

# THE SILVERY MINNOW'S IMPACT ON NEW MEXICO

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## OVERSIGHT FIELD HEARING

BEFORE THE

COMMITTEE ON RESOURCES  
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED EIGHTH CONGRESS

FIRST SESSION

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Saturday, September 6, 2003, in Belen, New Mexico

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## **OVERSIGHT FIELD HEARING ON THE SILVERY MINNOW'S IMPACT ON NEW MEXICO**

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**Saturday, September 6, 2003  
U.S. House of Representatives  
Committee on Resources  
Belen, New Mexico**

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The Committee met, pursuant to call, at 9:00 a.m., in Belen High School, 1619 West DelGado, Belen, New Mexico, Hon. Richard W. Pombo [Chairman of the Committee] presiding.

Members Present: Representatives Pombo, Calvert, Pearce and Baca.

Also Present: Representative Wilson of New Mexico.

The CHAIRMAN. If I could have everybody take their seats, please.

The Oversight Field Hearing by the Committee on Resources will come to order.

The Committee is meeting today to hear testimony on the Silvery Minnow's Impact on New Mexico.

Before we begin I ask unanimous consent that Congresswoman Heather Wilson be permitted to sit on the dais and participate in the hearing, without objection.

I would now like to recognize Congressman Steve Pearce for some special announcements and introductions. Congressman Pearce.

Mr. PEARCE. Thank you, Mr. Chairman. Thank you for coming to this field hearing. My district is Belen. It has been nothing but gracious as we made the preparations to have this very important discussion. Today, before we get started, we are pleased to have the Belen High School ROTC Unit post the colors. Please rise and show respect as the unit presents our flag.

[Whereupon the colors were posted.]

Mr. PEARCE. Now I would like to present Luperto Garcia, Disabled American Veterans Chapter 29 of Belen; Billie F. Jones, Sr., State Commander, U.S. Navy Combat Corpsman. We also have Commander Dwight Bierner, U.S. Army, 2nd Infantry, Korea; Vice Commander Bernadette See, U.S. Women's Army Corps, Vietnam Era; Veteran's Service Officer, Dale Howard, U.S. Navy Seabee, Korean War; Ruperto Baldonado, U.S. Army, Korean War; Chad Good, U.S. Navy, Gulf War; Carl Schauer, Treasurer, U.S. Army, World War II and Korean War.

And I just want to recognize them for being here and being representative of those who have fought to keep our freedoms, those

who have fought to keep our liberties, the sacrifices that have been made throughout the generations of America. And we just recognize you and thank you.

Mrs. Corby Lynne Chavez will lead us in "God Bless America."  
[Whereupon "God Bless America" was sung.]

Mr. PEARCE. Vianca Corral from Belen High School, a sophomore, will give a Spanish invocation, that will be followed by Jim Wilburn from Belen Christian Church leading us in the English invocation.

Ms. CORRAL. Buenos dias tengan todos ustedes. Estamos reunidos hoy en este dia, dandole gracias a nuestro padre Dios por permitirnos estar aqui. Y de ese modo juntos podamos tomar decisiones que ayude a mejorar nuestro pais, nuestras comunidades, y nuestros Pueblos, y haci hacer un mundo mejor. Por eso tengamos fe en nosotros mismos que llegaremos a tener un futuro mejor, lleno de oportunidades e igualdades.

Ahora por favor me gustaria mucho que me acompanaran por un momento y juntos acercarnos a nuestro senor Dios.

Padre nuestro que estas en el cielo, santificado sea tu nombre, venganos tu reino, agase senor tu voluntad aqui en la tierra como en el cielo. Danos hoy nuestro pan de cada dia, y perdona nuestras ofensas como nosotros tambien perdonamos a los que nos ofenden. No nos dejes caer en tentacion, mas libranos de todo mal. Amen.

Rev. WILBURN. Let us pray. Almighty God, we recognize that you do have dominion over nature. We read in Genesis that you brought so much rain to this globe that it turned to a global flood. We read in Second Kings that you brought judgment to Israel with several years of drought. But by your words to Christ in the Gospels you said peace to a violent storm and it was still.

Lord, we lift this day to you. First of all we ask that you will bring rain and more water to replenish this drought-stricken state. We also lift this day to you, we will pray for those, the farmers that are in dire need for the necessary water for their crops, for the cities that are in dire need for the necessary water for the drinking of water and other necessary needs of the cities. With that, on the other hand we also lift up those who are concerned with the welfare of the wildlife in our streams and rivers of our state. We lift this day to you. We ask that you will give us guidance, direction, wisdom, and bring a resolution to this matter, as you alone will be glorified. In your precious name, in Jesus' name. Amen.

Mr. PEARCE. If you will be seated. We will recognize a couple of dignitaries we have in the audience. We have state Senator Michael Sanchez, who was my first interim Committee chairman on—Mike is standing back at the back and we recognize him, my first interim Committee chairman on water and utilities.

We have also State Representative Don Tripp, both of them represent—Don is here in the middle—both of them represent this area. We have Arthur Rodarte over here, who I spent a lot of time in the State Senate and is a good friend from up in the northern part.

Manuel Lujan is here, former Secretary of the Interior, also former U.S. Congressman.

Mr. Chairman, again, thank you for being here and thank you for bringing this important discussion to New Mexico.

The CHAIRMAN. Thank you. I'd like to, if I may, before we begin the opening statements ask former Secretary of Interior and a former colleague of ours, Mr. Lujan, if he would mind coming up and saying a few words.

Mr. LUJAN. Thank you, Mr. Chairman. Thank you for coming to New Mexico, and Congressman Calvert, and Congressman Baca. Congressman Baca is one of our own from here, we just loaned him to California for the time being, but we hope that you come back to us and to our New Mexico delegation.

Mr. Chairman, thank you very much for agreeing to have this meeting here. It's very vital to New Mexico. You know, I was in the Congress at the time that the Endangered Species Act was passed, but to tell you the truth, I really thought it was, you know, to save elephants and tigers, and kind of things like that. And, of course, it turns out that it's not quite that way, it was probably one of the more contentious things that I had to deal with when I was in the cabinet with the spotted owl and all of those different things.

I really do think that we need some balance. The Endangered Species Act ought to show that there is a balance between, of course, the endangered species and human beings. The judge issued a ruling here that, you know, interpreting the Endangered Species Act that had to take water from human beings and give it to the river for the endangered species, and so maybe, I think that perhaps what is in order and what advice, if I might take that privilege, it would be that there needs to be a balance to take into consideration, of course, the endangered species, you don't want to completely ignore that, but on the other hand you got to take economic interests and, of course, the interests of the human beings.

So thank you very much for holding the hearing. You'll find that it's a very contentious issue here in New Mexico because the livelihood of people, of course, depend on it. Thank you very much, Mr. Chairman.

The CHAIRMAN. I now recognize myself for an opening statement.

**STATEMENT OF THE HON. RICHARD POMBO, CHAIRMAN,  
COMMITTEE ON RESOURCES, AND A U.S. REPRESENTATIVE  
FROM THE STATE OF CALIFORNIA**

The CHAIRMAN. I want to thank you for the opportunity to bring the House of Representatives' Committee on Resources to the State of New Mexico. I look forward to listening and gaining greater insight from the witnesses today and from my congressional colleagues on how the Endangered Species Act is being implemented by Federal agencies and interpreted by the courts specific to the Middle Rio Grande River. I have great confidence that the witnesses who are here will be more than successful in presenting New Mexico's views on this issue.

For nearly a decade Congress has worked to bring amendments to the Endangered Species Act to conserve both species and the rights and needs of Americans. During this same time designation of critical habitat under the Endangered Species Act has involved into a source of controversy. Due to the vigorous mandates required under the current act, specifically critical habitat designations, many think the program is unworkable.

Judicial orders and court-forced settlement agreements have left the United States Fish and Wildlife Service with limited ability to prioritize its species recovery programs and little or no scientific discretion to focus on the species and the greatest need of conservation.

The Administration acknowledges the court orders and mandates often result in leaving Fish and Wildlife Service with almost no ability to confirm scientific data in its administrative record before making decisions on listing and critical habitat proposals.

In the wake of this decade-long trend, in the current administration supported by the previous Clinton Administration, it is recognized that the critical habitat designations provide the majority of listed species and proposed to be listed species, little, if any, additional protection.

Since the last authorization of the Endangered Species Act expired in 1993, there has been great optimism and hope that we would be able to amend the Act and implement a process based on sound science and common sense approaches to species conservation and recovery, goals similar to those that the 1973 Congress envisioned when they originally adopted the law.

Congress intended for this law to be used to prevent the extension of species and to increase the number of those in need before triggering fed regulation. It never dreamed that it would turn into a tool used by vocal and well-funded special interest groups seeking to impose court ordered Federal land and water use controls on the majority of Americans. They also never envisioned the widespread injunctions, economic meltdowns and social dislocations that many of you are now facing here in New Mexico as a result of the silvery minnow legal actions.

I realize amendment and reauthorization of the Endangered Species Act has dragged on with little success since it expired in 1993. This is not for a lack of trying, and Congress has come close to reaching agreement a number of times but, unfortunately, some groups would rather play politics and benefit from the current state of dislocation under the act, they would have to agree what is best for the species.

It is this selfish attitude that has resulted in the uncertainty New Mexico is facing with the silvery minnow. However, New Mexico is not alone in this uncertainty. It is happening throughout the U.S. because of the flaws in the Endangered Species Act. Recognizing that this is not just a regional problem, the best and only way to fix the Act is to amend the law for all Americans, with equal application across the country. Such an approach to amending the Endangered Species Act also maintains the broad stakeholder support critical to reaching a majority consensus in Congress.

The House Committee on Resources is here today as a result of the request of the New Mexico delegation members, Mr. Pearce and Ms. Wilson. We are before you today to hear from you and receive your ideas on what we, as your elective representatives in Washington, can do to improve the implementation of the Endangered Species Act.

Again, I thank you for having us. And before I recognize the next member I would just like to conclude by saying that this is an



official hearing of the Congress of the United States and we require the audience and the members to, to have a certain decorum during the hearing. That does involve no reaction or outbursts from the audience. We do have a strict time limit that we place all the witnesses under. So we, anyone that has signs or tries to disrupt the hearing in any way will be asked to stop in order to maintain the decorum that is necessary in the House of Representatives.

[The prepared statement of Chairman Pombo follows:]

**Statement of The Honorable Richard W. Pombo, Chairman,  
Committee on Resources**

Good Morning. Thank you for the opportunity to bring the House of Representatives Committee on Resources to the State of New Mexico. I look forward to listening and gaining greater insight from the witnesses today, and from my Congressional colleagues, on how the Endangered Species Act is being implemented by federal agencies and interpreted by the Courts specific to the Middle Rio Grande Region.

I have great confidence that the witnesses who are here will be more than successful in presenting New Mexico's views on this issue.

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For nearly a decade, Congress has worked to bring amendments to the Endangered Species Act that conserves both species and the rights and needs of Americans.

During this same time, designation of critical habitat under the Endangered Species Act has evolved into a source of controversy. Due to the rigorous mandates required under the current Act, specifically critical habitat designations, many think the program is unworkable. Judicial orders and court-forced settlement agreements have left the United States Fish and Wildlife Service with limited ability to prioritize its species recovery programs and little or no scientific discretion to focus on those species in greatest need of conservation.

The Administration acknowledges that court orders and mandates often result in leaving the Fish and Wildlife Service with almost no ability to confirm scientific data in its administrative record before making decisions on listing and critical habitat proposals. In the wake of this decade-long trend, the current Administration, supported by the previous Clinton Administration, recognize that critical habitat designations provide the majority of listed species and proposed to be listed species little if any additional protection.

Since the last authorization of the Endangered Species Act expired in 1993 there has been great optimism and hope that we would be able to amend the Act and implement a process based on sound science and common sense approaches to species conservation and recovery. Goals similar to those that the 1973 Congress envisioned when they originally adopted this law.

Congress intended for this law to be used to prevent the extinction of species and to increase the number of those in need before triggering federal regulation (restrictions). It never dreamed that it would turn into a tool used by vocal and well-funded special interest groups seeking to impose court-ordered Federal land and water use controls on the majority of Americans.

They also never envisioned the widespread injunctions, economic meltdowns and social dislocations that many of you are now facing here in New Mexico as result of the silvery minnow legal actions.

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I realize amendment and reauthorization of the Endangered Species Act has dragged on with little success since it expired in 1993. This is not for a lack of trying and Congress has come close to reaching agreement a number of times. But unfortunately, some groups would rather play politics and benefit from the current state of dislocation under the Act then have to agree what is best for the species. It is this selfish attitude that has resulted in the uncertainty New Mexico is facing with the silvery minnow.

However, New Mexico is not alone in this "uncertainty." It is happening throughout the U.S. because of the flaws in the Endangered Species Act. Recognizing that this is not just a "regional" problem, the best and only way to fix the Act is to amend the law for all Americans with equal application across the country. Such an approach to amending the ESA also maintains the broad stakeholder support critical to reaching a majority consensus in the Congress.

The House Committee on Resources is here today as a result of the requests of its New Mexico Delegation Members, Mr. Pearce and Ms. Wilson. We are before you today to hear from you and receive your ideas on what we, as your elected representatives in Washington, can do to improve the implementation of the Endangered Species Act.

Again, thank you for having us and I would at this time like to recognize Mr. Baca.

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The CHAIRMAN. I'd like at this time to recognize my friend and colleague from California, Mr. Baca.

**STATEMENT OF THE HON. JOE BACA, A REPRESENTATIVE IN  
CONGRESS FROM THE STATE OF CALIFORNIA**

Mr. BACA. Thank you very much, Mr. Chairman. Bien venidos a todos. It's an honor to be here this morning in my home town, where I was born not too many years ago. And it wasn't too many years ago, although I may look a little bit older, but it wasn't too many years ago. But it's nice also to see many of my relatives that are here with me, and I see Rupert out here, and Flora that's out here. Mela, one of the custodians that's out here, and I see, there's nothing wrong with being a custodian. I was a custodian before, and look at that, I'm now a United States congressman. So a lot of things can happen to you as well. But it's nice to be here and visit some of my relatives and to be back in the State of New Mexico.

And, of course, I feel I have the responsibility of being a guardian angel to Belen, otherwise my family members who live here may not claim me. So I have that responsibility, and that's why Heather Wilson and Steve Pearce, a lot of times I come here and try to do as much as possible for this area, because this is where a lot of my roots are, and this is where I grew up in the summers. My parents always wanted to make sure that I knew where I was born and where I came from. And it's nice to be here.

Never dreamed that I would be coming back here and having a hearing here. I believe that this is the first time that a congressional hearing has ever been held in Belen, so it's historical in terms of what's happening here today dealing with this particular problem. And I'm glad to participate.

I will curtail some of my comments, as the Chair covered a lot of the aspects of it, but I look forward to participating in what I hope will be a productive hearing to help solve some of the dilemmas that have faced this area for a long time. And I say for a long time because during the summers I used to come out here and bale hay, so I know what it's like in reference to the farmers and the hay and the drought, and needing the hay as well. Let me tell you, after baling hay I said that's not the kind of job that I want, I want to do something else. It's hard work, but it's good work too.

The conflict, protection of the endangered species and the needs of the community, are nothing new to myself or to Ken Calvert from California. In our districts in California we have the endangered Delhi sands flower-loving fly, recently named the Giant Delhi sands flower-loving fly. This is an endangered species, you know, a fly that you see flying around that we're now trying to protect. And I think I was on NBC at one time and I happened to swat a fly, and I don't know if it was endangered species or not. But—and

then I was afraid that a lot of the cattle and horses, and others, if they swatted the fly, what would happen to them too in terms of the fly. But these are the kind of things that we've got to deal with as well.

In one of the fastest-growing regions in the country where 76 percent of the population is minority, we have had to stall commercial development to preserve this fly. Now they're talking about the possibility of moving 5.8 million pounds, or 120 truckloads of rare sand, in order to turn it into a habitat.

To me, this goes beyond what the ESA was created to do. And I think that's why we're at this hearing in terms of ESA and the establishments of the endangered species. We also have to protect the endangered kangaroo rat for Fish and Wildlife that has interfered with the businesses, military bases, water rights, water companies.

I understand that we have a duty to protect the endangered animals and insects from extinction, but, as public servants, we also have a duty to protect the welfare. And I state, we have the responsibility to protect the welfare of the people who make up our community. Their needs should come first and foremost. And when you talk about water and supplies in the states like New Mexico that already face drought, limited water supplies, this couldn't be greater.

I am confident, through the leadership represented here today and the guidance of this Committee, that we can meet in the middle to create a balance. As Lujan indicated earlier, the plan that benefits the state farmers, the Pueblo Indians, and other citizens, and increases the state water supply, and the numbers of the silvery minnow.

I look forward to a constructive dialog today as we listen to the witnesses and their valuable points of view. Hopefully, it will be a fair and objective hearing in listening to everybody's point of views in reference to the problem and, hopefully, we can solve the problem. Because it is a problem to the farmers, it is a problem in terms of drought in this area. We've not had any water. As I talked to relatives in the area, and as we look at water and the needs between the Pueblo Indians as well, and the Indians that are affected and the water that flows in this area, we need to find a happy medium for our farmers.

And I know that a lot of the flow that comes through when you're harvesting. You've got a certain time you have to harvest your crop and if you're not releasing a lot of that water to a lot of them, then you can't harvest alfalfa or other crops. So I understand that.

So with that, I want to thank the Chairman for having this hearing here in my home town of Belen, where I was born.

[The prepared statement of Mr. Baca follows:]

**Statement of The Honorable Joe Baca, a Representative in Congress from the State of California**

Thank you, Mr. Chairman.

Buenos Dias. It is an honor to be here this morning, in my hometown of Belen, New Mexico. Even though I represent the 43rd District of California, I was born in this town not too many years ago. And I feel that I have the responsibility of being a guardian angel to Belen, otherwise my family members who live here may not claim me. I have been looking forward to participating in what I hope will be

a productive hearing today to help solve a dilemma that has faced this area for a long time.

The conflict between the protection of endangered species and the needs of communities is nothing new. In my district in California, we have the endangered Delhi Sands flower-loving fly (recently named the Giant Delhi Sands flower-loving fly). In one of the fastest growing regions in the country, where 76% of the population are minority, we have had to stall commercial development to preserve "the fly." Now, they're talking about possibly importing 5.8 million pounds, or 120 truckloads, of rare sand to turn it into fly habitat. To me, this goes way beyond what the ESA was created to do.

Also, protection of the endangered Kangaroo Rat through the Fish & Wildlife Service has interfered with the business of a military base, and the water rights of water companies.

I understand that we have a duty to protect endangered animals and insects from extinction; but as public servants, we also have a duty to protect the welfare of the people who make up our community. Their needs should come first and foremost. And when you talk about water supplies in a State like New Mexico that already faces drought and limited water supply, these needs couldn't be greater.

I am confident that through the leadership represented here today, and the guidance of this Committee, we can meet in the middle to create a balanced plan that benefits the state's farmers, Pueblo Indians, and other citizens; and increases the state's water supply and the number of silvery minnow. I look forward to a constructive dialogue today as we listen to the witnesses and their valuable points of view.

Thank you.

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Mr. BACA. And for the record, I'd also like to submit a statement by Congressman Udall, that could not be here today, but asked that if I would submit for the record his statement. He had a conflict in terms of scheduling and had to be somewhere else, otherwise Congressman Tom Udall would have been here. So, for the record, I'd like to submit his statement. Thank you very much, Mr. Chairman.

The CHAIRMAN. Without objection, it will be included in the record.

[The prepared statement of Mr. Tom Udall follows:]

**Statement submitted for the record of The Honorable Tom Udall, a Representative in Congress from the State of New Mexico**

For several weeks now, there has been an ongoing collaborative process of negotiations occurring here in New Mexico regarding the current water situation in the Rio Grande Basin. Several of the same groups that are named or interested parties in the recent Tenth Circuit opinion have been actively engaged in these negotiations. We are at a delicate point in these negotiations and we should all hope a local settlement can be achieved.

Future water decisions for New Mexico require that collaboration continue at the local level so that we can address and resolve the core issues that affect the Rio Grande. Sustainability of the river and our water supply depends upon local involvement and solutions, rather than intrusive intervention by the federal government.

As we all know, the Tenth Circuit Court of Appeals upheld the Federal District Court's opinion determining that the Bureau of Reclamation "has the discretion to reduce deliveries of water" to comply with the Endangered Species Act." This affirmation rekindled the passionate debate about how we use our water resources, about the sustainability of our current water practices, and whether we are using our water wisely.

This is a very difficult situation for everyone involved. Some have painted the situation as a crisis, as a people versus fish issue. Others state that this "crisis" should be taken as an indication that it is time to recognize the bottom line of the matter: water is a scarce commodity in New Mexico and should be treated accordingly.

Our water resources are over-allocated, and population growth is stretching these precious supplies to the limits. This situation is compounded by a water infrastructure that is inefficient, outdated, and insufficient to meet our current needs. We can no longer overlook the importance of water use and conservation plans.

In an effort to find a common-sense approach to sustainable water management in New Mexico and the west, I engaged in extensive discussions with the major

stakeholders in the San Juan/Chama water dispute, and shared my concerns directly with United States Department of Interior Secretary Gale Norton, the person ultimately responsible for enforcing the 10th Circuit ruling.

As a result of these conversations, I introduced The Middle Rio Grande Emergency Water Supply Stabilization Act of 2003, a bill that will address our outmoded water principles and practices and help ensure sustainable water management and conservation in New Mexico.

My bill addresses the core, crucial issues that underlie New Mexico's water problems. First, my bill authorizes the Secretary of the Interior to contribute to a long-term solution for the Middle Rio Grande River in the State of New Mexico by preventing, reducing or eliminating wasteful depletion of waters. This would entail the establishment of a water supply stabilization program at the local level. Under this program, the Secretary would provide financial and technical assistance to promote and encourage the adoption and implementation of water conservation measures within the Rio Grande Basin in New Mexico.

To accomplish this, the Secretary would enter into cost sharing and other agreements with the State and other entities including organizations, municipalities, Indian Tribes and Pueblos, and individuals, who use agricultural or municipal and industrial water from the Rio Grande River and its tributaries in New Mexico, including water supplied directly or indirectly from the Middle Rio Grande Project or the San Juan-Chama Project. These collaborative agreements will result in localized decisions regarding sustainable water management along the Rio Grande.

Second, the bill encourages the implementation of water conservation measures that will improve water quantity and water quality conditions needed to support a sustainable, living river environment within the Middle Rio Grande Basin, and will result in conservation, recreation, and other public benefits.

Third, the bill sets a goal to achieve, within three years of the date of enactment of this legislation, quantifiable improvements in irrigation efficiencies through the incorporation of measures such as lining canals and ditches, and the use of low-flow or drip irrigation systems and other modern hydrological technologies.

Fourth, the bill directs the Secretary to cooperate with the State of New Mexico, water use organizations, and affected landowners to develop and implement a comprehensive program to identify, remove, and control salt cedar vegetation in the flood plain of the Rio Grande River and its tributaries, and to replant and re-establish native vegetation if appropriate.

Fifth, the bill authorizes grants for basic research on technological solutions for accessing new sources of water including, but not limited to, desalinization, and the purification of brackish and other types of unpalatable water. Furthermore, the bill authorizes grants for basic research to increase water efficiency. For example, Los Alamos National Labs, located in my district, is working to improve technology so that less water will be required in manufacturing computer microchips. And, the bill authorizes funds to conduct studies to quantify the water needs, requirements and rights of tribes and pueblos in the Middle Rio Grande Basin.

Finally, the bill confirms the original intentions of Congress as set forth in the Colorado River Storage Project Act of 1956, and the San Juan-Chama Project Act 1962. These Acts set forth the principle purposes underlying the furnishing of federal water supplies in New Mexico, including water for municipal, domestic, and industrial uses, and for the conservation of, and I quote from the original authorizing legislation, "the scenery, the natural, historic, and archeologic objects, and the wildlife" on lands affected by the project, and "to mitigate losses of, and improve conditions for, the propagation of fish and wildlife."

We are in the midst of a very serious drought, and in New Mexico and across the west. Our water resources are over-allocated, and an exploding growth in population is stretching these resources to the limits. This situation is compounded by a water infrastructure that is inefficient, outdated, and insufficient to meet our current needs.

My bill deals with these realities and many other crucial issues. It sets up incentives to conserve our water resources and develop collaborative solutions at the local level. It restores and protects the Rio Grande River and the surrounding Bosque, and encourages technological solutions for new sources of water and methods to harness such technology to increase water efficiency.

Considering the above, if we do not focus collaboratively and make every effort possible to conserve our water, I believe that New Mexico, and similarly situated western states, will continue to confront similar, if not worse, water scarcity problems indefinitely. We need greater and more conscientious efforts on the part of water users to conserve this precious commodity. And, these users must become more accountable for water waste. My bill provides the incentives to conserve our

water resources to ensure that all New Mexicans will have water to use in the future.

We need to act now to ensure sustainable water management and conservation in New Mexico. We need greater and more conscientious efforts on the part of water users to conserve this commodity. The health and sustainability of the Rio Grande depends on the collaborative efforts of us all, concentrated not at the federal level but here at home, where the effects of our water dilemma is felt the greatest.

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The CHAIRMAN. I'd like at this time to recognize Congressman Ken Calvert, who is the Chairman of the Water and Power Subcommittee.

**STATEMENT OF THE HON. KEN CALVERT, A REPRESENTATIVE  
IN CONGRESS FROM THE STATE OF CALIFORNIA**

Mr. CALVERT. Thank you, Mr. Chairman. And I certainly commend you for holding this hearing and appreciate your long-standing interest in improving the Endangered Species Act and protecting water rights. I'm pleased to be here in New Mexico with my friends and colleagues. It's certainly good to see Manuel Lujan. He's not only a great son of New Mexico but a great patriot, a great American, and I'm sure you're very proud to call him your own.

And I, you know, these hearings are about learning new things, and I learned something on the way over here, that this is Joe Baca's hometown. So that's great. Joe's district is right next to mine in southern California.

As the House Water and Power Subcommittee Chairman, I know firsthand about the role water plays in safeguarding our environment, cultures and tradition, and certainly our food supply and our economy. However, we've often found in the west, and elsewhere in the nation, that in many cases water supplies can't meet multipurpose demands, particularly in times of drought. For this reason, many communities, like Albuquerque and others, have sought blueprints of certainty in meeting water needs. They assume their citizens will get the water they paid for when they created those long-range plans.

Well, no good deed goes unpunished. They were proven wrong this summer when the Tenth Circuit Court of Appeals ruled that non-native water, long-standing Rio Grande water contracts, could be used for environmental regulations that were never before on the table. A shock wave of uncertainty hit the western water world, not just in New Mexico, but throughout the western United States.

This ruling primarily means that the Endangered Species Act, for the first time, takes precedence over urban water supplies that never would have been used for the silvery minnow uses in the first place. The ruling essentially ignores the nation's fundamental premise of private property freedoms by exerting Federal control over locally controlled watery sources.

There's little wonder that this precedent makes many uneasy in my region of southern California, who are left wondering what else is going to threaten an already uncertain water supply situation on the Colorado river. They have witnessed, in the Endangered Species Act, impacts on Klamath farmers, then on Albuquerque and Santa Fe urban water users.

And my region, as Joe Baca stated, currently has endangered Steven kangaroo rats, Delhi sand flowers loving flies, and many

wonder what the next target will be. And be certain of this, there will be another target.

The court's opinion also speaks volumes about the state of the Endangered Species Act. Nearly everyone agrees with the need for endangered species protection, but it seems that more than money is being spent on litigation and waging battles in the courts and on protecting species. The only good thing I can think of in this regard about the current Tenth Circuit determination, that at least it makes our Ninth Circuit in California look a little bit better.

No one ever intended this law to become the full employment act for lawyers and environmental extremists, but I'm concerned that it's going to go in that direction. It also says that long years of collaboration could be hijacked by someone on the fringe not happy with the initial outcome.

It's time for a fresh look at whether the Endangered Species Act can be carried out more effectively in a cooperative and scientific manner. This hearing is a good start in that direction. I certainly look forward to hearing from today's witnesses and working with my colleagues to resolve the issue before us today. Thank you very much.

[The prepared statement of Mr. Calvert follows:]

**Statement of The Honorable Ken Calvert, a Representative in Congress  
from the State of California**

I commend you, Mr. Chairman, for holding this hearing and appreciate your interest in improving the Endangered Species Act and protecting water rights. I'm pleased to be here in New Mexico with my distinguished friends and colleagues.

As the House Water and Power Subcommittee Chairman, I know firsthand about the role water plays in safeguarding our environment, our cultures and tradition, our food supply and our economy. However, we have often found in the west—and elsewhere in the nation—that in many cases water supplies can't meet growing multi-purpose demands, particularly in times of drought.

For this reason, many communities—like Albuquerque and others—have sought blueprints of certainty in meeting water needs. They assumed that their citizens would get the water they paid for when they created these long-range plans.

They were proven wrong this summer. When the 10th Circuit Court of Appeals ruled that non-native water and longstanding Rio Grande water contracts could be used for environmental regulations that were never before on the table, a shockwave of uncertainty hit the western water world. The ruling primarily means that the Endangered Species Act—for the first time—takes precedence over urban water supplies that never would have been used for silvery minnow uses in the first place.

This ruling essentially ignores our nation's fundamental notion of private property freedoms by exerting federal control over locally controlled water resources. It's little wonder that this precedent makes many uneasy in my region of southern California who are left wondering what else is going to threaten an already uncertain water supply situation on the Colorado River. They have witnessed the Endangered Species impacts on Klamath farmers, then on Albuquerque and Santa Fe urban users, and my region currently has endangered kangaroo rats and Delhi Sands Flower-loving flies, so many wonder who the next target will be.

The Court's opinion also speaks volumes about the state of the Endangered Species Act. Nearly everyone agrees with the need for endangered species protections, but it seems that more money is being spent on litigation and waging battles in the courts than on protecting species. No one ever intended this law to become the full employment act for lawyers and environmental extremists, but I'm concerned that it's going in that direction. It also says that long years of collaboration can be hijacked by someone on the fringe not happy with the initial outcome. It's time for a fresh look at whether the Endangered Species Act can be carried out more effectively in a cooperative and scientific manner. I support the efforts of the New Mexico Delegation to bring closure to the silvery minnow issue, but a longer term ESA fix may be necessary. This hearing is a good start in that direction.

I look forward to hearing from today's witnesses and working with my colleagues to resolve these issues before us today.

The CHAIRMAN. I'd like to remind our audience that the expression of agreement or disagreement with any of the statements that are made is out of order in terms of the decorum of the House.

I'd like to now recognize a very valuable member of the Committee, Congressman Steve Pearce, for any statement he may have.

**STATEMENT OF THE HON. STEVEN PEARCE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW MEXICO**

Mr. PEARCE. Thank you, Mr. Chairman. This issue is extremely important. We have people who've driven here from Kansas, Arizona, Texas, Colorado and, of course, here in New Mexico. We all understand in the west that water is about families, it's about a way of life, it's about our culture, it's about our jobs. Water is life in the west. It gives value to our properties. And what the Tenth Circuit Court did was say that for one single species, all other species have to give up their rights.

The Tenth Circuit did not mind using waters that were non-native to keep a species alive. If that's the case, then river water anywhere in America can be shipped anywhere else to keep any single species alive.

Mr. Chairman, as I look at a 2000-year summary of water and rainfall in New Mexico, we see periods of extreme droughts. During the 13th century and the 16th century there were periods exceeding 10 years. The Rio Grande has been dry for periods of 10 years running. In our own lifetimes we've been witness to an extremely wet period. The 1950s, I can remember the droughts of the 1950s, and they did not reach the extremes of the droughts that we've seen in history. The minnow stayed alive during all of those times of drought, of dryness.

We have a system of reservoirs to store water in this state, four reservoirs. The Rio Grande runs basically down the center of our state, but four reservoirs up north in New Mexico, they were built to store water so that in periods of drought we would be able to provide water to our farmers along the acequias and along the river.

I witnessed, in my last year in the legislature in 2000, the judge's order which released 50 years' worth of water in storage during 1 year to keep the minnow alive. That's like working your whole life and spending your whole bank account for nothing, because that water is gone. During my last visit to the state here in August there were four-wheel tracks where people were driving their ATVs in the river bed. We cannot sustain the flows that the judges and that the extreme environmentalists said had to be there. And we've given up 50 years' worth of storage in the process.

Mr. Chairman, it is time that we consider humans in this equation. The Supreme Court has said that water is a private property right. The Constitution of the United States says that, on the Fifth Amendment, that if the government takes private property rights it will compensate those people that it took private property rights from. I live in this state and I do not know one person who was compensated last year, either irrigators of the City of Albuquerque for the water that was taken, I have not seen anyone talking this year about the payments that are going to be made for the loss of farms, for the loss of livelihoods.



The Native Americans in New Mexico have lived in periods of drought and greater rain throughout history. The Spanish came through 400 years ago. New Mexico has 400 years of cooperatively working to share a shortage, and now the Tenth Circuit Court, Judge Parker, say that it's got to go for one purpose. I don't think that's right. I don't think that's fair.

Mr. Chairman, I thank you for holding these hearings because we must look the people in the eye who are talking about taking the water from. There are people that are going to testify today who had families in this valley for 400 years. You'll hear from the Native Americans who've been here even longer. The Constitution is extremely clear that the Federal Government only has those rights given to it expressly, that all other rights are reserved from the states. Water is a state issue because water is not given to our Federal Government. Our Constitution says so.

I've submitted a bill, Mr. Chairman, that should be coming before the Committee, which simply says the Federal Government can't take water to enforce any law; that water belongs to the state and to the people of the state. Water belongs to the people, and I think we're going to hear the compelling stories today of the loss that's being incurred because we have let our endangered species get out of bounds.

Mr. Chairman, I applaud you and thank you for being here.

The CHAIRMAN. Thank you.

[The prepared statement of Mr. Pearce follows:]

**Statement of The Honorable Stevan Pearce, a Representative in Congress  
from New Mexico**

Thank you, Mr. Chairman. I appreciate your willingness to hold this hearing today, and to come see for yourself the impact the recent ruling by the 10th Circuit Court of Appeals is having in New Mexico. As you can see by the impressive turnout today, New Mexican's are seriously concerned about having their water taken away from them.

If there are no objections and with your permission, I'd like to include in the record a copy of the videotape from this morning's rally.

Mr. Chairman, it is terribly disappointing that both Governor Richardson and Mayor Chavez declined the Committee's offer to testify today. This is the most important issue facing New Mexico, and will continue to be a problem into the foreseeable future. It would have been nice to have Governor Richardson and Mayor Chavez here, however, we are going to move forward with this public dialogue, and try to find solutions to resolve our water crisis. The only way we are going to resolve this issue is by working together to find a solution. We will not find a solution by leaving out those who are directly impacted, and we will definitely not find a solution through litigation, which is divisive, and takes away private property rights from the rightful owners.

There is no justice, common sense or collaboration through lawsuits, many of which are filed by those who have no claim to the water, and who won't lose farms, ranches and homes from the courts ill-conceived rulings, rulings that take away water rights—the lifeblood of New Mexico. Federal judges who make these decisions are also not directly impacted. They never have to see the consequences of their decisions. They don't see the heartbreaking decisions made by farmers and ranchers like Corky Herkenhoff, who decided to idle more than 1/3 of his land because of the uncertainty of receiving the water they have a right to use.

There is no common sense when federal judges insist on New Mexico releasing water that took us 50 years to store, particularly when the West and New Mexico are in the middle of a severe drought. Releasing water at the rate of 300 cubic feet per second is not sustainable. According to a study done for the State Engineer, the Middle Rio Grande experiences a drought about once a century, and experienced mega-droughts in the 13th and 16th Centuries. Since the 16th Century New Mexico has experienced six droughts that lasted for more than 10 years, (11, 12, 15, 15, 17, 21 year durations) the longest being 21 years. Both the 13th and 16th Century

droughts correlate with known abandonment of pueblos and cultural shifts by the Native Americans living in the region. Those droughts saw the Middle Rio Grande go dry for 10 year periods, yet the silvery minnow survived those droughts.

We don't know how long the current drought will last. We do know that even if we come out of the drought tomorrow, New Mexico will be faced with a drought in the future. It should be left to New Mexicans to decide how to allocate the water within the state. This is guaranteed to them by the Fifth and Tenth Amendments to the Constitution. New Mexico, and not the Federal government, owns the water rights in the state, and we should have the power to decide when and how to use the water we own.

My bill, H.R. 2603, does just this Mr. Chairman. It guarantees that those who hold the water rights can exercise those rights. It returns primacy to the states, where it belongs. It protects the Fifth and Tenth Amendments of the Constitution. It protects Native American water rights. My bill is a step in the right direction because it once again returns to the states the right to allocate and adjudicate water rights, instead of having those water rights usurped by federal judges.

Mr. Chairman I appreciate your concern and interest in this issue, and the time you have taken away from your family to be here. Together we can find a solution for this problem. I look forward to working with you and other Members, my constituents and the citizens of New Mexico to resolve this problem.

Thank you. I yield back the balance of my time.

The CHAIRMAN. I'd like to now recognize Congresswoman Heather Wilson for any statements she may have.

**STATEMENT OF THE HON. HEATHER WILSON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW MEXICO**

Mrs. WILSON. Thank you, Mr. Chairman, and thank you very much for coming here today. Joe and Ken thank you for coming. Joe, I know this is your hometown and you like to get back here and we're very, very glad to have you here.

Steve, thank you for hosting this today and for your hard work in making this possible.

