputed property, until there has been a final adjudication otherwise. *See 28 U.S.C. § 2409a(b).* Clearly, the Bureau remains in "possession and control" of all MRG Project works, even where MRGCD, its "agent," is operating some of them. *FApp 13-15, ¶¶ 26 & 29.*

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Because the United States has claimed ownership, and the record confirms that claim, Judge Parker has not erred in presuming federal ownership pursuant to the Quiet Title Act. This Court must do likewise.

B. The Bureau Has Discretion To Limit MRG Project Diversions To Reasonable Beneficial Use Requirements.

The federal ownership and control of the MRG Project is important, first, because operation of the Project must comply with the long-standing federal and state law requirements that irrigation diversions are limited to reasonable beneficial use amounts.

Judge Parker held that the Bureau has authority to determine whether MRGCD's diversions through the MRG Project exceed what is reasonably needed for beneficial use. *See April 19th Opinion, at 30, 34 (AApp 92, 96).* He also noted that "there is some evidence" in the record that MRGCD is using excessive amounts of water, thus imposing on the Bureau a duty to consult with FWS over whether Project diversions should be reduced and hence more water available to sustain the silvery minnow. *Id. at 30 (AApp 92).* Judge Parker incorporated this holding into his September 23rd Order, making clear that overuse of water by MRGCD could be a basis for the Bureau to restrict its diversions. *September 23rd Order, ¶ 14 (AApp 145).*

MRGCD claims that the Reclamation Act does not apply to the MRG Project and, in any case, if water is being wasted it could not be used by the

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federal government to benefit endangered species. *MRGCD Brief, at 52-54.* MRGCD is wrong on both counts.

1. 43 U.S.C. § 372.

In Section 8 of the Reclamation Act, Congress restricted use of water in federal reclamation projects to the amount of water reasonably needed for beneficial use. *See 43 U.S.C. § 372* (beneficial use is the "basis, measure, and limit" of water use under the Reclamation Act). *See also California v. United States, 438 U.S. 645, 668 n.21 (1978); Nebraska v. Wyoming, 515 U.S. 1, 17 (1995)* (noting beneficial use limitation). The Reclamation Act thus imposes a duty on the Bureau to ensure that use of water under reclamation projects does not exceed reasonable beneficial use. *See United States v. Alpine Land & Reservoir Co., 697 F.2d 851, 854-55 (9th Cir. 1983), cert. denied 464 U.S. 863 (1983)* (addressing Reclamation Act's "binding congressional directive that the water right must be . . . governed by beneficial use," and "cannot include any element of 'waste' which, among other things, precludes unreasonable transmission loss and use of cost-ineffective methods") *(quotations omitted).*[13]

[13] *See also* R. Benson, "Whose Water Is It? Private Rights and Public Authority Over Reclamation Project Water," *16 Virginia Env. L. Journal 363, 414, 417-8 (1997).*

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This federal law requirement matches New Mexico water law, which likewise limits diversions to reasonable beneficial uses. *See N.M. Const. Art. XVI, § 3; NMSA 1978, Section 72-1-2; State v. McDermett, 901 P.2d 745, 748-49 (N.M. 1995)* (holding that diversions into ditch or flooding of land do not constitute beneficial use, without actually irrigating crops). As the New Mexico Supreme Court held:

> It is important to observe that, no matter how early a person's priority of appropriation may be, he is not entitled to receive more water than is necessary for his actual use. An excessive diversion of water, through waste, cannot be regarded as a diversion to beneficial use within the meaning of the Constitution. . . .Water, in this state, is too scarce, and consequently too precious to admit waste.

State v. McLean, 308 P.2d 983, 987-9 (N.M. 1957)(citations omitted).

This Court has previously enforced the requirement of 43 U.S.C. § 372 that, in operating reclamation projects, the Bureau can only allow water to be delivered for reasonable beneficial uses. In *Jicarilla Apache Tribe v. United States, 657 F.2d 1126, 1133-34 (10th Cir. 1981),* the Court held that Section 372 prohibited the Bureau from delivering SJC Project water to Albuquerque for storage in Elephant Butte Reservoir, where about 93% of the water would have evaporated before being put to beneficial use.

Other courts have found waste when excessive amounts of water are lost due to an unreasonably inefficient system, or because the amount of water applied to a use is unreasonable. For example, in *Yuma County Water*

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Users Ass'n v. Udall, 231 F. Supp. 548 (D.D.C. 1964), the court upheld the Bureau's decision to reduce water deliveries by 10% on the Yuma Project, finding that irrigators had "consistently over-ordered water" deliveries, and a "large amount of water" was "diverted into lateral wastes and . . . not applied to any farms." This "waste" amounted to 12-13% of the water ordered by the irrigators. *Id. at 549-50.*[14]

2. Application of § 372 to the MRG Project.

As noted above, the federal reclamation laws are incorporated into the 1948 MRG Project authorizing legislation. *PlApp 2.* Thus, the Bureau is required as a matter of federal law under 43 U.S.C. § 372 to ensure that water is delivered through MRG Project facilities only for reasonable beneficial use.

The evidence in the record in this case shows that MRGCD's water diversions in recent decades have been excessive and wasteful, far beyond

[14] *See also Doherty v. Pratt, 124 P. 574, 576 (Nev. 1912)* (allowing 2/3 of the water diverted to become lost not a "reasonable and economical method" of diversion); *Basinger v. Taylor, 211 P. 1085, 1086 (Idaho 1922)* (50% loss between point of diversion and on-farm application found "unreasonable, excessive, and against public policy"); *Erickson v. Queen Valley Ranch, 22 Cal. App. 3d 578 (Cal. App. 1971)* (5/6ths of water lost in delivery via earthen ditch inefficient and wasteful); *Dern v. Tanner, 60 F.2d 626, 628 (D. Mont. 1932)* ("excessive evaporation, seepage and absorption" in delivery is unreasonable diversion); *Imperial Irrigation Dist. v. State Water Resources Control Bd., 225 Cal.App.3d 548 (Cal. Ct. App. 1991)* (unreasonable water loss by district in "canal spill" and "tailwater").

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any reasonable beneficial use under federal and state law. As MRGCD acknowledged in its 1992 "Water Policies Plan," the "duty" of water for irrigation in the Middle Rio Grande valley is 2.1 acre-feet per year ("afy") per acre. *PlApp 82 (MRGCD plan); PlApp 110 (State Engineer letter).* But crop reports filed with the Bureau by MRGCD (as required by reclamation law) show that in recent decades it has been diverting water often in excess of 600,000 afy to irrigate just over 50,000 acres – a rate of over 11 afy per acre. *See PlApp 83-108 (crop reports and summary).*

Even worse, MRGCD diversions have actually **increased** while the acreage irrigated has dropped. MRGCD reports reveal that it diverted more water in the 1990's (average annual diversions of 611,253 afy) than in 1975-89 (535,280 afy), an increase of almost 80,000 afy. *Id.* Total diversions in 1996-98 were three of the highest on record, even though 1996 was a drought when the river dried up and thousands of silvery minnows were killed due to diversions. *Id.; AApp 2288-89.* MRGCD reports also show a sharp reduction in active farming in the District, down to only 170 full-time farmers whereas twenty years ago there were over 1,600. *PlApp 88.* [15]

[15] *See also* L. Brown, "The Middle Rio Grande Conservancy District's Protected Water Rights: Legal, Beneficial, or Against the Public Interest In New Mexico?" *40 Nat. Res. J. 1, 13 (2000)* ("[MRGCD] has diverted more water from the Rio Grande in the past decade than ever before, while irrigated acreage in the District has declined").

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As noted in the April 19th Opinion, the New Mexico State Engineer recently advised MRGCD that its diversions are excessive under state law and should be reduced by more than one-third. In a March 23, 2001 letter to MRGCD, the State Engineer stated:

> Based on the best available data and other information available to the Office of the State Engineer and the Interstate Stream Commission, and **making very conservative assumptions in favor of MRGCD, the State will take the position in this litigation that the diversion from the Rio Grande by MRGCD** (i.e., a project delivery requirement) **of 7.2 acre-feet of water per acre** of irrigated non-Pueblo lands on an annual basis **is a sufficient and non-wasteful diversion of water**. This quantity is based upon a consumptive irrigation requirement of 2.1 acre-feet per acre and a reasonable allowance for losses. In addition, the rate of diversion at any point in time and at any particular location must be limited to the quantity reasonably required to deliver and place water to beneficial use. This is a preliminary assessment, and is subject to revision at any time if better information or analyses become available. However **it is our determination at the present time that this quantity of water is sufficient to ensure that no farmer in the District will incur any shortage and that all will be able to make beneficial use of the full amounts of water to which they are entitled under New Mexico law**, provided, of course, that sufficient river flows exist.

PlApp 109-110 (emphasis added).

