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**APPENDIX A**  
**NMOSE RESTORATION OFFSET POLICY, EMERGENCY DROUGHT**  
**WATER RELINQUISHMENT AGREEMENT AND AMENDMENT**

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NMISC GH/AL  
10/3/2007

**New Mexico Interstate Stream Commission comments to MRG ESA CP  
Coordination Committee on Quantifying Depletions Associated with Habitat  
Restoration Projects in the Middle Rio Grande**

**October 3, 2007**

The Interstate Stream Commission (ISC) as signatory to the Middle Rio Grande Endangered Species Collaborative Program wants to ensure that the Program is aware of how depletions must be accounted when undertaking habitat restoration projects. The ISC has confirmed with the Office of the State Engineer (OSE) the current science and policy for accounting for depletions. It is necessary that the OSE review any potential increases in open water for evaporation losses.

The OSE and ISC support the concept of habitat restoration for endangered species. However, habitat restoration projects have the potential to increase depletions from the river system, which impairs water rights holders and compact deliveries. The Rio Grande Compact limits the amount of water that can be depleted in the Middle Rio Grande. Any increase in net depletions constitutes a new appropriation on the system that will jeopardize the ability of the State of New Mexico to meet its downstream delivery obligations. Therefore, the OSE requires that new projects demonstrate that they will not result in any increases in net water depletions, or that any increases are offset by purchased or leased water rights.

The State Engineer maintains that habitat restoration projects implemented by the Bureau of Reclamation, Army Corps of Engineers, or NMISC in the middle Rio Grande floodway do not require water rights permits because of those agencies' respective flood control and compact delivery statutory roles, but that additional depletions caused by those activities must be offset as described below. Habitat restoration projects proposed by other entities will be evaluated with regard to permitting requirements on a case-by-case basis.

**General Protocol**

If an entity plans to conduct a habitat restoration project that involves diversion of water from a waterway or creation of new open water surface area, that entity needs to provide the Office of the State Engineer with information describing the proposed project. Plans should be sent to the District I office in Albuquerque. The Office of the State Engineer will make a determination of permitting and depletion offsetting requirements.

The OSE and ISC are only concerned with increased evaporation from open water surfaces. Project plans should address evaporative loss from increases in open water surface area. Project plans should not address theoretical net gains to or losses from the system from changes in vegetation.

**Criteria for Quantifying Depletions**

1. Depletions resulting from any increase in the amount of open water surface area attributable to a project will be quantified at the State Engineer's recognized open water

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evaporation rate. Artificial or restored marsh and wetlands are considered equivalent to open water.

According to Office of the State Engineer Memorandum, Water Rights Division – Policy Memorandum dated August 13, 2004; direct evaporation for open water will be derived from Soil Conservation Service Map 4-R-33582 (Gross Annual Lake Evaporation, New Mexico, 1972). Rainfall is not subtracted from the gross evaporation shown on map because the State Engineer is only concerned with losses due to evaporation – not net depletions to the reservoir. An example for calculating evaporation follows below.

For a 15-acre pond, the contour for average annual evaporation is shown as 55 inches or 4.583 feet per year. Evaporation loss is calculated by multiplying 4.583 feet per year by 15 acres for a result of 68.75 acre-feet evaporation loss per year.

2. The State Engineer does not recognize credits or debits for removal or establishment of vegetation. Scientific information collected from the evapotranspiration monitoring sites within the Middle Rio Grande Floodway and elsewhere indicate that water savings from removal or modification of vegetation is relatively small or nonexistent and ephemeral.
3. Work activities conducted by the Bureau of Reclamation, Army Corps of Engineers, or NMISC in the river channel within the Rio Grande Floodway are not likely to increase depletions. The extent of the river channel for different reaches is currently being quantified by OSE/ISC.

## EMERGENCY DROUGHT WATER AGREEMENT

The Parties to this Emergency Drought Water Agreement (“Agreement”) are the State of New Mexico (“New Mexico”) acting through the New Mexico Interstate Stream Commission (“NMISC”) and the New Mexico Attorney General, and the United States of America (“United States”), acting through the Army Corps of Engineers (“Corps”) and the United States Department of the Interior, Bureau of Reclamation (“BOR”). This Agreement amends the Conservation Water Agreement of June 29, 2001, entered into by the Parties.