Senator Pete Domenici asked me to submit a written statement on his behalf, and with unanimous consent I'd ask that that be added to the record.

The CHAIRMAN. Without objection, we'll include it in the record.

Mrs. WILSON. Thank you, Mr. Chairman.

[The prepared statement of Senator Domenici follows:]

**Statement of The Honorable Pete V. Domenici, a U.S. Senator from the State of New Mexico**

I thank the House Resources Committee and Chairman Pombo for holding this hearing in New Mexico on one of the most contentious and significant issues in my home state. I also extend my regards to Congressman Pearce, who has done a fine job representing Southern New Mexicans over the past year. Further I would like to give special thanks to Congresswoman Wilson for attending this hearing and introducing my statement. Also let me acknowledge Congressman Udall for his attention to this matter.

Mr. Chairman, New Mexico is facing ever increasing pressures on its water supply. These pressures come from within—increasing population, changing demographics—and from without—lingering drought, federal Endangered Species Act requirements, etc. Indeed, the silvery minnow is only one of a host of factors that have put farmers and cities and pueblos in the predicament we face today. I believe that it is important that we recognize the complexity of the problems that we New Mexicans face in order to best come to productive solutions.

One of the most publicized and discussed of these factors is the silvery minnow in the Middle Rio Grande. Indeed, it is the subject for which this hearing is being held. I've been involved with this issue since long before the minnow was even listed as an endangered species. I voted for the ESA and its subsequent amendments almost 30 years ago. I don't think anyone can reasonably argue against the intent of

the ESA as a just one. But I don't think the latter day implementation of the ESA is what Congress intended either. We envisioned this Act as a means to protect and recover species on the brink of extinction because bio-diversity is a vital concern. However, we did not envision the ESA as a tool to exert an all encompassing power and control over state water supplies and public lands. This is the sort of thing that has occurred on the Rio Grande with the silvery minnow.

The minnow situation came to a head in June with the release of the 10th Circuit's 3-judge panel decision affirming a ruling that essentially gave ESA precedence to contracts established prior to its adoption and granted the Bureau of Reclamation a form of discretion that it never had before. While an appeal to the full 10th Circuit is ongoing, I have taken steps towards mitigating the opinion's effects on New Mexico. I introduced language on the Senate Energy and Water Appropriations bill that will do the following two things: (1) prohibit the federal government from involuntarily taking inter-basin transfer water for ESA purposes on the Rio Grande; and (2) mandate the implementation of the 2003 U.S. Fish and Wildlife Biological Opinion's reasonable and prudent alternatives as the foundation for the minnow recovery plan. The language will put a ceiling on how much water can be used to recover the minnow without preventing the appeal to the 10th Circuit.

I hope that New Mexico can take this latest adversity and turn it into an opportunity. The problems created by attempting to save the minnow highlight the growing need for New Mexico to better manage its water and move forward with modernization and adjudication efforts. Even should the minnow be fully recovered and de-listed, pressures will continue to mount against New Mexico's water unless we take active steps towards addressing them.

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Mrs. WILSON. I think today's hearing is about protecting water rights it's a very simple and straightforward issue; that's what today is about. And it's about making very clear that I believe the U.S. Congress has already acted and said very clearly that the Tenth Circuit Court decision was wrong. It was wrong on what the law is and it highlights the need to clarify the law for it.

The Endangered Species Act does not authorize the Federal Government to take water it doesn't own. It does not authorize the seizing of water without paying for it. The water in the Rio Grande, particularly the San Juan-Chama project, belongs to the cities and the people, and the ranchers and the farmers that worked in the 1960s to bring that water to New Mexico.

The Endangered Species Act was never intended to apply to non-native water. This is not even Rio Grande water. This is water from the other side of the Continental Divide, brought to the Rio Grande to the Heron Reservoir, through 26 miles of tunnels built with Federal money paid for by cities up and down this state, and it's not native to the Rio Grande.

If they can take water without paying for it, if they can take water that's not even native to the Rio Grande, then they can take anybody's water. They can take water from Missouri that is trucked in, they can take this water and where every single one of us go down to the river and pour it in. That wasn't what the law is for and it needs to be clarified.

The House has now acted and clarified, there's an overwhelming voice vote in the House of Representatives to an amendment that Steve Pearce and I put on the Energy and Water Appropriations bill. And that bill, that amendment says the water from the Middle Rio Grande project, and from the San Juan-Chama project, that includes all of the irrigators and all of the water purchased by the City of Espanola, to Taos, Los Alamos, and Albuquerque, Belen and Los Lunas, cannot be used for the purpose of complying with the Endangered Species Act.

In the Senate the, our two senators, Senator Bingaman and Senator Domenici, have comparable legislation to address this issue and to override an incorrect decision by overreaching courts.

I don't think today is about whether we'll recover the silvery minnow or whether we want to protect the endangered species, because we all do. In fact, working with our senators over the last 5 years, we've got 24 million dollars in Federal funds for the restoration of the Rio Grande, for the eradication of salt cedar, the improvement of efficiency of our irrigation system and for the recovery of the silvery minnow in a kind of ground-breaking project operated by the City of Albuquerque at the zoo to breed the silvery minnow and restore the endangered species. And we're thinking outside of the box on our water future, on research and development, on desalinization and of brackish water, on interstate utility law. It is easier to put in a natural gas pipeline across state lines than it is to put a water pipeline in across state lines.

It's not about whether we will recover this species, that's not the issue here. But the reality of today is that none of all these efforts of conservation matter, none of them matter if the Federal Government can seize our water rights and take our water without paying for it. We can never plan for our water future if they can do that.

We can't underestimate the importance of the issues we're addressing today. San Juan-Chama project water is planned 70 percent of the water supplied to the City of Albuquerque; 30 years from now if we don't have that water, when you turn on your tap there won't be any water coming out of it. That's how serious this issue is.

And it's not only for Albuquerque, that water has been purchased by the citizens of Santa Fe, and Espanola, and Los Alamos, and Belen, and Los Lunas, and Bernalillo, and Taos, and three tribes, and brought here to New Mexico to plan for their future. If the Federal Government, 4 years after the fact, 4 years after the project was started, can just walk in and say, "I'm sorry, we're taking your water," how do you go to the next bond issue and say, "Oh, want you to raise your water rates to plan for your water future," if somebody can take it away from you or take it away from your children? We can't. And that's why Congress must step in and restore the balance of New Mexico water rights so that we can protect our water for our children and for our children's children.

Mr. Chairman, again, I thank you very much for holding this hearing today and for hearing directly from people who are affected, why Congress must act and we must insist that we fix this problem now.

The CHAIRMAN. I would like to now recognize our first panel of witnesses: Ms. Jessica Sanchez, who is a family farmer and rancher representing the New Mexico cattle growers and New Mexico Farm and Livestock Bureau; Ms. Eileen Grevey Hillson from AguaVida Resources; The Honorable Anthony Ortiz, Governor of the Pueblo of San Felipe; Mr. John D'Antonio, New Mexico State Engineer; Ms. Alletta Belin, New Mexico Counsel; and Dr. Tom Wesche, HabiTech, Incorporated.

Before the witnesses testify we will, it is customary for the House Resources Committee to administer the oath. I'd like you, all the panel to stand and raise your right hand.

[witnesses sworn.]

The CHAIRMAN. Let the record show they all answered in the affirmative.

I would like to now recognize Ms. Jessica Sanchez to testify for 5 minutes. All of the witnesses' oral testimony will be limited to 5 minutes. Your entire written testimony will be included in the official record, but if you could limit your oral testimony to 5 minutes it will help to get to the question and answering and to stay within our time limit. In front of you is the lights there, and it works just like a stop light; green means go, yellow means hurry up, and red means stop. And so as you watch the lights it will give you an idea. Ms. Sanchez, if you're ready you can begin.

**STATEMENT OF JESSICA SANCHEZ, FAMILY FARMER AND  
RANCHER, BELEN, NEW MEXICO**

Ms. SANCHEZ. Representative Pombo, members of the Legislature, Congressmen of the United States, families, neighbors and friends, all are welcome. Good morning and welcome to Belen, New Mexico, my beloved town.

I appreciate this opportunity to come on behalf of my friends, my family and some of the organizations that are imposed in these matters and are affected by the Endangered Species Act. The organizations that I'm referring to are New Mexico Cattle Growers, New Mexico Farm Bureau and the Rio Grande Water Association.

I am the oldest of nine children of the family of Roland Sanchez and Elia Sanchez. Our forefathers came to this valley, the Rio Grande Valley with Juan de Oñate.

Our family has been in this valley for the last 400 years. They created and established the rights of water and the rights of the land with three different nations, Spain, Mexico, and later the United States of America. And this was done on the Treaty of Guadalupe Hidalgo. Now we are told that there is Endangered Species Act compliance and that we may lose these rights which we have worked for for 100 years. And the water rights are no different than the blood that runs in our veins.

With your permission this is all that we are going to interpret. Thank you.

Mr. Chairman, Committee members, you know I have submitted a testimony concerning the issues in the written copy addressed here today, and I will do my own best to just overview a few critical points if time allows.

There are many devastating examples of the toll we have taken due to the past decision involving the silvery minnow and the southwest willow flycatcher. One of these examples is my grandfather, Florian Padilla, who I am very proud of. I remember being in the fields with him when he was, when I was younger; my sister, he would take us out to the chili fields he would show us how to irrigate and care for this land, just as his forefathers taught him before. So it is sad for me to see that he has lost over 30 percent of his crop this year due to the judgment regarding the silvery minnow and the willow flycatcher brought forth by the Endangered Species Act. He is just one example of the many farmers and ranchers in this area whose livelihoods have been affected by this decision.

My family is much like many of the others in New Mexico, and in the west, who are trying to hold on to the last bits of customs, cultures and land.

There is probably no single segment of society, in my opinion, that is concerned with more, or more instrumental in conserving wildlife and the environment than those of us involved in agriculture. We love the land and work it every single day.

We provide homes and habitats for countless species every day without even thinking about it. We are the first and the foremost conservationists, and environmentalists, of this land. But our conservation practices have been infracted upon by decisions made on part of the minnow and the flycatcher.

I am neither an attorney or biologist. I am a graduate in Agriculture of Animal Science, but the information given has told me that there is not enough science to base sweeping decisions that cannot only destroy families and economies, but animals as well.

The case, The Rio Grande Silvery Minnow and the Southwestern Flycatcher versus Keys case is an example, great example of this fact.

We are told that the minnow must have constant water supply in order to survive. If there's one major thing that can be done in order to give them this constant water supply, it's to take out the non-native salt cedar from the rivers. OK, we've got the technology to do that, let's go ahead. But wait a second, we can't do that, the willow flycatcher may need that non-native salt cedar in order for its nesting habitat.

So my question is, are we protecting the silvery minnow or are we protecting the willow flycatcher? This is a glaring flaw in the Endangered Species Act. If we don't get our water promised to us under contract, my family, the family I love, and others, will lose their field, which results in a loss of feed to our cattle, which can only be replaced by the purchase of alternative feed and added cost.

I'd like to thank you all again for coming to New Mexico. Our rural communities are dying of this exodus and our land is suffering with the catastrophic effects of mismanagement at the hands of our Federal Government. If we cannot count on our justice system for common sense and fairness, we look to leaders like you to help make the changes necessary.

Please help take time to listen to those who have been suffering at the hands of the Endangered Species Act. As I have said, we are the best conversationalists that this nation has and we need your help in order to protect, not only the land, its creatures, but also our families, communities, our customs and cultures. It is imperative that you act on this issue before we lose another farming season.

I know we have addressed two species here today, but there is a third, and that's the human race. The decision made has taken a toll on us economically, physically and emotionally. The land is our soul and the water is our life blood. I beg you to help the community, my family and me, to hold on to the last shred of heritage that we have left.

And as I started with *bienvenidos*, welcome, I leave you with *bienviaje*, good journey, because it is a good journey that we have embarked on here together today. Thank you.

[The prepared statement of Ms. Sanchez follows:]

**Statement of Jessica Sanchez, New Mexico Family Farmer & Rancher, on behalf of the New Mexico Cattle Growers' Association, New Mexico Farm & Livestock Bureau and Rio Grande Water Users**

Mr. Chairmen, members of the Committee, my name is Jessica Sanchez and I live here in Belen, New Mexico. On behalf of the New Mexico Cattle Growers' Association (NMCGA) and the New Mexico Farm & Livestock Bureau (NMFLB) and all of agriculture impacted by the Endangered Species Act (ESA), let me begin by expressing our sincere appreciation to you for this hearing today and taking the time to come to New Mexico to learn first-hand about the tremendously negative impacts of the Silvery Minnow and the ESA on our existence as farmers and ranchers.

As for a little history about me, I am an animal science graduate and local farmer. I am neither an attorney nor a biologist. But, I believe my stake in this battle is much greater and with greater tenure. My family has been in agriculture in this part of the world since Onate—that's over 400 years—and a heritage we are proud of. I am the oldest of six children, ranging from 13 to 26 years of age, and the daughter of Dr. Roland and Elia Sanchez. We have a family farming operation here in the valley, growing alfalfa and other hay species on 350 acres. In addition, we run 250 head of registered Santa Gertrudis cattle. We feed the hay we grow to our mother cows and then to background our cattle for our value-added natural beef program, as well as selling hay to our neighbors for their livestock operations. We have a ranch at Encino, New Mexico, and lease ranch pastures in other various parts of the state.

In today's agriculture economy, that is not enough income to raise six children. Thus, my father has a "side job" as a physician, practicing family medicine in our community. My mom and dad built this operation from scratch using the heritage and traditional model of their families' farms. My brothers and sisters and I have worked with our parents on the operation for as long as I can remember, just as they did with their parents. We are constantly looking at ways to maximize efficiency, while caring for the natural resources entrusted to us. Our natural beef sales program is just one example of adding value to our product to enhance income to our family farm.

My grandparents on both sides of the family have always made their living in agriculture. They raise chili, a crop New Mexico is known for the world over. As a result of the water ruling, my grandpa, Florian Padilla, has lost approximately 30 percent of this year's chili and other row crops. This farm has been his life and his income. It's heartbreaking to see the devastating effects of the ESA on Grandpa. He has shown us, since we were young, how to irrigate and care for the land, handing down his cultural traditions as did his forefathers before him.

My family is much like any number of others in New Mexico and the West who are trying their best to hang on to the last bit of our custom, culture and land. We here in the Southwest are accustomed to dealing with the impacts of Mother Nature—drought is just another piece of our culture and has been for literally centuries. We are used to dealing with the effects of a cyclic market, although globalism is having its impacts. However, that is a subject for a different hearing.

The ESA is the killing factor that we have no control over and no tools to deal with. We are at the mercy of endless litigation and the courts. Adding insult to injury is the total lack of common sense, balance and reality of the Act. The ESA, in its current form, does nothing to promote collaboration and local solutions.

There is probably no single segment of society that is more concerned with or more instrumental in conserving wildlife and the environment than those of us involved in agriculture. Farmers and ranchers are the most effective conservationists—and environmentalists—I know. We love the land and work it every day, which is our motivation to create and protect habitat for all species, including mankind. We have lived in harmony with the land and its wildlife for generations. Were it not for agriculture protecting the land, there would surely be much less diversity of species than we have today. And, we feed and clothe our nation and part of the rest of the world while we are at it. Less than two percent of the American population is involved in agriculture, yet our country has the highest standard of living in the world and are able to provide food for much of the rest of the world.

The Rio Grande has gone dry countless times over the past several centuries, yet there are still silvery minnows, southwestern willow flycatchers and numerous other creatures that live up and down the river. How can that be?

As I said, I am not a biologist, but this tells me that there is not enough science to base sweeping decisions that cannot only destroy families and economies, but ani-

mals as well. The Rio Grande Silvery Minnow and the Southwestern Willow Flycatcher versus Keys case is an excellent example of this fact.

We are told that the minnow must have a constant water supply to survive. If there is one major thing that could be done to increase the water supply along the Rio Grande, it is to remove the non-native salt cedar that guzzles the water from the river. Great, let's go eliminate salt cedar. We have the technology to do that, so why aren't we?

Wait a minute. We can't do that. The flycatcher may need that salt cedar for its nesting habitat. Are we trying to protect minnows or flycatchers?

This situation clearly points out a glaring flaw in the ESA. Protecting single species can, and is having tremendous impact on other species. If the goal is truly to protect species, we must look at the cumulative impacts on multiple species. If we don't or the animals being protected are doomed to failure, as are we. There must be educated decisions that balance the needs of all species—including humans.

To quote the dissenting opinion of 10th Circuit Court of Appeals Judge Kelly, "Under the court's reasoning the ESA, like Frankenstein, despite the good intentions of its creator has become a monster. The ESA was never meant to allow the federal government, on behalf of endangered species, to overturn established precedent."

I couldn't agree with Judge Kelly more. We along the Rio Grande Valley have based our lives and our livelihoods on the river for literally centuries. We have counted on contracts for water delivery with our government to run our operations for decades. Breaches of those contracts in the form of reductions and disruptions of our water supply are costing us not only in terms of the crops we are losing directly, but also in production inefficiency. We never know when we are getting water. When it comes, we must use it or lose it regardless of the time, day or night. We haven't been able to plant in our fall fields nor maintain the pasture rotations that renovate the soil. In addition, fallow fields will increase the invasion of weeds that our communities are dealing with. If we plant to help the soil and protect from weed invasion, we are gambling with \$60,000 just for seed, on our farm alone. Costs of fertilization, labor and equipment wear and tear are all additional. Will we ever have the water to properly care for our land?

If we don't get our water promised under contract, and lose one or two cuttings of hay, we have lost feed for our cattle, which can only be replaced by the purchase of alternative feed, at added cost. But we still have the same costs in our equipment, land and operating loans, whether we are using it productively or not. And I can tell you, without water, it is not productive. We are still paying the same water taxes, whether we receive water or not. Our neighbors who purchase feed from us are forced to go elsewhere if we cannot provide the hay they need. When they must leave the valley for feed it is often at a higher cost of and product.

Agriculture has come to depend upon contracts with our government for everything from water to risk management to conservation. If the government cannot be held accountable to those contracts due to later changes in law, such as the ESA, what good is entering into a contract?

Even more confusing is that the fact that although, apparently our contracts with the government are meaningless, New Mexicans are being forced to deliver water to Texas under historical contracts and court decisions. Not only is the double standard unfair, but also why are only a few Americans being forced to bear the burden of the ESA? If the Act is the will of the public, shouldn't all Americans be paying the price for their desires? How much is the rest of America paying due to the silvery minnow and willow flycatcher?

The whole ESA requires a strong overhaul. It was a well-intended law designed to protect nationally significant species. Instead, it has become a weapon—a monster—that is destroying our custom, culture and families. The emotional toll on all of us is immeasurable. Our elders are suffering because they are not being allowed to care for their land and their animals. Our youth are being driven from the land in search of the ability to care for their families. Health care is well beyond the means of most agricultural incomes, which forces young people to commute or move to urban centers where benefits are provided with jobs.

Our rural communities are dying with this exodus. Our land is suffering the catastrophic effects of mismanagement at the hands of our federal government.

If we cannot count on our justice system for common sense and fairness, we look to you, our representatives in Congress to change the law. Simple band-aides aimed at addressing specific situations will not solve the problems.

It is not only those of us along the Rio Grande who is at the mercy of the ESA for our water. The San Juan, the Pecos and the Canadian are other rivers in New Mexico that will soon be in the same situation. And, we can never forget what the ESA has done to Klamath Falls, Oregon.



Congressman Pearce's H.R. 2603 addresses this issue with regard to water contracts, and starts the process toward reforming the ESA. The government should not be able to modify the delivery, allocation or storage of water to be delivered under contract. But this is only the first step in addressing the inequities of the ESA.

New Mexico agriculture came together last year and developed the attached list of 17 changes in the ESA that would put a heart and brain in the Act. We hope you will seriously consider making these necessary changes in the current law.

Thank you once again for coming to New Mexico and for taking the time to see those of us who are suffering at the hands of the ESA. As I have said, farmers and ranchers are the best conservationists this nation has and we need your help in protecting not only the land and its creatures, but our families, our communities, and our custom and culture. It is imperative that you act this issue before we lose another farming season. Your actions will impact not only we farmers, but our entire communities. If we are not financially able to participate in commerce in our hometowns, local businesses like grocery stores, car dealership, and other mom and pop operations will die with us. Counties are unable to function without our tax contributions.

I know that we have addressed the protection of two species here today, but there is a third one that is involved as well. That is us, the human race. Decisions that have been made have taken their toll on us economically, physically, and emotionally. Help me and others regain trust in our leaders in order to know that my hard work on the farm that has paid for my education will not go to waste.

The land is our soul and water is our lifeblood. Please, I beg you, help my community, my family and me hold on to the shreds of heritage we have left.

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[An attachment to Ms. Sanchez' statement follows:]

**NEW MEXICO'S PROFESSIONAL AGRICULTURAL PRODUCERS SUGGESTED  
CHANGES TO THE FEDERAL ENDANGERED SPECIES ACT OF 1973 AND ALL  
REVISIONS**

**The Endangered Species Act must:**

1. Provide full compensation to individuals for current and long-term "takings". Take into consideration cost-benefit analysis and mitigate for all adverse economic, social and cultural needs of the human element. (change Section 4(b)(2) of ESA)
2. Consider and evaluate cumulative effects in accordance with the National Environmental Policy Act (NEPA) for recovery planning and designation of critical habitat. Single species management does not consider ecosystem needs and may be detrimental to the well being of other organisms. (add to Section 4)
3. Focus on species recovery instead of single species listing. Listing should be incentive based rather than regulatory. (add to subsection (c) of Section 4 and a new statement to Section 4)
4. Define; "science" and "peer review". Ensure that non-governmental, non-bias peer review is mandatory prior to the listing of any species.
5. Be revised so the citizen lawsuit provision requires the loser of any lawsuit pertaining to the ESA be totally responsible for all alleged costs to the Government, defendants and interveners. (revise Section 11(g))
6. Require appropriate bonding by any petitioner for a proposed listing of a species. Bond to be forfeited if a species is determined not warranted to be listed. Financial burden of any listing must be borne by the petitioner whether individual, organizational, or governmental. (add to Section 4(b))
7. Ensure agency regulations conform to ESA law. (ex.: adhere to critical habitat provisions)
8. Transfer recovery planning from the United States Fish and Wildlife Service (USF&WS) to the States. (add to Section 4(f) and Section 6)
9. Transfer critical habitat designation responsibilities from the USF&WS to the States. Confine critical habitat to realistic peer reviewed boundaries. (amend Section 4(b)(2) and Section 6)
10. Codify applicant status to make clear that permit applicants (consists of any individual seeking a Federal permit or license) are provided the opportunity of direct involvement in the Section 7 process. (amend Sections 6 and 7(a) and (d))
11. Not prevent implementation action of any project or activity prior to completion and formal approval of a Recovery Plan. (amend Section 7(a))
12. Reserve and limit Section 7 consultation to land management planning level documents. (add to Section 7(a))
13. Eliminate the proposed listing of any sub-species. (amend Section 3(16))
14. Not allow taxpayer funds to be utilized to sue the Government or others. (add to Section 1(c)(4) as new policy, and amend Section 11(9)(g))
15. Change the criminal penalty law to a civil violation. (Section 11)
16. Codify the delisting process. (add new subsection under Section 4)
17. Revise the "taking" definition to protect private and states' property rights in conformance with the United States Constitution. (Section 3(19))

The CHAIRMAN. I'd like to remind our audience that any, any recognition, either pro or con, is not allowed under the rules of the House.

I'd like to now recognize Ms. Grevey Hillson for her oral testimony.

**STATEMENT OF EILEEN GREVEY HILLSON, AGUAVIDA,  
RESOURCES, ALBUQUERQUE, NEW MEXICO**

Ms. GREVEY HILLSON. Chairman Pombo, members of the Committee, Representative Wilson. My name is Eileen Grevey Hillson. I'm an Albuquerque native, where the people have lived for over 300 years. I own a water consulting business called Agua Vida Resources, and my academic and professional background is in natural resources, with an emphasis in the water arena. I am here today representing one of my clients, the Albuquerque Business Water Task Force.

It's members include organizations such as the New Mexico Chapter of the National Association of Industrial Office Properties, the Greater Albuquerque Chamber of Commerce, the Albuquerque Economic Forum, and the Home Builders of Central New Mexico. It's a privilege to be invited here. Thank you for coming to Belen and giving us the opportunity to visit with you.

Chairman Pombo, you asked in your invitation letter about the impact of the Rio Grande silvery minnow on the State of New Mexico. From a business standpoint it could simply be summed up like this. Business needs certainty to stay here, to expand here, and certainly to locate here. To the extent that the decisions of how to protect and recover the silvery minnow, under the ESA, create uncertainty about the amount and reliability of water supplies available for human uses in our state, then the impact of the fish is decidedly negative. But it's more complicated than that.

In keeping with the spirit of your holding this hearing in our western state, I will respond to the title that only Clint Eastwood movie called "The Good, the Bad and the Ugly." The late Adlai Stevenson once said that man is a curious animal, he never sees the writing on the wall until his back is up against it.

The good impact of the silvery minnow, besides trying to recover the species, is that in the midst of a drought with all of the other things that relate to scarce water supplies, the silvery minnow has forced onto the radar screen of almost all New Mexicans the need for us to be proactively involved with the most effective, efficient water resources management.

And our state government, which I'm sure the state engineer, D'Antonio, will address, has been very proactive in trying to do this. We're trying to figure out who owns how much water since where, since when, create the funding to fund all the projects we need around the state to prevent forest fires, to eliminate non-native species, such as the salt cedar, to do flood control, and to have the money for endangered species recovery programs, and to have market transfer mechanisms.

Another good thing about the minnow is that it has spurred regional collaboration, efforts such as the Middle Rio Grande Endangered Species Act collaborative program, of which I am very honored to serve as the vice chair, seek to have representatives of the Federal, state, local government, tribal government, along with farming, environmental, business and university representatives,

recover the minnow in a way that allows both the human and the endangered species to coexist.

Albuquerque has certainly gone the extra mile, and perhaps even a few more miles, because of the silvery minnow and its stewardship of riparian environments. And the business community which I represent came to the table, in large measure, due to the silvery minnow. The Minnow versus Martinez, which is what Minnow versus Keys was originally called, and the Middle Rio Grande Conservancy District versus Babbitt case, involving the critical habitat designation of the silvery minnow, really galvanized us into coming to all of the tables where water policy decisions are being formulated and implemented.

The U.S. Fish and Wildlife Service has tried to have a flexible partnership with all of us, and that's a good thing that has come perhaps from the minnow. And what has really become a good thing from the minnow is the fact that we, as New Mexicans, have come very clearly to recognize that we are interconnected and interdependent through our water resources and that we are all going to hang together or hang alone.

Now what is the bad? The bad can be summed up in two words "the ruling." The Tenth Circuit Court of Appeals' ruling where the Federal Government, as members of the Committee and Representative Wilson have already mentioned, seizes our water, violates water rights, takes the unprecedented step of taking water from one river basin, the Colorado, into the Rio Grande River for uses that were intended to be cities', farmers', the Pueblos, and replaces that with serving the minnow. As our Attorney General Patsy Madrid said, it sends cracks through the foundations of state water law, it creates a climate of uncertainty for the users.

Judge Kelly, in his dissent, in that decision stated that the Bureau of Reclamation, without any recognized property right to water, may now use the San Juan-Chama Middle Rio Grande project water to provide in-stream flow to the minnow. In so holding, the court injects uncertainty into settle contractual obligations and profoundly alters in disregard of relevant statutory and regulatory authority the obligations of Federal agencies under the ESA. This is probably why nine other states have joined in the Amicus positions and are being against this decision.

It takes water from the city, as Representative Wilson said, and from cities all up and down the valley where there have been a vision and commitment decades ago, and two to three, in the case of Albuquerque, generations of ratepayers making a commitment to get this water and to divert it, and treat it, and distribute it to its population, and it renders all of that effort meaningless.

And as Representative Calvert said, it definitely—you stole my line—puts real meaning into "no good deed goes unpunished." In a myriad of ways the City of Albuquerque has tried to help the minnow through leasing water, through doing all kinds of mitigation efforts. It wreaks havoc on the water resources management strategy of the city whose cornerstone is San Juan-Chama water, so that we can switch from the unenvironmentally sound mining of our aquifer into diverting the surface water that comes from another basin.

It creates grave consequences that are similar, as speaker Sanchez mentioned, for the farmers and Pueblos. It doesn't foster greater cooperation, but mistrust. Just as we need a greater Federal-state cooperation on the endangered species issues, the Tenth Circuit Court ruling tears this apart.

The ugly: If business needs certainty to stay here, to expand here, or to locate here, then certainly these unsettled contractual expectations, which now can't be met because of the ruling, are going to create uncertainty. We hired an economic consultant to study the value of the San Juan-Chama water to Albuquerque, and he said, with less expected economic growth the Albuquerque economy will be unable to meet the need of the next generation of young people, narrowing or closing their options to live in Albuquerque.

In other words, not only did we agree to seven rate increases since 1997 to secure our San Juan-Chama water and to have it taken away from us possibly at the last moment when we were about to use it, but it will impact our economy in such a way as that our own children will not be able to have the option to stay here. Now, as a mother of four children, I want to tell you that is ugly.

Since we wouldn't abandon Albuquerque, the city, what would we do? All the possibilities are unpleasant. We can't continue to mine the aquifer, so we could just lose 50 million dollars, plus, and go seek for replacement water, desalinization of produced water, our good out-of-the-box solutions for down the road but the money, the environmental, legal questions make them impossible to replace our San Juan-Chama in the short term. We could buy all that water from our neighboring farmers but, as I've been told, we could do that as soon as we could pry it loose from their cold, dead fingers. And besides that, that massive amount of whole scale transfer of water would probably run into problems with the state engineer's obligations regarding transfers.

The ruling sets rural folks against urban folks. It polarizes our community. We do not want to be Klamath on the Rio Grande. So, we recognize that we are the life that wants to live in the midst of other life that wants to live. We want to work collaboratively.

What do we want? We want to support the rehearing that has been asked for en banc of the Tenth Circuit Court of Appeals so that this ruling can hopefully be overturned. We want to support Governor Richardson's efforts to negotiate with all the parties to reach a solution, a local solution for here in the Middle Rio Grande.

We want to support the legislative remedies that our congressional delegation has put on the table, to take our water off the table unless there are willing sellers. And we want to work with you to understand if avoiding rulings like this in the future necessitates a review of how the ESA reads a clarification, or of how it's interpreted and implemented. And we want your help in getting authorizing legislation to continue the funding of collaborative efforts like the ESA collaborative program.

We agree with Representative Wilson that this has presented grave consequences for the economy and sets a precedent that cannot stand. We agree with Representative Pearce that we need a balanced approach to satisfy human and endangered species needs.

Only then can we rest assured that the saga of “the good, the bad, and the ugly” does not degenerate into the shoot-out at the OK Corral.

Thank you so much for giving us the opportunity to testify, and we look forward to working with you.

The CHAIRMAN. Thank you.

[The prepared statement of Ms. Grevey Hillson follows:]

**Statement of Eileen Grevey Hillson, Owner, AguaVida Resources**

Chairman Pombo, Members of the Committee:

My name is Eileen Grevey Hillson. I live in Albuquerque, New Mexico, where I own a water consulting business named AguaVida Resources. Both my academic training for my Bachelor’s and Master’s degrees in government, as well as my professional experience with local, state and federal government and the private sector have been focused in the area of natural resources, most recently with a heavy emphasis on water policy issues. I am here today representing one of my clients, the Albuquerque Business Water Task Force, whose membership includes organizations such as the N.M. Chapter of the National Association of Industrial and Office Properties, (NAIOP), the Albuquerque Economic Forum, the Greater Albuquerque Chamber of Commerce and the Homebuilders of Central New Mexico. It is a privilege to be invited to appear before you today on their behalf. Thank you for coming to Belen and giving us this opportunity.

Chairman Pombo, in your letter soliciting our presentation of testimony at this hearing, you requested that we address the impact of the Rio Grande silvery minnow on New Mexico. From a business standpoint, it could simply be summed up thusly: Businesses need certainty to stay here, to expand here and to locate here. To the extent that decisions about how to protect and recover the silvery minnow create uncertainty about the amount and reliability of water supplies available for human uses in the state, the impact of this fish is decidedly negative. However, the answer is really much more complicated than that. In keeping with the spirit of your holding this oversight hearing in a western state, I will respond through the title of an old Clint Eastwood movie, “The Good, The Bad and The Ugly.”

*The Good*

The late Adlai Stevenson once said that “Man is a curious animal. He never sees the writing on the wall ‘til his back is up against it.” The “good” impact of the silvery minnow, as well as its endangered species counterparts throughout the state, is that it has forced water onto the radar screens of New Mexicans, inspiring us to proactively, and expeditiously learn to manage our water resources so that we avoid having our backs up against that wall.

While in various parts of the state, among certain stakeholder groups and within directly-involved government agencies, water has always, or at least intermittently, been a concern, until quite recently, most of us were pretty ignorant of and/or complacent about the short hand Mother Nature dealt us in this area. In approximately the same time frame that the Endangered Species Act came into being, New Mexico entered a wet phase in its highly variable climate. With water readily coming out of the tap in most areas, it had easily escaped our attention that throughout the last few decades, we were receiving more water than we had in most of the last twenty centuries. Maintaining biodiversity was not threatening or even particularly noticeable in that environment. The drought changed everything, making the truth hit home: In wet years, we had barely made ends meet in terms of our supplies keeping up with our demands. Now in dry years, with increased populations and the same interstate compact obligations, we just might not have enough to go around if we don’t take action.

*Getting the State’s Water House in Order*

The additional drought-induced demands placed by the silvery minnow and its endangered comrades on an already stressed resource helped spur us into putting our state’s water house in order. Towards that end, and with our Governor, state legislature, offices of the State Engineer and Interstate Stream Commission leading the charge:

- We have embarked on an ambitious program to, as quickly as possible, find out who owns what water, where and since when—urban, rural and tribal—and to have water rights information well-preserved and accessible in a user-friendly computer data base format;

- We are developing a State Water Plan to ensure the most effective, coordinated, comprehensive management of our water resources in a way that can address the state's very diverse and often competing, social, environmental and economic needs;
  - We are developing tools like measuring and metering; incentives like tax credits; rules for priority administration and water market transfer prototypes; pilot projects for "produced" water; water conservation educational materials -all to ensure the most efficient use of our water, compliance with our interstate and international treaty contractual obligations and the equitable allocation of the water necessary for sustaining urban, rural and ecosystem life;
  - We have institutionalized various funding mechanisms for meeting the approximately \$5 billion worth of infrastructure, watershed restoration, flood control, and endangered species recovery needs identified throughout the state for our present 13 listed aquatic species; and,
  - We have deliberately chosen to do all of the above in a collaborative fashion that involves a geographically-dispersed, very diverse group of stakeholders interacting with our elected and appointed government officials.
- Last, but hardly least, at least in part due to the impact of endangered species issues,
- We have recognized as New Mexicans that, like it or not, water winds like a liquid rope throughout the state, rendering us interconnected and inter-dependent. We are coming to understand that we can either use it together as a life-rope or allow it to hang us. In that spirit, we have collectively endorsed having our taxpayer money used to defend the right to have New Mexico's water preserved and put to beneficial use in New Mexico for New Mexicans.

#### *Minnow Recovery Spurs Regional Collaboration*

At a regional level, in the Middle Rio Grande, the silvery minnow has had a positive effect, in that, to be in compliance with meeting its water needs through the Endangered Species Act, diverse stakeholders who might otherwise never have met, much less worked together, have come together to begin the arduous process of recovery in a world of competing claims for the same resource. One example of this is the Middle Rio Grande Water Assembly, where a regional water plan is being developed.

The example most timely and appropriate for today's discussion is the Middle Rio Grande Endangered Species Act Collaborative Program, on whose Steering Committee I am honored to serve as Vice Chair. The Program was established in January of 2003 "...to strive for the survival and recovery of threatened and endangered species in the Middle Rio Grande while simultaneously protecting existing and future uses of water."

The 19 signatories who signed the Interim Memorandum of Understanding, committing to participate in its efforts, represent federal, state, local and tribal governments, farmers, environmentalists, universities and the business community. With such a diverse membership, procedural and financial constraints and programmatic unknowns, the program remains a work-in-progress. While signatories have yet to gather "round the campfire, arms entwined, singing "Cumbya," they have realized that it is in everyone's best interests, not to mention those of the fish, to get down to work on the innately-right, statutorily-mandated job of recovering the species. The Program has developed and implemented a number of recovery programs for the silvery minnow and southwestern willow flycatcher, with the aid of almost \$30 million in funding from federal congressional appropriations and considerable matching cash and in-kind contributions from non-federal signatories. Further, and quite importantly, even when we have had to agree to disagree, and ended up in litigation against one another, at least through our discussions we probably narrowed the areas of potential courtroom dispute—and in the meantime moved the species that much closer to recovery. In addition, program participants have actually engaged in mutually beneficial collaborative efforts on non-species-related water issues as a result of our program "networking,"—a great side-benefit in New Mexico, where money, labor and time are at a premium.

#### *Albuquerque Goes the Extra Mile and Educates its People*

At a local level, the ESA most assuredly had an impact on the City's Water Resource Management Strategy, both in terms of the comprehensiveness of its programmatic content and the funds required for its successful implementation. While the City, on its own initiative, has for years been developing and implementing programs to preserve and enhance its bosque areas in an environmentally-sound manner, the coincidence of it being declared as part of the critical habitat for the minnow no doubt speeded up and expanded its own riparian habitat restoration activi-

ties. To their credit, the City leaders, such as our Mayor, and his Public Works staff, have publically promoted actions to sustain a healthy river environment as positive contributions, rather than as onerous obligations.