Of course, it is not for this Court (nor for Judge Parker) to decide at this juncture whether MRGCD's diversions are wasteful. The issue is only whether the Bureau has a legal obligation under federal reclamation law to determine whether overuse is occurring. If so, the Bureau must then consult with FWS under the ESA over how the Bureau might alter MRG Project

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operations to avoid such wasteful water use and benefit endangered species. This is precisely what Judge Parker held. *See April 19th Opinion, pp. 30, 34.*

MRGCD claims that Section 8 of the Reclamation Act requires that any determination about the amount of its reasonable beneficial use of water must be made under state law, not federal law. But Section 8 simply calls for the Bureau to follow state water law, where not in conflict with federal law (which otherwise is supreme); and is expressly conditioned by the beneficial use limitation. *See 43 U.S.C. §§ 372 & 383.*[16] *See also California v. U.S., 438 U.S. at 670-79* (noting supremacy of federal reclamation law where state law conflicts).

Further, the mandates of state and federal law are identical in prohibiting diversions beyond reasonable beneficial use needs, and the New Mexico State Engineer has recognized that MRGCD's diversions are excessive and wasteful. Thus, the Bureau would in no way violate Reclamation Act Section 8 by enforcing its requirement that Project deliveries be limited to reasonable beneficial uses.

MRGCD's attempt to invoke state law is also unavailing, when MRGCD itself has failed to "prove up" its beneficial use for 70 years, in violation of New Mexico water law. MRGCD's claimed water rights are

[16] Section 8 has been codified into these two sections. *See Ivanhoe Irr. Dist. v. McCracken, 357 U.S. 275, 278 n. 4 (1958)* (full text of § 8*).*

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based on two water permits issued in 1930 and 1931. *FApp. 56; MApp 914-918; PlApp 81*. New Mexico law allows a permittee ten years to file a "proof of beneficial use" after obtaining a permit, based on which the State Engineer may issue a license confirming the water right. *See NMSA 1978, § 72-5-14; N.M. State Engineer Manual of Rules and Regulations Governing the Appropriation and Use of the Surface Waters of New Mexico, IIM (PlApp 13-14).* Yet to this day, MRGCD has never filed the required "proof of beneficial use" to obtain licenses, despite multiple requests from the State Engineer that it do so. *See PlApp 109-100 (State Engineer letter).* MRGCD's 70-year delay in proving up its beneficial use certainly cannot thwart the Congressional mandate that reclamation projects may not deliver excessive amounts of water, particularly when that overuse is killing endangered species.

MRGCD also argues that, to the extent that it is found to be wasting water, such water could not be used for endangered species because MRGCD could "spread" it onto other acreage. But beneficial use "is the basis for a water right in New Mexico." *McDermett, 901 P.2d at 748.* To the extent that water use exceeds beneficial use, there is no water right. Thus, MRGCD has no legal right to any water in excess of its reasonable beneficial use requirements. If the Bureau were to find that reasonable

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beneficial use meant that diversions could not exceed a given amount per acre, then any water beyond that amount would have to be left in the river, undiverted. While theoretically this water would be available to the next downstream water user, in fact MRGCD is the only water diverter in the Middle Rio Grande. Thus as a practical matter the water would be left in the river, available to help protect the endangered minnow.

In sum, over the last two decades MRGCD has typically diverted upwards of 600,000 afy to irrigate just over 50,000 acres. Certainly, there is at least a good possibility that MRGCD has been overusing water. Federal reclamation law requires that the Bureau examine MRGCD's water use to determine whether it is excessive. Thus, Judge Parker correctly ordered the Bureau to examine whether overuse is occurring, and to consult with FWS over ways to restrict diversions to reasonable beneficial uses and avoid jeopardizing the endangered Rio Grande silvery minnow.[17]

[17] The reasonable beneficial use limitation equally applies to deliveries of SJC Project water to MRGCD. The Bureau's 1963 SJC Project contract with MRGCD expressly states it is intended to provide a "supplemental" irrigation water supply to MRGCD. *FApp 34-35.* The SJC legislation and its history confirm the Project was intended to furnish "supplemental" water to irrigate 81,600 acres in the MRGCD. *AApp 1173, 739.* Yet MRGCD's reports show an average of only 53,685 acres irrigated in recent years – indicating that this "supplemental" water may not be needed at all to irrigate current acreage. *PlApp 81-108.* Possible reduction of SJC deliveries to ensure MRGCD diversions are limited to reasonable beneficial uses based

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C. The Bureau Has Discretion Over Operation of El Vado Dam, Including Water Storage and Releases.

In addition to requiring the Bureau to limit MRGCD diversions to reasonable beneficial uses, Judge Parker held that the Bureau has discretionary authority to consider alternative MRG Project reservoir storage and releases that may aid the silvery minnow – and hence must consult with FWS over the exercise of that discretion. *Sept. 23rd Concl. Of Law L, M (AApp 139); April 19th Opinion at 29-34 (AApp 91-96).* These alternatives could include **not** storing water in El Vado Reservoir, if needed to maintain river flows to avoid jeopardizing the minnow, or reducing water deliveries out of El Vado to MRGCD under the MRG Project and 1951 Contract.

As explained below, these holdings are clearly correct in light of the Bureau's ownership and authority over El Vado, the relevant statutes, and the provisions of the 1951 Contract.

1. The Bureau's ownership establishes its discretionary authority over El Vado operations.

As noted, the Bureau owns both El Vado Dam and Reservoir, and the water storage right in El Vado under State Permit 1690, which MRGCD transferred to it in 1963. *FApp 50-56; MApp 951-53*. This ownership means El Vado is not a private reservoir, as MRGCD asserts, but instead is a

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on current irrigated acreage needs, thus could aid the minnow without reduced deliveries to Albuquerque or other SJC contractors.

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federal facility that the Bureau must manage in accordance with all federal laws.

One of those laws is the ESA. Appellants argue that the ESA does not "expand" any federal agency's authority, but they cannot dispute that the ESA imposes specific mandates upon federal agencies, including that they "shall insure" that any action "funded, authorized or carried out" by them is not likely to jeopardize endangered species. *16 U.S.C. § 1536(a)(2).* This command, as the Supreme Court has held, means that Congress gave "endangered species priority over the 'primary missions' of federal agencies." *TVA v. Hill, 473 U.S. at 185.*

Under the ESA, then, the "Bureau ha[s] an affirmative duty to ensure that its actions [do] not jeopardize endangered species." *NRDC v. Houston, 146 F.3d 1118, 1127 (9th Cir. 1998), cert. denied, 119 S.Ct. 1754 (1999). See also Sierra Club v. Marsh, 816 F.2d 1376, 1385 (9th Cir. 1987)* (discussing federal agencies' "rigorous duty" to "insure" that federal actions do not jeopardize the continued existence of species).

Because the Bureau owns and operates El Vado, it "authorizes" and "carries out" all reservoir storage and releases, within the meaning of ESA Section 7(a)(2). The Bureau thus must comply with the ESA in its operation of El Vado reservoir; and it must consult with FWS to insure that its

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reservoir operations (and their indirect and interconnected effects) do not jeopardize the silvery minnow – even if it may have to change reservoir storage and deliveries from what MRGCD would otherwise want.

Indeed, other courts have reached the same conclusion about the Bureau's discretionary authority and consultation duties under the ESA, where it owns and operates federal Reclamation project facilities. *See O'Neill v. U.S., 50 F.3d 677 (9th Cir.), cert denied 116 S. Ct. 672 (1995)* (affirming Bureau consultation and reallocation of Central Valley Project water delivery contracts to aid endangered salmon); *NRDC v. Houston, supra* (ordering Bureau to conduct consultation over project water delivery contracts).

Recent decisions over the Bureau's Klamath Project in Oregon are illustrative of how the ESA requires the Bureau to operate its projects in accordance with the ESA. *See Klamath Water Users v. Patterson, 15 F.Supp.2d 990(D. Or. 1998), aff'd 204 F.3d 1206 (9th Cir. 1999), cert. denied 121 S.Ct. 44.* There, irrigators challenged a Bureau decision to alter water releases from the Link River dam to provide flows for downstream endangered species, which the irrigators claimed would interfere with their contractual water deliveries from the Project. In a strong affirmation of the

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Bureau's duties under the ESA to operate federal projects to avoid jeopardizing endangered species, the Ninth Court concluded:

> Because Reclamation retains authority to manage the Dam, and because it remains the owner in fee simple of the Dam, it has responsibilities under the ESA as a federal agency. These responsibilities include taking control of the Dam when necessary to meet the requirements of the ESA, requirements that override the water rights of the Irrigators. Accordingly, we hold that the district court did not err in concluding that Reclamation has the authority to direct Dam operations to comply with the ESA.