1. The purposes of this Agreement are to:
  - A. Provide water for any Reasonable and Prudent Alternatives (“RPAs”) or Reasonable and Prudent Measures (“RPMs”) for Biological Opinions issued by the United States Fish and Wildlife Service (“FWS”) regarding BOR and the Corps’ proposed federal actions related to water management operations and river maintenance activities in the Middle Rio Grande and non-federal water management operations in the Middle Rio Grande.
  - B. Reduce the risk that conditions in the Middle Rio Grande for the next ten years will result in a finding that these actions are likely to jeopardize the continued existence of species listed under the Endangered Species Act (“ESA”), 16 U.S.C. § 1531 et seq. At this time those species are the Rio Grande Silvery Minnow (*Hybognathus amarus*) and the Southwestern Willow Flycatcher (*Empidonax trailii extimus*).
  - C. Promote the recovery of the listed species and further efforts to populate the silvery minnow in the Middle Rio Grande above San Acacia.
  - D. Contribute to and support the efforts of the Middle Rio Grande ESA Collaborative Program Workgroup (ESA Workgroup).
  - E. Address and protect the interests, needs, and rights of Indian Pueblos and Tribes and of all other Middle Rio Grande stakeholders.
  - F. Recognize the hydrologic realities and the limitations on the water supply that exist in the Middle Rio Grande Basin in a manner consistent with the provisions of applicable state and federal law and the relevant interstate compacts.

2. Term. Except as expressly provided herein in paragraph 8, this Agreement shall expire on February 28, 2013.

3. Definition. “Emergency Drought Water” is water stored and made available by New Mexico consistent with the relevant interstate compacts and with state and Federal law as a conservation pool above Elephant Butte Reservoir. Water that is native to the Rio Grande basin may be stored in reservoirs upstream of Elephant Butte following relinquishment of New Mexico’s Rio Grande Compact credits, and upon acceptance of the relinquishment by the State of Texas under Article VII of the Rio Grande Compact. Emergency Drought Water consists of water for needs of the Middle Rio Grande Project (“Project”) and to benefit the listed species.

4. Obligations of New Mexico.

A. Provided that the conditions specified in paragraph 8 of this Agreement are met, New Mexico shall make available to the United States up to 70,000 acre-feet of Emergency Drought Water over the term of this Agreement. A maximum of 20,000 acre-feet of Emergency Drought Water made available by New Mexico may be released by the United States in any one calendar year; provided that the United States may release a maximum of 30,000 acre-feet of Emergency Drought Water in 2003. New Mexico further agrees that the United States shall have the right to carry over for release in a future year of this Agreement any portion of a particular year’s allocation of the Emergency Drought Water that the United States does not release in that year, in which case the United States shall not be responsible to pay for evaporative losses on such water.

B. The NMISC shall be the lead non-federal agency responsible for obtaining any approvals or agreements from non-federal agencies or entities which are required for the storage of Emergency Drought Water above Elephant Butte Reservoir, including, without limitation, any consent of the Rio Grande Compact Commission which may be required under applicable law, except with respect to any agreement with the Middle Rio Grande Conservancy District (“MRGCD”) as further described herein. The NMISC shall be the lead state agency for coordination of implementation of this Agreement with the federal agencies.

C. New Mexico agrees to use payments received from the United States pursuant to this Agreement for purposes of conservation and recovery of the listed species in the Middle Rio Grande Basin, including for purposes of optimizing MRGCD operations.

D. New Mexico will administer the non-Indian water rights in the Rio Chama so as to ensure that releases of Emergency Drought Water are protected. In the event that Emergency Drought Water flows are not protected from diversion, the United States may elect to terminate this Agreement.

5. Emergency Drought Water shall be made available to the United States only for the following purposes:

A. To satisfy the provisions of a RPA or RPM of a Biological Opinion (BO) issued by the FWS, and accepted by BOR and the Corps.

B. To fulfill terms and conditions of permits issued to the United States by the New Mexico Office of the State Engineer for the pumping of water from the Low-Flow Conveyance Channel into the Rio Grande regarding the offset of additional depletions resulting from the operation of such pumps.

C. To fulfill terms and conditions of permits issued to the United States by the New Mexico Office of the State Engineer for the pumping of water from existing or new wells or for other activities for the benefit of the listed species regarding the offset of additional depletions resulting from such pumping or activities.

D. Release to the Rio Grande for beneficial uses occurring in the Rio Grande between two specified locations consistent with a permit issued by the New Mexico Office of the State Engineer pursuant to paragraph 6B with such flows being protected from diversion pursuant to paragraph 4D.

E. Provide to MRGCD, the six Middle Rio Grande Pueblos, or other water users in exchange for water willingly provided by such entities for the benefit of the silvery minnow during bypass operations or emergency situations as may be requested by the United States.