In the process of informing its residents about the threats to the City's San Juan-Chama Project water brought on by the *Minnow v Martinez* (aka *Minnow v McDonald* and now *Minnow v Keyes*) litigation, the City has made its citizenry aware of the significant potential social, economic and environmental challenges involved in protecting the minnow. In so doing, it has educated its citizenry to recognize the scarcity and value of water. Thus, the minnow, may have inadvertently assisted the City in making us all more aware and responsible stewards of this natural resource.

#### *The Business Community Comes to the Table*

Five years ago, with few exceptions, the Albuquerque business community was not seated at the tables where water policy decisions were being developed and implemented. Organizations such as the Economic Forum and the Greater Albuquerque Chamber of Commerce (GACC) had studied various water quality and quantity issues and adopted resolutions strongly supporting the San Juan-Chama Project, but organized interaction with other stakeholder groups had not occurred.

The *Minnow v. Martinez* lawsuit, which had environmental plaintiffs arguing that our San Juan-Chama Project water should be on the table for helping to meet minnow needs, and the *MRGCD v Babbitt* case, where it appeared that a critical habitat designation for the minnow had been made without sufficient sound scientific and economic data, changed all of that.

Two of Albuquerque's major business organizations—NAIOP and the Economic Forum—formed a Joint Water Task Force. One of the key rallying points and first action items was to hire a consultant to research and report on the economic implications to the City and the region of the contested issues involving the minnow and to enter amicus positions with that report attached in both lawsuits to help protect the sanctity of our San Juan-Chama water. In the process, we began to realize the complexity of our state, regional and local water issues and the direct connection between how they were resolved and our very economic sustainability. Other business organizations, such as the GACC, were invited to join our efforts and that marked the beginning of the Albuquerque Business Water Task Force which I am representing here today.

Members are actively involved in a multitude of collaborative water efforts around the state, including the Governor's Blue Ribbon Task Force on Water, the State Water Trust Board, the Water Quality Control Commission, the Middle Rio Grande Water Assembly, and the Town Hall on the State Water Plan. We have started our own Business Water Conservation Task Force with activities ranging from helping build New Mexico's first water-efficient Habitat for Humanity home to conducting internal studies to determine what more we can do to improve water conservation in the business sector and the city as a whole.

We have brought our concerns on a number of water policy issues before our City Council, to the Governor and state legislature and to our congressional delegation. In short, in part thanks to the minnow getting our attention, we are now fully engaged in the water policy arena. And the minnow continues to hold our attention. Most recently, we organized the submission of resolutions/letters of support from 17 business organizations representing several hundred thousand local citizens to be included in the BOR's Draft EIS on the City's Preferred Alternative for the San Juan-Chama Drinking Water Project (The Preferred Alternative includes a significant number of projects to protect the minnow) and, we are, of course before you today on the subject of the Tenth Circuit Court ruling centered around the minnow.

#### *U.S. Fish and Wildlife Service: A Flexible Partnership*

The last example of a positive impact that has come from the silvery minnow in New Mexico is the positive effort made by the regional and local field service staff of the FWS over the last few years to allow for increased flexibility and regulatory certainty in the process of conserving the silvery minnow. There has truly been an admirable attempt to develop innovative ways to work cooperatively with stakeholders in keeping with both the 1982 amendment to the ESA (ESA section 2(c)(2)) and the spirit of the FWS's 1997 10 Point Plan to "Making the ESA Work Better" (printed, 1997, reprinted, 1998) To the extent that this positive "can-do," adaptive management-type of approach is carried out, it minimizes stakeholder conflicts and thus contributes to the ultimate success of species recovery efforts. The March 13th, 2003 Ten Year Biological Opinion is an example of trying to interpret and implement the ESA in such a way that, in wet and dry years, the feds and non-feds can work together to protect the silvery minnow without making humans endangered in the process. From an economic standpoint, the business community heartily wel-



comes these efforts, as they promote a greater sense of stability about what is needed to protect the species, as well as expectations that positive outcomes will come to all water users through the recovery process.

#### *The Bad*

It is pretty easy to sum up “The Bad” in two words: “The Ruling.” The Tenth Circuit U.S. Court of Appeals ruling in the Rio Grande Silvery Minnow et al. v. John W. Keyes III:

- Takes the unprecedented step of ordering water imported from the Colorado River Basin into the Rio Grande Basin for use by the people of Albuquerque and other cities, farmers and Pueblos to be used instead for the silvery minnow;
- “...sends cracks through the foundation of our State water laws and creates a climate of uncertainty for our users.” (News release quoting NM Attorney General Patricia Madrid, 8/11/03)
- Quoting from Judge Paul Kelly’s dissent, “The court holds that the BOR has discretion to deliver less than the full amount of available San Juan-Chama (SJC) and Middle Rio Grande (MRG) project water to its contractors.” “...thus, the BOR, without any recognized property right to the water in question, may use this stored project water to provide instream flows for the silvery minnow to alleviate jeopardy to that species under the Endangered Species Act (ESA). In so holding, the court injects uncertainty into settled contractual expectations and profoundly alters, in disregard of relevant statutory and regulatory authority, the obligations of federal agencies under the ESA.” (Judge Paul Kelly in dissent in *Minnow v Keyes*, p1) (Emphasis added); (Attorney General Madrid and Judge Kelly’s remarks may explain why nine other western states with Reclamation contracts are joining New Mexico in attempting to overturn the decision);
- Takes water that the forefathers of the City of Albuquerque had the vision and commitment to contract for decades ago, for use by future generations of its citizenry—and that two or three generations of Albuquerqueans have now paid tens of millions for through their water rates—and puts it on the table for uses other than those for which it was intended, AND DOES THIS exactly at the time that the City is ready to begin diverting, treating and distributing that water to its population;
- Puts real and painful meaning into the cliché that “no good deed goes unpunished,” considering that the City has gone considerably more than the extra mile in regards to assisting with recovery of the silvery minnow itself, for example:
  - The City has leased unused SJC water which has ultimately allowed for supplemental minnow water to become available;
  - The City has contributed large amounts of funding, personnel and operating costs since 1999 for the minnow breeding program at the Albuquerque Zoo and now contributed again, with the donation of land and design and construction participation for the minnow’s Naturalized Refugium;
  - The City has conducted silvery minnow swimming speed studies to achieve design criteria for fishways;
  - The City is participating in minnow monitoring studies for the Albuquerque reach;
  - The City organized and helped staff the 2003 minnow egg collection;
  - The City has contributed staffing and management for the ESA Collaborative Program; and last, but not least,
  - The City has created a plan for its diversion project which tries to mitigate any potential negative effect on the minnow of that diversion.
- In sum, the ruling threatens to wreak havoc with the cornerstone of the City’s 1997 environmentally and financially sound, Water Resource Management Strategy which would transition the City away from continuing the environmentally unsustainable practice of mining its aquifer for drinking water to using instead its imported surface water;
- The ruling has different but similarly grave consequences for the farmers and Pueblos of the Middle Rio Grande, thus threatening region-wide disruption of the livelihoods of hundreds of thousands of New Mexicans.
- The ruling flies in the face of fostering greater cooperation between the ESA’s implementing federal agencies and the states, as was statutorily directed by the 1982 ESA amendment Sec 2 (c)(2); and,
- Instead, the ruling creates an atmosphere of highly unproductive mistrust into Federal/state and/or local relationships. Just as groups like the Western States Water Council are recognizing the significant need for federal/state collabora-

tion to reduce conflicts between the water use needs of endangered species and human water users, the Tenth Circuit ruling tears them apart.

### *The Ugly*

Judge Kelly notes in his dissent that “This case has enormous significance. Although the contracts at issue establish certain bilateral rights and duties, the court’s interpretation renders the contracts somewhat illusory because the BOR will have the discretion to modify those rights and duties, thereby rendering uncertain the parties’ settled contractual expectations.” (p. 34 of his dissent in *Minnow v Keyes*)

Now, at long last, I return to my initial response to your inquiry. If business needs certainty to stay here, expand or locate here, and an available and reliable water supply is important to their perception of “certainty,” then, as Judge Kelly implies above, the majority ruling involving meeting the minnow’s water needs with supplemental flows that come from our contracted San Juan-Chama water could create a very negative economic impact for Albuquerque and in fact, the entire Middle Rio Grande. Albuquerque itself has been counting on this water to supply 70% of its water needs to the year 2060, as it cannot safely continue its current rate of groundwater pumping. All its prudent, farsighted planning is now put at risk.

As our economist consultant, Dr Brian McDonald said in his report, “Water, Regional Economic Development and the Public Welfare,—“With future water physically constrained and less reliable, Albuquerque’s continued economic health will be undermined.” McDonald goes on to explain that “...If businesses perceive our area as less attractive due to uncertain water supplies, there will be less economic growth, which will result in the local tax base being insufficient to provide public goods and services which are an important component of the region’s quality of life and public welfare.” (McDonald report, p. 2)

As a mother of four children, I would like them to have the option to live here. Dr. McDonald dashes those hopes with his next statement, “..With less expected economic growth, the Albuquerque economy will be unable to meet the employment needs of its next generation of young people, narrowing or closing their options to live and work in Albuquerque.” In other words, not only may I, and hundreds of thousands of other responsible citizens here, have agreed to seven annual water rate increases since 1997 to secure our San Juan-Chama water to have it, through this ruling, possibly taken away at the last moment, but the result of that action may be that our community will not have the economic wherewithal to sustain our own children. NOW THAT IS UGLY.

Since we would assumedly not put up with abandonment of our City for a lack of water, what would we do? Here are some unpleasant possibilities:

- Faced with a groundwater resource that is depleting, causing subsidence and having increasing water quality issues, we would have to swallow an over \$50 million dollar loss and go out looking for replacement supplies;
- Replacing 48,200 AF of San Juan-Chama water, at today’s cost of approximately \$4,500/AF for water rights, including transaction costs could cost the City over \$300 million dollars -and that doesn’t begin to touch the opportunity cost for what we could have done with our San Juan-Chama payments or this \$300 million;
- Now we are faced with the question of where are we going to get this much water in the time frame we need it? Desalination and oil and gas “produced” water could not fill the bill in such short order, even if there were not economic, environmental and legal obstacles involved. Could we lease that much water from the other stakeholders on the Middle Rio Grande? For many, sure, if we could pry it out of their cold, dead fingers;
- Even assuming that were possible, now we are talking about destroying an entire way of life for farming folks, many who have had that livelihood as an integral part of their family heritage for generations and generations;
- Even if that were a viable, desirable option, the Middle Rio Grande has not been adjudicated, thus rendering almost moot the idea of ensuring timely acceptance by the State Engineer for such a whole-scale place and purpose of use transfer of water; and
- Obviously, to use the roadmap set forth through these hypothetical responses to the loss of our San Juan-Chama water would set urban dwellers against agricultural water users. It would polarize our entire region, and make water policy options a zero-sum game. We do not want to re-enact Klamath on the Rio Grande or worse, thank you very much.

Our City Fathers, in the 1960’s, took bold steps to ensure an adequate public water supply for future generations living in a growing, prosperous and peaceful Albuquerque, through the purchase of the San Juan-Chama water. They charted a for-

ward-looking path and started down it. We are fortunate to actually have one of those gentlemen involved in our Business Water Task Force today. It is time for him to pass the baton to us so that we can cross the finish-line with the diversion, treatment and distribution of water to Albuquerque that translates his dream and that of his colleagues into our present reality and our children's water future. And that's a peaceful water future without a concurrent civil war with our rural neighbors. We truly can do no less.

So, how do we propose to do this?

- By offering support to all those presently engaged in securing an en banc rehearing of the Tenth Circuit Court's decision. It should be overturned;
- By wishing all the parties well who are engaged in Governor Richardson's efforts to find a negotiated settlement to the competing water users' needs which have led us to this point;
- By supporting the legislative remedies offered by our Congressional delegation, through added language to the Water and Energy Appropriations Bills, to take our San Juan-Chama Project Water off the table as a mandated BOR "discretionary" fix to the supplemental water needs of the Rio Grande Silvery Minnow, unless there are willing sellers;
- By working with you and the rest of your House Resource Committee members to understand if avoiding rulings of this nature necessitates a review of how the Endangered Species Act reads, or of how it is interpreted and implemented.

We agree with our Congresswoman Heather Wilson that "The court's decision has enormous consequences for all western states where water is such a valuable resource and critical part of the economy" and that therefore, "This sets a precedent we can't allow to stand." (press release, August 30) and with our Congressman Steve Pearce, that we "need to find a balanced approach to satisfy the needs of both human water users and endangered species." (press release, August 30)

We look forward to working with you all to ensure we reach that balanced approach. Only then can we rest assured that the saga of "The Good, The Bad and the Ugly" doesn't end with a "shoot-out at the OK Corral!"

Once again, on behalf of the Albuquerque Business Water Task Force, we greatly appreciate your interest in and commitment to making the ESA work in the west for both human and endangered species, and your giving us the chance to share our views.

NOTE: Exhibits attached to Ms. Grevey Hillson's statement have been retained in the Committee's official files.

The CHAIRMAN. I'd like to now recognize The Honorable Anthony Ortiz.

**STATEMENT OF ANTHONY ORTIZ, GOVERNOR, PUEBLO OF SAN FELIPE, ACCOMPANIED BY SUSAN WILLIAMS, LEGAL COUNSEL TO PUEBLO OF SAN FELIPE**

Mr. ORTIZ. Good morning. Good morning, Chairman and Honorable Congressional Delegates. It is an honor and a privilege to be before you here today to give testimony on behalf of my tribal council. So on behalf of my tribal council, the Pueblo of San Felipe highly values water. It is important to all of our customs and traditions. We do not waste water.

We have lived on this land over a thousand years and find joy in the spiritual connection we share with the water and the land that the Creator has provided to us.

We are concerned that the Federal Government is not living up to its trust responsibilities because of the Department of the Interior is not protecting our senior Federal reserved water rights. This is a great threat to the survival of our ancient customs and traditions.

For example, the Bureau of Reclamation is refusing to store sufficient water to our use, in clear violation of Federal law.

Additionally, Reclamation continues to make unauthorized illegal releases of our storage water.

The United States also has failed to adequately maintain the Pueblo's water delivery system.

Finally, Reclamation is threatening to use our senior Federal water rights without our permission to accommodate municipalities and non-Indian farmers who don't want to share their junior water rights with the minnow.

All of this must stop. The Federal Government must provide the Pueblos with funding necessary to fully settle and permanently protect our water rights, and take all actions in accordance with the Federal trust responsibilities owed to our tribe, Pueblo.

We understand that many families and communities need water also. We are here to work cooperatively to find solutions that will be good for everyone. In order to do this our senior rights must be considered and the Pueblos must have the place at the table with this Honorable Congressional Delegates.

We have other concerns of water. There's lot of ways that we do survive from the water. It has been passed on to us in generations from our ancestors and our elders. There's lot of ways that we use water that we benefit from, because that is what we were taught from our elders and our ancestors.

It cleanses our body when we are weak, when we are ill. It is how we cleanse our body in order to get the strength, in order to continue on with our lives. It is not only irrigation that is involved, there are a lot of aspects to water. We, as Pueblo people up and down the Rio Grande, we have a unique way of using the waters. We don't waste waters. Once we open the gates to irrigate we have a way of talking to the water in order to get the crops that we are looking for toward, to survive our families.

So I would wish and hope that we are considered to come to the table, to come with a solution to take care of the matter here. So with that, I hope, and I pray for you, and that our spiritual guidance will be with you to make a sound decision, to come with a solution to take care of everybody's needs here. Thank you very much.

The CHAIRMAN. Thank you.

[The prepared statement of Mr. Ortiz follows:]

**Statement of The Honorable Anthony Ortiz, Tribal Governor, and Susan M. Williams, Pueblo Legal Counsel, Pueblo of San Felipe, New Mexico**

**1. The silvery minnow water needs and related Federal actions threaten the survival of traditional Pueblo life.**

For the first time in history, the silvery minnow water crisis and the current drought will require the Federal and state governments to enforce senior water rights in accordance with the prior appropriation system. Because the United States has seriously over-engineered the Rio Grande with many dams and reservoirs, the natural ecosystem is in crisis and the silvery minnow is on the brink of extinction. At the same time, Federal mismanagement of the river and water delivery systems has made it very difficult for the Middle Rio Grande Pueblos to continue our ancient customs and traditions that depend upon our precious water.

The current actions and inactions of the United States with regard to the silvery minnow are causing tremendous negative impacts to the cultural, religious and social structure of the Pueblo of San Felipe. The United States is refusing to act in accordance with well-established principles of Federal reserved water rights law and the Federal trust responsibility owed to Indian tribes and pueblos, as explained below. Simply put, the United States is trying to solve the silvery minnow water crisis without regard for the senior Federal reserved water rights of the Middle Rio Grande Pueblos.

When you visit our Pueblo, you will not see any golf courses, public parks, or residential grass lawns. Rather, the Pueblo highly values water and thus uses this precious resource only for consumption, cooking, growing food, and bathing. The Pueblo does not waste water.

Despite the Pueblos' senior water rights entitlements, many traditional Pueblo farming families are not able to use their lands for subsistence farming because of a lack of available water. This lack of available water is caused by the actions and inactions of the United States. Because the Pueblo economy and social structure has survived for centuries on the strong foundation of traditional farming and related ceremonies, the United States' actions and inactions aimed at dismantling this foundation threaten the very existence of traditional Pueblo life.

In our traditional ways, the fields, the crops, and the water provide answers and solutions to challenges we must face as a community, including family stability, community violence, education, youth development, and elderly issues. When the crops and the water are not available on our lands, our traditional community becomes fractured, and additional social problems emerge.

We want the future generations to work our lands and learn our traditions from our elders. We want Pueblo life to stay strong and healthy. Without our water, none of this is possible. Without our water, our traditional roots will dry up and our Pueblo community will wither away.

**2. The Bureau of Reclamation must use water, otherwise contracted to municipalities and non-Indian farmers, to ensure survival of the silvery minnow.**

The 10th Circuit Court of Appeals recently held that the delivery of water pursuant to Federal contracts to municipalities and non-Indian farmers must be curtailed in order to ensure the survival of the silvery minnow, in accordance with the Endangered Species Act. This means that municipalities and non-Indian farmers have less water available from Federal reclamation projects than they would like to have.

Because a water shortage was anticipated when the current water delivery contracts and construction funding contracts were drafted, these contracts include drought and shortage clauses which limit the amount of water to be delivered to non-Federal contracting parties in a time of shortage. These contract provisions are well summarized in the 10th Circuit opinion. See *Rio Grande Silvery Minnow v. Keys*, 333 F. 3d 1109; 2003 U.S. App. LEXIS 11672 (10th Cir. 2003).

Despite these clear contract limitations and conditions, the municipalities and non-Indian farmers continue to maintain that water is being denied to them illegally in violation of their Federal contracts. As the 10th Circuit clearly explained, that claim is simply not true. The municipalities and the non-Indian farmers do not have a right to receive contract water when that water is not available. Under the current conditions, the water desired by the municipalities and the non-Indian farmers is not available due to the drought and Federal needs related to the flow requirements for silvery minnow survival pursuant to the Endangered Species Act.

Currently pending are proposed Federal appropriation riders that are intended to prevent the Bureau of Reclamation from expending funds in any manner that deprives municipalities and non-Indian farmers of contract rights to receive water without a voluntary sale or lease. However, as the 10th Circuit Court of Appeals plainly explained, these users do not have any rights to receive contract water in times of shortage, and are not somehow entitled to sell or lease water to the Federal government in times of shortage. Rather, the relevant contracts expressly condition all delivery on the availability of water (which is not currently available). Moreover, as the Court explained, the contracts contemplate the application of subsequent Federal laws, including the Endangered Species Act and its water flow limitations.

For these reasons, there is no contract right for municipalities or non-Indian farmers to receive contract water when it is needed for Federal purposes such as the minnow, or when it is unavailable due to drought. Thus, the proposed riders requiring "willing sellers" are not in accordance with either Federal water law or the express language of the contracts signed by the municipalities.

This is a concern for the Pueblo of San Felipe because Reclamation has repeatedly informed the Pueblos that Pueblo water will be used for minnow purposes if Reclamation is unable to find enough junior users who may "agree" to become "willing sellers" of their contract water delivery rights. In accordance with Federal law, the United States must exhaust all efforts to obtain minnow water from junior water users, and must not deprive the Pueblo of its senior water rights in that process. The "willing sellers" requirement creates an additional serious threat to the availability of water for Pueblo use because Reclamation will use Pueblo water if the junior users refuse to become "willing sellers."

Simply put, the junior water users with water delivery contracts have no vested water rights to sell to the Federal government. The United States' desire to "buy"

such non-existent water rights must not come before its respect for the senior Federal reserved water rights held by the Middle Rio Grande Pueblos.

**3. Permanent solutions will require significant Federal funding and resources to allow a settlement of Pueblo water rights.**

In order to create permanent solutions to water shortage and allocation issues in the Middle Rio Grande basin, it will be necessary to agree upon the amount of senior Federal reserved water rights held by the Pueblos. This settlement can be accomplished best through the Federal government's formal Indian water rights settlement process.

To move this process forward, the Federal government must fund the technical engineering and legal work necessary to determine the amount of water to which each Pueblo is entitled. If the Pueblos receive the full Federal funding necessary for meaningful participation in this Federal process, a comprehensive settlement of Pueblo water rights could move forward quickly. Until such settlement of senior Pueblo water rights is accomplished, there will be no certainty regarding the availability of water for junior water users such as the City of Albuquerque and non-Indian farmers. Thus, it is in the best interests of all concerned for the Federal government to provide adequate and immediate funding for the settlement process.

The total amount of Pueblo water rights best can be determined only through this type comprehensive settlement process. The only other alternative for resolving the Pueblo water rights is years of contentious and expensive litigation.

Federal law requires a measurement of Pueblo water rights that will provide enough water for the present and future homeland needs of the Pueblo. The United States Supreme Court has long held that Federal Indian reservations were set aside as permanent homelands for Indian people to live upon in a self-sustaining fashion into the indefinite future, with enough water reserved for Pueblo use now and for all the future generations.

In the landmark case of *Winters v. United States*, 207 U.S. 564 (1908), the United States Supreme Court held that Congress, by creating the Indian reservation, impliedly reserved "all of the waters of the river—necessary for—the purposes for which the reservation was created." *Winters*, 207 U.S. at 576. The Court further declared that this reservation of water was not only for the present needs of the tribe, but "for a use which would be necessarily continued through years." *Winters*, 207 U.S. at 577.

This principle outlined in *Winters* is now well-established in Federal water rights jurisprudence: the United States, in establishing Indian or other Federal reservations, impliedly reserves enough water to fulfill the purpose of each Federal reservation, including the residential, economic development, and governmental needs of Indian tribes. See *Arizona v. California*, 373 U.S. 546, 599-601 (1963); *Cappaert v. United States*, 426 U.S. 128, 138 (1976); *United States v. New Mexico*, 438 U.S. 696, 700 (1978); *In Re The General Adjudication of All Rights To Use Water In The Gila River System and Source*, 35 P.3d 68 (2001). Importantly, this type of Federal reserved water right "is superior to the rights of future appropriators." *Cappaert*, 426 U.S. at 138.

For these reasons, the settlement of Pueblo water rights will include the amount of water necessary for the present and future homeland needs of each particular Pueblo. There will not be certainty for the junior water users, or a permanent solution for minnow water, until after the Pueblos' senior Federal reserved water rights are settled in this manner.

**4. The current El Vado Reservoir storage and release policies and procedures are an important part of the problem.**

In 1928, Congress authorized and funded construction of a water delivery system to benefit Pueblo lands and non-Indian lands in the Rio Grande basin. This water delivery system was to be administered by the Middle Rio Grande Conservancy District (MRGCD). See 70 P.L. 169, 70 Cong. Ch 219, 45 Stat 312 (1928).

As part of the construction authorization, Congress directed MRGCD to deliver part of the Pueblos' water entitlement through the MRGCD water delivery system, and agreed to pay for the operation and maintenance costs associated with that part of MRGCD's delivery system. In 1981, the United States and the Pueblos agreed to store in El Vado Reservoir sufficient water to sustain this part of the Pueblos' water entitlement to be released for delivery through the MRGCD system.

The Pueblo of San Felipe, however, is not receiving its full allocation of water that is required to be delivered to the Pueblo through the MRGCD water delivery system pursuant to the 1928 Act and the 1981 Storage and Release Agreement. The Bureau of Reclamation routinely violates the 1981 Storage and Release Agreement by making unauthorized releases of Pueblo water resulting in the use of Pueblo water by junior, non-Indian downstream users. Reclamation also is failing to store sufficient water under the 1981 Storage and Release Agreement.

Further, the Pueblo is not presently using its full share of the native flow of the Rio Grande (and related groundwater) that the Pueblo is entitled to use for residential, commercial and governmental purposes. The Pueblo is not able to use its full allocation in large part because the water delivery system is in serious need of substantial improvements and repairs to allow adequate water delivery.

Despite the illegal reduction in the amount of Pueblo water stored and released from El Vado Reservoir, and despite the Pueblo not using its full entitlement to native flow directly from the Rio Grande, the Department of Interior is now threatening to deprive the Pueblo of its senior Federal reserved water rights so that the junior municipal and non-Indian water users are spared from feeling the full impact of the current drought and silvery minnow water demands.

The current water crisis must not be resolved at the expense of the Pueblos, in violation of Federal law. It is not fair or lawful for the United States to impose the burden of this drought and the silvery minnow water needs on the most senior water rights holders on the river. In accordance with well-established Federal law, delivery of native flow and stored water to the Pueblo must receive priority over the junior non-Indian native flow and storage delivery before Endangered Species Act limitations could or should be applied to the Pueblo's senior Federal reserved water rights. This is consistent with the conclusions of the Department of Interior Working Group on the Endangered Species Act and Indian Water Rights that was formed to evaluate these issues in 1997.

**5. Federal law imposes trust duties of the highest standard on the United States that require the Department of Interior to take all actions necessary to protect and maintain Pueblo water rights.**

The United States Supreme Court has long held that, as the Pueblos' trustee, the United States must act to "preserve and maintain trust assets," using "reasonable care and skill to preserve trust property." *United States v. White Mountain Apache Tribe*, 123 S.Ct. 1126, 1133-34 (2003). See also *United States v. Mitchell*, 463 U.S. 206 (1983). These trust duties require protection in circumstances such as ours where "water rights constitute the trust property" which the Federal government, as trustee, has the duty to preserve by performing "all acts necessary." *Fort Mojave Indian Tribe v. United States*, 23 Cl. Ct. 417, 426(1991). Failure to comply with these Federal trust duties will result in a monetary award against the United States for breach of trust.

As the Supreme Court recently explained, the United States' Federal trust duties are substantial when the United States exercises direct control over tribal trust assets on a daily basis. In such circumstances, "a fiduciary actually administering trust property may not allow it to fall into ruin on his watch." *White Mountain Apache*, 123 S.Ct. 1126, 1133.

Because the Bureau of Reclamation exercises daily control over Pueblo water storage and release, Reclamation has a heightened trust duty to protect Pueblo water from waste and unauthorized use by junior users, including municipalities and non-Indian farmers. Additionally, the Department of Interior has the trust obligation to take the affirmative steps necessary to settle and permanently protect Pueblo water rights in a comprehensive manner. This will require substantial Federal funding, which must be provided to the Pueblos for this purpose.

To date, the United States has entirely failed to provide the Pueblos with the funds necessary for the technical engineering work and legal services that will be necessary to settle Pueblo water rights in the Rio Grande basin. Significant and immediate funding will be necessary to move this process forward in a comprehensive manner aimed at finding permanent solutions to the Rio Grande water crisis.

Additionally, the United States, acting through the Bureau of Reclamation, is breaching its Federal trust responsibility by failing to store sufficient Pueblo water in accordance with the 1928 Act and the 1981 Storage Agreement. Reclamation is also violating the 1981 Storage and Release Agreement by making unauthorized releases of Pueblo water resulting in the use of Pueblo water by junior, non-Indian users. Further, Reclamation is threatening to commit an even greater breach of its trust responsibility through its intention to use Pueblo water for minnow purposes if the junior users refuse to become "willing sellers."

Under well-established principles of Federal water law, Indian tribes and Pueblos in New Mexico hold senior, Federal reserved water rights that must be fulfilled before water is allocated to junior users such as municipalities and non-Indian farmers. Thus, even if the municipalities and non-Indian farmers had a contract right to receive Federal water in times of shortage (which they do not), that right would be junior to the right of the Pueblo to receive its Federally reserved senior water rights. In other words, Pueblo water rights must be fulfilled before the municipalities and non-Indian farmers are entitled to receive any contract water, or the native

flow of the Rio Grande (including related groundwater), regardless of whether such junior users “agree” to become “willing sellers.”

**6. Our water and our entire way of life are bound together through our traditional farming practices.**

The Pueblo of San Felipe has a cherished name of Katishtyha. This is the original name for the city. We call ourselves Katishtyamé. Our homeland in its current location dates back to the 1400's. Before that, we can name our ancestors as the people of Chaco, Mesa Verde, Bandelier. We are the first city builders in America.

We were also the first in this land to develop our ancient water delivery systems, our traditional farming-based economy and closely related social structure. Our art and culture reflect our deep connection to our water, crops and lands. Our sophisticated system of traditional self-governance is necessary to administer and conserve the precious resources that the Creator has given us. It is this civilization—our civilization—that the anthropologists are constantly studying. We are repeatedly examined at the Smithsonian Institute. Universities and tourists from around the world come to study our homeland and our traditional way of life.

All this examination and study leaves us to wonder when we will truly be understood or acknowledged as humans who have human needs. Our families need to eat. We need to teach our youth the ways of our people. Our community needs to celebrate and honor our land and our crops. None of this is possible if the Federal government continues to deny us our basic rights to water.

One source of inspiration for our lives comes from the challenges of food production in the arid environment in which we live. It is a spiritual concept, this idea of being able to survive and using simple tools to work the land. It seems like only yesterday when the tribes lived without the impact of Europeans. This memory—which is so close and still clear—makes us very unique in our concept of survival. The spiritual power of gratefulness has created beauty on our lands and a guarded presence each Katishtyamé possesses, as if our breath may be taken away at any moment. We place water on that same spiritual level.

For a human to exist, that human needs water, food and, perhaps, shelter. But water is the number one need. For these many centuries we have survived. We have been prudent in our use of water, and we are grateful for the water provided to us by the Creator. But we are concerned about the survival of our crops and the future water needs of our children. We are farmers. Throughout history, our people have expressed the importance of our water and our crops in our traditions which can be seen by outsiders as designs in drawings, paintings, weavings, songs, dances, poetry and theatre, and basically in every aspect of our cultural heritage.

These traditions are our cultural legacy. We share this immense cultural contribution with the United States, the State of New Mexico, the universities that study us, the institutes that examine us, and all of the tourists who experience the artistic and psychological impact of our traditional Pueblo way of life when they visit New Mexico.

There is no corporate foundation or concept in our traditional farming. It is simply our way of life. Our farmers take great pride in providing well for their families, extended families, and the entire Pueblo community with our crops. Beyond food to eat, our Pueblo farmers often earn the basic necessities of life by selling produce to neighboring Pueblos or farmers markets, or through barter with other Pueblo families who will, in turn, share their goods as needed. This is how we often provide school clothes for our children, supplies for our artists, and non-food items essential to any household.

Children work with their parents to assist with our traditional farming. The elders pass down stories and lessons related to our farming traditions and thus teach our youth how to grow and accept the responsibilities adulthood will bring. As with our crops, this circle of life feeds our traditions, and provides the foundation for our entire way of life.

If our water is not protected, there will be no survival of these traditional practices. Children will not learn what they need to know from the elders. There will be no fresh produce for healthful eating. The farmers will have nothing to sell or trade for the non-food items that they need. Without water, a welfare state will be imposed on our traditional communities, and a rich culture dating back thousands of years will finally be extinguished.

We will not stand by and watch this destruction occur. As our trustee, the United States must not continue to cause our water to be taken by others, and our water delivery systems to fall into ruin. The silvery minnow water crisis is just one part of a very complicated water shortage in the Middle Rio Grande.

In order to avoid contentious and expensive litigation, the United States must diligently exercise its trust responsibility to protect and preserve our water rights. As discussed above, this will require significant and immediate Federal funding to



the Pueblos for the permanent settlement and protection of our water rights. Additionally, the Department of Interior must stop the unauthorized releases of Pueblo water from El Vado Reservoir, and must store sufficient Pueblo water in accordance with the 1928 Act and the 1981 Storage and Release Agreement.

There will not be certainty for the junior water users in the Middle Rio Grande—or a permanent solution for the silvery minnow water crisis—until after the Pueblos' senior Federal reserved water rights are fully settled and permanently protected. Until that time, the United States must not create temporary band-aids that illegally deprive the Pueblos of water that is critical to sustain Pueblo homelands and the traditional Pueblo way of life.

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The CHAIRMAN. I would like to now recognize Mr. John D'Antonio.

**STATEMENT OF JOHN D'ANTONIO,  
NEW MEXICO STATE ENGINEER**

Mr. D'ANTONIO. Thank you, Mr. Chairman. Honorable Members of Congress, and water rights holders of New Mexico, and honored guests.

Based on the request contained in your letter of August the 27th to Governor Bill Richardson, I offer the following remarks for presentation at the Committee's oversight field hearing here in Belen, New Mexico. You specifically requested that the state present its views on the Tenth Circuit Court of Appeals ruling on Rio Grande Silvery Minnow versus Keys, et al., the impacts of the recovery process, how the ruling has affected New Mexico citizens, and the state's historic role in funding and implementing silvery minnow recovery efforts.

The ruling itself. From the legal analysis I've seen, I think it's clear that this ruling goes far beyond previous cases because it allows the U.S. to seize water promised to others under perpetual contracts, contracts executed decades ago, which have been consistently honored to up to now, and upon which the users are critically dependent. Even the Ninth Circuit (which the Tenth Circuit said it was agreeing with) says that the U.S. can't simply invalidate contracts unless the U.S. retained some discretion to act, such as renegotiation of the terms of a renewal contract. No such discretionary action occurred here—the court simply said that ESA needs prevail over the contract terms, and that's wrong.

Also, the idea that imported water, water that has caused no harm to the species, should be used first to potentially aid in its recovery seems absurd to us. And, if upheld, the ruling would have significant impacts in other river basins in the west where cities have grown dependent for their existing water needs on transbasin diversions.

I'm also concerned that the Tenth Circuit reached a conclusion regarding the legislative authorization for the San Juan-Chama project which is contrary to a previous case result, which was the Jicarilla versus the U.S., which has been heavily relied upon by New Mexico and others, without arguing or overruling that case. That is an inadequate foundation for such a revolutionary and disruptive conclusion.

Finally, I was dismayed that the court also justified its results on the basis of a questionable doctrine never raised or argued by any of the parties. To me, that's fundamentally unfair.

Most importantly, though, the court made its greatest error in finding that the Reclamation has discretion to seize water from its contractors. One thing that the ESA cases say almost uniformly is that the ESA did not add to the authorities already possessed by the Federal Government-- it merely required that those existing authorities be used in a way that would not jeopardize listed species.

And I believe that we're far beyond that here. Does anyone really believe that the, prior to the ESA the, Bureau of Reclamation had the right to seize water promised to others under perpetual contracts, even though it possessed no beneficial use water rights itself? That all its reservoir system supply contracts which municipalities, farmers and Indians relied upon were illusory?

No, that's not credible. And the Tenth Circuit ruling which says Reclamation did have the discretion is therefore not credible to me. New Mexico agrees strongly with the need and policy of protecting endangered species, but the heavy-handed approach of the Tenth Circuit will, I fear, will result in a backlash which will set the program back, not advance it. The way forward is by collaborative efforts, and I ask your support for a funding to continue those critical efforts.

The impacts on the recovery process. The impacts have been profound and also confounding. Prior to the ruling, there was a sense among the affected parties of a real need to collaborate and reach a viable long-term solution that balanced the needs of water users and the minnow. With the ruling, my impression is that there is a sense of frustration and hopelessness-- an attitude of "what's the point--the U.S. will take the water as needed, when needed, anyway." That's an extremely unfortunate result of the ruling, in my opinion.

Technically, the Rio Grande Silvery Minnow Recovery Team has been reconstituted at the direction of Dale Hall, the regional director of the Fish and Wildlife Service. While we are happy to be members of that team, we're concerned with the lack of progress and, in particular, believe it is critical that the revised Recovery Plan include realistic and measurable downlisting and delisting criteria for the fish... the lack of which, in our mind, is a significant shortcoming in the existing plan.

As far as the effects on New Mexico citizens, the primary effects are those resulting from the uncertainty and risk produced by the ruling--neither farmers, nor municipalities, nor individuals, have any assurance of how much water they may get, or when. In water, uncertainty of the legal right to use is fatal to efficient markets, to mitigation of shortages, to the ability of farmers and other users to plan for the upcoming year, and to the preservation of its value.

New Mexico's historic role in the minnow recovery efforts, I'm pleased to report that New Mexico, acting through the Interstate Stream Commission and the Office of the State Engineer, has been a leader in finding innovative ways to provide upstream Rio Grande conservation pool storage and releases to preserve the silvery minnow.

In 2001 the ISC obtained the first-ever State Engineer permit for maintenance of the silvery minnow's habitat, based on an innovative method to use the state's compact delivery flows. This action

provided over 70,000 acre feet for the minnow. In 2003, the ISC arranged a compact credit relinquishment agreement with Texas which provides another 70,000 acre feet for the next 3 years for the minnow.