204 F.3d at 1213.

As Appellants note, ***Klamath*** is slightly different from this case, because irrigators there claimed they were third party beneficiaries of a contract between the Bureau and a power company regarding management of the dam. But the irrigators only pressed this third party beneficiary theory because their own water delivery contracts contained the same "shortage" provision addressed in ***O'Neill*** and ***NRDC v. Houston*** (and also found in the MRG and SJC Project contracts here, as discussed below). The Bureau itself argued in ***Klamath*** that these shortage clauses allow reduced irrigation contract deliveries to comply with ESA requirements. ***See Klamath Water Users Ass'n v. Patterson, 15 F.Supp. 2d at 995.*** As the district court stated, "[t]o allow plaintiffs to sue for a shortage under the 1956 contract, to which they are not parties, in the face of the [shortage] provision contained in their

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individual repayment contracts, to which they are parties, would be inconsistent and is not supported by the record." ***Id.***

As a practical matter, the Bureau may need not to go as far here as it did in ***Klamath***, because of other discretionary authority it has to avoid jeopardizing the silvery minnow – including limiting MRGCD diversions to reasonable beneficial uses, or releasing Heron water in amounts that would not reduce any contract deliveries (discussed below). But contrary to Appellants' view, the Bureau cannot simply shrug its shoulders and say it has no authority to manage El Vado differently than MRGCD wants, when the ESA commands that its actions shall not jeopardize the minnow.

2. Other statutes confirm the Bureau's discretion.

MRGCD argues that the MRG Project authorizing statutes do not allow the Bureau to operate El Vado to assist the silvery minnow. But in fact, these and other applicable statutes fully confirm that the Bureau does have discretionary authority over El Vado management.

The 1948 MRG Project authorizing legislation specifies that "[i]n the administration of the provisions of this Act all water in the Middle Rio Grande Valley in New Mexico shall be deemed to be useful primarily for domestic, municipal, and irrigation purposes." *PlApp 2*. This provision does not forbid any operation of Project facilities so as to benefit endangered

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species. Whether or not operations provide some benefit to endangered species, it will remain true that the great majority of water run through the Project will be used for "domestic, municipal, and irrigation purposes." All of the parties to this litigation agree with this notion because, for years, SJC Project water has been "exchanged" with native water so that the native water could be run down the river, using El Vado and other MRG Project works, in order to benefit the silvery minnow. *PlApp 166-175.*

The 1948 authorizing legislation also provides that the Secretary of Interior, in managing the MRG Project, "shall be governed by and have the powers conferred upon him by the Federal reclamation laws . . . and Acts amendatory thereof or supplementary thereto, except as is otherwise provided in this Act or in the [1947-48 project] reports referred to above." *PlApp 2.* One such reclamation law is the Reclamation States Emergency Drought Relief Act of 1991, *43 U.S.C. § 2201 et seq (PlApp 7-12).*[18] This Drought Relief Act provides clear authority for the Bureau to operate El Vado (both storing and releasing water) in such a way as to protect the silvery minnow during dry conditions, like those seen in 2002:

> [t]he Secretary may make water from Federal Reclamation projects and nonproject water available on a nonreimbursable basis for the

[18] As Federal Appellants point out, this Act applies to current operations in the Middle Rio Grande and has been used as authority by the Bureau for leasing water rights to benefit the silvery minnow. *Fed. Br. at 16, 31-2.*

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> purposes of protecting or restoring fish and wildlife resources, including mitigation losses, that occur as a result of drought conditions or the operation of a Federal Reclamation project during drought conditions. The Secretary may store and convey project and nonproject water for fish and wildlife purposes, and may provide conveyance of any such water for both State and Federal wildlife habitat and for habitat held in private ownership.

43 U.S.C. § 2212(d). If there were any doubt that the Bureau can both store and release water from El Vado in a manner to benefit endangered species under Judge Parker's Order, this statute eliminates that doubt.

The Fish and Wildlife Coordination Act is yet another Congressional act confirming the Bureau's authority to operate El Vado and other facilities of the MRG Project to benefit fish and wildlife, including the silvery minnow, even when there is no drought. It provides, for preexisting projects such as this, that "[f]ederal agencies authorized to . . . operate water-control projects are authorized to modify . . . the . . . operations of such projects" in order to accommodate the means and measures for "conservation, maintenance, and management of wildlife resources" as long as such modification is compatible with the project's purposes. *See 16 U.S.C. § 662(c) (AApp 1324).*

In short, the Bureau's ownership of El Vado Dam and the water storage rights therein, together with the 1948 authorizing legislation, the Reclamation States Emergency Drought Relief Act, and the Fish and

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Wildlife Coordination Act, all make clear that the Bureau has authority to alter both storage and release operations at El Vado Dam in order to aid downstream endangered species – even without referencing the ESA. When the ESA is also considered, with its mandate that federal agencies "shall insure" that any actions they fund, authorize, or carry out may not jeopardize listed species, plainly Judge Parker was correct in holding that the Bureau must evaluate in consultation with FWS how alternative operations of El Vado storage and releases could be used to prevent jeopardy or extinction of the minnow.

3. The 1951 Contract confirms the Bureau's authority over operations of El Vado Dam.

MRGCD seeks to downplay the importance of its 1951 Contract with the Government, claiming that the contract is terminated because MRGCD has completed its partial repayment obligation. However, the 1951 Contract is still in effect, and its terms confirm that the Bureau has discretion over management of El Vado storage and releases.

Nothing in the 1951 Contract, or the 1948 authorizing legislation, supports MRGCD's claim that the contract has terminated. Both MRGCD and the United States are operating Project facilities and making operation and maintenance payments under its provisions. *AApp 1865-69.* Completion of MRGCD's payments did not terminate the United States'

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property interests, nor did it terminate the 1951 Contract or its purposes, as confirmed by *City of Mesa v. Salt River Project Agricultural Improvement and Power District, 416 P.2d 187 (Ariz. 1966).*

City of Mesa involved a federal reclamation project where the agricultural district had completed repayments under its contract with the United States. The district argued that, as a result, its contract was terminated, and the Government no longer had any interest in its part of the project properties. The Arizona Supreme Court rejected this claim, noting that irrigation districts repay only a small fraction of the total cost of federal reclamation projects; that the projects are subsidies, the cost of which are never recovered in full; and thus that the United States retains an interest in the project even after the district has fulfilled its repayment obligations. *416 P.2d at 193-95.* As the court pointed out, the entire scheme underlying the federal reclamation laws underscores the ongoing federal interests in reclamation projects even after repayment has been completed. *Id.*

Given the federal ownership of El Vado Dam and the storage right therein, as well as the statutory authority discussed above, the real question is whether the 1951 Contract took away discretion that the Federal Government had by virtue of its ownership and legislatively-conferred authority over MRG Project operations. Several cardinal principles govern

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the Court's review and interpretation of all federal contracts, including the 1951 Contract.

First, "sovereign power, even when unexercised, is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact **unless surrendered in unmistakable terms.**" *Bowen v. Public Agencies Opposed to Social Security Entrapment, 477 U.S. 4, 52 (1986) (internal quotation omitted; emphasis added).* *See also Peterson v. U.S. Dept. of Interior, 899 F.2d 799, 807, 812 (9th Cir. 1990)* (applying this principle to reclamation contracts). Thus, "contractual arrangements, including those to which a sovereign itself is party, 'remain subject to subsequent legislation' by the sovereign." *Public Agencies, 477 U.S. at 52.*

A second related principle is that federal contracts "should be construed, if possible, to avoid foreclosing exercise of sovereign authority." *Id., at 52-53.* Third, federal contracts should be interpreted in the context of the legislative scheme that authorized them, and interpretations of ambiguous terms should be made in light of the policies underlying the controlling legislation. *Peterson, 899 F.2d at 807.*

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In sum, the 1951 Contract cannot be construed as giving up federal authority to comply with subsequent federal legislation, unless such authority is clearly and unmistakably surrendered. It has not been.

Instead, the terms of the 1951 Contract support the Bureau's retention of authority over El Vado operations. Nothing in the Contract, particularly Paragraph 13 which governs operation and maintenance of Project works, precludes the Bureau from operating El Vado in a manner that avoids jeopardy to endangered species. *FApp 1-31*. To the contrary, as already noted, the 1951 Contract provides for Government ownership of both the Project works and the relevant water rights, including the water storage right in El Vado. *FApp 13-15, ¶¶ 26, 28, 29.*[19]

Furthermore, the "shortage" provision in Paragraph 23 of the 1951 Contract, to which Appellants devote so much attention, further confirms the Bureau's discretion and authority that emanates from federal ownership and the relevant statutes. Paragraph 23 provides that the United States is not liable for any failure to deliver water to MRGCD through the MRG Project

[19] Amendments 2 and 3 to the 1951 Contract, adopted in 1955 and 1956, provided that the Bureau would operate any "works, structures and improvements, including levees and flood control structures as requested by the District for which funds are advanced to the United States." *FApp 24-28*. However, these amendments were expressly superseded in 1974 when the Bureau transferred operation and maintenance of Project works, other than El Vado and San Acacia Dams, to MRGCD. *PlApp 137-138*.