F. To offset new or additional net depletions, if any, resulting from Rio Grande habitat restoration projects by the United States pursuant to an agreement with the State Engineer.

6. Obligations of the United States

A. For purposes of this Agreement only, New Mexico and the United States agree that the value of the release of Emergency Drought Water pursuant to the terms of this Agreement is One Hundred Dollars (\$100.00) for each acre-foot released on behalf of the listed species. Payment therefore shall be made to New Mexico no later than February 28 of the year following when such water was released. Under the Article VII dry-year scenario in the BO, when MRGCD storage has been exhausted, Jemez Canyon Dam outflow is negligible, and MRGCD is diverting all the direct flow of the river at Angostura diversion dam to meet irrigation demand within the Albuquerque Division, New Mexico and the United States will meet to negotiate as to payment on that portion of the water released by BOR to flow over Angostura diversion dam to meet the Albuquerque gage flow target that is thereafter diverted by the MRGCD at Isleta diversion dam.

B. The United States agrees to join with the NMISC to apply for any required permits from the New Mexico Office of the State Engineer to store and release any Emergency Drought Water. In the event that a permit is required and the permit issued does not provide for storage and releases of Emergency Drought Water in a manner consistent with the BO from the FWS or with this Agreement, the United States may elect to terminate this Agreement. The parties agree that the release of water stored on behalf of the listed species is an extraordinary action taken under the authority of New Mexico through the relinquishment of New Mexico's Rio Grande Compact credits. When water is stored in El Vado Reservoir under Permit No. 1690 consistent with existing agreements, the six Middle Rio Grande Pueblos have rights to benefit from that storage. Nothing herein is intended to affect Permit No. 1690.

C. The United States shall be responsible for determining the timing, amount, and manner of the storage and release of the Emergency Drought Water in accordance with paragraphs 4A and 6E and in coordination with the six Middle Rio Grande Pueblos through the Bureau of Indian Affairs' Designated Engineer and with the MRGCD.



D. The United States shall perform the hydrologic accounting for all Emergency Drought Water stored and released pursuant to this Agreement in accordance with all current water accounting methods approved by the Rio Grande Compact Commission.

E. Subject to the completion of all necessary approvals and regulatory requirements, the United States will seek to capture, store, and release up to 210,000 acre-feet of Emergency Drought Water over the term of this Agreement, to be allocated as follows: 70,000 acre-feet to the United States, 140,000 acre-feet to the MRGCD, or *pro rata* if due to insufficient runoff such capture, storage and release is not possible. A maximum of 66,667 acre-feet may be released in any one year, with an exception for 2003, and allocated on the same *pro rata* basis, subject to the terms and conditions in this Agreement. A maximum of 76,667 acre-feet may be released in 2003 with a maximum of 30,000 acre-feet released on behalf of the listed species. A maximum of 120,000 acre-feet can be captured and stored under this Agreement in 2003. Such capture, storage and release is to be done in accordance with permits issued by the New Mexico Office of the State Engineer. The United States shall inform the NMISC on a regular basis regarding the status of storage activities.

F. For a period of five years from the date of this Agreement, the emphasis for silvery minnow habitat restoration projects shall be placed on river reaches north of the San Acacia Diversion Dam.

G. The United States shall continue to cooperate in good faith with representatives of New Mexico that apply for permits or authorizations to monitor, collect, and participate in research and data collections and evaluations concerning the silvery minnow.

7. Avoidance of New Depletions.

A. The United States acknowledges that habitat restoration activities done to benefit listed species may cause depletions to the Rio Grande and that such depletions may adversely affect New Mexico's ability to meet its Rio Grande Compact obligations or may impair senior water rights holders. The United States further acknowledges that the NMISC and the New Mexico State Engineer are entrusted under state law with administering the

laws of New Mexico so that New Mexico's Compact obligations may be met and so that senior water rights holders are not impaired.

B. The United States and New Mexico agree:

1. the United States will submit annual reports to the State Engineer outlining all habitat restoration projects, including estimated net depletions resulting from such projects; and

2. to work together so that all future projects that the United States, New Mexico and/or the ESA Workgroup finance or conduct will be designed or constructed so that net depletions will not increase; however, New Mexico acknowledges that certain projects may be of such value to the listed species and that offsetting depletions at that site may not be feasible, in which case the United States agrees to use its best efforts to otherwise offset depletions caused by such projects.