With regard to river operations, we are heavily involved in day-to-day water management activities including aiding Fish and Wildlife Service in rescuing the minnow during the managed ramp downs of the river flows. I, with the ISC, have also warned that because of the longer-term reality of the hydrology of the Rio Grande is one of scarcity punctuated by floods and the 20 years prior to 1999 were quite wet in comparison to the preceding 30 years, we are in need of river management options that take account of our continuing drought situation. New Mexico is conducting field characterization studies to better understand the interaction between surface water and groundwater in critical areas of the river so we can better manage the river.

ISC has also been a leader in promotion cooperative and technical programs which will facilitate the long-term recovery of the minnow, not merely its preservation. Even before the silvery minnow lawsuit was filed, ISC convened and supported (with both staff and funding) the ESA Collaborative Program, a long-term funding and recovery program vehicle. ISC also conceived, implemented, and paid for the highly successful Silvery Minnow Natural Refugium.

Moving forward, we believe significant and long-term funding of the Middle Rio Grande ESA Collaborative Program will be needed to implement the research, habitat restoration, and efficiency/forbearance projects that are needed. We have been surprised at how little is actually known about the needs of the fish and how we can implement projects that will help it recover.

Research to address the needs of the fish has begun using workgroup funding and we eagerly await the results. In this regard, the non-Federal participants of the Program, at the request of Senator Domenici and Senator Bingaman, have developed Draft Authorizing Legislation for the Program and expect to submit the language to Senator Domenici in the near future.

In sum, New Mexico has been at the forefront of all aspects of efforts to preserve and recover the silvery minnow, both in the refugia and in the wild. It began these efforts before the litigation even arose, and it has continued even during the difficult litigation.

Finally, these results have been accomplished within the Law of the River while insuring that all water obtained has been provided from willing sellers.

Thank you for this opportunity for providing testimony.

The CHAIRMAN. Thank you.

[The prepared statement of Mr. D'Antonio follows:]

**Statement of John R. D'Antonio, Jr., P.E., New Mexico State Engineer,  
Secretary, New Mexico Interstate Stream Commission**

Pursuant to the request contained in your letter of August 27, 2003 to Governor Bill Richardson, I offer the following remarks for presentation at the Committee's oversight field hearing in Belen, New Mexico. You specifically requested that the state present its views on the 10th Circuit Court of Appeals ruling in *Rio Grande Silvery Minnow v. Keys, et al.*, the impacts on the recovery process, how the ruling has affected New Mexico citizens, and the state's historic role in funding and implementing silvery minnow recovery efforts.

*A. The Ruling itself.*

From the legal analyses I've seen, I think it is clear that this ruling goes far beyond previous cases because it allows the U.S. to seize water promised to others under perpetual contracts, contracts executed decades ago, which have been consistently honored to up to now, and upon which the users are critically dependent. Even the 9th Circuit (which the 10th Circuit said it was agreeing with) says the U.S. can't simply invalidate contracts unless the U.S. retained some discretion to act, such as renegotiation of the terms of a renewal contract. No such discretionary action occurred here—the court simply said that ESA needs prevail over the contract terms, and that's wrong. Also, the idea that imported water, water that has caused no harm to the species, should be used first to potentially aid in its recovery seems absurd to us. And, if upheld, the ruling could have significant impact in other river basins in the west where cities have grown dependent for their existing water needs on transbasin diversions.

I am also concerned that the 10th Circuit reached a conclusion regarding the legislative authorization for the SJCP which is contrary to a previous case result, *Jicarilla v. U.S.*, which has been heavily relied upon by New Mexico and others, without arguing or overruling that case. That is an inadequate foundation for such a revolutionary and disruptive conclusion.

Finally, I was dismayed that the court also justified its result on the basis of a questionable doctrine never raised or argued by any of the parties. To me, that's fundamentally unfair.

Most importantly, though, the court made its greatest error in finding that Reclamation has discretion to seize water from its contractors. One thing the ESA cases say almost uniformly is that the ESA did not add to the authorities already possessed by the federal government—it merely required that those existing authorities be used in a way that would not jeopardize listed species. And I believe we're far beyond that here. Does anyone really believe that, prior to the ESA, the Bureau of Reclamation had the right to seize water promised to others under perpetual contracts, even though it possessed no beneficial use water rights itself? That all its reservoir system supply contracts, which municipalities, farmers and Indians relied upon, were illusory? No, that's not credible. And the Tenth Circuit ruling which says Reclamation did have that discretion is therefore not credible to me. New Mexico agrees strongly with the need and policy of protecting endangered species, but the heavy-handed approach of the Tenth Circuit will, I fear, result in a backlash which will set that program back, not advance it. The way forward is by collaborative efforts, and I ask your support for funding to continue those critical efforts.

*B. Impacts on the recovery process.*

The impacts on the recovery process have been profound and confounding. Prior to the ruling, there was a sense among the affected parties of a real need to collaborate and reach a viable long-term solution that balanced the needs of water users and the minnow. With the ruling, my impression is that there is a sense of frustration and hopelessness—an attitude of “what's the point—the U.S. will take the water as needed, when needed, anyway.” That is an extremely unfortunate result of the ruling, in my opinion. Technically, the RGSM Recovery Team has been reconstituted at the direction of Dale Hall, the regional director of the FWS. While we are happy to be members of that team, we are concerned with its lack of progress and, in particular, believe it is critical that the revised Recovery Plan include realistic and measurable downlisting and delisting criteria for the fish...the lack of which, in our mind, is a significant shortcoming in the existing plan.

*C. Effects on New Mexico citizens.*

The primary effects are those resulting from the uncertainty and risk produced by the ruling—neither farmers, nor municipalities, nor individuals, have any assurance of how much water they may get, or when. In water, uncertainty of the legal right to use is fatal to efficient markets, to mitigation of shortages, to the ability of farmers and other users to plan for the upcoming year, and to preservation of value.

*D. New Mexico's historic role in minnow recovery efforts.*

I am pleased to be able to report to you that New Mexico, acting through the Interstate Stream Commission and the Office of the State Engineer, has been a leader in finding innovative ways to provide upstream Rio Grande conservation pool storage and releases to preserve the silvery minnow. In 2001, ISC obtained the first-ever State Engineer permit for maintenance of the silvery minnow's habitat, based upon an innovative method of use of the State's compact delivery flows. This action provided over 70,000 AF for the minnow. In 2003, the ISC arranged a compact cred-

it relinquishment agreement with Texas which provides another 70,000 AF over three years for the minnow.

With regard to river operations, we are heavily involved in day-to-day water management activities including aiding the Fish and Wildlife Service in rescuing RGSM during the managed ramp downs of river flows. I, with the ISC, have also warned that because the longer-term reality of the hydrology of the RG is one of scarcity punctuated by floods and that the 20 years prior to 1999 were quite wet in comparison to the preceding 30 years, we are in need of river management options that take account of our continuing drought situation. New Mexico is conducting field characterization studies to better understand the interaction between surface water and groundwater in critical areas of the river so that we can better manage the river.

ISC has also been a leader in promoting cooperative and technical programs which will facilitate the long-term recovery of the minnow, not merely its preservation. Even before the silvery minnow lawsuit was filed, ISC convened and supported (with both staff and funding) the ESA Collaborative Program, a long-term funding and recovery program vehicle. ISC also conceived, implemented, and paid for the highly-successful Silvery Minnow Natural Refugium.

Moving forward, we believe significant and long-term funding of the MRG ESA Collaborative Program will be needed to implement the research, habitat restoration, and efficiency/forbearance projects that are needed. We have been surprised at how little is actually known about the needs of this fish and how we can implement projects that will help it recover. Research to address the needs of the fish has begun using workgroup funding and we eagerly await the results. In this regard, the non-federal participants of the Program, at the request of Senator Domenici and Senator Bingaman, have developed Draft Authorizing Legislation for the Program and expect to submit the language to Senator Domenici in the near future.

In sum, New Mexico has been at the forefront of all aspects of efforts to preserve and recover the silvery minnow, both in refugia and in the wild, it began these efforts before the litigation even arose, and it has continued them even during that difficult litigation. Finally, these results have been accomplished within the Law of the River and while ensuring that all water obtained has been provided from willing sellers.

Thank you for the opportunity to provide these remarks. I hope they are helpful and I will be glad to respond to any questions you may have.

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The CHAIRMAN. Ms. Alletta Belin.

**STATEMENT OF ALLETTA BELIN, NEW MEXICO COUNSEL,  
WESTERN RESOURCE ADVOCATES**

Ms. BELIN. Mr. Chairman, and members of the Committee, thank you for the invitation to participate in today's hearing. My name is Alletta Belin and I represent the plaintiffs in the Rio Grande Silvery Minnow versus Keys litigation we've been talking about, and I'm going to address that lawsuit and its impacts on New Mexico.

The silvery minnow was once one of the most abundant and widespread fishes in the Middle Rio Grande, originally inhabiting the Rio Grande all the way from Espanola down to the Gulf of Mexico and the Pecos River—about 3,000 miles of river.

At times it was so abundant that the river literally turned silver with minnows. It is now the only one left of a family of four similar fish that once inhabited the Middle Rio Grande. In all, nearly one-half of the native fish in the Middle Rio Grande area have either been extirpated from the Middle Rio Grande or gone extinct.

By the time silvery minnow was listed as endangered in 1994, it had been reduced to 5 percent of its original historic range, and it remained only in the 160-mile stretch of river between Cochiti Dam and Elephant Butte Reservoir.

The reasons cited by the U.S. Fish and Wildlife Service for its listing as endangered include the loss and fragmentation of aquatic

habitat, the narrowing of the species' range, and the impacts of irrigation withdrawals and the dewatering of the habitat.

Since its 1994 listing, the silvery minnow population has continued to plummet. And I would refer you to the first two exhibits, I have in the graph in those exhibits, which depicts the further deterioration of the status of the minnow since 1994.

To talk about the Tenth Circuit silvery minnow decision I must first mention the two Federal water projects that affect the flows in the Middle Rio Grande, and those are the Middle Rio Grande Project and the San Juan-Chama Project.

The Middle Rio Grande Project, which was approved by Congress in 1948 and 1950, included a vast Federal overhaul and expansion of the dams and irrigation works of the then-bankrupt Middle Rio Grande Conservancy District, and authorized construction of major flood control and levy facilities in the Middle Rio Grande, including the Abiquiu and Cochiti Reservoirs.

The San Juan-Chama Project, which was authorized by Congress in 1962, called for the construction of tunnels to transport water from the Colorado River Basin across the Continental Divide into the Rio Grande watershed, as well as construction of Heron Reservoir to hold the project water. The central idea behind this project was to offset past and future anticipated stream flow depletions in the Middle Rio Grande and to provide water for the future growth in the area.

According to its own records, MRGCD serves about 170 full-time farms and 2000 part-time farms. About over 95 percent of the irrigation water is used for alfalfa and other forage. During the late 1980's and the 1990's, MRGCD diverted, on average, over 11 acre feet of water per acre per year which, according to the State Engineer, is about two or more times more water than it is diverted by other irrigation districts in the state.

The silvery minnow litigation arose after about 3 years of dialog among various stakeholders. That dialog began in 1996 after MRGCD water diversions had killed over half of the last remaining silvery minnows. Many people worked very hard over those 3 years to try to find collaborative solutions to the problems and to avoid court litigation.

Unfortunately, the dialog didn't produce real changes and the silvery minnow continued to decline. I believe that the events of the last few years clearly demonstrate that had we not filed the litigation, the silvery minnow would, for all intents and purposes, be extinct by now.

Since the litigation was filed in late 1999, there have been many positive actions taken by many agencies and water users in the Middle Rio Grande. Some of these are reviewed in my written testimony, and I think that many of those actions, not all of them, but a lot of them came about because of the focus and incentives created by the litigation.

As for the Tenth Circuit decision, some people have claimed that that decision is a Federal grab of individuals' water rights. That's not true. The Federal Government is involved in the Middle Rio Grande because it has funded and built dams, reservoirs, irrigation ditches, and levees throughout the Rio Grande, to the tune of hundreds of millions of dollars.

All the water users in the Middle Rio Grande have benefited because of these massive Federal investments. MRGCD, for example, paid back (over 50 years, interest free) only a fraction of the money that the Federal Government invested in its irrigation and levee system through the Middle Rio Grande Project. Farmers got an excellent bargain from the Federal Government: Massive Federal dollars in return for Federal ownership and control over the irrigation system.

The Tenth Circuit was right to hold that Federal water contracts must be interpreted in a manner consistent with the Endangered Species Act. A contrary interpretation would be a death warrant to most of the rivers in the western United States, including the Rio Grande.

And I just, in response to some of the things that were said earlier today, I just wanted to point out that with the various court orders that have been issued in this case, no water has been taken by the Federal Government from anyone. All the water that's been used for the silvery minnow has been sold or lent, and people selling that water have been paid for it. And the water shortages this summer that farmers are experiencing are a result of the drought, they are not the result of the silvery minnow. None of MRGCD's water is being used or taken for the silvery minnow this summer.

Albuquerque and other cities contracting for San Juan Chama water have plenty of options after the Tenth Circuit's decision. If they believe that municipal water contracts should be given a different treatment under the Endangered Species Act and irrigators' contracts, then the contracts should be revised and other measures should be adopted to protect endangered species from the effects of the water deliveries.

And remember that less than 1 percent of Albuquerque's water is used for drinking. Most of it is used for golf courses and landscaping. Cities can always choose to cut back on their water-guzzling amenities in order to leave some water for the river and the bosque.

I think there have been a lot of positive effects from the court decisions in this case. We have heard some of them this morning. I think one of the most positive effects of the Tenth Circuit opinion is that it has spurred intensive efforts to negotiate a collaborative solution to the problems on the Middle Rio Grande. The specifics of those negotiations, led by Governor Richardson, are confidential and I can't talk about them, but I can say that I believe that no such negotiations would be taking place in the absence of the court's opinion, and I certainly hope that they are successful.

There have also been some substantial positive economic impacts on the Upper Rio Grande Basin and the Middle Rio Grande as a result of the efforts to protect the silvery minnow. I review those in my written testimony.

I would refer you just to a recent study by an agricultural economist at NMSU, and another economist that found positive economic effects of flow requirements for the silvery minnow. And as Ms. Grevey Hillson mentioned earlier, the various recovery efforts to the tune of tens of millions of dollars have benefited not only the river and the minnow, but also our economy.

Thank you very much again for the opportunity to speak.

The CHAIRMAN. Thank you.  
[The prepared statement of Ms. Belin follows:]

**Statement of Alletta Belin, New Mexico Counsel,  
Western Resource Advocates**

Mr. Chairman and Members of the Committee, I appreciate your invitation to participate in today's field hearing concerning the Rio Grande silvery minnow, the decision of the U.S. Court of Appeals for the Tenth Circuit in *Rio Grande Silvery Minnow v. Keys*, and their impacts on New Mexico.

My name is Alletta Belin, and I represent the plaintiffs in that lawsuit. I will address the lawsuit and its impacts on our state. My testimony addresses the following points:

- The valuable but declining state of the Middle Rio Grande ecosystem, and the perilous status of the Rio Grande silvery minnow, which is on the brink of extinction;
- The overall importance and vulnerability of river ecosystems, including the many rivers in the western United States affected by federal water projects;
- The history and purposes of the two federal water projects that operate in the Middle Rio Grande: the Middle Rio Grande Project and the San Juan-Chama Project;
- The failure of agencies and water users to address the urgent problems in the Middle Rio Grande that led to a crisis and ultimately to the filing of *Rio Grande Silvery Minnow v. Keys*;
- Developments in the lawsuit that spurred many minnow and river restoration efforts and led up to the Tenth Circuit opinion;
- The meaning and implications of the Tenth Circuit opinion, which is consistent with similar rulings from the Ninth Circuit, and which creates incentives to solve the problems, while still allowing flexibility in how they are solved;
- The positive economic effects of actions to protect the silvery minnow on the Middle Rio Grande and the rest of the Upper Rio Grande Basin.

*Background on the Middle Rio Grande and the Rio Grande Silvery Minnow*

The Middle Rio Grande, home to the last remaining population of the endangered Rio Grande silvery minnow, is a unique and critical stretch of river. Prior to human influence, the Middle Rio Grande was a perennially flowing river, with a braided channel that would migrate back and forth across the floodplain. It supported a dense cottonwood and willow forest, or "bosque," which provided the habitat for a wealth of native and migrating bird and wildlife species. Flow levels in the river were seasonal, with greatest flows in the late spring during peak runoff from snow melt, and in mid to late summer from rain runoff. Reports from the first Spanish settlers of the sixteenth century paint a magnificent picture of the river: "[A] large and mighty river" that "flows through a broad valley planted with fields of maize and dotted with cottonwood groves" (Alvarado, 1540). . . "[A]long the river [near San Marcial] banks there were many cottonwood groves and some patches of white poplars four leagues [about 20 miles] wide" (Espejo, 1583) . . . "A deep river" and "the river with much water" (Castano de Sosa, 1590) . . . "[S]wift and beautiful, surrounded by numerous meadows and farms" (Obregon, late 1500's).

Even now, the Middle Rio Grande boasts the biggest intact stretch of native cottonwood-willow bosque left anywhere in the Southwest. But that bosque is deteriorating as the cottonwoods seeded in the 1940's die without being replaced and non-native species continue to invade. The Middle Rio Grande is also home to about two-thirds of New Mexico's six hundred wildlife species, but we are losing those species. Fourteen animal species in the Middle Rio Grande are on the state list of threatened and endangered species; two are on the federal list: the Rio Grande silvery minnow and the Southwestern willow flycatcher. These problems have been exacerbated by the current drought, and stand to get worse as the valley's population increases and as Albuquerque commences using water from the Rio Grande for its water supply.

The silvery minnow was once one of the most abundant and widespread fishes in the Middle Rio Grande, occurring in the Rio Grande from Espanola to the Gulf of Mexico and in the Pecos River. At times it was so abundant the river would literally turn silver with minnows. The silvery minnow is now the only remaining member of a suite of four endemic Rio Grande mainstream cyprinids that once inhabited the Middle Rio Grande. Of approximately seventeen fish species that were native to the Middle Rio Grande, at least seven have been extirpated or have become extinct (shovelnose sturgeon, American eel, speckled chub, Rio Grande shiner, phantom shiner, Rio Grande bluntnose shiner, blue catfish).



The silvery minnow's population has dropped precipitously in recent years. By 1994, it was reduced to 5% of its historic range, and remained only in the stretch of the Rio Grande between Cochiti Dam and Elephant Butte Reservoir. In 1994, the U.S. Fish and Wildlife Service listed the Rio Grande silvery minnow as an "endangered" species. In determining to list the silvery minnow as endangered, the FWS cited the loss and fragmentation of aquatic habitat, the narrowing the species' range, the impacts of irrigation withdrawals and dewatering of its habitat, and other factors.

Since its 1994 listing, the silvery minnow population has continued to plummet. The most recent silvery minnow monitoring report prepared for the federal government found that by late 2002, the number of silvery minnows found in the river "had declined to the lowest levels ever recorded." (Dudley, Gottlieb & Platania, 2002 Population Monitoring of Rio Grande Silvery Minnow, *Hybognathus Amarus*, Final Report," (June 10, 2003), p.vi. (See Exhibit 1 attached hereto, excerpts of that report; Exhibit 2, graph showing decline of silvery minnow 1994-2002)). Like earlier monitoring studies, this report found the highest densities of silvery minnow in the lowest stretch of the Middle Rio Grande, between San Acacia Diversion Dam and Elephant Butte Reservoir. The lowest densities of silvery minnow were found above Isleta Dam, in the stretch of river that runs through Albuquerque. The 2002 Final Report concluded:

The cumulative effects of years of river drying, downstream displacement, and habitat degradation continue to be manifested by the decline of the Rio Grande silvery minnow. The marked and alarming declines in abundance of Rio Grande silvery minnow recorded in 2002 during this population monitoring study provide the strongest evidence that the problems that led to the precipitous decline of this species have not been remedied. A renewed focus on issues that directly affect the immediate survival of this species in the wild is essential. Removal of instream barriers that prevent Rio Grande silvery minnow from repopulating upstream reaches, the need to maintain increased and variable flow throughout downstream reaches, and restoration and reconnection of the historical floodplain are paramount issues that need to be resolved to assure the continued persistence of this species.

Id.

The declines in the Middle Rio Grande ecosystem parallel declines experienced in rivers throughout the western United States affected by federal water projects. Freshwater ecosystems are critical to all life on earth; at least 12% of the world's animal species inhabit freshwater environments. (Nature Conservancy, *Freshwater Initiative* (2002)). In the United States, approximately 303 fish species, or 37% of freshwater fish, are at risk of extinction, and at least seventeen species have already gone extinct. (Nature Conservancy, "The Declining Status of Freshwater Biodiversity and National and International Water Resources" (2002)). About 123 species of fish, mollusks, crayfish and amphibians in North America alone are extinct due to the building of dams, water pollution, and loss of wetlands. (Id.) As of 1993, in the seventeen western states, 68 fish species were listed as endangered and threatened, and "physical habitat alterations," including water diversions, dams, reservoirs, channeling, and watershed disturbances, was the factor cited most frequently as contributing to the decline of these fish species. (Moore et al., "Water Allocation in the American West: Endangered Fish Versus Irrigated Agriculture," 36 *Nat. Resources J.* 319 (1996)). As of 1995, 184 species that rely on habitat affected by federal water projects run by the Bureau of Reclamation were either listed or proposed for listing under the Endangered Species Act. (Id.)

#### *Rio Grande Silvery Minnow v. Keys*

Two federal water projects affect flows in the Middle Rio Grande: the Middle Rio Grande Project and the San Juan-Chama Project. The Middle Rio Grande Project, approved by Congress in 1948 and 1950, included a vast federal overhaul and expansion of the dams and irrigation works of the then-bankrupt Middle Rio Grande Conservancy District (MRGCD), and authorized construction of major flood control and levee facilities (e.g., Abiquiu and Cochiti Dams) in the Middle Rio Grande. The San Juan-Chama Project, authorized by Congress in 1962, called for construction of tunnels to transport water from the Colorado River watershed across the Continental Divide into the Rio Grande watershed, as well as construction of Heron Reservoir, on a tributary to the Rio Chama, to hold project water before it is released to entities contracting for the water. The central idea behind the San Juan-Chama Project was to offset past and future streamflow depletions in the Middle Rio Grande, and to provide water for the future growth of the area. The Project provides on average 96,200 a-f/year of transported water into the Rio Grande Basin.

According to its own records, MRGCD serves about 170 full-time farms and 2,000 part-time farms. Approximately 97% of the 50-55,000 acres irrigated in MRGCD are forage, i.e., alfalfa, hay, irrigated pasture, and silage or ensilage. Six pueblos lie within the boundaries of MRGCD and are served by its irrigation works. During the late 1980's and 1990's, MRGCD's records indicate that it was diverting close to 600,000 a-f/yr. of water—upwards of 11 a-f/acre/year. The State Engineer stated in 2001 that reasonable beneficial use would probably amount to only about 7.2 a-f/acre/year—about one-third less than MRGCD had been diverting.<sup>1</sup>

In April 1996, MRGCD's diversion of all the water in the Rio Grande at Isleta Dam killed many thousands of silvery minnow. FWS subsequently estimated that MRGCD's actions at that time killed nearly half of the entire remaining population of silvery minnows. That disastrous kill-off of minnows gave rise to several years of dialogue among agencies, environmental groups, and other stakeholders about how river management might be changed to avoid future similar calamities and to ensure protection of the silvery minnow and the related river ecosystem. Unfortunately, while the debate was healthy and much information was exchanged, water management by federal and state agencies and MRGCD did not change in any significant respect. Minnow populations continued to spiral downward. The agencies' minnow protection program was nothing more than a standing offer to buy any spare water that anyone offered to sell for the minnow. There was neither a short-term nor a long-term program to protect or recover the silvery minnow and the habitat on which it depends. Moreover, there had never been any consultation between the Bureau of Reclamation, the Army Corps and the FWS to analyze what water operations actions could be taken to protect federally-listed species such as the silvery minnow, even though such consultation was required by the Endangered Species Act.

Only after three years of discussions failed to change Middle Rio Grande water operations and address the problems of the silvery minnow did several environmental groups file the lawsuit against the Bureau of Reclamation and the Army Corps of Engineers known as *Rio Grande Silvery Minnow v. Keys*. Absent this litigation, there is every reason to believe that the silvery minnow would be extinct by now and the Middle Rio Grande river and bosque habitats would be far more degraded than they are today.

Court-ordered mediation in the case during the drought summer of 2000 resulted in two agreed court orders that kept up flows in the river and avoided the anticipated river drying that would have wiped out the vast majority of remaining silvery minnows. At that time, upstream reservoirs were full to the brim and Albuquerque literally had no place to store water and no use for its San Juan-Chama Project water. Albuquerque was able to lend substantial amounts of water to the Bureau for the minnow that will be paid back in future years when Albuquerque most needs the water. In addition, the litigation and mediation caused the Bureau of Reclamation to initiate a number of other steps to aid the minnow and river flows, such as pumping water from the Low Flow Conveyance Channel back to the river. As a result, the silvery minnow survived that drought summer.<sup>2</sup>

Numerous developments grew out of the litigation over the next two years, including entry of a Conservation Water Agreement between the State and the United States that provided for storage of up to 100,000 a-f of water to be used for the minnow over a three year period, and issuance of a Biological Opinion by FWS on June 29, 2001, that allowed for significant drying of portions of the Middle Rio Grande containing the last viable silvery minnow populations.

In late 2002, another drought year, the Bureau of Reclamation announced that it would be unable to comply with the minimum river flows required by the June 29th BO. Once again faced with the prospect of massive drying of the only parts of the Rio Grande harboring the last silvery minnows, plaintiffs went back to court

<sup>1</sup>During the drought of the past two years, and under pressure from this litigation, MRGCD has reduced its diversions to the neighborhood of 7.7 a-f/acre, an amount closer to (but still higher than) the amount diverted by other irrigation districts in the state. (See S.S. Papadopoulos & Assoc., "Evaluation of the Middle Rio Grande Conservancy District Irrigation System and Measurement Program," (December 2002) (prepared for the New Mexico Interstate Stream Commission))

<sup>2</sup>At that time, there were virtually no silvery minnows in captivity. The agreed orders entered in the litigation in the summer of 2000 set in motion various actions by the federal agencies and other parties to greatly increase captive populations of silvery minnow in an effort to ensure the existence of at least minimal remnant populations if river drying were to kill off substantial portions of the last silvery minnows remaining in the Rio Grande. It must be noted, however, that the ESA requires protection of species in their native habitat. 16 U.S.C. §1531(b). While fish tanks might be used to help avoid extinction of a species, they are not a substitute for true conservation and recovery of a species.

to seek release of a limited amount of San Juan-Chama Project water from Heron Reservoir to comply with the BO. Unfortunately, by the time plaintiffs were informed of the anticipated BO violation, MRGCD had used up all of its stored water and thus could not help to comply with the BO. Virtually the only water available to bring about compliance was the water in Heron Reservoir. Chief U.S. District Judge James Parker ruled in the plaintiffs' favor, although in order to limit the amount of water to be released, he allowed the U.S. to meet lower flow levels than those required by the BO. This court order, as well as an order issued several months earlier, triggered the appeal to the Tenth Circuit that resulted in the June 12, 2003 Tenth Circuit decision in *Rio Grande Silvery Minnow v. Keys*.

#### *Tenth Circuit Opinion*

In the view of the plaintiffs, the Tenth Circuit ruling in *Rio Grande Silvery Minnow v. Keys* is not significantly different from the Ninth Circuit rulings in *O'Neill v. U.S.*, 50 F.3d 677 (9th Cir. 1995); *NRDC v. Houston*, 146 F.3d 1118 (9th Cir. 1998); and *Klamath Water Users Protective Assn. v. Patterson*, 204 F.3d 1206 (9th Cir. 2000). It is not a radical proposition to hold that federal water contracts must be interpreted in a manner consistent with the ESA. Indeed, in the plaintiffs' view, it would be a dramatic roll-back of the ESA to hold the contrary: that federal water contracts should be given a narrow interpretation that excludes the possibility of managing water to avoid jeopardy to listed species when possible. Such an interpretation would not only be a radical departure from current federal law. It would also be a death warrant for our western rivers and the freshwater ecosystems which they support—almost all of which are greatly affected by federal water projects run by the Bureau of Reclamation and the Army Corps of Engineers.

The main thing that differentiates this case from the earlier Ninth Circuit cases is that it concerns, in part, federal water that is contracted to municipalities for public water supplies. Unlike irrigators, who generally are used to living with significant variations in their water supply, municipalities want to be able to count on a constant supply. Although municipalities' water needs are different from farmers' water needs, their federal water contracts (at least the municipal San Juan-Chama Project contracts) are not materially different from farmers' federal water contracts. Hence, unless and until municipal water contracts are drafted differently, we believe it is unlikely that courts will find a rationale to treat cities' water contracts differently from irrigation districts' water contracts.

If it is the consensus among the federal government, water users, and the public that municipal contracts for water from federal projects should be given different treatment vis-à-vis the ESA than irrigators' contracts, then the contracts should be revised and other measures should be adopted to protect listed species from the effects of the water deliveries. Reversing the Tenth Circuit's holding by way of back-room appropriations riders that are strongly opposed by important stakeholders and that never receive any public scrutiny or congressional debate does not serve the full panoply of public interests at stake in this case.

Some people have claimed that the Tenth Circuit's decision is a federal grab of individuals' water rights. This is not true. The federal government is involved in the Rio Grande because it has funded and built dams, reservoirs, irrigation ditches, and levees throughout the Rio Grande, to the tune of hundreds of millions of dollars. All water users in the Middle Rio Grande have benefitted from these massive federal investments. MRGCD, for example, paid back (over 50 years, interest-free) only a fraction of the money that the federal government invested in its irrigation and levee system through the Middle Rio Grande Project. Farmers got an excellent bargain from the federal government: massive federal dollars in return for federal ownership and control over the irrigation system.

By the same token, those entities that entered into contracts with the federal government for San Juan-Chama Project water didn't get an absolute guarantee that a set amount of water would be delivered every year, no matter what. There is no way the federal government would or should have provided such a *carte blanche* promise. Rather, they got only what the contracts provided: a promise that water would be provided to the extent available and consistent with federal law—including the ESA.

There is nothing fundamentally wrong with how the ESA has been applied to water management on the Middle Rio Grande or on other rivers in New Mexico and around the west. In most instances, the ESA is applying, adjustments are being made, and problems are being solved without overwhelming obstacles. Indeed, there are many success stories around the west where application of the ESA has brought rivers and fisheries back from the brink of death, to the great benefit not only of the species but also of the people in the area. In many of the rivers in California's Central Valley, for example, salmon runs have rebounded from mere handfuls to

tens of thousands. These rivers would be barren and dead if the ESA had not been applied just as the Tenth Circuit is applying it to the Rio Grande.

Many of the proposals to “fix” how the ESA applies to water management would result in the death of our rivers. We must be careful in the areas where it is particularly difficult to mesh the ESA with meeting people’s water needs, to craft solutions that do not simply throw out the ESA and kill our rivers.

In those few instances that pose particularly difficult problems, such as the Middle Rio Grande, court decisions won’t fix the problems, nor will quick congressional ESA exemptions. The only lasting solution will come when the parties come together and collaborate to solve the problems in a way that meaningfully implements the ESA.

*Efforts to Collaborate To Protect the Silvery Minnow and the Rio Grande*

One of the most positive effects of the Tenth Circuit opinion is that it has spurred intensive efforts to negotiate a collaborative solution to the problems on the Middle Rio Grande. The specifics of those negotiations, led by Governor Richardson, are confidential. We can point out, however, our firm belief that no such negotiations would be taking place in the absence of the court’s opinion. Rather, in all likelihood, the agencies and water users would simply throw their hands up and declare, just as they did a year ago, that they were unable to comply with the BO and unable to preserve the silvery minnow. Without a court opinion creating incentives to come up with creative solutions, and with no adverse consequences stemming from a failure to protect the silvery minnow, the river would inevitably dry up and die, taking much of the bosque with it. It would not be long before the Middle Rio Grande turned into the barren dry ditch that we see further downstream, where the Rio Grande used to flow through El Paso.

*Economic Effects of the Endangered Species Act on the Upper Rio Grande Basin*

Earlier this year, economists from New Mexico State University and Siena College in New York released a study on the economic effects of water releases for the silvery minnow. (See Exhibit 3 attached hereto; excerpts from Frank A. Ward and James F. Booker, “Economic Costs and Benefits of Instream Flow Protection For Endangered Species in an International Basin” (2003). The economists examined the effects of implementing minimum flow requirements for the silvery minnow in the Middle Rio Grande that are higher than the minimum flows required by the most recent Biological Opinion issued by FWS in March, 2003. They found that “[p]rotecting instream flows for the silvery minnow produces positive market economic benefits for agriculture and M&I uses of water for the upper Rio Grande Basin.” (Id., p.17). They estimated the overall economic benefit to the New Mexico/Texas area of instream flows for silvery minnow protection to total over \$1.5 million/yr. (\$1,522,000). Specifically, they determined that New Mexico agriculture would receive economic benefits in the amount of \$68,000/year, while New Mexico M&I uses would lose benefits amounting to \$24,000/year, for a net overall benefit to New Mexico of \$44,000/yr. Texas agriculture would receive \$203,000/yr. of economic benefit, and Texas M&I users would gain \$1,275,000/yr, for an overall gain to Texas of \$1,478,000/year.

Moreover, these estimates of positive economic impacts from increased flows do not even account for the benefits—both economic and other—to the State that have resulted from the Rio Grande Compact delivery credits coming from those increased flows. Those credits have been especially valuable since Article VII of the Rio Grande Compact went into effect and storage of native water would not have been possible absent relinquishment of Compact credits.

In addition to these projected economic impacts resulting from increased river flows for the silvery minnow, there have been other positive economic impacts on the region from efforts to restore the silvery minnow and its river habitat. Federal funding (together with state and local cost-shares) of river restoration and minnow protection efforts over the past several years has injected in the neighborhood of \$30 million into the regional economy. The State of New Mexico and various other governmental entities have also provided significant amounts of additional funding in furtherance of protection of the minnow, the river, and the bosque. This funding has not only benefitted our economy, it has benefitted the river. There are currently over fifty restoration projects in the Middle Rio Grande that are ongoing or in planning stages that are funded or sponsored by federal, state and local governments and other entities. (Tetra Tech, Inc./Alliance for the Rio Grande Heritage, A Framework for a Restoration Vision for the Rio Grande: Hope for a Living River (May 2003), App. D).

*Impacts of the Tenth Circuit Ruling on Albuquerque and Other Municipal San Juan-Chama Contractors*

The Tenth Circuit decision has provided a common sense interpretation of the terms of the contract that Albuquerque entered into with the United States regarding provision of 48,200 a-f/yr. of San Juan-Chama Project water to Albuquerque, when such water is legally available. For Albuquerque to leap to the assumption that its contract was a perpetual guarantee for 48,200 a-f of water every single year forever more, regardless of the circumstances and regardless of the language of its contract, was simply wishful thinking.

In any event, Albuquerque (and other San Juan-Chama contractors) has several options for alleviating the uncertainties in its current contract. It can renegotiate its San Juan-Chama contract with the United States to provide greater certainty. It can also seek congressional action to provide the level of certainty desired in its water contract. Or, it could live with the terms of its contract, with the assurance that the federal government cannot take large amounts of San Juan-Chama Project water to use for the minnow because the San Juan-Chama authorizing legislation expressly requires that “a reasonable amount” of water be delivered to contractors.

A recent poll conducted by University of New Mexico’s Institute for Public Policy found that people ranked use of water for the Rio Grande and riparian areas second only to water for drinking and bathing in importance. Less than 1% of Albuquerque’s San Juan-Chama water will be used for drinking. Most of it will be used for outdoor watering of golf courses, turf and other water-guzzling amenities. Thus, if any San Juan-Chama water were ever to be taken by the federal government and used for the minnow under the Tenth Circuit’s opinion—which would only happen if the New Mexico stakeholders were unable to solve these problems themselves—it would not affect anyone’s drinking water. Rather, it would be in essence a re-allocation of water from golf courses and non-native lawns to endangered species, and the river and bosque on which they depend. Such a result would be consistent with the purpose of the Endangered Species Act. It would also be a proper response to the warning of the impending demise of our river that is being given by our “canary in the coal mine”—the Rio Grande silvery minnow.

# **PROGRAMMATIC BIOLOGICAL ASSESSMENT**

**OF**

**BUREAU OF RECLAMATION'S  
WATER AND RIVER MAINTENANCE OPERATIONS,  
ARMY CORPS OF ENGINEERS' FLOOD CONTROL OPERATION,  
AND  
NON-FEDERAL ACTIONS  
ON THE MIDDLE RIO GRANDE, NEW MEXICO  
March 1, 2003 – February 28, 2013**

**Partially incorporating the 2001 Biological Assessment  
Submitted to the U. S. Fish and Wildlife Service**

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**RIO GRANDE SILVERY MINNOW  
BALD EAGLE**

**SOUTHWESTERN WILLOW FLYCATCHER  
INTERIOR LEAST TERN**

**February 19, 2003**

**U. S. Department of the Interior  
Bureau of Reclamation  
Albuquerque Area Office  
Albuquerque, New Mexico**

**U. S. Army Corps of Engineers  
Albuquerque District  
Albuquerque, New Mexico**

**ECONOMIC COSTS AND BENEFITS OF INSTREAM FLOW PROTECTION  
FOR ENDANGERED SPECIES IN AN INTERNATIONAL BASIN**

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In Texas, El Paso M&I users experience gains of about \$1.3 million per year from slightly increased use over the long run, with groundwater pumping falling slightly to make up for increased surface water supplies. Average benefits per added acre-foot are about \$1700. El Paso area agriculture receives \$203,000 per year in direct farm income gains produced by greater surface flows delivered to Elephant Butte Reservoir. This gain is about one percent of benefits earned under a policy of no minnow flow requirements.