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on account of water "shortages." *FApp 13, ¶ 23.* By immunizing the United States from liability for under-deliveries of water due to "shortages," this provision confirms that the Bureau can, in order to comply with federal ESA requirements, declare a "shortage" and alter Project operations or limit water deliveries accordingly.

As Judge Parker observed, this is precisely the holding of other decisions that have construed Reclamation contract "shortage" provisions. *See April 19th Opinion, pp. 31-33 (AApp 93-95).* For example, in ***Barcellos & Wolfsen v. Westlands Water District, 849 F. Supp. 717 (E.D. Cal. 1993), aff'd sub nom O'Neill v. U.S., 50 F.3d 677 (9th Cir.), cert denied 116 S. Ct. 672 (1995)***, the Bureau conducted ESA consultation over water delivery contracts with irrigators on the Central Valley Project in California, and determined to reallocate a portion of project water from irrigation to instream uses in order to comply with a BO and avoid jeopardy to threatened salmon. *See 50 F.3d at 681.* Irrigators challenged the Bureau's decision as violating their contracts. The Ninth Circuit upheld the Bureau, holding that the contracts did not prohibit such reallocation of irrigation water for endangered species purposes. The decision construed a contract clause that immunized the U.S. from liability if water was unavailable for delivery because of "water shortages caused by errors in operation, drought, or any

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other causes." *Id. at 680, 682-83 (emphasis added; internal quotations omitted).* The *O'Neill* court held that this shortage provision was "unambiguous" and gave the Bureau authority to restrict water deliveries in order to avoid jeopardy to the listed salmon. *Id., at 684, 686-88.*

The contract language in *O'Neill* is identical to the 1963 Amendatory Contract between the Bureau and MRGCD, which has amended the 1951 Contract; and the Bureau previously conceded that it is legally indistinguishable from ¶ 23 of the 1951 Contract. *MApp 902; PlApp 180.* Thus, *O'Neill* strongly underscores the fact that the Bureau retains discretion under either the 1951 or 1963 Contracts with MRGCD to determine that a "shortage" exists – whether due to dry conditions or to meet the needs of ESA species – and hence reduce deliveries if needed to provide water for the listed species.

Appellants argue that *O'Neill* is distinguishable from this case because, in addition to the ESA, another federal law (the Central Valley Project Improvement Act, or "CVPIA") had been passed mandating reduced water deliveries. However, the CVPIA directed the Bureau to comply with the ESA in determining to reallocate water to endangered fish. *Pub. L. No. 102-575, § 3406(b) (AApp 1356).* The Bureau was thus required by the ESA and CVPIA to reduce deliveries in order to comply with a BO and avoid

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jeopardy to listed species, as mandated by Section 7(a)(2) of the ESA. The contractors there made all the same arguments that Appellants make in this case: that the Bureau's interpretation of the shortage clause abrogates the contracts, violates public policy, and is unconscionable. *See Barcellos & Wolfsen, 849 F. Supp. at 723-27*. In response, the district court pointed out:

> The 1963 contract was the result of bargaining between sophisticated parties who foresaw the possibility that any number of circumstances, known or unknown, might limit the government's ability to deliver the contracted quantity of water. The broad language of [the shortage provision] reflects this understanding.

Id., at 723. Further, the court noted that the Bureau did not have unlimited discretion to declare a shortage whenever it suited. Rather, the Bureau was permitted to declare a shortage where required in order to comply with the mandate of Section 7(a)(2) to avoid jeopardy to listed species. *Id., at 723, 725.*

Since the decision in *O'Neill* holding that the "shortage" clauses of reclamation contracts give the Bureau discretion to reallocate water to endangered species in order to comply with the ESA, the Bureau has taken this same position in other cases too. In *Klamath Water Users*, discussed above, the Bureau cited *O'Neill* in arguing that its decision to alter dam operations and thus reduce irrigation deliveries did not violate its water contracts, because a "shortage" under the contracts could result from drought **or** its

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obligation to comply with other federal laws, such as the ESA. *See 15 F. Supp.2d at 995.*

Thus, the 1951 Contract (as amended in 1963) clearly does not remove the Government's authority to operate El Vado Dam so as to comply with the ESA's mandate that water operations avoid jeopardy to endangered species. Indeed, the contract reaffirms that sovereign authority. Judge Parker did not err in so construing the contract provisions.

D. The Bureau Has Discretion To Operate The Middle Rio Grande Diversion Dams So As To Bypass Some Flows To Avoid Jeopardy To the Silvery Minnow.

Finally, based on the April 19th Opinion, the September 23rd Order may direct the Bureau to operate MRG Project irrigation diversion dams so as to provide "bypass" flows needed to maintain adequate river habitat conditions for the silvery minnow. Again, MRGCD is the only Appellant to challenge these rulings.

Indeed, the Federal Government agrees that the Bureau has discretion over operation and maintenance of all of the MRG Project diversion dams; as a result, the Bureau's 2001 consultation with FWS included operation of the dams. *PlApp 177-179 (Feds' 6/11/01 Br.).* In June 2001, the Bureau did not propose to require flow bypasses at any of the diversion dams because there were other means available of achieving the minimum flows required

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by the June 29th BO. *Id.* The Bureau, however, has stated that it considers requiring bypass flows to be an option for avoiding jeopardy to endangered species. *Id.; AApp 1504.*

For the same reasons that the Bureau has authority and discretion over operations of El Vado Dam, it also has authority and discretion over operations of the MRG Project diversion dams. The Bureau owns the diversion dams both by virtue of "constructing" them within the meaning of the 1951 Contract, and by virtue of conveyances in 1953 and 1962 from MRGCD to the Federal Government. *FApp 4, 50-56; AApp 90; MApp 176, 951-53, 929-950.*

Although MRGCD conducts the day-to-day operation and maintenance of the three diversion dams, it does so only as the "agent" of the United States, pursuant to paragraph 13 of the 1951 Contract. *FApp 7-9, ¶ 13; AApp 1866; PlApp 177 (Feds' 6/11/01 Br., at 29).* The United States may terminate MRGCD's agency and reassume the operation and maintenance of the diversion dams upon six months' notice. *Id.*

Thus, the Bureau could advise MRGCD that the diversion dams must be operated in such a way as to ensure achievement of the minimum flows required by FWS. Or the Bureau could issue other instructions on ways to operate the dams so as to better protect endangered species. The Bureau

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could further notify MRGCD that, if it did not comply with the Bureau's operation instructions, the Bureau would terminate MRGCD's agency and take over dam operations.

In short, the Bureau has significant discretion over operation of the MRG Project diversion dams by virtue of its ownership, which the 1951 Contract did not take away. Rather, it made clear that MRGCD operates the dams only as the Bureau's agent and pursuant to its instructions. To the extent that the September 23rd Order may require the Bureau to impose restrictions on how the diversions are operated, to avoid jeopardy to the silvery minnow, Judge Parker thus did not commit any error.

IV. THE BUREAU HAS SOME DISCRETION TO ALTER OPERATIONS OF THE SAN JUAN-CHAMA PROJECT TO AVOID JEOPARDY TO THE SILVERY MINNOW.

A. Judge Parker's Orders Regarding San Juan-Chama Project Are Far More Limited Than Described By Appellants.

Appellants and virtually all amicus briefs focus on the San Juan-Chama Project, exaggerating the scope of Judge Parker's rulings and making alarmist claims that bear little relation to reality. For example, Albuquerque and New Mexico complain that Judge Parker's orders will cause the "draining" of Heron Reservoir, and render the SJC Project a "nullity" by reallocating all of the Project water to endangered species. These scare

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tactics misinterpret the District Court orders, stretching them far beyond any relief Plaintiffs asked for or Judge Parker actually ordered.

As mentioned above, Judge Parker's order that water be released from Heron was expressly limited to the year 2002 and never took effect. For 2003, Paragraph 14 of the September 23rd Order does not necessarily require **any** releases from any reservoir. Instead it directs the Bureau to restrict diversions through the MRG Project, and/or reduce contract deliveries through either the MRG or SJC Projects, **if necessary** to meet river flow targets established by FWS – and it applies only to 2003, not subsequent years.

In this, as in all his rulings, Judge Parker was mindful of the competing needs for water in the Middle Rio Grande, and did everything possible to avoid ordering specific judicial relief for 2003 or future years, so as to encourage the parties to voluntarily reach agreed solutions, as they have in the past.

Reading Paragraph 14 of the September 23rd Order in the context of the rest of his rulings makes it clear that Judge Parker did not intend that the September 23rd Order be interpreted as requiring the draining of Heron Reservoir, reallocation of all SJC contract water, or the elimination of agricultural diversions. Rather, Judge Parker's order calls for restrictions of

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diversions and/or water deliveries only to the extent consistent with the relevant legislative authority and contract language.

As explained below, the Bureau has discretion to make some releases of SJC Project water from Heron Reservoir without placing full contract deliveries in any significant risk. Further, the Bureau has discretion to reduce Project contract deliveries to some extent if needed to avoid jeopardy to the silvery minnow, as long as a "reasonable amount" of contract deliveries continue to be made. Judge Parker's order correctly requires only that the Bureau exercise that discretion to the full extent permitted by law and contract, if necessary to avoid jeopardy or possible extinction of the silvery minnow.

B. San Juan-Chama Project Water May Be Used To Benefit The Silvery Minnow.

Before addressing the Bureau's discretionary authority, Plaintiffs must refute the argument of some Appellants and amici that SJC water can **never** be used to aid endangered species, because benefits to fish and wildlife are supposedly not an authorized use of Project water. The applicable legislation, contracts, and case law all show this argument is incorrect.

1. San Juan-Chama Project legislation and contracts.

The argument that SJC water cannot be used to aid fish and wildlife would have the Court ignore the express language of Congress. The

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authorizing legislation provides that the SJC Project is to supply water "for municipal, domestic, and industrial uses, and providing recreation **and fish and wildlife benefits**" in the Middle Rio Grande Valley. *Act of June 13, 1962, P.L. 87-483 (76 Stat. 96) (AApp 1173) (emphasis added).* [20] It is a fundamental tenet of statutory construction, of course, that courts must give effect to all provisions and the plain language of a statute. *F.D.I.C. v. Canfield, 967 F.2d 443, 445 (10th Cir. 1992).*

Before this litigation started, the Bureau, City, and other parties obviously understood this statutory purpose, because they entered into contracts that expressly provide SJC Project water can and will be used for fish and wildlife. *AApp. 1184 (¶3a), 1193 (¶18h).* The contracts allocate a percentage of the Project's operating costs to these fish and wildlife uses. *Id., 1185 (¶4b).*

The contracts also anticipate that SJC water may have to be reallocated from Project contractors to fish and wildlife needs in increased amounts; and they provide a mechanism for adjusting the Project costs

[20] Similarly, the Colorado River Basin Project Act, which provides a program for the development of Colorado River Basin water, including the SJC Project, specifies that "improving conditions for fish and wildlife" is one of the purposes of the program. *Pub. Law 90-537, § 102 (1968). See also Colorado River Storage Project Act of 1956, Pub. Law 84-485, § 8* (authorizing construction of SJC Project "facilities to mitigate losses of, and improve conditions for, the propagation of fish and wildlife").

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allocated to these uses accordingly. *FApp. 41.* These provisions were used to lower Albuquerque's share of Project water, and its allocated costs, when it was determined that SJC Project water should be used to maintain a 50,000 acre-feet minimum pool in Cochiti for fish, wildlife, and recreation purposes. *AApp 2457, 1198-1215.*

2. *Jicarilla*.

Although the SJC Project is expressly authorized for fish and wildlife purposes, Appellants and amici rely on *Jicarilla Apache Tribe v. United States*, *657 F.2d 1126, 1137 (10th Cir. 1981)*, to argue that SJC Project water can never be used to aid the minnow. But *Jicarilla* presented very different facts, and never addressed several statutes relevant here, including the ESA. Hence, its holding should not be expanded into a broad prohibition against use of SJC Project water for endangered fish and wildlife.

At issue in *Jicarilla* was not survival of an endangered species, but whether Albuquerque could waste huge amounts of SJC Project water. In 1982, the City began receiving its full annual delivery of 48,200 afy. *657 F.2d at 1132.* It had little use for the water, and did not expect to need the full amount of its annual deliveries until 2025. *Id. at 1133.* Between 1982 and 2025, Albuquerque anticipated receiving over 1.1 million af of "excess" SJC water. *Id.*

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Albuquerque's proposal was to take its full SJC deliveries every year from Heron Reservoir, and run all that water down to Elephant Butte Reservoir to be stored for the 40 years until it was needed for municipal uses. During that time, 93% of the water (all but 78,811 af) would be lost to evaporation. *Id. at 1134.*

Albuquerque claimed that, in the intervening years, the water could be put to various uses, including some sales and recreational use in Elephant Butte. But this Court held that these possible uses, for which there were no current contracts, were too speculative and wasteful to constitute beneficial use. *657 F.2d at 1135-6.* The Court rejected the claimed recreational use because it deemed recreation not to be a primary SJC Project purpose, and also did not constitute "beneficial consumptive use" as required by the Colorado River Storage Project Act. *Id. at 1139.*

It is not surprising this Court would not look kindly upon a proposal allowing 93% of Albuquerque's SJC water to disappear by evaporation, serving no useful purpose. Certainly Congress did not intend such a squandering of water. And neither did the Bureau: where a SJC Project contractor has no ability to put the water to beneficial use, the contracts provide that the Bureau will not deliver the water to the contractor and it will

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be left in Heron Reservoir, available to be allocated in future years. *AApp 1193, ¶ 18i.*

By contrast here, using SJC Project water for supplemental flows to sustain the silvery minnow would not waste the water, as was the case in *Jicarilla*, but would result in beneficial consumptive use that complies with the SJC Project authorization and relevant interstate compacts.[21] As in most western states, instream flows for fish and wildlife constitute beneficial use of water under New Mexico state law. *See N.M. Op. Atty. Gen. 98-01 (March 27, 1998), 1998 WL 1796400. See also Ariz. Rev. Stat. § 45-151 (1994); Cal. Water Code § 1243 (Cum. Supp. 1997); Mont. Code Ann. § 85-2-102(2) (1995); N.D. Cent. Code § 61-04-06.1(1995); Wash. Rev. Code Ann. § 90.54.020 (Cum. Supp. 2000).*[22] Further, using SJC water for

[21] Appellants argued in the District Court that use of SJC water for the silvery minnow violated the Colorado and Upper Colorado Compacts, because it would not result in "beneficial **consumptive** use" of the water in New Mexico, as required by the compacts. Judge Parker ruled to the contrary in his April 19th Opinion, noting that the water "would be 'consumed' in New Mexico because flows can be managed so that no water, or only a trickle, reaches Elephant Butte Reservoir," and because the water can be exchanged for native Rio Grande water. *AApp 99-100.* Appellants have not challenged this ruling in their briefs.

[22] Although some amici contend a state permit is required for such use of SJC water, historically the NM State Engineer did not issue permits to SJC contractors for their use of Project water, since those rights are based on and defined by federal contracts. More recently, the State Engineer has issued permits for use of native water for the silvery minnow. *See PlApp 114, ¶ 5D*

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instream flows to benefit the minnow is consistent with Congressional intentions that Project water would principally be run down the Rio Grande to offset river depletions from other uses (as discussed below). Where Albuquerque and others in fact use SJC water this same way, thus satisfying beneficial consumptive use requirements, using SJC water to supplement flows for ESA purposes will meet the same requirements and benefit Appellants by helping to offset river depletions while aiding the minnow.

In addition to these factual differences, several laws passed by Congress also distinguish this case from ***Jicarilla***. First, as noted above, the Drought Relief Act provides authority for the Bureau to operate the SJC Project to protect the silvery minnow during times of drought, such as the present. *43 U.S.C. § 2212(d).* The Act was not in place when ***Jicarilla*** was decided, but it underscores and supplements the Bureau's authority to use Project water for fish and wildlife purposes.[23]

(CWA). There is no reason a state permit could not similarly be issued for instream use of SJC water, if one were required.

[23] Federal Appellants admit this Act "enhances Reclamation's ability to take actions for the benefit of fish and wildlife," yet argue it does not authorize reducing contract deliveries because it specifies the Bureau's actions must be "consistent with the Secretary's other obligations." *Fed. Br at 31-2.* But the ESA is among these other obligations, and the Bureau has ample contractual authority to make releases from Heron to avoid jeopardizing the minnow, as discussed below.

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Second, the Fish and Wildlife Coordination Act also was not applicable to ***Jicarilla***, but authorizes federal agencies to modify their operation of water projects in order to conserve fish and wildlife. *16 U.S.C. § 662(c) (AApp 1323-26).* As Judge Parker noted, an opinion from the Regional Interior Solicitor, "i.e., the [Bureau's] own lawyer," determined that this Act supports the conclusion that SJC Project water "could be used to protect the minnow." *April 19th Opinion, p. 37, n. 15 (AApp 99).*

Third, Judge Parker (and the Regional Interior Solicitor) also cited a 1981 law passed by Congress to legislatively reverse the ***Jicarilla*** holding, and authorize storage of SJC Project water in reservoirs for recreational and other beneficial uses. *Id.; Pub. L. 97-140, § 5 (AApp 1343-44).* While this act does not directly endorse use of Project water for fish and wildlife uses in the river, as opposed to reservoirs, it signals congressional approval for using SJC water for reasonable beneficial uses, including Project purposes that may be incidental, rather than primary.