## 5 CONCLUSIONS

The U.S. Endangered Species Act and its amendments emphasizes the protection of endangered species, with limited consideration of cost. Despite this emphasis, it is important to measure the economic costs of saving species in order that people who are called upon to pay the money or water needed can contribute to informed choices for measures to save the species consistent with biological requirements.

This paper estimated the economic impacts associated with one measure for increasing instream flows to meet critical habitat requirements of the endangered Rio Grande Silvery Minnow. Using an integrated model of the hydrology, economics, and institutions of the Rio Grande Basin, a 44-year simulation of future inflows to the basin was conducted to estimate economic impacts of providing minimum acceptable flows for the minnow.

Protecting instream flows for the silvery minnow produces positive market economic benefits for agriculture and M&I uses of water for the upper Rio Grande Basin. Water uses affected by the minnow's protection are reallocated within the basin. Water used for instream flow protection is run downstream to high-valued agriculture and M&I uses.<sup>31</sup>

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<sup>31</sup>The authors thank an anonymous reviewer for this paragraph's insights.



Economic benefits to New Mexico agriculture were estimated at \$68,000 per year, distributed as a \$149,000 loss to central New Mexico agriculture combined with a \$217,000 gain to agriculture in southern New Mexico. These gains by southern New Mexico agriculture could compensate losses incurred by central New Mexico agriculture, with a residual net gain of \$68,000. Annual average benefits lost to New Mexico M&I water users was a modest \$24,000. So the net annual average gain to New Mexico associated with instream flow protection for the silvery minnow is \$44,000. The policy of year-round minnow flows produced a gain in benefit of \$203,000 per year for El Paso Texas agriculture as well as a gain in benefit of \$1,275,000 for El Paso M&I users.

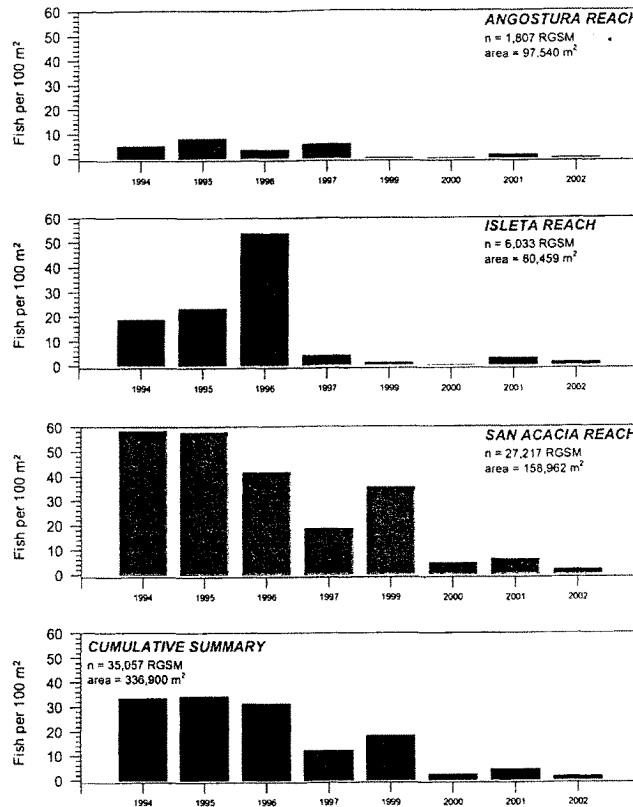


Figure 11. Reach Specific Annual Silvery Minnow Catch Rates between 1994 and 2002. (Dudley and Platania, 2002). (Note: the high catch rate of silvery minnow indicated within the Isleta Reach in 1996. This catch rate is the result of a sampling anomaly: silvery minnow were confined to isolated pools during river drying events).

**Statement submitted for the record by Alletta Belin,  
New Mexico Counsel, Western Resource Advocates**

In response to Chairman Pombo's statement that the written record would be open for ten days following the September 6, 2003, field hearing on the impacts of the Rio Grande silvery minnow, I submit this additional testimony to correct some erroneous statements that were made at the hearing.

1. It was stated that at least one farmer lost at least 30% of his crops this year due to the Tenth Circuit's ruling in *Rio Grande Silvery Minnow v. Keys*. This is not true. No farmer has lost crops this year due to water reductions resulting from the court ruling. The Middle Rio Grande Conservancy District's irrigation season has been cut short by drought—not by actions taken by the federal government in response to the court ruling. In fact, MRGCD has voluntarily contributed about 3100 a-f to the minnow this year, which is only enough water to provide a few days of irrigation. I invite the Committee to confirm this fact by consulting with the Bureau of Reclamation.
2. It was stated that the Tenth Circuit released fifty years' worth of water from reservoirs in one year for the minnow. This also has absolutely no basis in fact. I assume that the speaker was talking about the year 2000—the year in which the most water was released to keep the silvery minnow from extinction. In that year, the federal government purchased and used approximately 144,900 a-f of water for the minnow.<sup>1</sup> About 70,000 a-f was purchased and used by the federal government before court-ordered mediation in *Rio Grande Silvery Minnow v. Keys* took place, and 74,900 was purchased and released as a result of two agreed orders that resulted from the mediation. (See August 2, 2000, Agreed Order and October 5, 2000, Supplemental Agreed Order in *Rio Grande Silvery Minnow v. Keys*, Civ. No. 99-1320-JP/LAM.) Thus, the total amount of water released in 2000 for the silvery minnow was about 145,000 a-f. Virtually all of this water was San Juan-Chama water that was not needed by the water users and contractors at that time. Since 96,200 a-f/yr. of San Juan-Chama Project water is available for use in New Mexico, that means that about one and one-half years' worth of San Juan-Chama Project water was used in 2000—not fifty years' worth of water under any measure.

Thank you very much for the opportunity to testify before your committee on the impacts of the Rio Grande silvery minnow on New Mexico.

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<sup>1</sup>30,000 additional a-f was made available to the federal government by the City of Albuquerque in the October 5, 2000, Supplemental Agreed Order but was not used because it was not needed, and 36,000 a-f of water was provided under the August 2, 2000, Agreed Order to MRGCD for irrigation.

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September 26, 2003

Richard Pombo, Chairman  
House Committee on Resources  
Washington, D.C. 20515

Re: September 6, 2003 Field Hearing on Impacts of Rio Grande Silvery Minnow

Dear Chairman Pombo and Members of the Committee:

This letter responds to your September 15, 2003, letter to me that asked me to answer four questions. My answers to those questions are set forth below:

1. The House-passed fiscal year 2004 Energy and Water Development Appropriations bill includes a provision that would prohibit the release of water from the San Juan Chama Project or Middle Rio Grande Project for the purpose of complying with the Endangered Species Act. If enacted, what impacts will this language have?

The House-passed provision would eliminate any assurance of compliance with the minimum flow requirements established by the U.S. Fish and Wildlife Service in its March 17, 2003, Biological Opinion (BO) and thus greatly increase the likelihood of significant violations of the BO and resulting adverse impacts on the Rio Grande silvery minnow. To date, the federal government has never had to release water under either the San Juan Chama Project or the Middle Rio Grande Project absent voluntary agreements with water users. However this House-passed provision, by taking all water users totally "off the hook" for Endangered Species Act compliance, would greatly undercut incentives for negotiated water solutions that meet BO requirements next year. It would establish a new framework under which complying with the ESA would be viewed by all water user stakeholders as "somebody else's problem." As a result, the possibility of people coming together to solve the problem will dwindle.

If, as a result of enactment of the House-passed provision, there are substantial violations of the March 2003 BO, that will have serious negative long-term consequences. First, of course, such violations would, according to the U.S. Fish and Wildlife Service and other expert biologists, jeopardize the continued existence of the Rio Grande silvery minnow. (See attached recent status report on Rio Grande silvery minnow prepared by the independent biologists who have been monitoring the species for

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 House Committee on Resources  
 September 26, 2003  
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many years: Steven Platania and Robert Dudley, "Summary of the Biology of Rio Grande Silvery Minnow, An Endangered Species in the Middle Rio Grande, New Mexico," (Sept. 16, 2003). They would eliminate more of the last remaining silvery minnow populations still living in the Rio Grande and thus increase the likelihood that the silvery minnow will go extinct.

Second, such violations would essentially wipe out the March 2003 BO and trigger the requirement that the Bureau of Reclamation and Army Corps of Engineers reinitiate consultation with the Fish and Wildlife Service on the effects of Middle Rio Grande water operations on threatened and endangered species. Compliance with the March 2003 BO is the lynchpin of the government's plan to protect the silvery minnow. The State of New Mexico, the City of Albuquerque, the Middle Rio Grande Conservancy District and other water users have all supported this plan. The failure of this plan would be a great failure of all of these entities. It would very likely signal the inevitable extinction of the silvery minnow.

2. Could desalination or the use of other water technologies be useful in resolving some of New Mexico's water problems?

The short answer to this question is "yes." There is a range of actions that would be useful in resolving the water problems on the Rio Grande and throughout New Mexico, including desalination. I attach the recent report on water management in New Mexico which I co-authored, entitled Taking Charge of Our Water Destiny: A Water Management Policy Guide for New Mexico in the 21<sup>st</sup> Century (2002), including the most relevant excerpts from that report.<sup>1</sup> This report discusses desalination, moving water storage from high-evaporation reservoirs in the State to other locations, including underground, and water conservation, among other things. All of these are tools that can be used to resolve New Mexico's water problems and protect what remains of our rivers. Desalination certainly should be considered as an option for public water supplies for communities on the Rio Grande, as El Paso's recent decision to construct a desalination plant demonstrates. However, as a general matter, desalination is most feasible and cost-effective in coastal areas where disposal of the brine and sludge is less problematic.

On the Rio Grande, technologies and strategies that are most likely to produce near-term positive impacts on the Rio Grande and the State are increased irrigation efficiencies (particularly in delivery systems) and leasing and forbearance programs under which water can be leased from farmers and left in the river to protect endangered species. Because most of New Mexico, including the Middle Rio Grande, relies on centuries-old flood irrigation systems, there are many options for increasing the efficiencies of those systems and thus providing more water for both the rivers and the farmers. Unfortunately, implementation of such efficiencies will require major funding and assistance from the federal government.

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<sup>1</sup> This report is available online at: [www.1000friends-nm.org](http://www.1000friends-nm.org).

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September 26, 2003  
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3. Some people have suggested we just let the silvery minnow go extinct. What does the silvery minnow population say about the health of the Rio Grande River?

As those of us urging protection of the Rio Grande silvery minnow have often stated, the silvery minnow is "the canary in the coal mine" for the Rio Grande. The silvery minnow's precarious status is a clear message that we are on the brink of losing the living river that we still have in the Middle Rio Grande. The Middle Rio Grande supports the largest remaining intact native cottonwood-willow forest in the Southwest. It supports two-thirds of New Mexico's wildlife species. And of course it supports most of the people in the Rio Grande Valley. But the Rio Grande – especially the Middle Rio Grande in New Mexico – is slowly dying. We are killing it. Nearly half the native fish of the Rio Grande have already gone extinct or been extirpated from the river. Fires have been burning up the bosque, in part because the bosque and river are too dry. The silvery minnow brings the message that we cannot keep adding endlessly to the demands that we place on the Rio Grande – at least without serious negative consequences for both people and wildlife. There is still hope for protecting the Rio Grande and providing for our people, but we must heed the minnow's warning, and come together to find creative solutions that both preserve what we have left of the Rio Grande and its "bosque," and provide for the needs of the people of this area. The Endangered Species Act (ESA) and the Rio Grande silvery minnow have been an important wake-up call to the people of New Mexico. We should respond to that call not by simply eliminating the ESA's protections but by heeding its warning and planning for a healthy future for all of us, including the silvery minnow and the Rio Grande.

4. I think we can all agree that water is a scarce commodity in the West. Water resources are sometimes over-allocated, and population growth is stretching these precious supplies to the limits. This situation is often compounded by water use practices that result in the wasting of substantial amounts of water. In your opinion, would any of the current legislative proposals provide for a sustained long-term water supply here in the Rio Grande Basin? What is your assessment of the proposals offered in response to the water situation here in New Mexico? What would you propose as a solution?

H.R. 2982, the Middle Rio Grande Emergency Water Supply Stabilization Act of 2003, would move us a major step forward in helping to provide a sustained long-term water supply in the Middle Rio Grande. It also provides mechanisms that will help protect the silvery minnow, while simultaneously supporting farmers in the basin. Given the increasing demands for water from the Rio Grande, the only way to meet those needs over the long-term is through the types of conservation measures that are furthered in H.R. 2982. Increased efficiencies in irrigation systems are particularly important for protection of the Rio Grande because such efficiencies can greatly reduce the amount of

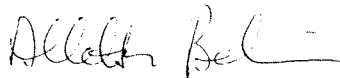
Richard Pombo, Chairman  
 House Committee on Resources  
 September 26, 2003  
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water being diverted out of the river, thereby protecting the river and the silvery minnow, without reducing the amount of water actually delivered to the crops themselves.

None of the other legislative proposals currently proposed that affect water management in the Rio Grande (the House-passed Energy and Water Appropriations provision, the Senate-passed Energy and Water Appropriations provision, and H.R. 2603) would have any beneficial effect in ensuring long-term sustainable water supplies or promoting greater water conservation or efficiencies. The House-passed provision simply exempts the Middle Rio Grande Project and San Juan Chama Project from ESA compliance for one year without doing anything to promote water efficiencies and conservation. Similarly, the Senate-passed provision only provides a permanent ESA exemption for San Juan Chama water and codifies the March 2003 BO (in addition to exempting other federal actions in the Middle Rio Grande from any ESA compliance whatsoever). Finally, H.R. 2063 would permanently bar the Bureau of Reclamation from ever altering or reducing any contract water deliveries, even where such alterations were permitted under the contract and advocated by the Bureau or were required by other federal laws or other intervening circumstances. None of these three provisions takes even the smallest step towards a **solution** to the problems being experienced in the Middle Rio Grande. They are simply different forms of ESA exemptions. Given that the ESA and the silvery minnow are, as described above, "the canary in the coal mine" warning of dire impending problems, these provisions are simply an attempt to put our heads in the sand and ignore those problems entirely.

Thank you very much for the opportunity to testify at the field hearing and to provide additional information in response to the questions from the Minority Members of the Committee.

Very truly yours,



ALLETTA BELIN

The CHAIRMAN. I'd like to now recognize Mr. Tom Wesche.

**STATEMENT OF TOM WESCHE, BIOLOGIST,  
 HABITECH, INC., LARAMIE, WYOMING**

Mr. WESCHE. Good morning, Mr. Chairman, Honorable Committee Members. I appreciate the opportunity to testify before you this morning concerning Rio Grande silvery minnow issues in New Mexico. Since 1999 I have served as a fisheries consultant for the Middle Rio Grande Conservancy District on issues pertaining to the minnow. In this capacity I served as a member of the Collaborative Program's Science Subcommittee.

In my letter of invitation I was asked to address several matters, including my views on the Tenth Circuit Court's ruling, the need for a additional flows to benefit the minnow, the underlying role of science in the recovery process, and the role of habitat enhancements and monitoring in this process.

As the first two issues are closely related, allow me to address them jointly. It is my understanding that the Tenth Circuit's ruling permits the Bureau of Reclamation, acting under the ESA, to reduce contract deliveries of non-native San Juan-Chama water and use that water for the benefit of the silvery minnow.

In essence, this ruling supports the notion that more water is necessary to conserve the minnow and that by simply releasing more from storage, no matter the source or the probability of future supply, the species will be protected. I disagree with this viewpoint and submit that history does not support the assertion that river drying can reduced flows of the principal causes for the current status of the silvery minnow.

Over the past 50 plus years, while minnow numbers have apparently been decimated, river flows have been substantially augmented and the number of zero-flow days substantially reduced. Such facts lead me to conclude a strategy of simply releasing copious amounts of water down the Middle Rio Grande channel to benefit the silvery minnow has failed.

Our critically low water supply levels dictate such wasteful practices be discontinued in favor of a more holistic approach such as that mandated by the Biological Opinion. This approach recognizes the hydrologic reality of the Middle Rio Grande, that river drying has occurred historically and will continue in the future, that priority life functions such as spawning must be protected first when water supply is short, that management priority must be given to those river reaches where flow can be provided most efficiently while maintaining other legitimate water uses, that refugia, hatcheries, and other sanctuaries are necessary, and that multiple factors, such as habitat degradation, passage barriers, and predation and competition have contributed substantially to the decline of the species.

I am encouraged by this approach and hopeful we can now move past the single, divisive issue of "keeping the river wet" at all cost and on to the important business of conserving the minnow. To this end, I am supportive of the current Biological Opinion and legislation such as that being sponsored by Congressman Pearce and H.R. 2603 which provides a positive solution to the problems created by the Tenth Circuit's decision.

Regarding the role of science in the recovery process, let me simply say "science" and the application of the "scientific method" is the critical underpinning of the entire recovery process. Complex problems require complex solutions, and science provides the framework within which such complex solutions will be crafted for the Middle Rio Grande.

Concerning the role of appropriate habitat enhancements, I'm of the opinion that the physical habitat of the Middle Rio Grande is severely degraded and recovery of the silvery minnow is questionable at best unless river-wide habitat enhancement measures are implemented. Flow-based solutions alone will not return habitat for the minnow. Well-conceived, designed and implemented habitat enhancement measures are needed to re-connect the river with its floodplain, widen the channel to promote diversity, and increase complexity. These are high priority measures needed immediately if silvery minnow recovery is to proceed.

Finally, monitoring of the silvery minnow population is an important component of the recovery effort. A river-wide, representative, statistically valid sampling program yielding quantitative results is necessary to document baseline conditions, teach us about the temporal and spatial distribution of the species, measure program successes and failures, and chart our progress toward established recovery targets. The Science Subcommittee has spent considerable time debating this matter I am confident that through these discussions, input from expert peer reviewers, and perhaps some fine-tuning, the resulting monitoring efforts will meet the needs of the program.

The CHAIRMAN. Thank you.

[The prepared statement of Mr. Wesche follows:]

**Statement of Thomas A. Wesche, Principal Scientist and Professor Emeritus, HabiTech Inc. and University of Wyoming, representing Middle Rio Grande Conservancy District**

My name is Thomas A. Wesche. I appreciate the opportunity to testify before you on matters concerning the Rio Grande silvery minnow (RGSM) in New Mexico. My resume is attached for your review. To summarize, I am presently the Principal Scientist for HabiTech Inc. and Professor Emeritus of Water Resources at the University of Wyoming. I have over 30 years professional experience in the western United States, including the desert southwest, as a fisheries scientist and surface water hydrologist, specializing in the evaluation and restoration of degraded river systems, the habitat requirements of various fish species, and the determination of suitable instream flow regimes to protect and restore aquatic ecosystems. In New Mexico, I have served as a member of the Biology Committee for the San Juan River Recovery Implementation Program since the mid-1990's and as a consultant for the Middle Rio Grande Conservancy District since 1999 on issues concerning the RGSM. In this latter capacity, I serve as a Delegate to the Middle Rio Grande Endangered Species Act Collaborative Program (MRGESACP) Science Subcommittee and a member of the San Acacia Fish Passage Workgroup and the newly formed RGSM entrainment ad hoc group. Also, I have conducted research on physical barriers to RGSM passage and am currently initiating projects to restore RGSM habitat using large woody debris and quantify hydrologic alteration along the middle Rio Grande.

In my letter of invitation, I was asked to address several matters in my testimony. These include my views on 1) the 10th Circuit Court's ruling on Rio Grande Silvery Minnow, et al. vs. John W. Keys, III, et al.; 2) the need for additional flows to benefit the silvery minnow; 3) the underlying role of science in the silvery minnow recovery process; and, 4) the role of appropriate habitat enhancements and improved monitoring measures in the recovery process. Following are my opinions on these issues.

As my views on issues 1 and 2 are strongly intertwined, allow me to address them collectively from a scientific, not a legal, perspective. It is my understanding that the 10th Circuit Court's ruling permits the Bureau of Reclamation, acting under the ESA, to reduce contract deliveries of non-native San Juan-Chama water and use that water for the benefit of the silvery minnow. In essence, this ruling supports the notion that more water is necessary to conserve the silvery minnow and that by simply releasing more from storage, no matter the source or the probability of future supply, the species will be protected. I disagree with this viewpoint and continue to argue, as I have for the past several years, that history does not support the assertion that intermittency, river drying, and reduced flows are the principal causes for the current status of the silvery minnow. For example, if we compare the San Marcial stream flow record for the 1950 to 1972 period with that for the 1973 to 1999 period, we find that mean monthly flows are substantially higher during every month of the year and the occurrence of zero-flow days substantially lower during the more recent period, when minnow numbers have apparently declined sharply. Likewise, comparison of similar time periods using the Albuquerque stream flow record results in similar findings. While silvery minnow have apparently declined, river flows have been substantially augmented and the number of zero-flow days reduced. Hydrologic facts such as these, coupled with the more recent unsuccessful flow augmentation efforts to maintain or enhance minnow numbers, lead me to conclude the strategy of simply releasing copious amounts of water down the middle Rio Grande channel to benefit the silvery minnow has failed. Our critically low



water supply levels dictate such wasteful practices be discontinued in favor of the more holistic approach mandated by the current Biological Opinion, and now being implemented by the MRGESACP. The single Reasonable and Prudent Alternative recognizes 1) the hydrologic reality of the middle Rio Grande by differentiating stream flow prescriptions between dry, normal and wet years, 2) that river drying has occurred historically and will continue in the future, 3) that priority life functions such as silvery minnow reproduction must be protected first when water supply is short, 4) that management priority must be given to those river reaches (such as the Albuquerque reach) where flow can be provided most effectively and efficiently, while maintaining other necessary, and legitimate, water uses, 5) refugia, hatcheries, and other types of sanctuaries are necessary, at least in the shorter term, to protect and conserve the species, and 6) multiple factors, such as physical habitat degradation, poor water quality, passage barriers, and predation and competition from native and non-native species alike, have likely contributed substantially to the decline of the silvery minnow. I am encouraged by this holistic approach and hopeful we can now move past the single, divisive issue of “keeping the river wet” at all cost and on to the important business of conserving the Rio Grande silvery minnow. To this end, I am supportive of the current Biological Opinion and of legislation such as that being sponsored by Congressman Pearce in H.R. 2603 which provides a positive solution to the problems created by the 10th Circuit Court decision.

The third issue I was asked to address relates to the underlying role of science in the silvery minnow recovery process. Let me begin by simply saying that in my opinion, “science”, and the application of the “scientific method”, is the critical underpinning of the entire recovery process. As you may recall from junior high science class, the steps in applying the “scientific method” are quite simply stated: 1) observe a phenomenon; 2) develop a hypothesis to explain the phenomenon; 3) design an experiment to test your hypothesis; 4) gather your data; 5) analyze your data; and, 6) accept or reject your hypothesis based upon the conclusions drawn. On paper, it sounds pretty simple. In practice, it usually isn’t, especially within the framework of a collaborative program composed of numerous signatory agencies and groups, all with diverse and often competing missions, trying to conserve a minuscule biological organism about which we know precious little that lives in a highly complex river system about which we also know precious little. Given such a scenario, how does one even attempt to proceed? Well, to avoid total chaos and hopefully to begin to make progress, we fall back, often perhaps without even knowing it, on the framework provided by the scientific method. We begin the slow, often agonizing and confrontational process of trying to work our way through those six steps. At the start, can we even agree on the phenomenon (e.g. silvery minnow are scarce), let alone on the hypotheses to attempt to explain why (e.g. water is in short supply, habitat is degraded)? Each step of the way is fraught with disagreement, mistrust, argument, and the like, as we attempt to identify probable limiting factors and ways to address them. Eventually though, with the help of outside peer reviewers and the clearer thinking that hopefully results from perhaps heated yet productive scientific debate and experimentation, management actions are implemented, monitored and evaluated leading to progress toward recovery. Unsuccessful treatments and prescriptions will be discarded or modified, while successful efforts will be documented and duplicated elsewhere. From my perspective, the MRGESACP is still in the early stages of this process. We are attempting to define complex phenomena with the short-term and incomplete data sets that we have in hand, our hypotheses are still somewhat fuzzy and untested, and our ability to draw conclusions is tenuous at best. Complex problems typically require complex solutions. Science and the scientific method provide the framework within which such complex solutions will be crafted for the middle Rio Grande.

The final issue I was asked to address concerns the role of appropriate habitat enhancements and improved monitoring measures in the recovery process. Over the past several years, I have had the opportunity to conduct four aerial reconnaissance flights over the middle Rio Grande through the designated critical habitat and have spent numerous days in the field observing habitat conditions. Based upon these observations, my review of historic records and documents, and my experience with degraded river systems throughout the western U. S., I am of the opinion that the physical habitat of the middle Rio Grande is severely degraded and recovery of the silvery minnow is questionable at best unless river-wide habitat enhancement measures are implemented. In its present condition, much of the river is narrower, deeper, and swifter than it was historically. Habitat diversity has been substantially reduced, secondary channels have been cut-off from the main channel and lost, substrate coarsening has occurred with gravels and cobbles replacing silts and sands in many locations, and important elements of structural complexity, such as large

woody debris, have been flushed from the system without replacement. The result is a substantial reduction in habitat quantity and quality for the silvery minnow. Stream flow-based solutions alone will not return habitat for the silvery minnow to the middle Rio Grande. Well-conceived, designed and implemented habitat enhancement measures, such as those described in the Biological Opinion and now being implemented by the Bureau of Reclamation and others, are needed to re-connect the river with its floodplain, widen the channel to promote habitat diversity, and increase overall complexity. These are high priority measures needed immediately if silvery minnow recovery is to proceed.

Monitoring of the silvery minnow population is an important component of the recovery effort. A river-wide, representative, statistically valid sampling program yielding quantitative results is necessary to document baseline conditions, teach us more about the temporal and spatial distribution of the endangered species as well as the other members of the fish community, measure program successes and failures, and chart our progress toward established recovery targets. We need to be certain that our monitoring 1) is sampling habitats throughout the middle Rio Grande in proportion to their availability, 2) using appropriate fish collection methods, procedures and gear for all habitat types present within the river, 3) has a sampling frequency sufficient to detect seasonal distribution shifts but not so repetitive that undue sampling mortality and species behavior modifications occur, 4) is thoroughly documented and reproducible, and 5) is producing quantitative results of sufficient statistical rigor to allow valid temporal and spatial comparisons to be made and progress toward recovery to be documented. Over the past year, the Science Subcommittee of the MRGESACP has spent considerable time debating this matter. I am confident that through these discussions, input from expert peer reviewers, and perhaps some fine-tuning, the resultant monitoring effort will meet the needs of the Program.

This concludes my written testimony.

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[Mr. Wesche's response to questions submitted for the record follows:]



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29 September 2003

The Honorable Richard W. Pombo  
Chairman  
Committee on Resources  
U. S. House of Representatives  
Washington, DC 20515

Dear Chairman Pombo:

In reply to your letter of September 15, 2003 regarding the Committee's field hearing on the Silvery Minnow's Impact on New Mexico, I submit the following responses to questions from the Minority Members:

**Question 1. *What are the benefits to the Bosque of increased flows-regenerating cottonwoods and removing underbrush? Could future fires be prevented by increased flows?***

It is known that over-bank flooding can promote cottonwood regeneration. However, simply increasing flows in the Middle Rio Grande, given its' present degraded condition, will not be beneficial in and of itself. To better promote over-bank flooding, river restoration is needed first to re-establish the link between the river and its' flow regime by channel widening, bank lowering, and secondary channel development. Increased flows will not likely have an affect in the short-term on underbrush removal. The principal causes for the current fire condition in the Bosque are the large build-up of woody debris and the presence of non-native phreatophytes such as salt cedar. Until these conditions are addressed, increased flows will not have a substantial effect on future fire conditions.

**Question 2. *What can you tell us about how the historical flow conditions have changed, and impacted the river ecosystem - not just the minnow, but also the Bosque and the flyway?***

My research to date has focused on the more recent historical period from approximately the early 1900's to the present for which U. S. Geological Survey records are available. My preliminary findings, based on analysis of the Albuquerque and San Marcial records, suggest the

Response of Thomas A. Wesche, 29 September 2003

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following:

- At Albuquerque, comparing the 1942 - 1970 period with the 1975 - 1999 period, mean monthly flows for all 12 months have been substantially augmented during the more recent period. Likewise, the 1-, 3-, 7-, 30-, and 90-day minimum flows have increased, while the 1-, 3-, 7-, 30-, and 90-day maximum flows have remained similar. The number of zero-flow days has declined from an average of about 8 per year for the 1942-70 period to less than one per year for the more recent period. The timing of the annual minimum and maximum flow events has remained un-altered.
- At San Marcial, comparing the 1950 - 1972 period with the 1973 - 1999 period, the results are similar to those for Albuquerque. All 12 mean monthly flows have been substantially augmented during the more recent period, while all 1-, 3-, 7-, 30-, and 90-day minimum and maximum flow values have also increased dramatically. The number of zero flow days has declined from an average of 225 per year for the 1950-72 period to about 65 per year for the more recent period. The timing of the annual minimum and maximum flow events remained pretty much unaltered.

In both cases, the stream flow regime appears to be substantially enhanced during the past 25 to 30 years, leading me to conclude that hydrologic alteration is likely not responsible for the current condition of the aquatic ecosystem.

***Question 3. What are the factors that have led to the decline of the silvery minnow?***

At present I am not aware of any research which has definitively isolated and identified specific factors limiting the Rio Grande silvery minnow and contributing to its' decline. It has been hypothesized by some that changes in stream flow regime, diminished water quality, degraded physical habitat, passage barriers, non-native species, and perhaps other factors have contributed to the decline. Focused research and management through the Collaborative Program is needed to identify, quantify, and mitigate the relevant factors.

***Question 4. What could be done to restore the Middle Rio Grande to a healthier state, a "living river"?***

Based upon my observations, I am of the opinion the following could likely contribute to restoring the MRG to a healthier state:

- Promote improved habitat quality through implementation of river restoration treatments;
- Identify and mitigate water quality conditions that may be affecting the aquatic ecosystem;

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- Improve longitudinal connectivity throughout the system;
- Promote water conservation and improved water use efficiency, especially during the current drought, to meet the flow targets established in the Biological Opinion.
- Reduce the distribution and abundance of non-native species (both terrestrial and aquatic) and return the species composition to a more natural balance.

Thank you for this opportunity to respond. If I can be of further assistance to the Committee, please contact me at your earliest convenience.

Sincerely yours,

Thomas A. Wesche

The CHAIRMAN. We're now going to turn to the members for questions, and I remind the members that we are limited to 5 minutes to question as well.

We have basically two separate issues that we've heard testimony on this morning, one deals with the water and who owns the water, and as Congressman Pearce talked about in the Fifth Amendment to the Constitution, "nor shall private property be taken for public use without just compensation." And we have a question as to who owns the water, and if the water is taken, who should be compensated for that. Several of the water users that have testified, several that we have heard from in letters and in e-mails to the Committee, have dealt with the need for there to be some kind of compensation in terms of water that is taken.

The other question that is in front of us I think deals with the minnow itself, you know, is it endangered? If it is, how do we recover it? What is critical habitat? And those are two very separate issues, even though they all fall under the Endangered Species Act.

I'll tell you, under the way that the law is currently being implemented they have established the right to take private property to enforce the Endangered Species Act. And that's what's going on, not just here in New Mexico, but all over the country, whether it's private property, or water rights, or what have you.

There has been a history in recent years of them being able to take control over the private property in order to enforce the act. And my argument has always been that if they are going to take private property you should be compensated for that private property. But, you know, that is an issue that Congress has debated and continues to struggle over, as how we deal with that particular issue.

On the question of the minnow, and I'd like to turn to Dr. Wesche if I can. We hear that, from you, that this may not be, the decisions that are being made right now may not be the best way of recovering the species, that there may be a better way of going into this. And I know that you've been very involved with this, but can you explain to me a little bit more about what, what response

you've gotten from the Federal agencies in terms of what your ideas and others have in terms of recovering the species?

Mr. WESCHE. I would attempt to give that my best shot. First off, let me say that I'm not sure that my argument that river drying and removal, that river drying and the condition of flow within the Rio Grande channel is not a primary cause. I don't think that argument has gone very far with many of the Federal agencies, and perhaps others. Certainly some within the program that I've discussed my arguments with are receptive to them, others are not. And this is why the program is there, and in a forum such as the Science Subcommittee are there to discuss such matters.

In my opinion, while the stream flow is certainly an issue, there is a dual goal here that we have to look at if we're going to recover the silvery minnow. Sure, we do need some amount of water, but the critical question, in my opinion, is, how is that water performing and behaving within the channel to which it flows.

And this is where the matter of habitat enhancement and physical habitat restoration enters into questions. We're dealing have a very severely degraded channel here, and as I testified earlier, even though flows recently have been augmented substantially, the minnow has not recovered, and that tells me something is lacking here. And a big part anyway of what is lacking, and certainly not the entire answer is a well, is a diverse, complex channel through which whatever flows available can provide for that.

The CHAIRMAN. Just, finally, let me ask you, you have an understanding of the hydrology of the river, the way that the river works. Right now they are taking imported water and releasing that in an effort to increase flows. What would happen in the river if that water wasn't there, if they hadn't imported that water into the system, if the reservoirs that were built over hundreds of years in this area, if all the canals, everything wasn't there and we went through an extended drought period, what would happen to the river?

Mr. WESCHE. Well, let me respond by saying that historically, while intermittence was a natural characteristic of the river, that the river, the structure of the river was quite a bit different than what we see today, is my belief. We had a much broader floodplain where we had secondary and tertiary channels where small amounts of water would remain, even though flow in the river no longer was present, but species could exist within that. What we see now is a river that has been severely channelized, both due to man's actions, and also physical processes within the river itself. We see a river that's been narrowed and deepened, and its connection with its floodplain and the secondary channels, has been lost. So today, when we see a river, the river go dry, we may not have some of these historic habitats available to us.

Now, to my knowledge, no one has yet defined exactly what the in-stream flow requirements of the minnow are. And that, to me, is also one of the areas lacking so far.

The CHAIRMAN. Thank you.

Mr. Baca.

Mr. BACA. Thank you very much, Mr. Chairman. The first question I have is for D'Antonio, Jr., who is representing the Governor's Office. We understand that the endangered silvery minnow is an

emotional issue for the people of New Mexico. How great of a financial impact do you say that the endangered silvery minnow will have on the State of New Mexico, both from agricultural and infrastructure development resulting from water use reduction?

Mr. D'ANTONIO. Mr. Chairman, Members of the Committee. The financial impact to the Middle Valley, obviously, I think that the biggest impact that is going to cause concern to everybody is the drought situation, the drought scenario that we have. Everything that we've been able to do within state law is to require the Federal Government to come in and acquire at an arms'-length transaction, water from individual private property holders.

To date, and we've been able to do this, to date we've been able to permit every Federal Government activity that's come in and require that the Federal Government actually does purchase water from willing buyers and willing sellers. And from my office standpoint, I don't see any reason why we're going to do any different in terms of protecting private property owners' rights within the state.

I guess my feeling is, and the things that I'm trying to do within my office, is establish some sound water-banking techniques in which in times of drought, in which we have periodic drought times in which we have limited supply of water, I want to make sure that the senior water right holder is protected in terms of being able to lease and/or sell his water right for another use, and make sure that that senior water right holder is protected.

In terms of the financial impact to the farmers, and everybody else, municipalities, Native Americans, every other water user within the State of New Mexico, really the drought is the overarching economic impact to the state. And I see right now no reason why the endangered species shouldn't be sharing in that shortage.

We have a shortage in almost every basin within basin, I say almost every, every basin within the State of New Mexico we have a shortage of water resources. And we're implementing shorted sharing amongst all users. And I guess my concern is that the endangered species also shares in that shortage.

And I think we have mechanisms in place with the refugium, the ability to breed in captivity the endangered species that we can reintroduce. I think Biological Opinion allows for us to dry the river, and I think within the state we're dealing more with issues of drought than we are with just water being provided for the minnow.

If we have a good system in place we should have a willing seller and, in this case, a farmer that may not be having a full supply of water, have the ability to sell his supply to the Federal Government for endangered species use and make sure that that senior water right holder is compensated; there is not a taking and still provide some flexibility within our system to allow water for the minnow.

Mr. BACA. Eileen, you look like want to jump in here. Could you tell us what it would be, or do you have a figure or cost? Because I know you talked about providing funds. As we're looking at the needs of providing funds we'd like to look at what is the actual infrastructure of the cost that may impact the area as well?

Ms. GREVEY HILLSON. Chairman Pombo, Representative Baca, Members of the Committee. In terms of the City of Albuquerque, we have already paid over 50 million dollars for this water. By the time the San Juan-Chama project would be completed, with its associated subprojects, that would be over 250 million dollars. If our 48,200 acre feet was put at risk and we were not able to do it, it would immediately be a 50-million-dollar lump sum loss.

The replacement cost, at about 4500 to \$5,000 an acre, would be over 300 million dollars for the City of Albuquerque. That doesn't begin to touch the opportunity cost of what we could have done with that water that we've already paid for, or what we could have done with the water that we would need to secure to go out and replace the San Juan-Chama water.

I'd like to underscore the fact that was brought up by Committee Members, that there is something called fiduciary responsibilities of elected city officials to the ratepayers, asking them for seven rate increases. And that's another very negative impact that would come about with the threatened loss of this water.

One final thing I just wanted to add is that when we talk about compensation for water that has been taken, that this is community would certainly agree that water that is taken should be compensated for, but there is a problem with monetary compensation for water, you cannot drink money.

And the water that the City of Albuquerque intended to utilize to offset the effect of its pumping groundwater, the impact that that had on surface flows in the Rio Grande, there is no amount of money that is going to be able to compensate for putting wet water back into the river to offset for that groundwater pumping. And we don't want to turn the clock back to continuing the unsound mining of our aquifer. So it presents a great dilemma.

Mr. BACA. I know that my time has expired because the red light has come on and back in D.C. they would cut us off immediately, but hopefully the Chair would allow me to ask one additional question and hopefully we have time to ask additional ones. And if not, I'll submit those and hopefully you'll be able to reply or some of the panelists out here.

To John D'Antonio; What do you think the region could do improve water infrastructure and use to benefit the communities that rely on the Rio Grande?

Mr. D'ANTONIO. Mr. Chairman, Congressman Baca. The—we need more funding in terms of looking at the measuring and metering and look at efficiencies. The whole, biggest problem within, with New Mexico, I feel, is being State Engineer and trying to administer, actively manage our water resources, is the lack of measuring and metering devices to actually go in and look at implementing and enforcing, number one, priority administration, which we don't have the tools in place to administer priorities.

And number two, in the absence of having the proper tools in place, which are measuring and metering devices, which are an active water master and rules and regs within all the major river basins, we have to have measuring and metering components so that we can account for the water usage. And that's where we need to focus in the short term.

Mr. BACA. Thank you.



The CHAIRMAN. Mr. Calvert.

Mr. CALVERT. Thank you, Mr. Chairman. My favorite philosopher once said, Yogi Berra, "It's deja vu all over again," and we've been here before, Mr. Chairman. We've been in Klamath Valley, we've been talking about the Platte, Nebraska, Upper Mississippi in Missouri, the Arkansas River in Colorado, and certainly the Colorado River. I've spent some time in Brownsville, Texas.

And my second favorite philosopher is Clint Eastwood, and he said, "You got to know your limitations." And what I mean by that is that the reallocation of water within the state. And you will hear from some, and we've heard from many over the years, that all waters are Federal waters. And obviously I don't believe that, I don't think most people believe that; certainly most water law doesn't represent that. And I guess my first question is for the State Engineer John D'Antonio, can you describe how the other western states are viewing this current Tenth Circuit decision?

Mr. D'ANTONIO. OK. Mr. Chairman, Congressman Calvert. Yeah, I think every western state has the same opinion as we do, that the Tenth Circuit decision is an absurd decision, that it really will give the Federal Government the discretion to go in and take water. And again, that's where I would draw the line, obviously, within the State of New Mexico, with that first taking.

And I consider that these perpetual contracts that are in place with the San Juan-Chama water, if the government were to have that, the Federal Government, that discretion to take water, then it is a taking in my view, and I think every other of the western states—

Mr. CALVERT. You bring up a key word, the word "discretion," and in all water case law we come up with the word "discretion" is being bantered about. But the Secretary—does the Secretary have discretion to reallocate water, especially within a state, for other purposes? And really, I think that this entire case is hinged on that, on that, that principle. How does that impact western water law principle throughout the west, not just the law of the river that has been created here in the Rio Grande, but every major river in the west?

Mr. D'ANTONIO. Mr. Chairman, Congressman Calvert, I think it turns of the prior appropriation system on its head, again, my feeling is that—and my job is to protect the senior water right holder on the system within New Mexico, and I think this decision, if it stays as it is, has far-reaching effects to do just that, to turn the prior appropriation system on its head.

Mr. CALVERT. If state water law is put on its head, as you, I think, accurately state, how are states like New Mexico, or any other western state, able to make economic decisions for their future if the amounts of water are undeterminable? In other words, if, in fact, you have a question mark of whether or not water right will hold, based upon what has been historically the case, how do you, as a water engineer, make decisions? Are you able to make decisions?

Mr. D'ANTONIO. Well, Mr. Chairman and Congressman Calvert, you know, it's almost impossible to make a fair decision in terms of how we allocate our water resources and make sure that the senior water right holders are protected.

Mr. CALVERT. Have other states joined New Mexico in its legal efforts to rehear the circuit case?

Mr. D'ANTONIO. Mr. Chairman, Congressman Calvert, I believe so. There's significant amount of other western state interest in terms of—I don't know the particular states but I know that they have joined New Mexico in their views.

Mr. CALVERT. OK. On the—you know, we run into a lot of issues as far as reallocation of water because of the Endangered Species Act. Obviously, you know, New Mexico is not by themselves in this case. But I think it would be, the people here in New Mexico need to understand that this is an issue that's broader than just New Mexico. This is an issue that by some, we believe, that the Federal Government should control the reallocation of water within the states, and I think it's up to us here, as members, to obviously protect the rights of the states and the community because just, by the way, paying individuals for water is, in my mind, still, still does not answer the question of third-party impact. There are third-party impacts on the environment when water is exchanged. There are certainly third-party impacts on communities and economies beyond just the payment to a farmer, those who may hold private property.

My time is expired. I look forward to the second round. Thank you, Mr. Chairman.

The CHAIRMAN. Congressman Pearce.

Mr. PEARCE. Thank you, Mr. Chairman. Before I start my questions I'd like unanimous consent to include a tape from a rally held earlier today with several speakers on this issue. Include that in that testimony from today.

The CHAIRMAN. Without objection.

**[NOTE: The tape has been retained in the Committee's official files.]**

Mr. PEARCE. I appreciate the presentation from all of you. Ms. Sanchez gave just a compelling personal testimony of her family that's caught in this issue. Ms. Hillson adequately described the need for certainty. The Governor just gave us the historical, spiritual qualities of water that I appreciated. John, I'm always appreciating your testimony every time I hear or see you. I'm glad you're representing us in the water issue. I think the boldness with which you characterized the Tenth Circuit decision, takes a lot of courage to say that publicly, and I appreciate your willingness to take a stance.

My question for you is, in your opinion, does the treaty of Guadalupe Hidalgo precede or supersede this decision by the Tenth Circuit or can the Tenth Circuit even take waters that should be guaranteed through that treaty?

Mr. D'ANTONIO. Mr. Chairman, Congressman Pearce. I'm, I guess I'm a little bit deficient in being able to answer it in terms of the treaty of Guadalupe Hidalgo other than I would say that I don't think the Tenth Circuit decision has any merit at all in terms of how it's come out; so, obviously, the treaty would suffice or would—

Mr. PEARCE. I was asked the question earlier today and, frankly, had no answer either, but it does not look like the court is saying that the treaty waters are exempt in any way.

Ms. Belin, in your verbal testimony, and page six of your testimony, you claim that the Federal Government has the perfect right to be involved because it's funded and built the dams, reservoirs, irrigation ditches and levees to the Rio Grande to the tune of hundreds of millions of dollars. Is there some default that exists to justify this, this intrusion by the Federal Government or is it not a case of default that, instead, just the lending or participation is the basis of the Federal Government's presence?

Ms. BELIN. Mr. Chairman, Representative Pearce. The Tenth Circuit decision is fundamentally an interpretation of the Federal contracts, and those Federal contracts were entered into by a bargain basically between the water users and the Federal Government. They got, the water users got a lot of benefits, and in return for that they gave, gave some things up. And I think fundamentally the decision just is a reading of a contract in saying what does this contract provide?

In the case of the San Juan-Chama contracts, the only—those contracts are the only basis for those water rights. So it's really just a matter of looking at the contracts and interpreting them, and interpreting how much discretion is left in the Federal Government.

In the case of the Middle Rio Grande, it's a little bit different because people already had water rights under the state prior appropriation system, but then the district entered into a contract with the Federal Government to get those Federal investments, and in the process of entering into the contract, the Federal Government got ownership over the diversion facilities and the other works, and thus has authority over those. So I think it's really a matter of Federal contract law basically.

Mr. PEARCE. Really, I did not hear in that comment that there was default of any kind. The Federal Government—three or 4 years ago when I was in the state legislature—brought suit to declare ownership of water in the Elephant Butte irrigation system, and it's my understanding that that's the only Bureau of Reclamation project that has been paid off in full. And would your firm engage in lawsuit saying that the Federal Government should be there taking that water, or would you not in the case where the facilities have all been paid free and clear?

Ms. BELIN. Well, I think it's a question of who owns the facilities and what the law provides as to who has authority over those facilities so who can operate them. And I'm not familiar—I know that the Middle Rio Grande project, Congress has not turned back the facilities to MRGCD, so the Federal Government still owns them. So—and I'm not exactly familiar with the status of that on the Rio Grande project.

Mr. PEARCE. So the Elephant Butte was where the suit was brought and, again, those facilities have been paid off and yet the Federal Government said they own the water. And so I think, Mr. Chairman, what we're seeing is a great assault from the Federal Government to say that "we own all the water in the west;" it was actually for a short time last year, a legislation in the senate that declared that.

And I think that, that we, in the poor states, we states that don't have millions and millions of population, are going to lose tremen-

dously if, if the Federal Government takes water, because it will go where its politically expedient for it to go. And so this fight is a fight, not only for property rights, for constitutional rights, but it's a fight for the small, less populous states against those that would take the water for any purposes.

My last point, I think, with regard to this, and, Mr. Wesche, I appreciate your comments on it, we feel like are on track. But this concept that the Federal Government sometimes lent money and, therefore, it's got a right to take ownership, is one that seems only to be directed at the agriculture segment. I don't see the Federal Government saying that "we built all of the highways through your state; these are not loans even. We built all the highways so we own all the commerce. We own every vehicle that goes over the highways." We've built in China the Three Gorges Dam and in Egypt the Nasser Dam, and I don't see anyone in America saying that we should take ownership of the water in those areas. It looks like the justification that the Federal Government somehow got involved and lent money is one that's peculiarly used as an attack on the agricultural community.

Mr. Chairman, the agriculture economy is the economy along this Rio Grande River. It's not just farmers and ranchers that will be out of jobs, it's people who sell oil, tires, fertilizer, tractors; the stakes are huge in this battle for my district.

And, Mr. D'Antonio, I'm happy to have you there, again, because I think your position is the most key position in this water fight.

Thank you all for being here. Thank you all for your testimony.

The CHAIRMAN. The Chair now recognize Congresswoman Heather Wilson.

Mrs. WILSON. Thank you, Mr. Chairman. And again, thank all of you for your testimony.

I have some questions to clarify some things and, John, I believe maybe you can help me on some of this water law. If the Federal Government owns a dam, do they own the water right.

Mr. D'ANTONIO. Mr. Chairman, Congresswoman Wilson. No, the ownership of a water right in New Mexico is based on who put that water to beneficial use. And, obviously, the farmers in the Middle Rio Grande, which we're referring to here, they're the ones that have put water to beneficial use. They're the owner of that water with that priority date, depending on when they put that water to use.

Mrs. WILSON. So does the Federal Government have any water rights on the Rio Grande?

Mr. D'ANTONIO. Mr. Chairman, Congresswoman Wilson. They do have some water rights in terms of federally reserved rights for service and some things along those lines. But as far as actually owning water rights, it's very limited.

Mrs. WILSON. And those water rights were acquired in accordance with state law; is that a right?

Mr. D'ANTONIO. Yes, Mr. Chairman, Congressman Wilson. All water rights that I've seen involving Federal Government is being permitted through state regulation.

Mrs. WILSON. Alletta, I had some questions for you as well. I think this is, reading your testimony as far as how far these Federal rights go, in your view, to use other people's water. Your view

that the Federal Government would provide water to be included was to the extent consistent with ESA. Now, does that mean that the Federal Government has the right to take tribes continuing water rights—

Ms. BELIN. I'm sorry, I couldn't hear you, the last part. I heard the first part.

Mrs. WILSON. Does the Federal Government have the right to take tribes pre-treaty water rights if they need it to comply with the Endangered Species Act? Does the ESA own the right of private water, pre-treaty water rights?

Ms. BELIN. The ESA—there's nothing in the Tenth Circuit decision that says the ESA overrides anybody's water rights. As I said, it's a matter of having an effect on entities that enter into Federal contracts.

Mrs. WILSON. Most of the tribes on the Rio Grande get their water through the Middle Rio Grande project works. Can the Bureau of Reclamation or the Middle Rio Grande Conservancy District be ordered to go out there and turn off the ditches for tribes?

Ms. BELIN. That is not something we have ever asked for, in fact, we have—

Mrs. WILSON. I'm asking you—you're a lawyer, you have been a plaintiff a lot longer than I have been involved with this. I'm asking what your view is. Does the Federal Government, under these laws, have the right to go up and turn off the tribes ditches?

Ms. BELIN. The Federal Government has authority over the MRGCD ditches. As to that subset of issues, how it affects the Pueblos, I don't have an issue.

Mrs. WILSON. When you initially filed your lawsuit against the United States, your initial filing said that we need 300 cubic feet per second of water at the volume of the conservancy district, the river is dry now, and has been for weeks. And your initial contention was that if we didn't have that, the minnow would go extinct. They haven't had it for several weeks, is the minnow extinct?

Ms. BELIN. First of all, we didn't say that we were following—all along we have been following the biological, the opinions issued by the U.S. Fish and Wildlife Service. And at that time the Fish and Wildlife Service was saying that there needed to be continuous flows from Cochiti all the way down to Elephant Butte. The Fish and Wildlife Service has evolved with these opinions. I think that the minnow—

Mrs. WILSON. I think there is an important clarification. You did not allege that without 300 cubic feet per second the minnow would go extinct. You have never changed that?

Ms. BELIN. No, we did not.

Mrs. WILSON. That's interesting. One final question. You say in your written testimony that for most of the Tenth Circuit's holding by a back room appropriation meetings, never received any published or congressional debate, did not serve the public's interest. Mr. Pearce, and I often remember, on floor of the house in July there was submitted by the full House of Representatives, and voted on the floor of the House. Is the floor of the House the one you're referring to or are you referring to other amendments?

Ms. BELIN. Representative Wilson, first of all, I want to say I do think that the minnow, by the way, based on the current dryness,

is heading toward extinction. But getting on to that question, my understanding of that is that there was no debate at all on that provision, that there was no opportunity for review at the time of the minnow Committee review, no hearings, no discussion.

Mrs. WILSON. Is it your view that a member of Congress should never be allowed to offer an amendment and debate it on the floor of the House and voted in the full view of the United States of America?

Ms. BELIN. Representative Wilson, no, that's not my view. My view is, obviously these issues relating to the Endangered Species Act and exceptions from the Endangered Species Act. And potential extinction of species are highly controversial and are issues of great public importance that really deserve a full scrutiny through hearings and a full debate, and shouldn't just been popped out without debate.

Mrs. WILSON. And they are better decided in Denver.

Thank you, Mr. Chairman.

The CHAIRMAN. I want to recognize Mr. Baca for additional questions.

Mr. BACA. Thank you very much, Mr. Chairman. I guess one of the questions for Belin, just to continue some of the questions that were asked. The minnow's historic habitat used to run all the way down the Rio Grande to the southern tip of Texas. Is there any possibility of helping restore the minnow population at downstream locations?

Ms. BELIN. Representative Baca, certainly we have strongly supported reestablishment of the minnow in other locations outside the Middle Rio Grande, including down in the southern area. We certainly hope that that process moves forward as quickly as possible.

Mr. BACA. Thank you. Jessica, earlier in your document you stated that it has been documented that the silvery minnow can survive lower water levels in a dry season. How has your farm been affected by the reduction of water available and what have you been doing to—

Ms. SANCHEZ. Our farm, along with other farmers in this valley, has been affected. Our crops have died. My family has lost parts of our alfalfa and hay which we use in order to feed our cattle. That is winter feed for us. Also, without having the last cutting, due to the lack of water we are unable to keep a stock amount of pasture where we would normally. Without this pasture, that we've had a lack of, we have to buy new hay.

We also sell some of our alfalfa and some of our hay to both the farmers and ranchers in the area. If we do not supply them with their needs, then they have to go to an outside source, costing more money needed to them because of shortage of hay, because of the shortage of water. And also costing more money to them because of transportation needed to go for the distance to get this.

We have implemented new things like a national beef program in order to gain more money on the cattle, instead of normally when we go to the sales barn, to the market, we get a given price for the animal per pound. In order to accommodate for that and compensate for the loss in our crops and our fields for the water, we are having to create a national meat market to gain an added

value price to that animal in order to compensate for the money lost and put back into our farming operation to continue on.

It is just taking a toll more than just financially, economically. Whether we have the water or not, we still have to pay the same amount of water taxes. So that's something that we have to budget out, but we still don't have that money coming back in. And we're not compensated for those water taxes that we are paying.

It's like a domino effect, if we can't economically participate in commerce because of the lack of our income, then, therefore, the local commerce, the local operations that are in this area which we help support, grocery stores and other things, car dealerships, will also falter and die with us.

Mr. BACA. Thank you, very much.

Governor Ortiz, how greatly will San Felipe water rights be affected by the silvery minnow compared to other Pueblos?

Mr. ORTIZ. Chairman, Congressman Baca, I will let my lead counsel respond to that.

The CHAIRMAN. OK. Please identify yourself for the record.

Ms. WILLIAMS. My name is Susan Williams. I'm legal counsel to the Pueblo of San Felipe. The Pueblo of San Felipe, along with all the other Pueblos, are at great risk of the taking of their water rights for the silvery minnow. All the Pueblos support equal system restoration of all species and protection of all species, but not at the expense, and in disregard water of the senior Federal reserve water rights for these tribes.

These tribes have overlapping water rights. Members of Congress, they have Federal reserved water rights with aboriginal priority that predate all the state permits and the rights to use water through the MRGCD. Now they have some water rights through the MRGCD as well, but they're overlapping with their preexisting Federal reserved water rights, and some of their water rights are not covered by the MRGCD permits.

And that is why the Pueblos are concerned that their storage in El Vado Reservoir is at risk, because none of the riders specifically protect the Federal reserved water rights for the tribes. The natural flow water rights of the tribes, they're not in as much risk because there is no natural flow, it's our water rights in El Vado that are the target of any needs for the silvery minnow, and they may not be protected through the Middle Rio Grande Conservancy District state permits.

So if we want clarification in any riders that protect water rights from a taking or use of the silvery minnow, to specifically refer to the Federal reserve water rights and the Pueblos to insure that our overlapping water, Federal and state water rights, are protected along with everybody else in this valley.

Mr. BACA. Thank you very much.

If I may ask one other additional question, Mr. Chairman.

This goes to Ms. Hillson. Of the potential available solutions to preserve the silvery minnow, which solution would benefit the City of Albuquerque the most economically?

Ms. GREVEY HILLSON. It's really a combination, but certainly the overturning of the Tenth Circuit Court decision is critical to the economic sustainability of Albuquerque. It's meant, not just the actual loss of water, even if circumstances made it that the water

doesn't need to be taken, the perception that that creates in the business community, both in Albuquerque and the Middle Rio Grande and outside, is completely countered to the concept of economic sustainability and growth.

The idea of collaborating, collaboration to recover the minnow while at the same time allowing present and future human water use, is something that would greatly benefit the City of Albuquerque. It has been taking part with great financial contribution, and the income contributions of labor in the Middle Rio Grande Endangered Species Act Collaborative Program effort, and the city really feels that that is—well, I can't speak on behalf of the city—the business community feels that that is certainly an appropriate avenue to pursue; collaboration that is hopefully taking place through the Governors and Congress, and other examples. So it really is a combination.

The riders that take the water off the table and protect the users here in the valley, and certainly we would agree with what Ms. Williams has stated, those are critical. We think that the Endangered Species Act, the solution is that the Endangered Species Act to protect the endangered species but not use it in human species as the sacrificial lambs to do it, and there has to be a balance.

Mr. BACA. Thank you.

The CHAIRMAN. Thank you.

Mr. Calvert.

Mr. CALVERT. Thank you, Mr. Chairman. The Native Americans, you need to relax because the Federal Government, we never violated Native American rights.

One thing I want to point out in closing, that I would like to work certainly with both the members here in New Mexico, Senator Domenici and Senator Bingaman, to really help develop additional water. Because, you know, in the final analysis, this entire hearing is because of the stress on the availability of water throughout the west. And I'm putting a little appetizer here, we have a legislation where we're proposing, both the Chairman and I, are supporting H.R. 2828 which, in effect, would develop additional water, either through conservation, which is important, I heard that as much as 11 acre feet per acre is being used on land. You know, we ought to be able to help create better methods of irrigation and get the same amount of production used by you by less water per acre. That could create additional yield, that's one way of conserving.

But reclamation of the communities here in Albuquerque and throughout New Mexico, and throughout the west, is important. Conveyance in a more efficient system. Because these are common-sense solutions for the problem. And I just insure that we can get everyone's support here to do that exactly. I know Mr. Baca sponsored this bill also. I think we're going to have a lot of support for this to move forward. Let's look for some common-sense issues where we don't have to have these tragedies that happen every day throughout the west.

Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Pearce.

Mr. PEARCE. Thank you, Mr. Chairman. I've got one, one clarification for him and one question. But before I do that I would like



to give some thanks, thanks to the Belen Consolidated Schools Superintendent Don Duran. Thanks to Belen High School Principal Joe Trujillo; Vice Principal Audrey Tucker. Their entire staff has worked diligently to make this hearing, both possible, and for it to come off without flaw. The City of Belen Mayor Ronnie Torres, and all of his staff, have been extremely helpful. To Belen Chief of Police Mike Chavez, and his entire staff. All of his officers have been congenial and offering their services to us.

Socorro Consolidated Schools' Mr. Nick Fleming provided the communications. His staff has been exceptional. My staff has commented during the week about how well coordination among all of these, these groups have gone.

Finally, Mr. Herman Tabet and the entire staff of the Belen Holiday Inn Express have just been courteous and gracious to the Committee Members who have stayed here and we appreciate that.

My point of clarification, Mr. Chairman, is that, again, on the subject that Congresswoman Wilson was addressing, the information in the one testimony that declared a back room deal to be worked on a rider; the person that led the debate team on this subject had the amendment 1 week in advance and, in fact, was invited to be a co-sponsor of that amendment, elected not to debate against it. I think misinformation that's contained in your testimony is unfortunate. I think it's what drives the deep, deep split in the very controversial issues when we begin to misuse information that's, and it's misleading.

My last question, again, and a very short answer, Mr. D'Antonio, will be that from your testimony it appeared that we were well on our way to collaborating in a solution that would have insured the survival of the species of the silvery minnows, and it would also have gone a long way to insuring the survival of the species of the American farmer as they exist on the Rio Grande Valley. The Corps of Engineers was also participating in that, and it's my understanding that all of those collaborations were set aside and were required to be set aside by this court decision; is that true?

Mr. D'ANTONIO. Mr. Chairman, Congressman Pearce. I don't know that they were set aside. I think that it was a group of two different teams that were supposed to be working on this, and I think one of them was a technical team and a participation team. And I think the participation team hasn't met for a period of time. But the collaboration is still ongoing as far as I know, and I'm not sure I'm addressing the question or not, but we're continuing to go forward with this collaborative efforts in line with everything else that's going on.

Mr. PEARCE. And you've developed ways to keep the minnow alive, alternative means to keep the minnow alive in finding that it breeds in captivity very well?

Mr. D'ANTONIO. Yes, as a matter of fact, in the last initial phase of refugium there were 600 adult minnows that produced over 200,000 eggs, of which 90 percent were fertile. And so we provided that initial result as a very good result in terms of captivity and breeding of the species in captivity.

Mr. PEARCE. OK. Thank you, Mr. Chairman. I know that we're running up against the clock and I will yield now.

The CHAIRMAN. Congresswoman Wilson.

Mrs. WILSON. Thank you, Mr. Chairman, and thank you again for holding this hearing, and thank everyone for coming, and particularly those who testified.

I would ask the Chairman to accept the Rio Grande Silvery Minnow versus John W. Keys, to support an emergency injunctive relief dated September 4, 2002, and signed by Ms. Belin.

The CHAIRMAN. Without objection.

Mrs. WILSON. Thank you, Mr. Chairman. I don't have any final questions. I do have one, I guess, final thing to say, and that is that Americans have a role in the south and the west, and our biggest challenge over the next 50 years will be to be able to provide the water that is needed to sustain our growth and our way of life. And that means we're going to have to do some really innovative things, like water banking, and conservation, and restoration, desalinization, and research and development on the use of evaporation. Number one, water loss in the State of New Mexico is evaporation.

Actually there are things that can be used to plan for our future, we cannot allow the Tenth Circuit Court opinion to stand. The first step has to be restoring, protecting New Mexico's water rights, and the primacy of water law in the state of New Mexico.

I think we're making steps toward that end. We're also taking steps to protect the land we love. We are blessed to live in the most beautiful state in the Nation and all of us want to keep it that way. I think by working together we can do so. We don't solve problems by spending millions of dollars on lawyers and courts. We solve it by working together in a collaborative process which restores balance, protecting the land we love and the way of life.

Mr. Chairman, thank you so much for coming to New Mexico. It's really a pleasure to have you here. Thank you.

The CHAIRMAN. Thank you. It was my pleasure to have the opportunity to be here and to hear from our witnesses. We received extremely valuable testimony, and as our, my effort and the effort of the Committee has been to try to get members of Congress outside of Washington and to bring them into areas like this where the real problems are, and to actually hear from people who have to deal with the rules and regulations and the laws that are passed by Congress and implemented by the Administration. I think it's well worthwhile for the members of the Committee to have this opportunity.

I want to thank Congressman Pearce and Congresswoman Wilson for their hospitality and for their insistence that we do bring the Committee to New Mexico. And over the past several weeks we've had a number of conversations and, about the need to bring the Committee out here, and I was happy that we finally had the opportunity to do that.

I want to especially thank Congressman Baca and Congressman Calvert for making the effort to be here and to spend time away from their districts. I would say their families, but since his family is here it doesn't count, half his family. But in conclusion, I'd say that I come from a district in California that, amongst many, many other things, we are home to endangered kangaroo rats, endangered frogs, endangered snakes, endangered birds, endangered fish, endangered foxes, every square inch of my district is habitat for one endangered species or another.

And to listen to Congresswoman Wilson talk about the future, I'll let you in on a little secret about the future. My home town, the average price of a home has now hit \$350,000. The average price of homes in other cities in my district are in excess of \$650,000. The opportunity that my kids or my grandkids are going to have to live in a community that my family has been in for five generations doesn't look real good right now. And as we look at, as Congressman Calvert said, trying to put some common sense into the implementation of this law, I hope that Congress is able to recognize what the real impacts are on communities and to try to factor that into the implementation of this law.

I want to thank the community for being here, for sharing with us this beautiful place. And I'll tell you that because of the limitation on time not everyone had the opportunity to testify that wanted to. The hearing record will be held open for 10 days to give everybody the opportunity to submit written testimony that will be included as part of the hearing record.

If there is no further business before the Committee, I want to thank the members of the Committee, I want to thank our witnesses for making the effort to be here. And the Committee stands adjourned.

[Whereupon, the Committee was adjourned.]

The following information was submitted for the record:

- Central Arizona Water Conservation District, Statement submitted for the record
- Chavez, Hon. Martin J., Mayor, City of Albuquerque, New Mexico, Statement submitted for the record
- Godfrey, Liz, Great Plains Organizer, Endangered Species Coalition, Blanco, New Mexico, Letter submitted for the record
- Harris, Steve, Executive Director, Rio Grande Restoration, Statement submitted for the record
- Madrid, Hon. Patricia A., Attorney General, State of New Mexico, Letter submitted for the record
- National Endangered Species Act Reform Coalition, Washington, DC, Statement submitted for the record
- Ortiz, Hon. Anthony, Governor, Pueblo of San Felipe, Response to questions submitted for the record
- Rio Grande Water Rights Authority, Statement submitted for the record
- Shah, Subhas, Chief Engineer, Middle Rio Grande Conservancy District, Albuquerque, New Mexico, Statement submitted for the record
- Turner, Dr. William M., Trustee, Lion's Gate Water, Statement submitted for the record

[A statement submitted for the record by Central Arizona Water Conservation District follows:]

**Statement submitted for the record by George Renner, President, Board of Directors, Central Arizona Water Conservation District**

Mr. Chairman and Members of the Committee, the Central Arizona Water Conservation District (CAWCD) is pleased to offer the following testimony regarding the Tenth Circuit Court of Appeals' ruling in the Rio Grande Silvery Minnow case. While we understand that the chief purpose of this hearing is to take testimony

about the effects of the decision on New Mexico, the case is of exceptional importance to CAWCD and other water users throughout the arid West.

CAWCD is a multi-county water conservation district responsible for managing Arizona's single largest renewable water supply B approximately 1.5 million acre-feet of Arizona's annual share of Colorado River water. CAWCD operates the Central Arizona Project (the CAP).

The CAP was authorized by the 90th Congress of the United States under the Colorado River Basin Project Act of 1968. The CAP is a multi-purpose water resource development project consisting of a system of aqueducts and pumping plants that lift water nearly 3,000 feet over a distance of 336 miles from Lake Havasu on the Colorado River to the project's terminus south of Tucson. The CAP was designed to deliver Colorado River water to the central and southern portions of the state for municipal, industrial, agricultural and Indian uses. The Bureau of Reclamation (Reclamation) initiated project construction in 1973, and the first water was delivered to the Phoenix metropolitan area in 1985. The project's aqueduct system was declared complete in 1993. In 2000, the CAP delivered for the first time its full normal year entitlement of 1.5 million acre-feet, allowing Arizona to use its full Colorado River apportionment of 2.8 million acre-feet.

CAWCD was created in 1971 for the specific purpose of contracting with the United States for the delivery of the CAP water supplies and the repayment of the reimbursable construction costs of the CAP properly allocable to CAWCD. In 1972, CAWCD entered into a master contract with Reclamation for delivery of Colorado River water and repayment of CAP construction costs (the Master Contract). Under the Master Contract, CAWCD is entitled to divert all Colorado River water available for use within the State of Arizona under the terms of the decree entered by the United States Supreme Court in *Arizona v. California*, 376 U.S. 340 (1964), after satisfaction of senior and certain co-equal priority uses. CAWCD's service area is comprised of Maricopa, Pima and Pinal counties, encompassing roughly 80% of the water users and taxpayers of the State of Arizona, including the greater metropolitan areas of Phoenix and Tucson.

Recently, in the Silvery Minnow case, the Tenth Circuit Court of Appeals ruled that the Endangered Species Act allows, indeed requires, Reclamation to amend its water delivery contracts unilaterally and reallocate contracted-for project water for the benefit of an endangered fish B the Rio Grande Silvery Minnow.

This ruling threatens Reclamation water delivery projects throughout the West. It suggests that the requirements of Reclamation water delivery contracts may freely be ignored if the United States finds a new use for the contracted-for water supplies. It sets an extremely dangerous precedent, allowing, even requiring, that Reclamation reduce deliveries of project water to those who have contracted for it, and instead use that water for the benefit of endangered fish and wildlife, even though the water delivery contracts were entered into prior to the enactment of the Endangered Species Act (ESA) and never contemplated use of the water supplies for endangered species. The ruling allows Reclamation to lay claim to project water supplies to benefit endangered species even though Reclamation has no recognized right to the project water at issue. The ruling turns Western water law on its head and injects intolerable uncertainty into settled contractual expectations.

Although Reclamation's authority and responsibility in any given case will vary according to applicable contracts and law, incorrect resolution of the legal issues at stake in this case could impair the reliability of water contracts throughout the West. The proper resolution of the issues in this case is a matter of exceptional importance to CAWCD and to all affected stakeholders in the arid West. CAWCD has joined with other interested stakeholders in urging the full Tenth Circuit to rehear and overturn the decision of the three-judge panel. If the Court fails to do so, however, it is imperative that Congress act to preserve existing water delivery contracts against this unparalleled assault on their validity and enforceability. Our future in the West depends upon it.

Thank you for considering this important issue.

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[A statement submitted for the record by Hon. Martin J. Chavez, Mayor, City of Albuquerque, New Mexico, follows:]

**Statement of The Honorable Martin J. Chavez, Mayor,  
City of Albuquerque, New Mexico**

Welcome to New Mexico and thank you for the opportunity to speak with you this morning. The City of Albuquerque is centrally located in the Middle Rio Grande valley between the towering cliffs of the Sandia Mountains and the volcano cones of

the West Mesa. The Rio Grande, surrounded by a verdant Bosque forest, flows through the central core of our City. However, our more than 475,000 residents do not receive their water directly from the river. Currently, the City's only source of water is a large groundwater aquifer and last year the City pumped approximately 106,000 acre-feet from deep wells. In 1994, the United States Geological Survey (U.S.G.S.) published a report that completely changed our understanding of the water situation in Albuquerque. Previously, the City, State and other experts thought that the aquifer was in direct connection with the Rio Grande and any ground water withdrawals would be replenished by the river. The U.S.G.S. report clearly showed that only half of the amount the City pumps from the aquifer is being replenished causing a rapid lowering of the water table underneath the City. Continued sole reliance on the aquifer would lead to serious water shortages, water quality degradation and ultimately land surface subsidence.

#### *Albuquerque's Water Planning*

In 1995 during my first term as Mayor, we started an aggressive water conservation program to reduce our usage by 30% over ten years. At the end of 2002, we had achieved a 26% reduction in overall usage with pumping decreased to levels not seen for more than fifteen years. Recently, we adopted an additional 10% reduction (or 40% overall reduction as compared to 1995) as the new goal for our water conservation program. Water conservation, however, is not enough to reduce our pumping to sustainable levels. In 1997, the City adopted the Water Resources Management Strategy to provide a sustainable supply to 2040 by transitioning from sole reliance on the groundwater aquifer to renewable supplies. The City has three reuse and reclamation projects to utilize non-potable industrial effluent, municipal effluent, surface water and shallow ground water for irrigation and industrial uses throughout the City. In addition to water conservation and reuse, the most important aspect of the Strategy is the diversion and direct use of our San Juan-Chama water for drinking water purposes.

The Drinking Water Project consists of the design and construction for a new diversion on the Rio Grande, a new surface water treatment plant, and 50 miles of transmission pipelines to integrate the surface water with our existing ground water system. In addition, the City has designed environmental features into the project to protect endangered species including a fish passage structure and fish screens. We will be restoring the Bosque and Rio Grande affected by the construction in addition to a commitment to construct three projects over twenty years to provide habitat for the silvery minnow. In addition, we are working to remove all of the non-native species in the Bosque in the Albuquerque reach over the next five years or sooner if we can obtain federal and state funding assistance. The recent fires in the Bosque clearly show that we must remove the non-native species and clear the dead brush to avoid catastrophic fires next year and beyond. The total cost of projects with the environmental enhancements was estimated at \$180 million in 1997. This cost is being paid for by our residents through seven dedicated water rate increases. The actual cost of the projects will most likely exceed \$ 250 million when complete.

#### *Albuquerque's San Juan-Chama Contract*

The City's San Juan-Chama water is our only available surface water supply and represents more than 70% of our supply when projected to 2040. Without the City's San Juan-Chama water, the City would be forced to continue to rely on the depleting aquifer which will lead to serious environmental consequences including lowering the groundwater table in the Bosque adjacent to the river, increased arsenic and other salts in the water supply, and ultimately land surface subsidence. The City signed a contract in 1963 to provide 53,200 acre-feet of imported water to the City in exchange for repayment of the capital with interest (and interest during construction) and a proportional share of the annual operation and maintenance for the project. Interestingly, Congress would not allow the Secretary of Interior to begin construction of the project until the City's repayment contract was signed and ratified by the then City Commission.

In 1965, the City relinquished 5,000 acre-feet for the Cochiti recreation pool. Since the construction was completed in 1971, the City has invested approximately \$50 million for the 48,200 acre-feet with more than fifteen years remaining on the repayment obligation. The City's contract for San Juan-Chama water is a perpetual contract giving the City the right to use and dispose of 48,200 acre-feet per year as long as the City is current on our payments. The City has fulfilled our obligation to make the payments called for in the contract and have never defaulted.

#### *10th Circuit Court of Appeals Ruling*

With the 10th Circuit Court of Appeals ruling, the City's San Juan-Chama water is in jeopardy. In *Rio Grande Silvery Minnow v. Keys*, various environmental groups

alleged that the U.S. Bureau of Reclamation, the U.S. Army Corps of Engineers and the U.S. Fish and Wildlife Service have discretion to control the dams and waters of the Rio Grande and had violated the Endangered Species Act by failing in their consultations to consider utilizing San Juan-Chama and Middle Rio Grande Project water for the minnow. The State of New Mexico intervened in the case to oppose the concept that these federal agencies have discretion to control or allocate the waters of the Rio Grande merely because the federal government has constructed and operates dams which store New Mexico's waters. The Middle Rio Grande Conservancy District, representing the valley farmers, intervened alleging that the federal government operates El Vado Reservoir for them and does not own the reservoir or the water in it. The City intervened because the environmentalists had included Heron and Abiquiu Reservoirs in their list of Rio Grande basin dams which should be operated to protect the minnow. Heron Reservoir is the storage facility for the San Juan-Chama Project and Abiquiu Reservoir is where the City stores its delivered allocations of San Juan-Chama water. The water delivered by the San Juan-Chama Project is New Mexico's portion of the Colorado River. This water has been imported under the continental divide into the Rio Chama basin and is not native to the Rio Grande basin. The San Juan-Chama Project water is Albuquerque's primary future water supply and using San Juan-Chama water to supplement Rio Grande flows jeopardizes another environmental program; the City's plans to use San Juan-Chama water for drinking water so it can curtail groundwater pumping which is depleting the aquifer.