The final key congressional enactment distinguishing this case from ***Jicarilla*** is the ESA. As Judge Parker emphasized, the ESA's powerful mandates counsel courts to make every attempt to interpret other federal legislation consistently with protection and recovery of endangered species. *See April 19th Opinion, pp. 35-36 (AApp. 98-99).* The ***Jicarilla*** decision had

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no occasion to consider the ESA at all. But as decisions including ***TVA v. Hill***, ***O'Neill***, ***NRDC***, and ***Klamath*** all underscore, operation of federal reservoirs and water projects must adhere to the ESA's mandates, under which "'the national policy of saving endangered species' has priority over even the 'primary missions' of federal agencies." *Id., quoting TVA v. Hill, 473 U.S. at 185.*

Any consideration of how ***Jicarilla*** may affect the present case must thus implement the requirements the ESA, as well as the other statutes noted above. Appellants would have this Court avoid that task and expand ***Jicarilla*** to the very different facts and law in this case. Plaintiffs urge the Court not to take that careless approach, and rather to uphold Judge Parker's ruling on this issue.

3. Legislative intent of the San Juan-Chama Project.

Another important consideration is that use of SJC Project water to supplement depleted river flows in the Middle Rio Grande, and thereby benefit the silvery minnow, is entirely consistent with the underlying intent of the Project, as described throughout its legislative history.

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From the beginning, the central idea behind the SJC Project was to offset past and future streamflow depletions in the Middle Rio Grande,[24] and to provide water for the future growth of the area. *See, e.g., AApp 794-6, 798-9.* That a key Project purpose was "to replace [both] previous and anticipated basin depletions" was repeatedly emphasized during congressional consideration of the Project authorizing legislation ultimately passed in 1962. *AApp 816.* [25]

To accomplish these objectives, it was always contemplated that SJC water would be run down the Rio Grande to offset depletions to the river from various causes, including irrigation and municipal demands. *See AApp 1172, 800.*[26] That is exactly what occurs when Project water is used to

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[24] Indeed, most of the SJC contracts note that one of the Project purposes is "to replace depletions in the Rio Grande Basin." *AApp 1184, ¶2.*

[25] *See Senate Report 2198, p. 15 (PlApp 147-157),* "Navajo Indian Irrigation and San Juan-Chama Participating Projects, New Mexico (accompanying S. 3648, 85th Cong., 2d Sess.,); *85 Cong. Record, August 15, 1958, pp. 17722-23 (PlApp 158-159)* (statement of Senator Anderson); *Senate Report 83, 87th Cong., 1st Sess, March 22, 1961, p. 8 (PlApp 160-165),* "Navajo Irrigation and San Juan-Chama Projects, New Mexico (accompanying S. 107); *House Rep. No. 685, 87th Cong., 1st Sess., July 10, 1961, p. 16 (AApp 1166),* "Authorizing Construction of the Navajo Indian Irrigation Project and the Initial Stage of the San Juan-Chama Project as Participating Projects of the Colorado River Storage Project," (accompanying H.R. 7596).

[26] In the case of Albuquerque, it was contemplated that Project water either would simply be run down the river, or would be used by Albuquerque and would result in return flows running down the river which would offset the

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supplement river flows in order to protect the silvery minnow. Unlike storage of water in Elephant Butte, at issue in ***Jicarilla***, running Project water down the river to supplement streamflows was thus always a contemplated purpose of the SJC Project; and in fact aids the State and City by offsetting depletions while serving the further purpose of preventing jeopardy to the minnow in violation of the ESA.

4. Exchange for native water.

Finally, Appellants ignore the obvious fact that SJC water can be used to benefit the minnow through "exchange" for native Rio Grande water. It is surprising that Appellants do not even mention such exchanges to this Court, when this practice has been used every year since at least 1996, without objection from any party to this case. *See AApp 1864-65, 1942-46.*

Under this practice, the Bureau buys SJC water from a willing contractor and uses the water to supplement flows for the silvery minnow. The "exchange" is simply a water accounting exercise by the Bureau, adding up the total amount of SJC water used to benefit the silvery minnow in a given irrigation season, and comparing that number to the total native water that came through the Middle Rio Grande during the same period. As long

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river depletions caused by groundwater pumping. *AApp 798.* In fact, Albuquerque does use some of its SJC water to run down the river and offset the impacts to the river from its groundwater pumping. *AApp 2423.*

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as the amount of native water exceeds the amount of SJC water, a valid exchange of water is presumed (since the native water is used for irrigation purposes which are unquestionably valid Project purposes). *PlApp 166-175; AApp 1942-46.*[27] This exchange mechanism works even if there is not an equivalent amount of native Rio Grande water in the system at the precise time that the release from Heron is made, as the calculation is based on total irrigation season water uses.

Since the overall purpose of the SJC Project was to offset past and future depletions to the Rio Grande caused by municipal and agricultural water use, by running Project water down the river, a liberal water exchange program is consistent with that intent. *See AApp 1172-81; AApp 794-6, 798-800, 816* (legislative history). Using the water exchange mechanism deems SJC water to have been used for irrigation, while native Rio Grande water is used to benefit the silvery minnow. This method, which has been used successfully for a number of years, avoids entirely Appellants' arguments that use of SJC Project water for minnows violates the Project legislation or the *Jicarilla* decision, as Judge Parker noted. *AApp 99.*

[27] Bureau documents show how the water exchange was calculated for the year 2000. This water exchange mechanism was used to implement the two Agreed Orders entered on August 2 and October 5, 2000, as a result of court-ordered mediation in this case. *PlApp 166-175; AApp 1943-44.*

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In summary, fish and wildlife benefits are expressly authorized under SCJ Project legislation, and using Project water to benefit the minnow is consistent with Project purposes as well as the ESA. The Court should thus reject the argument that SJC water cannot be used to benefit the minnow.

C. The Bureau May Contract For Delivery of Project Water In Excess Of The "Firm Yield."

Appellants' arguments against the use of SJC Project water to benefit endangered species are premised on the notion that such use will necessarily reduce contract deliveries. Appellants' real objection is to reductions in contract deliveries – not to use of Project water for endangered species.

Plaintiffs point out below that the Bureau may make small releases of water from Heron without shorting any SJC contract deliveries. Such a release is authorized under federal law and the contracts, and should be considered when it could help to avoid jeopardy to endangered species, as Judge Parker has directed.

1. SJC Project legislation and "firm yield" amounts.

Albuquerque and New Mexico, though not apparently other Appellants,[28] object to any release of water above the 96,200 afy found by

[28] Federal Appellants did not support the requested stay of Judge Parker's Order requiring a small release from Heron in 2002 because, *inter alia*, "the City does not contend that these releases alone will cause any shortfall to water users served by the City in the coming year or significantly interfere

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the Bureau in 1989 to constitute the "firm yield" of Heron Reservoir, because they fear that such a release would result in contract delivery reductions. Thus, they argue that any release above the "firm yield" would violate the Project's authorizing legislation.

But the SJC Project legislation says nothing about "firm yield," and does not prevent the Bureau from entering contracts that might – perhaps temporarily – exceed its current "firm yield" determination. The only reference in the legislation to a limit in the total amount of water that may be contracted by the Bureau is the following:

> The Secretary shall not enter into contracts for a total amount of water beyond that which, in his judgment, in the event of shortage, will result in a **reasonable amount** being available for the diversion requirements for the . . . San Juan-Chama project. . .

AApp 1178, § 11(a) (emphasis added).[29] Certainly nothing in the legislation could be construed as requiring that no amount of water above what the

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with its longer-term plan to utilize Heron Reservoir water for its Drinking Water Project." *Fed. Stay Br at 12.* In the past, when storage levels at Heron were higher than they are now, MRGCD has argued that release of as much as 40,000 af could be made from Heron to benefit the silvery minnow without any impact on contract deliveries. *State Appendix ("StApp") 34.*

[29] In addition, the legislation provides a general limit on the total amount of water subject to long-term contracts other than those anticipated in section 8:

> No long-term contract, except contracts for the benefit of the lands and for the purposes specified in sections 2 and 8 of this Act, shall be entered into for the delivery of water . . . until the Secretary has determined by hydrologic investigations that sufficient water to fulfill

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Bureau has most recently estimated to be the Project's "firm yield" may be released.

Moreover, "firm yield" is nothing more than an educated guess of the amount of water that can be delivered reliably each year from a reclamation project. It is calculated by the Bureau based on the size of the reservoir and the historic record of river flows that deliver water to it. This number for the SJC Project has changed repeatedly over the years. In 1964, it was calculated at 101,800 afy; in 1986 it was calculated at 94,200 afy; and in 1989 it was calculated at 96,200 afy. *AApp 1377, 1384, 1385, 1391*. The 1989 firm yield estimate was a theoretical calculation based on assumptions that never considered actual water levels at Heron Reservoir. *AApp 1376-1422*. The calculations assumed an arbitrary starting reservoir level, assumed full deliveries of 96,200 af for every year, and assumed the 100 year reservoir sedimentation load of 10,600 af was in place throughout the calculations, reducing Heron's capacity by that amount for the entire time. *AApp 1378, 1405-06, 1414-15*. None of these assumptions was correct. Had the Bureau chosen to use different assumptions, such as the more

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> said contract is reasonably likely to be available for use in the State of New Mexico during the term thereof. . .

AApp 1178. Fish and wildlife purposes are among the project purposes listed in section 8, and thus this provision does not place any particular limit on long-term contracts for fish and wildlife purposes.

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reasonable assumption that the sediment load started at zero and increased gradually over the years, the "firm yield" amount would have turned out higher.

MRGCD's hydrologist argued in the District Court that the Project "could have operated at higher release levels throughout its 28-year history." *StApp 34*. Indeed, water storage in Heron Reservoir has been full or nearly full most of the years since 1983, when Heron was first filled, so that in many years Project water diversions from the San Juan Basin have had to be reduced. *AApp 522*. As a result, New Mexico is way below the maximum ten-year average Project delivery that is permitted in the Project legislation. *PlApp 174*.[30] Thus, if needed to restore high storage levels at Heron, New Mexico can receive far more water in the coming years than it has in the past and still not approach the maximum diversion permitted in the legislation.[31]

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[30] The law provides that total diversions from the San Juan to the Rio Grande may not exceed 1,350,000 af in any ten consecutive years, thereby allowing an annual average diversion of 135,000 af. *AApp 1176, § 8(a)*. Maximum delivery to Heron in any one year is 270,000 af. *Id.* The total annual delivery was 926,877 af from 1991-2000, and the average annual delivery has been 90,500 afy over the life of the Project. *PlApp 174*; *State Br. at 8.*

[31] Amicus San Juan Water Commission ("SJWC") claims that ESA requirements in the San Juan Basin limit SJC diversions from that basin to a maximum of 108,000 af in any one year. *SJWC Br. at 12.* But the State affidavit cited for this claim indicates only that FWS has assumed average SJC deliveries of 108,000 afy – not an annual maximum of that amount.

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Significantly, Appellants also mislead the Court in claiming that the entire "firm yield" currently projected by the Bureau has been contracted out. In fact, the SJC Project has never been contracted to the full 96,200 afy "firm yield" limit. In 1989, only 84,150 af had been contracted. *AApp 1381*. By 1999, 91,210 af had been contracted; and as of this date, 93,210 af is contracted. *AApp 1495*. This means that, even if one assumes the firm yield calculations are accurate and precise, **up to 2,990 af can be released every year from Heron without having any impact whatsoever on contract deliveries.** In recent years, the Bureau has used this uncontracted water (presumably by entering temporary contracts) to benefit the silvery minnow. *See PlApp 166-175*.

When it was considering its options last summer, the Bureau prepared charts showing what the expected impacts would be to Heron Reservoir and contract deliveries over the next ten years if there were a one-time release of water from Heron to benefit the silvery minnow. *AApp 233-35*. As the Bureau's hydrologist admitted at the September 2002 hearing, these charts showed that a release of 20,000 af would have no impact on contract

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AApp 2410-11,¶ 19. Estimates used for FWS analysis are not a legal limit imposed on SJC deliveries. Moreover, SJWC is contradicting its own argument that the ESA cannot alter the terms of the SJC authorizing legislation. In any case, average annual SJC deliveries will remain well below 108,000 afy even if they were to increase substantially in the coming years, because they now average just over 90,000 afy. *State Br., p.8*.

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deliveries over the next ten years under any weather conditions, even if the full 96,200 af were delivered every year. *Id*; *PlApp 181-194.*[32] A release of 50,000 af would not cause any contract reductions unless the next ten years were the driest ten year period in SJC Project history, in which case there would be a small shortfall only in year nine. *Id.*

If the Bureau released just 12,000 af from Heron in 2003 for the minnow, it could replace that water in four years by simply allocating the 2990 afy of uncontracted water to make up this amount. Thus, the one-time release could be restored well before there was even a threat of reduced contract deliveries resulting from the release. Yet 12,000 af could make all the difference between river drying late in the season or remaining flowing to prevent minnow deaths.

Therefore, the SJC Project legislation does not prohibit releases in excess of the Bureau's estimated "firm yield." As long as "a reasonable amount" is available to contractors, and any releases are made pursuant to contracts, they are permitted by the authorizing law. *AApp 1178, § 11(a).* This discretion to make small releases from Heron might seem trivial. But, as the events of this past year made clear, this discretion could, in some

[32] The estimates predict a very small shortage in the tenth year if the next ten years were equivalent to the driest ten year period in SJC history. *AApp 233.* Of course, since the Project is not fully contracted, even in those circumstances, there would be no shortfall in actual fact.

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situations, be just enough to avoid massive river drying and probable extinction of the silvery minnow. Congress clearly intends that the Bureau have and exercise such discretion if the need arises, to avoid jeopardy to endangered species.

2. San Juan-Chama contracts.

Nor would a limited release of water from Heron violate any provisions in the SJC contracts. Nothing in those contracts requires the Bureau to limit releases to the "firm yield" amount. To the contrary, the contracts anticipate situations where the Bureau might determine that the "actual available water supply" exceeds the "estimated firm yield," in which case the Bureau can release extra water. *AApp 1193, ¶ 18j.*

Contrary to Albuquerque's claims, it does not own the water in Heron and has no right to bar the Bureau from releasing that water. Consistent with the authorizing legislation, the SJC contracts give the Bureau full authority to operate Heron Reservoir and other SJC project facilities. *See AApp 1188, (¶7a), FApp 37 (¶7a).*[33] Water diverted to Heron Reservoir from the San Juan Basin does not become the property of Project contractors, such as Albuquerque, until it is "delivered" out of Heron Reservoir to them pursuant

[33] The United States filed appropriate water rights applications for the SJC Project with the New Mexico State Engineer. *Doc. No. 101, Exh.A.*

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to contract. As the authorizing legislation states: "[n]o person shall have or be entitled to have the use for any purpose . . . [of San Juan water under the Project] except under contract satisfactory to the Secretary and conforming to the provisions of this Act." *AApp 1178, § 11(a).*

Likewise, Project contracts with Albuquerque and others expressly provide that the contractors' water rights consist only of the right to use the water made available for delivery in a given year. *See AApp 1193 (¶18e), FApp 40 (¶12e).* Contractors are barred from saving up water from year to year in Heron Reservoir. *Id.* Moreover, contractors do not have the automatic right to receive their full delivery every year. They have "the exclusive right to use and dispose of" only "that share of the project water supply available and allocated [by the Bureau] to municipal water supply purposes." *AApp 1192-93 (¶ 18d), FApp 40 (¶12e).* The Bureau has the right to dispose of contracted water if it determines the water "is not in that year to be used or disposed of by the [contractor]." *AApp 1193 (¶ 18i), FApp 41 (¶12i).* And, if "the actual available water supply" is "less than the estimated firm yield," the contractor shall receive only its proportionate share of available water. *AApp 1193-43, ¶18j.* Any contracted water that is not delivered does not belong to contractor; it remains in Heron available for future allocations to any contractor. *AApp 1193, ¶¶18e, 18i.*

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Court decisions addressing the nature of water rights under reclamation projects such as the SJC Project further underscore that the contractors do not own the water in Heron Reservoir. As the Ninth Circuit has observed:

> A distinction must be recognized between the nature of nonproject water, such as natural-flow water, and project water, and between the manner in which rights to use of such waters are obtained. Right to use of natural-flow water is obtained in accordance with state law. In most western states it is obtained by appropriation – putting the water to beneficial use upon lands. . . **Project water, on the other hand, would not exist but for the fact that it has been developed by the United States. It is not there for the taking (by the landowner subject to state law), but for the giving by the United States.** The terms upon which it can be put to use, and the manner in which rights to continued use can be acquired, are for the United States to fix.

Israel v. Morton, 549 F.2d 128, 132-33 (9th Cir. 1977) (emphasis added).

While project contractors hold a "beneficial interest" in project water, *Ickes v. Fox, 300 U.S. 82, 94-95 (1937),* the terms and conditions of Reclamation contracts establish the scope of the beneficiaries' interests in the use of reclamation project water. *See Ivanhoe Irr. Dist. v. McCracken, 357 U.S. 275, 295 (1958)* ("beyond challenge" that Federal Government may "impose reasonable conditions" on receipt of federal reclamation project water or other benefits). Hence, the Bureau's discretion to add payment and environmental conditions in new or renewed contracts has been held not to

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violate beneficiaries' rights to project water. *Barcellos & Wolfsen., 849 F. Supp. at 721, aff'd 50 F.3d 677 (9th Cir. 1995); Madera Irr. Dist. v. Hancock, 985 F.2d 1397, 1402-06 (9th Cir.), cert. denied, 510 U.S. 813 (1993); Peterson v. US Dept. of Interior, 899 F.2d 799, 807-814 (9th Cir.), cert. denied, 498 U.S. 1003 (1990); Fremont-Madison Irr. Dist. v. U.S. Dept. of Interior, 763 F.2d 1084, 1088 (9th Cir. 1985).*

In short, neither the SJC legislation nor the contracts bar the Bureau from entering into a temporary contract[34] for a one-time release of water from Heron Reservoir above and beyond the estimated "firm yield" amount, where such a release is necessary to avoid jeopardy to an endangered species. This is especially true where the evidence indicates that the release is unlikely to result in any reduction in contract deliveries.