The district court decided that Reclamation can reduce annual contract deliveries to reallocate water to the minnow and can also use San Juan-Chama water stored for future years' contract deliveries. The San Juan-Chama Project water in Heron Reservoir cannot be used at the discretion of the federal government to address Rio Grande endangered species problems. Congress specifically created the project to provide municipal water supplies and Reclamation's only authority is to annually deliver the water stored for contractors. There is no support in the Project Act or the water delivery contracts for the concept that Reclamation can reduce the amount of imported Colorado water delivered to the contractors if there is a drought downstream in the Rio Grande. Similarly, Reclamation has no authority to deliver out of Heron Reservoir more water than is specified for annual contract deliveries. The amount of annual contract releases is based on the scientifically determined sustainable yield of the project. The water banked in Heron Reservoir for future years is not extra water and deliveries greater than the sustainable yield amount almost guarantees that the project will eventually dry up. The San Juan-Chama Project is uniquely designed to perpetually deliver water and, because there is no federal authority to alter its operation or reduce the required contract deliveries, Reclamation did not have to consult on the effect of its discretionary actions on endangered species.

In June of 2003, the Tenth Circuit affirmed the district court. Judge Porfilio wrote the decision with Judge Seymour concurring and Judge Kelly dissenting. Because of the implications of the decision, all of the defending parties and ten Western states have petitioned to have a full panel of all the Tenth Circuit Judges rehear the case. The federal agencies, New Mexico entities and Western states are concerned because the majority rejected Reclamation's, the City's and the farmer's settled interpretation of their water delivery contracts and found that certain water shortage provisions gave Reclamation discretion to reallocate water. Similar water shortage provisions appear in Reclamation contracts throughout the seventeen Reclamation states and have always been understood to mean that when there is a shortage of available water, Reclamation is not liable for apportioning drought reduced deliveries. The provisions concern shortages in upstream supply, and do not mention downstream needs or endangered species. The majority construed the shortage provisions differently and found that they authorize Reclamation to determine how much of the water supply to make available. Hence, for the majority, Reclamation has discretion to allocate water to the minnow and then deliver the remaining available water. The majority does not address how Reclamation can use water for endangered species without acquiring a state water right.

Obviously, no Western state would agree that Reclamation is above state water law and can unilaterally modify its contractual commitments to deliver irrigation or municipal water stored in a Reclamation project in order to provide that water to an endangered species. The federal agencies also reject the discretion the majority found because it implies that all federal natural resource contracts are subject to unilateral alteration if the resource is claimed for an endangered species. The United States properly argues that the ESA was not intended to change its obligation to honor its contracts and, as the dissent says, the majority decision renders the contracts somewhat illusory.

The majority opinion seems to be based in part on the erroneous notion that the Endangered Species Act provides independent authority to protect endangered species. It is well-settled that the ESA is not a source of new authority and merely directs the exercise of existing federal authority in a manner which will not adversely affect endangered species. Thus, the linchpin of an ESA consultation case should be a discussion of the discretionary action about which the federal agencies must consult. Because the San Juan-Chama Project Act and the contracts implementing it were intended to secure a dependable imported water supply for municipal, industrial and irrigation purposes, fish and wildlife benefits are merely mentioned as incidental to the primary purposes. Therefore, Reclamation is not assigned discretion to determine the uses of the water and cannot assign water to endangered species before it delivers available water. In fact, the Tenth Circuit has previously interpreted the San Juan-Chama Act to prohibit even a contractor from devoting Project water to other uses. The majority justification for this departure from Tenth Circuit precedent was three Ninth Circuit cases which found Reclamation discretion because of completely different Congressional authorization and contract status. The City is sorely disappointed in the Tenth Circuit's ruling and intends to pursue its appeal while seeking legislation which removes San Juan-Chama water from the list of Rio Grande basin solutions for the minnow.

#### *The Future*

The City's goal is to establish once and for all that the imported San Juan Chama water in Heron Reservoir is for the use by Albuquerque citizens for drinking. If Albuquerque can switch to drinking the San Juan Chama water, the aquifer will be able to replenish and the long-term sustainability of the Bosque will be promoted. However, removing the San Juan Chama water from the list of assets used to address environmental problems in the Rio Grande Valley is not the City's only goal. The City has always been a partner in Bosque restoration and other riparian environmental projects. The City has a captive breeding program to promote the recovery of the silvery minnow and is participating in the construction of new habitat. The City intends to continue with Bosque restoration and its efforts to breed and recover the silvery minnow and its habitat. The City intends to work with the environmental community in building the drinking water project diversion structures in a way that promote fish recovery and Bosque beauty. If this environmental recovery is not aggressively pursued, our children will not know the Bosque as a living forest. This is a tragedy that the City is committed to avoiding.

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[A letter submitted for the record by Liz Godfrey, Great Plains Organizer, Endangered Species Coalition, Blanco, New Mexico, follows:]

#### **Statement submitted for the record by Liz Godfrey, Great Plains Organizer, Endangered Species Coalition**

Thank you for the opportunity to submit written testimony for the record in response to the Committee on Resource's field hearing on "The Silvery Minnow's Impact on New Mexico."

The witnesses invited by the Committee were greatly slanted toward those opposed to protections for the endangered Rio Grande silvery minnow. We commend Ms. Aletta Belin, New Mexico Counsel for Western Resources Advocates, for her testimony.

The Endangered Species Coalition supports a "made-in-New Mexico," long term solution to protect the silvery minnow, the Rio Grande and future generations of New Mexicans. After years of over-allocation of water resources in the Rio Grande watershed and dry summers, the river has run dry. The Rio Grande is home to the last remaining populations of the endangered silvery minnow. The silvery minnow is the proverbial canary in the coal mine for the Rio Grande ecosystem. It is a symptom and symbol of a dying river. Because dams and reservoirs have been built throughout the river system, the natural flow has been altered. Backwater pools no longer form which once provided water and shelter for the minnows in dry years. Now if the river runs dry, the minnow will die—there is no longer a safe haven for the minnow to retreat to. Due to this dire situation, the courts ruled earlier this year to allow water allocation to parties to be altered in order to maintain adequate flow in the Rio Grande for the survival of the minnow.

The Rio Grande is typical of western water issues—too much demand and too little water. Rather than continue to only deal with such situations when a crisis is

at hand, we must come together to develop long-term, cooperative solutions for all species, human and non-human alike.

- Protecting the entire Rio Grande. The court decision does not just prevent the extinction of the silvery minnow, one of New Mexico's last native fish species. It also preserves the entire heritage and natural splendor of the Rio Grande. The vitality and life giving properties of this amazing river provide the backbone to both New Mexico's history and its future.
- What is right about the ESA. Many in politics and the media have called this an example of what is wrong with the Endangered Species Act. Quite the contrary, this is what is right with the ESA. The Act has prevented the extinction of one of New Mexico's last native fish species and in doing so, it will prevent the continued decimation of the entire Rio Grande ecosystem. The Endangered Species Act does not need to be reformed.
- The decision does not "take water from the mouths of our children." On the contrary, the Tenth Circuit opinion doesn't say that all San Juan-Chama Project water can be used—indeed the law requires that a "reasonable amount" of the Project's water be delivered to the contractors each year, which is exactly what conservationists have always argued to the courts

#### *INCREASED RIVER FLOWS HELP THE ECONOMY*

A recent study by Professors Frank A. Ward, New Mexico State University, and James F. Booker, Siena College, showed that increasing flows in the Rio Grande for the silvery minnow will have a positive economic impact on New Mexico. "Economic benefits to New Mexico agriculture were estimated at \$68,000 per year." Please see Appendix A for the full study.

#### *WATER CONSERVATION AND THE CITY OF ALBUQUERQUE*

A portion of the discussion at the September 6th hearing centered on the need for the City of Albuquerque and its businesses to have "certainty" about its future water resources. Blame has been cast on the endangered Rio Grande silvery minnow for this lack of "certainty," however, much of the blame lies on the City itself.

In 1995, the Albuquerque City Council enacted legislation that set a conservation target of 175 gallons per capita per day (gpcd), which constituted a 30% reduction from the 250 gpcd that was consumed in 1994. This goal was to be achieved by 2004. Currently, the City's water consumption still averages close to 200 gpcd (197 gpcd is the latest figure). It is clear the City will not be able to achieve the target by next year.

The Administration claims that Albuquerque has achieved a 30% reduction in its overall water use. This is based on a per-account methodology (comparison of the average account use for each customer class between 1994 and today), which is inherently biased. Average household size is declining, at least 20% over the last 30 years. Small businesses are increasing over larger commercial enterprises. So there is a natural decline in per account averages, regardless of any water conservation measures. The City is taking advantage of these natural declines to claim conservation success that is greatly exaggerated.

While the Administration claims that the "per capita" methodology is flawed because of errors in census data, at least the census data is randomly biased, not biased towards a particular outcome. Furthermore, New Mexico ranked very high on the scale of census reliability (higher than most other southwestern states), and yet other southwestern cities are still using the per capita methodology. So the City has less reason than others to abandon the per capita methodology, and yet it has embraced an incredibly biased method that artificially improves our water conservation success. A more cynical individual might hypothesize that the City is eager to appear as if it is achieving its conservation targets—a prerequisite for securing permits from the Office of the State Engineer for further diversions (like the San Juan-Chama project).

#### *Unaccounted-for-Water:*

Unaccounted-for-water is water lost to the system between production and billing. Although it does include water for fire control and other beneficial uses, it mostly consists of leakage from the system through pipeline breakages, etc. Albuquerque's rate of unaccounted-for-water is high, particularly for the desert southwest. It is also increasing, from 11.5% in 1994 to 12.3% in 2001. By comparison, a sampling of other southwestern cities' UAW rates for 2001 ranged from roughly 3% in Mesa, AZ, to 12.0% in Tucson. However, Tucson has a significantly lower per capita water consumption than Albuquerque (in 2001, 170 gpcd vs. 205 gpcd for Albuquerque), so the absolute value of unaccounted-for-water in Tucson is actually less than the percentage would otherwise indicate.



*Some disturbing facts about water use in the City of Albuquerque:*

Although most residents in Albuquerque have worked very hard to voluntarily conserve, there is a minority of city residents who have actually increased their use over the past 10 years (29% of residents have increased their use by an average of MORE than 40%). However, the Administration does not support any new mandatory water conservation measures, only voluntary restrictions and incentive-based programs. This places a disproportionate degree of responsibility on those who have already demonstrated their willingness to conserve, and ignoring those users who are wasting water that could benefit the ecosystem and future generations.

*Environmental Protection and the River*

There has also been a lot of misinformation spread about efforts to dedicate our drinking water to the river, and the myth of “stealing water from the mouths of our children” to save the silvery minnow. However:

- The San Juan-Chama water is not for drinking. At least 99% of it is not. The largest use of San Juan-Chama water will be for watering lawns and golf courses. Drinking water will be less than 1% of total use. So instead of talking about “taking water from the mouths of our children,” we should be talking about “taking water from the 14th fairway and the vast expanse of residential turfgrass that gets walked on once a year during the annual family BBQ”.
- People DO think that the river and the Bosque are important. In a recent poll conducted by the UNM Institute for Public Policy, water for the river and riparian areas ranked 2nd only to water for drinking and bathing. Water for residential lawns and gardens ranked dead last (6th). So we’re kidding ourselves if we think we’re representing Albuquerqueans’ desires by protecting lawns and golf courses while letting the river run dry and the Bosque die.
- Protection of the river, the Bosque and general environmental values are a fundamental policy listed in the City’s Water Resources Management Strategy. Recognition of this fact does not change existing policy in any manner whatsoever. In fact, return flows to the Rio Grande to meet environmental needs are listed as a key consideration.

**ALL PARTIES MUST WORK TOGETHER FOR LONG TERM SOLUTIONS**

Rather than continue the brinkmanship by all parties, concerned leaders from across New Mexico must come together to develop a long-term water plan that will benefit every being. There are many things that can be done at the local and federal level that can help the situation without having negative consequences to other legislation and ongoing cooperative efforts. These include:

- More efficient water conservation and management by both rural and urban users. The City of Albuquerque is one of the highest municipal-water users in the West—205 gallon per capita per day (gpcd) compared to 140-165 gpcd in Santa Fe, El Paso, and Tucson.
- Better water conservation and management practices by both rural and urban users. For example, the Middle Rio Grande Conservancy District (MRGCD) diverts two or more times as much water as similar irrigation districts in New Mexico. Converting many of the farms in the Middle Rio Grande Conservancy District from flood irrigation to sprinkler or drip irrigation systems would greatly reduce MRGCD’s demand and the amount of water it wastes. Water thus made available could then be left in the river for the minnow.
- Federal and state partnerships for problem solving and long term planning.
- Establish a voluntary water leasing program where water rights holders could not use their water in dry years in return for compensation using federal dollars. This program would help to ensure adequate water flows in the river—while allowing users to keep their water rights while not using their allocations in times of drought.
- Restoration of river and bosque habitat, including the removal of non-native vegetation like salt cedar.
- Establishment of an additional viable population of silvery minnows in a reach of the Rio Grande or the Pecos River in addition to the population in the Middle Rio Grande therefore creating a second safety net in dry years. Once the minnow is reestablished in multiple locations, it will be able to survive temporary river drying in some stretches of the river.
- Establish a permanent pool of water for endangered species. This water, created from surplus supply, new conservation measures, and voluntarily leased allocations, may be stored upstream for use in times of emergency to sustain adequate flows in certain stretches of the Rio Grande.

*THE ENDANGERED SPECIES ACT IS NOT BROKEN*

We oppose any efforts to weaken protections for our nation's threatened and endangered species. The Endangered Species Act of 1973 is one of our nation's most popular and effective environmental laws. In a national survey of people from around the country conducted in 2002 by the Biodiversity Project, over three quarters of Americans agreed that, "We should maintain a strong Endangered Species Act because protecting so many different kinds of plants and animals is important to the environment and the economy."

The Endangered Species Coalition speaks on endangered species issues for about 400 conservation, religious, scientific, business, sporting and humane groups around the country. We request that these comments be submitted into the official congressional record for the hearing. We look forward to working with the Committee on Resources on these important natural resource management issues.

NOTE: An attachment to Ms. Godfrey's letter has been retained in the Committee's official files.

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[A statement submitted for the record by Steve Harris, Executive Director, Rio Grande Restoration, follows:]

**Statement of Steve Harris, Executive Director, Rio Grande Restoration**

Mr. Chairman: I am Steve Harris, the Director of Rio Grande Restoration, a river protection group, based in Pilar, New Mexico. I am also a participant in the Middle Rio Grande ESA Collaborative Program, which is a broad-based collaborative of federal, state, local governments and private interests. This Program is working diligently to recover endangered minnow and flycatcher species in this valley. We have received the support of the federal government in this effort, for which we are grateful to Congress and especially to Senators Domenici and Bingman and Representative Wilson. The Program expects to have drafted a Long Term Plan for conservation of the species by the end of this year, in accordance with

The Rio Grande problem is not an easy one. Like so many Western river basins, we have an excess of claims to the river and a limited and wildly variable supply of water. It is clear that the entire river ecosystem has suffered and that our ESA crisis is a reflection of its continued deterioration. Clearly, fish need water and they have not gotten sufficient flows in the past to support them. So, we are working on the complexities of altering river management to provide more beneficial timing of flows and to acquire supplemental water to release into the river.

We have concluded that this will require substantial changes in the way we allocate water, not the least of which is the necessity of managing irrigation water in the most conservative way possible, with efficiency, austerity and most critically, close scheduling of water deliveries to farms.

Our experience leads us to the conclusion that we can provide the river with supplemental flows, without severe economic dislocations, by carefully crafting a program of water leasing from water users willing and able to forbear their use of water for short periods.

Over the past month, the parties have been negotiating a comprehensive solution. These talks have now been suspended pending the consideration of House and Senate riders, which take San-Juan Chama interbasin water off the table.

What gives this local effort its tremendous sense of urgency is the likelihood that in year 2006, there will be virtually no supplemental water available to meet the flow requirements of 2003 Biological Opinion. If we do not respond appropriately, the year 2006 will witness our biggest ESA-related crisis yet.

Since 1996, the greatest challenge facing the dozen or more parties who are attempting to recover the Rio Grande silvery minnow, improve its habitat or attain ESA coverage for their projects has been how to acquire water to supplement the flows of the Rio Grande. Each dry year ( which includes 6 of the past 8) has seen the group "pull a rabbit out of the hat," cobbling together leased San-Juan Chama water, negotiating difficult and complex deals with the Rio Grande Compact Commission and conducting daily phone calls to administer a supplemental water program that will satisfy our various needs for ESA compliance and contribute to the survival of a beleaguered Rio Grande

The City of Albuquerque has leased to the federal government over 300,000 acre feet of its SJC water in seven years. Those deals are a thing of the past. As the City has made clear: in the future they will use that water for a new drinking water project, which they plan to have in place by 2006.

The minnow has survived, year to year, by such arrangements as:

- An agreed order in 2000 provided nearly 40,000 acre feet of supplemental water and a whopping 150,000 acre feet of leveraged leases;
- A Conservation Water Agreement in 2001 provided an additional 50,000 acre feet total in 2001 and 2002; and
- An emergency deal involving relinquishment of New Mexico's Rio Grande Compact credits has provided 30,000 acre feet this year, is being counted on to provide 30,000 af in 2004 and 20-25 kaf in 2005.

At the end of 2005, City water will be off the table, New Mexico's Compact credit will be exhausted and the anti-storage provision in Article 7 of the Compact will prevent any further storage and release deals.

The supplemental water "rabbit" is becoming increasingly emaciated. In 2006, only the San Juan and Jicarilla SJ-C water can be expected to be available (some 10,000 acre feet, total) and continued drought in the San Juan basin over the next 2 years would place even that source in jeopardy. Our alternatives at that point are faint hopes: either draconian (taking of City water, shutting down the entire MRGCD operation) or nonexistent, unless a deal can be struck and soon. It is not hyperbole to say that this is formula for a train wreck and the unresolvable crisis will occur during the Richardson Administration.

Surely Congress and the Governor recognize that this is the likely scenario. Our leadership must realize that even if irrigation efficiencies and forbearance proceed on the most rapid schedule imaginable, the water may come too late. Suspending negotiations at this point, even for 30 days, increases the likelihood of failure. This scenario has been anticipated since 1996 and the future scenario cannot now be denied. All these earnest parties, Interstate Stream Commission, City of Albuquerque, Conservancy District, Bureau of Reclamation, the plaintiffs and perhaps the Congress itself, will be drawn into a firestorm in which everyone will be badly burned.

This is not a time to suspend negotiations that may, perhaps, resolve this critical issue among these parties. The intent and language of the Domenici and Wilson riders are well-known. In themselves, they do not solve the underlying challenge of a dry Rio Grande. In reducing the incentive to some parties to stay at the table they are actually unhelpful. Combined with the Bureau of Reclamation's expressed desire for more time to consider what the parties have put forward, they may actually scuttle the quest for a local solution. I hope not.

The final fly in the ointment is the issue of the availability of federal money to assist in implementing changes the parties might agree to. I submit that, while money alone will not solve any western water problem, the lack of money will surely preclude a solution.

Over the next 10 years, leases of water rights will require some \$30 million and creating conservation in irrigation some \$50 million more. This funding will tend to be front end loaded. Our economically disadvantaged state can probably be persuaded to find a quarter of this amount. The assistance of New Mexico's delegation and of this Committee will be critical if we are to avert the looming train wreck.

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[A letter submitted for the record by Hon. Patricia A. Madrid, Attorney General, State of New Mexico, follows:]



Attorney General of New Mexico

PATRICIA A. MADRID  
Attorney General

STUART M. BLUESTONE  
Deputy Attorney General

September 5, 2003

The Honorable Richard Pombo  
Chairman, Committee on Resources  
House of Representatives  
Washington, D.C. 20515

Re: Field Hearing on Silvery Minnow

Dear Congressin Pombo:

Thank you for your letter of September 3, 2003 inviting me to testify on September 6, 2003 at the Committee on Resources oversight field hearing in Belen on the Silvery Minnow's impact on New Mexico. As my office explained to your staff, unfortunately I will not be able to attend the hearing.

Your office has asked for helpful information to share with your committee, and I am therefore attaching a copy of the brief we recently submitted on behalf of the State of New Mexico to the United States Court of Appeals for the Tenth Circuit to support our Petition for Rehearing *En Banc*. That brief sets forth our principal legal concerns with the majority Tenth Circuit 2-1 panel decision that we believe is in error. I hope this is helpful to your committee and responsive to your request for my views on this important matter.

Finally, I want to emphasize that I believe it should still be possible to protect New Mexico's water rights and water laws, while preserving water for our citizens, municipalities, farmers, ranchers and irrigators and protecting the Silvery Minnow and the Rio Grande as a source of water for many uses and interests. I remain hopeful that all interested parties can work together cooperatively and respectfully to achieve these common goals.

Thank you again for contacting us.

Sincerely,

NOTE: The brief attached to Attorney General Madrid's letter submitted on behalf of the State of New Mexico to the U.S. Court of Appeals for the Tenth Circuit has been retained in the Committee's official files.

[A statement submitted for the record by the National Endangered Species Act Reform Coalition, Washington, D.C., follows:]

**Statement of the National Endangered Species Act Reform Coalition<sup>1</sup>**

The National Endangered Species Act Reform Coalition (NESARC) is deeply concerned about the effect of the Silvery Minnow decision and believes that Congress must take action not only to resolve the conflict created in the Rio Grande water allocation controversy, but also to avoid similar future conflicts. Our members are concerned about the effect of this decision on the sanctity of contracts with federal agencies and the reasonable expectations for parties holding such contracts, the destabilizing effect of such unilateral reallocation of water supplies on a community's ability to plan for long term water supply needs, and the continued failure to recognize the enormous financial and societal costs that businesses, state and local governments, and individual citizens are being forced to bear to implement federal measures taken to protect threatened and endangered species.

NESARC members believe that all necessary actions must be taken to override the Tenth Circuit Court of Appeals decision in the case of *Rio Grande Silvery Minnow, et al. v. Keys*, No. 02-2254 (10th Cir. June 12, 2003). This decision ruled that the Bureau of Reclamation (Bureau) has "discretion" to unilaterally disavow water delivery contracts with irrigators and other water users in order to provide that water for the benefit of the silvery minnow, a species listed as endangered under the federal Endangered Species Act (ESA). Further, the court held that the Bureau must use water acquired from an inter-basin transfer for the benefit of the minnow. This decision mandates that a federal agency alter the natural habitat of a species and places the perceived needs of the silvery minnow over human needs.

As the House Resources Committee considers legislative options to address this matter, NESARC urges the Committee to address the underlying problems in the ESA that contributed to the Silvery Minnow decision. What is happening to the citizens and communities of New Mexico as a result of the Silvery Minnow decision is not an isolated case. We need ESA reform that not only ensures that the federal government lives up to its existing commitments to provide water to the citizens of New Mexico but also protects citizens and communities throughout the United States from having the ESA used to unilaterally reallocate resources—without respect to the effect of such actions on communities, businesses, and human needs.

If allowed to stand, the Silvery Minnow decision would destroy the contractual relationships between the Bureau and the water users they serve. The decision also would usurp, throughout the West, the States' role in allocating water rights. By entering into contracts with the Bureau, water users expect a reliable source of scarce water resources. Water users have a right to expect that the Bureau will honor these contractual obligations.

NESARC members are greatly concerned with the court's decision to reallocate an inter-basin transfer intended for the citizens of the City of Albuquerque to provide flow augmentation for the silvery minnow. Inter-basin transfers of water are typical in the West as a means to transfer scarce resources from areas of surplus to areas of need. Such transfers are essential if the needs of water users in the arid West are to be met. If inter-basin water can be confiscated and unilaterally reallocated from state water right holders to serve a federal obligation to augment flows in a river system that has solely acted as a delivery channel for the inter-basin transfer, as the majority opinion holds, inter-basin transfers will themselves become endangered.

While this decision involved specific operations by the Bureau, NESARC also is concerned that this decision could have serious repercussions for parties holding federal permits, leases or contracts involving the use of federal lands. In its broadest terms, the Tenth Circuit's use of the "unmistakability" doctrine could allow the modification, if not complete abrogation, of existing federal permits, leases and/or

<sup>1</sup> NESARC is a broad-based coalition of over 100 member organizations, representing millions of individuals across the United States that is dedicated to bringing balance back to the application of the Endangered Species Act (ESA). Our membership includes farmers and ranchers, rural irrigators, cities, counties, electric utilities, commercial businesses and many other individuals and organizations from all walks of life that are directly affected by the ESA.

contracts. NESARC has long maintained that the ESA, as interpreted by the courts, has lost its equilibrium with the scales tipped in favor of taking actions for the perceived benefit of listed species without regard to the adverse consequences to the communities and individuals affected. Without further action to reverse this decision, the City of Albuquerque will be joined by more communities and businesses in facing similarly unbalanced and harmful actions under the current, unrefined and overly-broad Section 7 consultation process.

NESARC does not believe that the ESA, and Section 7 in particular, was intended to apply the way the majority opinion has interpreted it. The dissenting opinion in *Silvery Minnow* expressed it best: “Under the court’s reasoning the ESA, like *Frankenstein*, despite the good intentions of its creators, has become a monster.”

**National  
Endangered  
Species  
Act  
Reform  
Coalition**

**National Endangered Species Act Reform Coalition  
Membership List**

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|---|--|---|
| <b>American Farm Bureau Federation</b><br><i>Washington, D.C.</i>                           | <b>Codington-Clark Electric Cooperative, Inc.</b><br><i>Watertown, South Dakota</i>    | <b>Helix Water District</b><br><i>La Mesa, California</i>                                       |
| <b>American Agri-Women</b><br><i>Mission, Texas</i>   | <b>Colorado River Energy Distributors Association</b><br><i>Tempe, Arizona</i>         | <b>High Plains Power, Inc.</b><br><i>Thermopolis, Wyoming</i>                                   |
| <b>Animas-La Plata Water Conservancy District</b><br><i>La Plata, New Mexico</i>            | <b>Colorado River Water Conservation District</b><br><i>Glenwood Springs, Colorado</i> | <b>Holy Cross Electric Association, Inc.</b><br><i>Glenwood Springs, Colorado</i>               |
| <b>Anza Electric Cooperative, Inc.</b><br><i>Anza, California</i>                           | <b>Colorado Rural Electric Association</b><br><i>Denver, Colorado</i>                  | <b>Idaho County Light and Power</b><br><i>Grangeville, Idaho</i>                                |
| <b>Apache County</b><br><i>St. Johns, Arizona</i>   | <b>County of Boise</b><br><i>Idaho City, Idaho</i>                                     | <b>Idaho Mining Association</b><br><i>Boise, Idaho</i>  |
| <b>Arizona Municipal Power Users' Association</b><br><i>Phoenix, Arizona</i>                | <b>County of Catron</b><br><i>Reserve, New Mexico</i>                                  | <b>Intercounty Electric Association</b><br><i>Mitchell, South Dakota</i>                        |
| <b>Art Homes</b><br><i>San Antonio, Texas</i>   | <b>County of Eddy</b><br><i>Carlsbad, New Mexico</i>                                   | <b>International Council of Shopping Centers</b><br><i>Alexandria, Virginia</i>                 |
| <b>Association of California Water Agencies</b><br><i>Sacramento, California</i>            | <b>County of Sierra</b><br><i>Travis or Consequences, New Mexico</i>                   | <b>Kern County Water Agency</b><br><i>Bakersfield, California</i>                               |
| <b>Bar Eight Cattle Co., Inc.</b><br><i>Lyman, Nebraska</i>                                 | <b>Dakota Energy Cooperative, Inc.</b><br><i>Huron, South Dakota</i>                   | <b>Lyon-Lincoln Electric Cooperative, Inc.</b><br><i>Tyler, Minnesota</i>                       |
| <b>Basin Electric Power Cooperative</b><br><i>Bismark, North Dakota</i>                     | <b>Diele Escalante Rural Electric Association</b><br><i>Beryl, Utah</i>                | <b>Marine Industries Association of South Florida</b><br><i>Fort Lauderdale, Florida</i>        |
| <b>Boise-Kuna Irrigation</b><br><i>Kuna, Idaho</i>  | <b>Douglas County PUD No. 1</b><br><i>East Wenatchee, Washington</i>                   | <b>Merced Irrigation District</b><br><i>Merced, California</i>                                  |
| <b>Bridger Valley Electric</b><br><i>Mooseman Flw, Wyoming</i>                              | <b>Dugan Production Corporation</b><br><i>Farmington, New Mexico</i>                   | <b>Mid-West Electric Consumers Association</b><br><i>Denver, Colorado</i>                       |
| <b>Broadview Water District</b><br><i>Firebaugh, California</i>                             | <b>East River Electric Power Cooperative</b><br><i>Madison, South Dakota</i>           | <b>Morgan County Rural Electric Association</b><br><i>Pt. Morgan, Colorado</i>                  |
| <b>Buckeye Industrial Mining Company</b><br><i>Lisbon, Ohio</i>                             | <b>Eastern Municipal Water District</b><br><i>San Jacinto, California</i>              | <b>National Association of Counties</b><br><i>Washington, D.C.</i>                              |
| <b>Carlsbad Irrigation District</b><br><i>Carlsbad, New Mexico</i>                          | <b>Edison Electric Institute</b><br><i>Washington, D.C.</i>                            | <b>National Association of Home Builders</b><br><i>Washington, D.C.</i>                         |
| <b>Central Arizona Water Conservation District</b><br><i>Phoenix, Arizona</i>               | <b>Empire Electric Association, Inc.</b><br><i>Cortez, Colorado</i>                    | <b>National Association of Industrial &amp; Office Properties</b><br><i>Hermiston, Virginia</i> |
| <b>Central Electric Cooperative</b><br><i>Mitchell, South Dakota</i>                        | <b>Exeter Irrigation District</b><br><i>Exeter, California</i>                         | <b>National Association of Realtors</b><br><i>Washington, D.C.</i>                              |
| <b>Central Nebraska Public Power &amp; Irrigation District</b><br><i>Holdrege, Nebraska</i> | <b>Flathead Electric Cooperative</b><br><i>Kalispell, Montana</i>                      | <b>National Grange</b><br><i>Washington, D.C.</i>   |
| <b>Central Platte Natural Resources District</b><br><i>Grand Island, Nebraska</i>           | <b>Frank Raspo and Sons</b><br><i>Banta, California</i>                                | <b>National Marine Manufacturers Assn</b><br><i>Chicago, Illinois</i>                           |
| <b>Charles Mix Electric Association</b><br><i>Lake Andes, South Dakota</i>                  | <b>Garkane Power Association, Inc.</b><br><i>Richfield, Utah</i>                       | <b>National Rural Electric Cooperative Association</b><br><i>Washington, D.C.</i>               |
| <b>Clay-Union Electric Cooperative, Inc.</b><br><i>Watertown, South Dakota</i>              | <b>Garrison Diversion Conservancy District</b><br><i>Carrington, North Dakota</i>      |   |

[The response to questions submitted for the record by The Honorable Anthony Ortiz, Governor, Pueblo of San Felipe, follows:]

February 5, 2004

VIA FACSIMILE: (202) 226-6953

The Honorable Richard Pombo  
 Chairman  
 Committee on Resources  
 Subcommittee on Water and Power  
 1522 Longworth H.O.B  
 Washington, DC, 20515

Re: Follow-up Questions: House Committee on Resources Oversight Field Hearings  
 on the Silvery Minnow

Dear Chairman Pombo:

Thank you for the opportunity to testify at your Committee's field hearing in Belen. I write to respond to the two questions you presented to me in your letter dated September 5, 2003. As general background in response to the questions, I enclose a position paper the Pueblo has sent to congressional members. See Exhibit A. This paper is in support of the Pueblo's request that the senior time immemorial Pueblo water rights be included specifically in any legislative protections extended to other junior water rights holders in New Mexico regarding the endangered silvery minnow.

With respect to the Committee's questions and the Pueblo of San Felipe's response to these questions:

**Question 1: The House-passed Fiscal Year 2004 Energy and Water Development Appropriations bill includes a provision that would prohibit the release of water from the San Juan Chama Project or Middle Rio Grande Project for the purpose of complying with the Endangered Species Act. What impact would the provision, if enacted, have on the Pueblos?**

Answer: If enacted, the provision would expose the Pueblo's senior federal reserved water rights to increased risk of being taken without Pueblo permission for silvery minnow purposes. The Pueblo receives some water from the Middle Rio Grande Project (which Project receives some San Juan Chama contract water), and also pursuant to the Pueblo's senior federal water rights to Rio Grande waters and related storage in El Vado Reservoir. If Congress prohibits the release of water from the San Juan Chama Project or the Middle Rio Grande Project for the purpose of complying with the Endangered Species Act, little water exists in the Rio Grande System other than the Pueblos' senior water rights. This is water the Pueblos need for irrigation of lands they have farmed since time immemorial, and for other purposes. The Department of the Interior has advised us that it may have no choice but to use Pueblo water for the endangered silvery minnow if Congress eliminates San Juan Chama or Middle Rio Grande Project water as a water source for the minnow. This result would be unfair and is inconsistent with the United States trust responsibility to protect the Pueblo's federal water rights.

**Question 2: Are the Pueblo's full participants in water management and planning activities in the Middle Rio Grande Basin?**

Answer: The Pueblos do not waste water. We value water and the entire ecosystem. The Pueblo of San Felipe manages the lands and water of its reservation, including the Rio Grande River, to ensure these resources are available for future generations. The Pueblo is working with the United States, the State of New Mexico, and local governments to restore and protect the Rio Grande river and its surrounding habitat.

Significantly, several of the Middle Rio Grande Pueblos were exempted from the federal silvery minnow critical habitat designation because the United States Fish & Wildlife Service recognized the Pueblo management plans and practices are superior to any that could be established as part of a federal habitat designation. Pueblo of San Felipe staff has participated in numerous meetings and activities of the Middle Rio Grande Endangered Species Act Collaborative Program, and many other river and habitat restoration initiatives. And, importantly, San Felipe representatives are taking the lead on appropriate Pueblo and Tribal provisions in the state water plan.

The Pueblo of San Felipe is also working hard to assess its federal water rights claims so that we are prepared to participate in a comprehensive water rights solution that also benefits the minnow. The Pueblo has little resources of its own to devote to this effort. The Pueblo has sought federal funding for legal and technical assistance to finalize its water claim. It is absolutely critical that the Pueblo receive the federal funding it has requested. The funding is necessary for the Pueblo to continue our substantial efforts in planning and management activities, including the

development of a comprehensive settlement to resolve our water rights. This type of resolution will provide a much greater level of certainty for all of the junior water users that also want to plan and manage their junior water rights.

Thank you again for your interest in our water rights. Please let me know if you need anything further from the Pueblo.

SINCERELY,

**Anthony Ortiz, Governor, Pueblo of San Felipe**

cc: Representative Heather Wilson  
Representative Tom Udall  
Representative Steven Pierce  
Senator Pete V. Domenici  
Senator Jeff Bingaman

Enclosure:

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PUEBLO OF SAN FELIPE  
SILVERY MINNOW RIDER  
POSITION PAPER  
OCTOBER 1, 2003

- Pueblos have federal rights to the water of the Rio Grande with a time immemorial priority for irrigation, in-stream flows, and other needs of their homeland for the present and future generations.
- Over twenty years ago the Pueblos negotiated the right to store part of Pueblo water in El Vado Reservoir.
- The City of Albuquerque (and other municipalities with San Juan Chama delivery contracts) and the Middle Rio Grande Conservancy District ("MRGCD") also store water in El Vado Reservoir and other reservoirs.
- As of this date, the only water available for release into the Rio Grande is that water stored in El Vado Reservoir and other reservoirs.
- Releases of water from El Vado and other reservoirs are necessary to restore the flow of the Rio Grande to a level that will ensure survival of the silvery minnow, in accordance with the Endangered Species Act.
- The United States Court of Appeals for the Tenth Circuit has ruled that El Vado and other reservoir water stored for Albuquerque and MRGCD must be released in accordance with the needs of the silvery minnow. The Pueblos' water rights are not at issue in this litigation.
- Senator Domenici and Representative Wilson have each introduced language to protect Albuquerque and MRGCD from having their El Vado water taken for minnow purposes without their consent.
- The Middle Rio Grande Pueblos also need protection of their El Vado water storage and other senior water rights to ensure that such water is not taken for minnow purposes without the consent of the Pueblos.
- If the Pueblos are not included in the protective riders, the Pueblo water in El Vado Reservoir and other Pueblo water rights will be at great risk.
- The Pueblo water rights are senior to the storage and other water rights of Albuquerque and MRGCD.
- It is unfair to protect the junior water rights holders, but leave the most senior water rights holders unprotected and at risk.
- For this reason, the Pueblo of San Felipe respectfully requests to be included in the protective riders.
- Additionally, the Pueblo strongly believes that no permanent "legislative fix" should be passed as an appropriations rider until after hearings are held to determine the legal and practical effects of the proposed rider on the complex array of federal and New Mexico state water rights and resources.
- If the rider(s) move forward without hearings, please add the following language to protect the Pueblo water rights along with the other (more junior) water rights already protected:

The Secretary of the Interior is prohibited from obligating funds or exercising discretion, if any, to prevent, reduce, or restrict storage, releases, diversions, or uses of Rio Grande Basin water by or for the benefit of any of the six Middle Rio Grande Pueblos (Cochiti, Santo Domingo, San Felipe, Santa Ana, Sandia and Isleta) in order to meet the requirements of Section 7 of the Endangered Species Act (16 U.S.C. § 1536).



[A statement submitted for the record by the Rio Grande Water Rights Authority, follows:]

**Statement submitted for the record by the  
Rio Grande Water Rights Association**

In New Mexico, a number of plans have been advanced to provide water for the preservation of the silvery minnow.

Nearly all such plans share a common fallacy: that agricultural irrigators in the Middle Rio Grande Valley can achieve great efficiencies at low cost and with scant impact on current crop production, existing riparian habitat or aquifer recharge. The fallacy continues that these efficiencies will allow water to be taken from the irrigators to serve the minnow.

The thought is interesting; unfortunately, when the facts are known, it is no more than a fantasy based on flawed reasoning and misinformation.

*The mistake: 11 acre-feet*

Central to the fallacy is the mistaken notion that irrigators in the Middle Rio Grande Valley are taking and using 11 acre-feet of water per acre that is irrigated.

If this were true, much of the Middle Rio Grande Valley would be laboring under flood conditions the better part of the year. Houses, schools, buildings and roads would be swamped. Crops, rather than being parched, would literally be drowning in water.

As we know, this isn't happening. How did the misunderstanding arise? What are the facts?

*The real number: 3.8 acre-feet*

2002 is the most recent year for which we have complete information on irrigation in the Middle Rio Grande Valley.

The Middle Rio Grande Conservancy District (MRGCD) is the body that administers the irrigation system for the area, which stretches from Cochiti Dam on the north to the north boundary of Bosque del Apache on the south.

According to MRGCD gages that yield an accurate measurement of water used in its system, irrigators in the Middle Rio Grande Valley in 2002 used 268,000 acre-feet of water for 70,000 acres, or only 3.8 acre-feet per acre irrigated.

*Understanding the numbers*

Understanding the basis for the 3.8 acre-feet—and the 11 acre-feet—requires a rudimentary understanding of how the irrigation system works.

The MRGCD irrigation system is essentially a three-step system:

1. It diverts water from the river;
2. It delivers the water to the irrigation canals, ditches and fields; and, then,
3. It returns the water that isn't used to the river.

The water diverted in step 1 is called the gross diversion. The water returned in step 3 is called the return flow. When we subtract the return flow from the gross diversion, we arrive at the amount of water in step 2, the net diversion. That is:  
gross diversion -- return flow = net diversion.

The net diversion is the amount actually used by the irrigation system.

The MRGCD operates four diversion/return flow divisions. For all divisions, in 2002, as recorded by the MRGCD's gages, the gross diversion for the Middle Rio Grande Valley totaled 319,407 acre-feet of water, and return flow totaled approximately 60,000 acre-feet. Therefore, the net diversion, the amount actually used by the irrigation system, totaled about 268,000 acre-feet of water. Given the 70,000 acres irrigated, this equates to approximately 3.8 acre-feet of water per acre.

*Correcting the Fallacy*

A former Office of the State Engineer official had, at some time, announced that the MRGCD "diverted" about 11 acre-feet of water per acre irrigated. Unfortunately, the OSE official was using the number for the gross diversion of some past year. It was, if you will, a simple bookkeeping error. But the number was dramatic and it gave rise to hopes that "new" water could be found through simply improving efficiencies in the MRGCD's irrigation system.

*Efficiencies and impact*

The real numbers tell a different story about efficiencies and environmental impact, and suggest that more caution be taken in seeking efficiencies in the MRGCD irrigation system.

In 2002, the water used by the MRGCD irrigators went to crops, riparian habitat and aquifer recharge. The MRGCD estimates consumption this way:

- Crops consumed approximately 150,000 acre-feet;
- Riparian habitat (trees and other vegetation along the 1,238 miles of MRGCD waterways) consumed approximately 11,000 acre-feet; and,
- Aquifer recharge consumed 47,000 acre-feet.

#### *Crop Irrigation: Already Efficient*

According to irrigation engineers, efficiency of crop irrigation in the Middle Rio Grande Valley can be mathematically expressed as a ratio:

water consumed by crops divided by net water diverted; or,  
 150,000 acre-feet divided by 268,000 acre-feet; or,  
 $150,000 \text{ divided by } 268,000 = .559 \text{ or } .56$ .

This means that the MRGCD is 56% efficient.

In 1995, the New Mexico Office of the State Engineer reported that most irrigation systems in the state were about 50% to 55% efficient. At 56% efficiency, the Middle Rio Grande irrigators are at the high end of the efficiency range for irrigation systems in New Mexico. Therefore, suggesting that huge efficiencies can be reasonably achieved in crop irrigation may be misleading, especially if current crop production is maintained.

#### *Riparian Habitat: Efficiency vs. Environment*

The 1,238 miles of waterways that comprise the MRGCD irrigation system include delivery canals, return-flow outfalls and the Rio Grande itself.

These return-flow outfalls are generally unlined and the consequent saturation of the surrounding earth has fostered a riparian habitat, which is better known as the bosque.

In simple terms, this is an area where efficiencies can be gained. Canals and return-flow outfalls and, perhaps, even sections of the river can be lined with concrete. This would prevent seepage into the earth.

However, it would also destroy the bosque, which is host to a variety of plant and animal species. Consequently, any thought of the potential benefit to efficiencies has to consider both the enormous dollar cost of lining canals with concrete and the environmental impact.

#### *Aquifer Recharge: A Critical Benefit*

In addition to surface water, the Middle Rio Grande Valley is heavily dependent on water from the aquifer. It is no secret that experts believe that we are pumping water from the aquifer at a much faster pace than we are recharging it.

This imbalance has raised concerns of eventual depletion of the aquifer. In the near term, it raises concerns of subsidence—surface settling—that could have disastrous effects on infrastructure and real estate, especially in the population centers, such as Albuquerque.

Currently, the 47,000 acre-feet that seeps into the ground from the MRGCD irrigation system is estimated to be the source for about half of the recharge to the aquifer.

The MRGCD and the irrigators it serves consider the recharge to be a critical benefit to the Middle Rio Grande Valley.

We urge that any plan to improve efficiencies in either conveyance of water or irrigation of fields should consider the effect on aquifer recharge.

#### *Dangerous misinformation*

Given the very real dangers—potential destruction of the bosque, failure to recharge the aquifer, reduced crop production—that would arise from attempts to take water from the irrigators in the Middle Rio Grande Conservancy District, we cannot allow the mistaken notion that they are taking and using 11 acre-feet per acre to persist. It can only be viewed as dangerous misinformation and needs to be corrected before any further planning can take place.

And, we also need to dispel the notion that the irrigators themselves are not seeking efficiencies on their own.

#### *Ongoing improvements*

Since 1996, the MRGCD has been improving the efficiency of its water conveyance system. New gages have been installed to accurately measure diversions and return flows. New automated water gates have been installed at several critical points and plans are underway to install more automated gates at 40-plus locations. The MRGCD is also investigating how scheduling and rotation of irrigation water deliveries to farms can be improved.

The improvements in efficiency so far have been dramatic. Gross diversions have steadily decreased, dropping from 475,835 acre-feet in 1997 to the 319,407 diverted in 2002. The MRGCD is projecting a gross diversion of 275,149 acre-feet for 2003.

*Other considerations*

Other considerations are involved in the potential taking of water from the agricultural irrigators of the Middle Rio Grande Valley, but they are outside the scope of this testimony. However, it should be briefly noted that the taking of water, held by individual water rights, is the same as taking other personal property and should be subject to the same process and protection. And, any scheme to provide water for the silvery minnow should distribute the burden equally among irrigators, municipalities and pueblos alike. No one should be exempt. No one should be asked to bear the whole burden. And water should never be taken by fiat.

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[A statement submitted for the record by Subhas Shah, Chief Engineer, Middle Rio Grande Conservancy District, Albuquerque, New Mexico, follows:]

**Statement submitted for the record by Subhas Shah, Chief Engineer,  
Middle Rio Grande Conservancy District**

Chairman Pombo: Thank you for the opportunity to have Dr. Thomas A. Wesche provide oral testimony to the Committee on September 6. The Conservancy District also offers the following written testimony for consideration by the Committee.

1. Contrary to the claim made by Alletta Belin at the hearing on September 6, the Middle Rio Grande Conservancy District has never consumptively used "eleven acre-feet of water per acre of irrigated land." That claim is based on a distortion of reports from the U.S. Bureau of Reclamation. Gages along the Rio Grande that measure water in the river and water diverted from the river for irrigation show that in 2002 the Conservancy District diverted from the Rio Grande a total of 268,000 acre-feet of water. That is a "net" number, arrived at by subtracting from the total or "gross" amount diverted, the amount of water returned to the river as "return flow." Approximately 60,000 acre-feet of diverted water went back to the river as return flows at various points along 160 miles of the middle Rio Grande valley. Approximately 3.8 acre-feet of water were diverted from the river in 2002 for each of the 70,000 acres of irrigated land in the middle Rio Grande valley. In 2002, crops consumptively used about 150,000 acre-feet of water, or about 2.2 acre-feet of water for every acre of irrigated land in the Conservancy District. About 11,000 acre-feet of water was consumed by the trees and other "riparian" vegetation along the 1,238 miles of Conservancy District canals and drains (an estimate based on field surveys and published estimates of vegetation water use). Approximately 47,000 acre-feet of water seeped into the ground to recharge the aquifer. In addition to supporting valuable wildlife habitat along the canals, seepage from unlined canals is the source of about half the recharge to the aquifer in the middle Rio Grande valley, and is a direct benefit of the Conservancy District's water conveyance system. The gage numbers are available to the public on gage readings from various parts of the system, which can be found at:

<http://usbr.gov/pmts/rivers/awards/Nm/rg/RioG/gage/schematic/SCHEMATICnorth.html>

<http://usbr.gov/pmts/rivers/awards/Nm/rg/RioG/gage/schematic/SCHEMATICsouth.html>

<http://waterdata.usgs.gov/nwis>

<http://www.spa.usace.army.mil/wc/adbb/riogrt.htm>

The amounts of water consumed by crops and riparian vegetation along the canals are estimated based on the area of irrigated land and by calculating differences in gage numbers as water moves through the complex system that includes the river, the canals, the return flows, and the shallow aquifer. Seepage and recharge estimates from the 1997 Middle Rio Grande Water Assessment. Experts from Federal and State agencies, private consulting firms and universities have examined the Conservancy District's system, and most agree with the picture of Conservancy District water use portrayed here. Regarding efficiency and conservation,

Conservancy District "efficiency" refers to the relationship between the amount of water diverted from the river (in 2002 that was 268,000 acre-feet), and the amount of water consumed by crops (in 2002 that was about 150,000 acre-feet): 150,000 divided by 268,000 = 0.559, or 56%. In 1995, the New Mexico State Engineer reported that most irrigation systems in New Mexico were about 50% efficient, so the Conservancy District is in that way similar to other irrigation systems in the state. It may be possible to make the Conservancy District more efficient, but there are economic as well as ecological costs, and as several experts have repeatedly pointed out, efficiency does not create "new" water. Some of the planning, engineering, and con-

struction required to increase the efficiency of the Conservancy District is already done, and additional work will be expensive. The ecological costs of a more “efficient” Conservancy District, with miles of cement-lined canals, would result from reduced diversions which would produce smaller return flows to the river, less water for riparian vegetation along the canals, less seepage from the canals, less recharge to the aquifer, and less water available in the river for the endangered Rio Grande silvery minnow. The results of Conservancy District efficiency improvements to date are dramatic, as illustrated below in an analysis of Conservancy District diversions from the Rio Grande, between March and August, from 1997 to the present.

| <b>Year</b> | <b>Gross Diversion<br/>(in acre-feet, without subtracting return flows)<br/>March through August Only</b> |
|-------------|---|
| 2003        | 275,149   |
| 2002        | 319,407   |
| 2001        | 372,387   |
| 1997        | 453,835   |

NOTE: “Gross” diversions are used in this analysis because they best illustrate the kinds of efficiency improvements made to date by the Conservancy District, most of which have focused on reducing the volume of water diverted from the Rio Grande. We estimate that, while “gross” diversions have been dramatically reduced, it is unlikely that “net” diversions (that is, “gross” diversions less return flows) have changed as much. This is because “net” diversions are more closely tied to crop consumptive use, seepage, and canal surface evaporation, none of which have changed much over the last few years.

The result: Gross diversions from the Rio Grande (without considering return flows) have been reduced by 39%, or approximately 179,000 acre-feet annually.

2. The issue raised by the decision of the U.S. 10th Circuit Court of Appeals in *Minnow v. Keys* is the most basic issue of federalism. When the drafters of our Constitution prepared the document that allocates power between the Federal government and the States, one issue was abundantly clear: Allocation of property between private parties, power to assess local taxes and sustain State government, and the zoning and development of communities, were all left to the States. While overall regulation of interstate commerce was within the purview of the Federal government, the rights of individuals to hold property were to be governed by the States, consistent with the 10th Amendment to the Constitution. To promote equal protection of the laws, Congress may choose to regulate State actions that result in discrimination. To protect privacy or freedom of religion the Federal government has a clear role. The Endangered Species Act, as interpreted by the environmental plaintiffs in *Minnow v. Keys*, would take Congress role beyond the protection of Constitutional rights and use Federal legislation as a sword to impose Federal values on State entities, even going so far as to take property without compensation, in violation of the 5th Amendment to the Constitution. As interpreted by the environmental groups in *Minnow v. Keys*, the Endangered Species Act, by its own force, and without benefit of any Constitutional basis, would provide that the property rights of individual farmers under State law could be negated without compensation, if the Congress deems this necessary. Likewise, the regulatory rights of the States to allocate property could be nullified if Congress so chooses. This principle has no limits. Suppose Congress decided that municipalities should have no less than 30% open space and should all have a certain level of public transportation and should plant certain kinds of trees. To achieve this result, a Federal agency would simply have to order municipal governments to alter their zoning laws and those who have constructed buildings to the contrary to tear them down. Thus, while the context of the basic dispute on which the Committee is holding hearings involves Federal nullification of State water law and rights in water by the federal Endangered Species Act, the principle is without limits. This Committee should adopt the view that there is no place within our Constitutional framework for laws that use adoption of Federal policy to take property rights of individuals or nullify State choices as to the allocation of these rights: The principle promoted by the environmental plaintiffs yields the exact opposite result. The Committee should find that the intent of Congress was to allow jurisdiction to change regimes of water flow only where there is an express deferral by the States for this result and only if there is compensation for those who have relied upon their property rights under state

law to create farming communities and invest their capital. There is a model for this result. It is the Federal reserved water rights doctrine adopted and applied by the U.S. Supreme Court for fifty years. It holds that Congress can reserve water for a species only if a) this was the express intent of Congress, and b) only to the degree it does not preclude the use of senior water rights in the stream system. See *Cappaert v. United States*, 426 U.S. 128 (1976). I would urge you to consider this methodology in your deliberations.

3. The recent ruling of the U.S. 10th Circuit Court of Appeals in the case of *Minnow v. Keys*, permits the Bureau of Reclamation to reduce contract deliveries of native Rio Grande water, and non-native San Juan-Chama water, for the benefit of endangered species, including the Rio Grande silvery minnow. This ruling supports the notion that more water is necessary to conserve the silvery minnow, and that by simply releasing more from storage, no matter the source or the probability of future supply, the species will be protected. However, history does not support the assertion that intermittency, river drying, and reduced flows are the principal causes for the current status of the silvery minnow. For example, Rio Grande stream gage records show that mean monthly flows have been substantially higher and the occurrence of zero-flow days substantially lower during the recent period when minnow numbers have apparently declined sharply. While the numbers of silvery minnow have apparently declined, river flows have been substantially augmented and the number of zero-flow days reduced. These and other hydrologic facts show that the strategy of simply releasing copious amounts of water down the middle Rio Grande channel to benefit the silvery minnow has failed. Moreover, critically low water supply levels in upstream reservoirs dictate that such wasteful practices be discontinued in favor of the more holistic approach that is incorporated in the March 17, 2003, Biological Opinion of the U.S. Fish and Wildlife Service. That Opinion's single Reasonable and Prudent Alternative recognizes the hydrologic reality of the middle Rio Grande by differentiating stream flow prescriptions between dry, normal and wet years, acknowledges that river drying has occurred historically and will continue in the future, and places the priority for management in those river reaches (such as the Albuquerque reach) where flow can be provided most effectively and efficiently, while maintaining other necessary, and legitimate, water uses. Furthermore, the Opinion effectively supports the necessity, at least in the short term, for refugia, hatcheries, and other types of sanctuaries to protect and conserve the species while wild habitat is being enhanced. Such a strategy will allow all parties to move past the single, divisive issue of keeping the river wet at all costs and on to the important business of recovering the Rio Grande silvery minnow.

4. The Middle Rio Grande Endangered Species Act Collaborative Program (the "Collaborative Program"), while still in the formative stages of what will be at least a 10-year effort, is an effective and useful approach to the complex issues of water and endangered species in the middle Rio Grande valley. This collaborative process is attempting to define complex phenomena with incomplete data, test hypotheses that are still incompletely defined, and adaptively manage under conditions of an extreme, multi-year drought. To date, we have been unable to draw firm conclusions because the data is either missing or equivocal. However, complex problems such as those faced here in the middle Rio Grande typically require complex solutions that cannot please everyone. Nevertheless, the collaborative approach now in place in the middle Rio Grande provides a reasonable forum from which realistic solutions can evolve.

5. The condition of silvery minnow habitat in the reach of the Rio Grande designated as "critical habitat" is severely degraded. Therefore, recovery of the silvery minnow is unlikely unless habitat enhancement measures, such as those being developed by the Collaborative Program, are implemented. In its present condition, much of the river is narrower, deeper, and swifter than it was historically. Habitat diversity has been substantially reduced, secondary channels have been cut-off from the main channel and lost, substrate coarsening has occurred with gravels and cobbles replacing silts and sands in many locations, and important elements of structural complexity, such as large woody debris, have been flushed from the system without replacement. The result is a substantial reduction in habitat quantity and quality for the silvery minnow. Solutions that focus on enhanced flow alone will not return habitat for the silvery minnow to the middle Rio Grande. Well-conceived, carefully-designed, and properly-implemented habitat enhancement measures, such as those prescribed in the Biological Opinion and now being implemented through the Collaborative Program, are needed to re-connect the Rio Grande with its floodplain, widen the channel to promote habitat diversity, and increase overall complexity. These high-priority measures must have the funding necessary for them to proceed, if the silvery minnow is to be recovered.

6. At the present time, there is no river-wide, representative, statistically-valid sampling program to yield a quantitative description of the silvery minnow population, illuminate the temporal and spatial distribution of the endangered species as well as the other members of the fish community, measure the successes and failures of the Collaborative Program, and chart progress toward the (yet-to-be-established) recovery targets. Such a population sampling program must be initiated immediately, and it must: 1) Sample habitats throughout the middle Rio Grande in proportion to their availability; 2) Use appropriate fish collection methods, procedures and gear for all habitat types present within the river; 3) Establish a sampling frequency sufficient to detect seasonal distribution shifts but not so repetitive that undue sampling mortality and species behavior modifications occur; 4) Be thoroughly documented and reproducible; and 5) Produce quantitative results of sufficient statistical rigor to allow valid temporal and spatial comparisons to be made and progress toward recovery to be documented. Over the past year, the Science Subcommittee of the Collaborative Program has spent considerable time debating this matter, and that debate must conclude over the next few months in the development of a silvery minnow population monitoring effort that will meet the requirements outlined above.

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[A statement submitted for the record by Dr. William M. Turner, Trustee, Lion's Gate Water follows:]

**Statement of Dr. William M. Turner, Trustee, Lion's Gate Water**

Mr. Chairman and Members of the Committee, I appreciate your holding the record open for 10 days to allow Supplemental Written Testimony to be entered into the record, concerning the decision of the U.S. Court of Appeals for the Tenth Circuit in *Rio Grande Silvery Minnow v. John W. Keyes*<sup>1</sup>, and its impacts on New Mexico.

I am Dr. William M. Turner, Trustee of Lion's Gate Water which does business in New Mexico. I have been a consulting hydrologist in New Mexico for nearly 35 years and I was the expert witness in *The Jicarilla Apache Tribe v. The United States et al.*<sup>2</sup> that was cited so frequently with approbation in the *Silvery Minnow* decision. As the Natural Resource Trustee for the State of New Mexico under Governor Johnson, I was directly responsible for Governor Johnson's creation of the Governor's Blue Ribbon Task Force on Water on which I served for six years. I am also the Trustee of the WaterBank Trust, a not-for-profit organization that seeks to find new ways of dealing with water and environmental issues.

First let me apologize for not having been with you at your hearing. I have read all of the printed statements and find no real solutions presented by Committee Members or invited presenters. I agree with comments made by the Committee that we require a reliable, long term water supply that will eliminate the contentious struggle now in progress. The San Juan-Chama Project water is an unreliable source for many reasons.

I agree with Chairman Pombo (R. Ca.) that there is no long-term certainty in our present water supply picture. Our future growth requires a stable and reliable water supply for all users including the environment and economic development. The lack of certainty will discourage investment in New Mexico.

As Natural Resources Trustee for New Mexico charged with replacing damaged water resources of New Mexico, I hosted an international conference in Albuquerque in cooperation with Sandia National Laboratory on October 29, 2002. The conference explored the use of new tools for allocating limited water resources including game theory, complexity theory and systems analysis. These technologies have never been integrated. And, with the exception of systems analysis they have only rarely been used to solve closed-system water allocation problems. These efforts came to an end when Governor Richardson replaced me as the Trustee. Under the WaterBank Trust, these efforts can continue with adequate funding which I estimate at \$5 million over a five year period.

The water contretemps now playing itself out in the Rio Grande is has not been caused by the silvery minnow and environmentalists. The blame rests squarely on the shoulders of the U.S. Bureau of Reclamation and the acquiescence of State and other Federal agencies in their mismanagement of the water and it is the silvery

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<sup>1</sup> In *Rio Grande Silvery Minnow, et al. v. John W. Keyes et al.* (Decision 10th Cir., June 12, 2003) at 44.

<sup>2</sup> *Jicarilla Apache Tribe v. United States*, 657 F.2d 1126 (10th Cir. 1981)

minnow they have singled out as the scapegoat. There is no water shortage in New Mexico.

The Four “Cs” of President Bush’s Water 2025 Plan, namely, Cooperation, Communication, Collaboration for the Conservation of water are the new buzzwords. The Water 2025 Plan is not going to find any real solutions because the struggle is among multiple hydrohegemons for control the same drops of water no matter how politely they behave. As long as stakeholders continue to think inside the box, so to speak, no new solutions will be found. We must face reality. We are dealing with a finite resource and all of the suggestions to date are zero sum games. That is, there are winners and there are losers. There is really nothing new on the table.

I think we must take our lead from Mark Twain who said that the solution to water problems is more rain. No, I am not advocating cloud seeding. I would rather paraphrase Mark Twain by saying that the solution to our present water problems is conservation and less evaporation. And, if we do not learn the lesson of recent history and read the message now on the wall, we will repeat our errors far in the future.

In the Jicarilla case, Albuquerque proposed to store its San Juan-Chama water in Elephant Butte Reservoir until it was needed; then, it would recover it by book-keeping exchanges with the Elephant Butte Irrigation District. The trial was in 1979 and I modeled the surface water system of the Rio Grande on an Apple II+ computer including the surface area-volume relationship of Elephant Butte Reservoir. I simulated the various scenarios presented by the government and the City of Albuquerque and I was able to show that by the time Albuquerque recovered its stored water a minimum of 93 percent would have been lost to evaporation.

It is widely recognized by the State Engineer, New Mexico Interstate Stream Commission, U.S. Bureau of Reclamation, U.S. Army Corps of Engineers and water scientists that open reservoir consumptive evaporation in New Mexico from reservoirs containing more than 5,000 acre feet of storage is up to 591,000 acre feet per year. This must be compared to total municipal and industrial usage of 195,000 acre feet per year and total silvery minnow usage of say 20,000 acre feet per year. My calculations using current published data and some of the data that supported the decision in the Jicarilla case suggest that, at reservoir full conditions, evaporation from Cochiti, Elephant Butte and Caballo alone is about 392,000 acre feet annually. Of course, it is less now that these reservoirs are at about 10 percent capacity.

**There is no water shortage along the Rio Grande in New Mexico now nor has there ever been and those agencies that have led the public to believe this have done a wonderful job establishing a fiction to cover up their own mismanagement.**

The State Engineer has long held that there is no unappropriated water on the Rio Grande in New Mexico. Even the New Mexico Supreme Court, relying on a stipulation of the State Engineer, said as much in *State v. Meyers*<sup>3</sup>, a 1956 case. However, former State Engineer Tom Turney, though he continued the mantra that there was no unappropriated water sent letters to the BOR and the Middle Rio Grande Conservancy District (MRGCD) on March 21, 2001 requiring them to provide him proof of their beneficial use of water. They have not complied with his request nor can they.

Mr. Turney recognized that both the BOR and the MRGCD are only authorized by the State Engineer to store and convey water to the owners of the water rights. Any applications these agencies have filed for unappropriated water are null and void because, under New Mexico law, it is the Applicant that must use the water for a beneficial purpose and these agencies do not use the water. They simply serve as an intermediary in delivering a more reliable supply to the ultimate beneficial users whose rights originated many years prior to the creation of these agencies. The ownership of the water rights belongs to the person placing the water to beneficial use pursuant to N.M. Const. Art. XVI §3<sup>4</sup> and the opinion of Judge Harl D. Byrd<sup>5</sup> that, to draw a parallel, it is the farmers in the Carlsbad Irrigation District (CID) who own the water rights and not the BOR or the CID. Finally, in 1953, the MRGCD itself, as Appellee in *Middle Rio Grande Water Users Assn. V. The Middle Rio*

<sup>3</sup>State v. Meyers et al. 64 N.M. 186, 326 Pd 1075

<sup>4</sup>“The beneficial use of water shall be the basis, the measure and the right to the use of water.”

<sup>5</sup>Opinion Re Threshold Legal Issue No. 3 in *State of New Mexico ex rel. State Engineer and Pecos Valley Artesian Conservancy District v. L.T. Lewis, et al., United States of America*, Nos. 20294 & 22600 Consolidated filed with the Fifth Judicial District Court on November 4, 1997 at 8:35 AM

Grande Conservancy District<sup>6</sup>, recognized this and the New Mexico Supreme Court agreed.

So, I am in particular agreement with the testimony given by Governor Ortiz of the Pueblo of San Felipe in his opening statement: "Because the United States has seriously over-engineered the Rio Grande with many dams and reservoirs, the natural ecosystem is in crisis and the silvery minnow is on the brink of extinction. At the same time, federal mismanagement of the river and water delivery systems has made it very difficult for the Middle Rio Grande Pueblos to continue our ancient customs and traditions that depend upon our precious water." I would only add that the New Mexico State Engineer and the Interstate Stream Commission as well as the Rio Grande Compact Commissioners are equally as culpable for having stood by for almost 100 years while our precious water just evaporated away.

However, the myth of a water shortage has led to salutatory water conservation programs that continue today in our communities and under the leadership of Anne Watkins in the State Engineer's Office and Jim Baca, my successor as Natural Resources Trustee. Trustee.

The shortage of water is a product of antiquated water use and water management technology. It is also the product of government management that precludes the involvement of private enterprise. The U.S. Bureau of Reclamation (BOR) is certainly part of our problem. An agency that was borne in the late 1800's as a department within the U.S. Geological Survey upon the great oxymoronic purpose of wresting control over water in the west to "reclaim" desert land that was never irrigated. The agency leadership has not a new paradigm in view at a time when new paradigms are desperately needed. This is unfortunate because agency employees are intelligent and dedicated people who, given the chance, could solve our new problems with new concepts and technology.

It is extremely disturbing that after the court overturned the ill conceived plan of Albuquerque to store its San Juan-Chama water in Elephant Butte that no one learned from that decision that the evaporation losses were an egregious waste of our precious water resources. The Jicarilla case should have been an explosive wake up call to water managers in the West. It was not. Institutional inertia was just too much or maybe our backs were not close enough to the wall. For the past six years I had periodically brought the evaporation issue before the Governor's Blue Ribbon Task Force on Water but it never caught fire. I think the matter was just too large for them to grasp or grapple with because it involved too many sacred cows and entrenched shibboleths.

In fact, open, man-made reservoirs have been disastrous both to man and nature alike. They allow the unconscionable waste of water and destroy natural habitat. In 1999, the Edwards Dam on the Kennebec River in Maine was breached. The Four dams on the Snake River in Idaho are under pressure for removal to preserve the wild Snake River Salmon from extinction. In May 2003, Federal Judge James Redden ruled that a government plan for saving the salmon with measures short of dam breachings on the Snake was inadequate. A Bill now in the U.S. Congress (H.R. 1097) sponsored by Jim McDermott (D. WA 7th) with 85 co-sponsors, introduced on March 5, 2003, would give the approval of Congress to breach the dams. Removal of Cochiti Dam was advocated at the 47th Annual New Mexico Water Conference. On July 30, 2003, the KRQE Channel 13 Evening News ran a story on the Rio Grande bosque restoration that briefly mentioned removal of dams in New Mexico.

On June 16, 2003, followed by subsequent amendments and applications ending on September 5, 2003, Lion's Gate Water filed its application under N.M. Stat. Ann. § 72-1-1 et seq. for all of the unappropriated and wasted water that evaporates from the surfaces of Cochiti, Elephant Butte, and Caballo Reservoirs. Our proposal will divert the waters of the Rio Grande at points to be determined and to place the water associated with and that gives rise to the evaporation surface and the evaporation into ground-water storage and retrieval projects or to store the water in upstream reservoirs even into Colorado. Cochiti and Elephant Butte reservoirs would

<sup>6</sup>Middle Rio Grande Water Users Ass'n v. Middle Rio Grande Conservancy Dist., 57 N.M. 287,293, 258 P.2d 391 (N.M. 05/11/1953)

<sup>7</sup>E. That said contract and legislation under which appellee purports to act offends against the Tenth Amendment to the Constitution of the United States in that appellant is a public corporation vested with governmental function, including the power to tax and levy assessments, and that the appellee [MRGCD] is now trustee of the irrigable waters of the Rio Grande in the District for the purpose of distributing the same to the owners of water rights and has no title to the water; that the title to the water is appurtenant to the land and belongs to the landowners, and said contract attempts to transfer title to the water of the river and the taxing power of the appellee to an executive of the federal government, to-wit, the Secretary of the Interior



serve as sedimentation and temporary storage basins. The ground water storage and retrieval projects will be carried out either privately or in public private partnerships within the Santa Fe Group aquifer from Espanola to Las Cruces and within the Hueco and Mesilla Bolsons of southern New Mexico, and the Republic of Mexico. The water salvaged will be used for environmental restoration, endangered species preservation, agriculture stabilization, and future municipal and industrial beneficial uses within the Upper and Lower Rio Grande and possibly Mexico. I have long believed that the Rio Grande should be actively managed from its headwaters to the Gulf of Mexico. And, I believe the powerful Powersim model of the Rio Grande Basin, now under development by Sandia National Laboratory, should be used to evaluate water management rules.

Ground-water storage and retrieval projects are not rocket science. The Nabateans used a variant of them 2000 years ago in the Negev desert of Israel. Two years ago by the New Mexico Legislature enacted legislation that allows owners of such projects to maintain ownership of the water harvested. The legislation, however, does not permit private participation. We believe this is both unfortunate and illegal both because both federal and state government in our post 9/11 world lack the funding and because it represents an illegal attempt to protect a public monopoly to the exclusion of private enterprise and the commercialization of the resource. Certainly private enterprise is more innovative and flexible than government institutions in swiftly implementing solutions when government does not erect illegal, administrative, legal, financial, environmental and technical barriers to project implementation.

Our Application does not impair any existing or yet to be adjudicated historical water rights of either Indian or non-Indian water users anywhere. The water for which we are applying has never been used consumptively by man. For the water to evaporate from Elephant Butte and Caballo at all, it was first used by upstream users and then flowed downstream. Prior to construction of Elephant Butte dam historical water use was limited and unreliable in the Lower Rio Grande; however, our Application will provide additional water and stabilize agricultural uncertainty. It will be the only commodity sold to farmers wholesale rather than the retail prices they pay for everything else.

It is our intention that contractees for the water we have applied for will be required to purchase water for the environment in amounts that will be determined by biological opinion. This model is presently used by the Environment Agency in the United Kingdom where the government is struggling to facilitate the free marketing of Abstraction Licences, while enhancing environmental restoration and water quality. Indeed our Application will improve overall water quality by significantly reducing the increased concentration of solutes that results from evaporation.

Our initial applications have already been rejected by the State Engineer after consultation with the highest levels of the Executive and Legislative branches of government. Their reason in their August 25, 2003 letter (a copy of which is appended) states: "In fact, the evaporation loss from Elephant Butte Reservoir is accounted for and charged against accrued credits and/or debits." Such accounting would, in other circles, be called ENRON accounting. Accountants cannot hide the fact that the evaporative losses are "real water" and an egregious loss of our precious water resources which is a sustenance to the environment and mankind.

The rejection and policies that we think the State Engineer will use in furtherance of Executive policy to frustrate our Application will be discriminatory to the rights of the private citizen granted under Article XVI of the New Mexico Constitution and the clear language of State Law and the U.S. Supreme Court decision in *Sporhase v. Nebraska*<sup>7</sup> that recognized water as a commercial trade good and an article of interstate commerce. Rather than working with Lion's Gate, we believe that State Government will set up a long and protracted legal battle to protect the public water monopoly rather than allowing Lion's Gate Water to get on with conserving water and restoring the environment all of which are clearly in the public interest. State water law is already filled with numerous examples of legal barriers to private investment and participation. Some laws violate the Equal Protection Clause of the Constitution by granting rights and privileges to government entities that they deny to private entities. Contumacious behavior by the Executive and quite possible the Legislative Branch of government to implement illegal policy for which they may be held liable is clearly not in the public interest but perpetuates the water problems we now face.

Without permits in place and certainty, Lion's Gate Water is, of course, without the ability to raise investment capital to put its projects into place and free markets

<sup>7</sup> *Sporhase v. Nebraska Ex Rel. Douglas*, 458 U.S. 941 (1982)

will not develop, a theme that was touched on by Mr. D'Antonio, our State Engineer, and Ms. Grevey Hillson in their testimony.

For the complete information of the Committee, Lion's Gate Water submits herewith a copy of its final Application and amendment dated September 5, 2003. Our Application can be viewed on the Internet at (<http://www.waterbank.com/PDF%20Files/APPLICATION%20FOR%20PERMIT%20TO%20APPROPRIATE6.pdf>)

It is our purpose in presenting this testimony to seek a workable political, legal, and institutional framework within which Lion's Gate Water can operate commercially to conserve the 100s of thousands of acre feet of wasted water as a present and future sustenance to man and nature.

For example, we require legislation that will help us provide long-term, predictable and reliable supplies to the environment and other Rio Grande water users rather than frustrate the lawful objectives of our Application by creating discriminatory barriers and at least allows:

Private enterprise to pursue solutions to public water supply problems on an equal footing with public institutions as a lawful commercial enterprise which is a beneficial use of water under New Mexico law.

Active basin management by private enterprise subject to state and federal oversight while respecting free market pricing and the marketing and sale of water as a commodity and trade good.

Re-negotiation of the U.S.-Mexican Treaty for the transboundary storage, salvage, delivery, and sale of water to Mexico to alleviate the water shortages faced by Juarez.

Storage of Rio Grande Basin water in Colorado as part of overall basin-water management.

I have often marveled that the principles by which we order society and regulate our lives have changed little over the millennia thus I am reminded of the words of Justice McGhee in Middle Rio Grand Water Users Association who stated "In this connection two legal maxims, worn threadbare by time yet still functioning with as much vigor as ever with the added leaven of age, come to mind. They are: "Salus populi est suprema lex", literally translated meaning—"The health of the people is the supreme law" but often translated as "The safety of the people is the supreme law;" and "Sic utere tuo ut alienum non laedas," meaning "So use your own as not to injure another's property." which the BOR seems to have neglected these many years.

To conclude, I am sure you will agree that our Application is clearly in the public interest and, together with conservation and best water use practices, is the only large scale, comprehensive solution to our immediate water problems.

Should you wish, I am at your disposal to present testimony on this topic in Washington or elsewhere as the Bureau of Reclamation operates, I believe, some 348 reservoirs elsewhere in the West.

NOTE: An enclosure, "Application and Sixth Amendment to Appropriate the Public Surface Water of the State of New Mexico, August 25, 2003 rejection of Applications filed June 16, 2003 et seq." has been retained in the Committee's official files.

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NOTE: The following information has been retained in the Committee's official files:

- A report entitled "Taking Charge of Our Water Destiny: A Water Management Policy Guide for New Mexico in the 21st Century" by Alletta Belin, Consuelo Bokum, and Frank Titus. It is also available on the Internet at [www.1000friends-nm.org](http://www.1000friends-nm.org).
- A report entitled "Summary of the Biology of Rio Grande Silvery Minnow, An Endangered Species in the Middle Rio Grande, New Mexico" by Steven P. Platania and Robert K. Dudley.
- A report entitled "Economic Costs and Benefits of Instream Flow Protection for Endangered Species in an International Basin" by Frank A. Ward and James F. Booker.
- A packet of information submitted by Pena Blanca/Site Irrigation Working Group.