D. The Bureau Has Authority To Reduce SJC Contract Water Deliveries Somewhat In Order to Avoid Jeopardy To An Endangered Species.

Finally, in extreme instances where necessary to prevent jeopardy or extinction of the minnow, the relevant statutes and contracts also authorize the Bureau to make reductions in contract deliveries, so long as the Bureau

[34] The Bureau has routinely entered into temporary contracts to use unallocated SJC water to benefit the silvery minnow (by way of exchange for native Rio Grande water). *See PlApp 166-175.*

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continues to deliver "a reasonable amount" to contractors as provided in the Project's authorizing language. *AApp 1178, § 11(a).*

In fact, the Drought Relief Act, the Fish and Wildlife Coordination Act, and the ESA all encourage the Bureau to operate water projects so as to protect fish and wildlife – especially endangered fish and wildlife that will be placed in jeopardy absent some reduction in contract deliveries.

Further, the SJC Project contracts do not somehow take away the Bureau's statutory authority to reduce contract deliveries if necessary to comply with the ESA's mandates, as Appellants contend. Their heavy reliance on ***Sierra Club.v. Babbitt, 65 F.3d 1502 (9th Cir. 1995)***, is thus misplaced. ***Babbitt*** simply holds that ESA consultation is not required where an agency lacks discretion under prior contractual agreements. That is not the case here under the SJC Projects, for at least two key reasons.

First, as a matter of federal contract law, the Bureau has discretion to reduce SJC Project deliveries under the "shortage" clauses contained in all the contracts, which provide:

> Water Shortages: On account of drouth or other causes, there may occur at times during any year a shortage in the quantity of water available from the reservoir storage complex for use by the [contractor] pursuant to this contract. In no event shall any liability accrue against the United States . . . for any damage, direct or indirect, arising out of any such shortage.

AApp 1192, ¶ 18b.

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Again, as a matter of federal contract law, this language confirms that the Bureau retains discretionary authority to reduce contract deliveries through federal reclamation projects – whether reductions are required by drought conditions, or the need to comply with the ESA or other legal mandates to ensure adequate river flows for listed fish species. *See Barcellos & Wolfsen, O'Neill, NRDC, Klamath Water Users, supra.*

Further, the broad language of this shortage provision contradicts Appellants' theory that it refers exclusively to shortage caused by drought in the San Juan Basin. Had the drafters intended to limit the application of the shortage provision to drought in the San Juan Basin or to the shortages described in Section 11 of the Act, they could easily have done so.[35] They did not.[36] Where the language of the shortage provision allows for

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[35] Just as the shortage provision in the SJC contracts is not limited to application in the circumstances discussed in Section 11 of the SJC Act (where there is a drought in the San Juan Basin), the shortage sharing provisions described in Section 11 also do not apply to all shortages encompassed by the contract shortage clauses – such as shortages due to ESA compliance rather than drought in the San Juan Basin. *See AApp 1178.*

[36] In one contract – with the Jicarilla Apache Tribe – the phrase "outside the control of the United States" is added after "other causes." *FApp 310*. Even this provision could not be construed to bar reductions to comply with the ESA's mandate to avoid jeopardizing listed species. Such reduction is not "voluntary"– it is mandated by federal law and thus outside the Bureau's control. *See Barcellos & Wolfsen., 849 F.Supp. at 723-4, 728-9* ("mandatory compliance with federal statutes is neither unlawful nor unreasonable" and thus is authorized by the shortage clause). The Jicarilla

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shortages to be brought about by efforts to comply with the ESA, it should not be given an unduly narrow interpretation that would block efforts to avoid jeopardy to and possible extinction of endangered species.

Second, the SJC Project contracts also vest the Bureau with discretion to limit deliveries through its determination of the amount of project water available to supply to contractors. ***NRDC v. Houston*** is instructive on this point. At issue in ***NRDC*** was the Bureau's renewal of long-term water delivery contracts on the San Juaquin Project in California. Like here, the Bureau took the position in ***NRDC*** that it was contractually obligated to provide certain water from the Project's water supply to irrigators. *146 F.3d at 1126-27.* Citing ***O'Neill***, the Ninth Circuit rejected this claim, in part noting that the Bureau had discretion to reduce the project water supply available to provide irrigation deliveries, if necessary to allocate more water to endangered fish; and thus it must consult over the exercise of that discretion. ***Id.*** ***See also Barcellos & Wolfsen*** *, 849 F.Supp. at 728-9* ("the existence of a shortage and the lack of available water are two sides of the

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shortage provision does, however, demonstrate that SJC contractors and the Bureau are perfectly capable of drafting narrower language that would limit the application of the shortage provision to only certain specified situations.

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same coin," and hence Bureau may reduce available water to comply with ESA). [37]

Similarly here, SJC Project contractors do not have an unlimited and automatic right to receive their full amount of contracted water every year. They are only entitled to receive their allocated shares based on the available "project water" supply, which the contracts define as "water **available for use** through the project works." *See AApp 1183, "Definitions" (Albuquerque contract); FApp 35, "Definitions" (MRGCD contract); see also AApp 1188-89, 1192-94 (¶ ¶ 18d, 18j, 7a)(emphasis added).* The amount of project water supply "available and allocated" to them by the Bureau each year may be less than the full contract amount. *AApp 1193-94, ¶ 18j.* Moreover, the contracts provide that if "unusual circumstances arise" which change the appropriate cost allocation for fish and wildlife (which is

[37] *EPIC v. Simpson Lumber, 255 F.3d 1073 (9th Cir. 2001)* does not undermine *NRDC*, as Appellants suggest. *EPIC* confirms the Bureau's "discretion to decrease the total supply of water available for sale and thereby to decrease the amount of water granted in the renewed contracts," but says that *NRDC* "did not suggest. . . that once the renewed contracts were executed, the agency had continuing discretion to **amend** them at any time to address the needs of endangered or threatened species." *255 F.3d at 1080-81 (emphasis added).* Plaintiffs here have never argued the Bureau should "amend" any existing contracts – instead, the existing contracts provide the Bureau discretion to alter contract deliveries if necessary to avoid jeopardizing the minnow, including under the "shortage" and "available project water supply" provisions.

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paid by the United States, not contractors), the Bureau will modify operation and maintenance costs appropriately. *AApp 1189 (¶ 7b); FApp 41 (¶ 12h).*[38]

Thus, a careful review of the SJC contracts reveals that they do not preclude limited reductions in contract deliveries, where necessary to carry out the mandates of the ESA and avoid jeopardy to endangered species. As a matter of law, these contract terms vest the Bureau with discretion to: (a) determine what the available project water supply is in any particular year, and to distribute water to the contractors according to their respective proportionate shares of that supply; (b) to allocate more water to fish and wildlife functions, and adjust the proportionate costs paid by contractors accordingly; or (c) to declare a "shortage" in a given year, and deliver less water to contractors due to the shortage.

Indeed, these are legally indistinguishable contract provisions from those in cases such as ***O'Neill***, ***NRDC***, and ***Klamath***; and Judge Parker correctly construed them consistent with those decisions and the ESA. His SJC Project holdings should thus be affirmed.

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[38] The contracts also specify that a percentage of project construction costs are allocated to fish and wildlife purposes, to be paid by the United States. *AApp 1184, ¶ 3(a).* Nothing in the contract precludes the Government from increasing the amount of construction costs to be allocated to fish and wildlife purposes, and thus not be paid by contractors, if appropriate.

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CONCLUSION

For the foregoing reasons, to the extent the Court finds these appeals to be justiciable, Judge Parker's rulings should be affirmed.

DATED: Dec. __, 2002 Respectfully submitted,

_____
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CERTIFICATE OF COMPLIANCE
Tenth Circuit Rule 32(a)(7)(B) and Oct. 16th Order

I certify that the above brief complies with the requirements of Tenth Circuit Rule 32(a)(7)(B), as modified for this brief by the Order of this Court dated October 16, 2002 (allowing Plaintiffs-Appellees to file a response brief of up to 21,000 words). The above brief is proportionally spaced face of 14 points, and comprises 20,754 words as determined by Microsoft Word.

_____
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CERTIFICATE OF SERVICE

I hereby certify that on December __, 2002, I caused true and correct copies of the foregoing brief to be served via U.S. mail, postage prepaid, on the following counsel of record for the parties and amici curiae:

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