8. Conditions for Availability of Emergency Drought Water. The Parties recognize that the contents and conclusions of Biological Opinions are not subject to this Agreement. However, the parties also recognize that New Mexico will only make Emergency Drought Water available under certain conditions, and the Parties explicitly agree that if any of the following occur, this Agreement may be terminated by New Mexico or the United States:

A. If the FWS issues and BOR and the Corps accept a Biological Opinion for discretionary water management operations and river maintenance activities by BOR and the Corps which does not contain incidental take statements that authorize take that may result from the diversion and use of the waters of the Rio Grande, San Juan-Chama Project water or hydrologically connected groundwater pursuant to valid existing uses of water, the exercise of activities associated with the use of valid and existing water rights, permits issued by the New Mexico Office of the State Engineer, or other uses authorized within the limits of the Rio Grande Compact;

B. If a final Biological Opinion that is not contrary to paragraph 8A above is issued, but the final Biological Opinion is determined to be inadequate or invalid by a court of law or is not accepted by BOR and the Corps;

C. If the United States is required to reinitiate consultation pursuant to 50 C.F.R. Section 402.16, and New Mexico provides written notification to the Parties that it chooses to terminate the Agreement rather than participate in the re-initiation of inter-agency consultation;

D. If a specific federal action implemented to avoid the likelihood of jeopardy to listed species causes any beneficial user of water in the Middle Rio Grande or San Juan-Chama contractor to be prevented, without its consent, from diverting, storing, or using water to which it is entitled;

E. If, prior to April 22, 2003, the United States fails to reach an agreement with the MRGCD satisfactory to New Mexico for the storage, diversion, use, and consumption of water by the MRGCD in a manner that optimizes MRGCD's operations to provide water to farmers for the entire irrigation season and to efficiently satisfy the provisions of a RPA or RPM of a Biological Opinion; or

F. If, by the close of business on April 24, 2003, New Mexico fails to enter into an agreement satisfactory to New Mexico with the State of Texas pursuant to which the State of Texas agrees to accept relinquishment of New Mexico's Rio Grande Compact credits for an amount of up to 217,500 acre-feet of water for the purposes of (i) providing up to 210,000 acre-feet of Emergency Drought water, and (ii) allowing the City of Santa Fe to store up to 7,500 acre-feet of water. If the total amount of water available for storage by New Mexico pursuant to relinquishment of its Rio Grande Compact credits is less than 217,500 acre-feet of water, then the actual amount so available shall be allocated *pro rata* between Emergency Drought Water and City of Santa Fe water.

9. Upon expiration or termination of this Agreement or of the Agreement between the United States and MRGCD referenced in paragraph 8F, any Emergency Drought Water previously stored pursuant to this Agreement will be released as directed by the NMISC.

10. Nothing in this Agreement shall be construed as an admission or concession of any issue of fact or law by any Party.

11. No member of or delegate to Congress shall be entitled to any share or part of this Agreement, or to any benefit that may arise from it.

12. It is the United States's position that implementation of this Agreement is contingent on specific and sufficient Congressional appropriations to carry out the terms of this Agreement. It is New Mexico's position that implementation of this Agreement is contingent on specific and sufficient appropriations by the New Mexico Legislature to carry out the terms of this Agreement. This Agreement is also contingent upon approval of the NMISC.

13. Nothing in this Agreement may be construed to require the obligation, appropriation, or expenditure of any money from the U.S. Treasury. This Agreement is subject to the requirements of the federal Anti-Deficiency Act, and the parties acknowledge that the United States will not be required under this Agreement to expend any federal agency's appropriated funds unless and until an authorized official of that agency affirmatively acts to commit to such expenditures as evidenced in writing.

14. Nothing in this Agreement shall affect or be construed or applied in a manner that is inconsistent with New Mexico law, including the State's authority to regulate and control non-Indian depletions. Nothing in this Agreement shall affect or be construed or applied in a manner that is inconsistent with federal law, or the Rio Grande Compact of 1938, which states:

“Nothing in this compact shall be construed as affecting the obligations of the United States of America to Mexico under existing treaties, or to the Indian tribes, or as impairing the rights of the Indian tribes.”

This Agreement shall not be construed or implemented in a manner that affects or impairs rights of the Pueblos or the obligations of the United States to the Pueblos. This Agreement does not affect the United States' existing obligations with respect to storage and delivery of water to the six Middle Rio Grande Pueblos.

Dated this 23 day of April, 2003.

United States Department of the Interior

  
Jennifer Gimbel, Department of the Interior

United States Army Corps of Engineers

  
Dana R. Hurst, Lt. Col., Commander, Albuquerque District

State of New Mexico

  
Estevan R. Lopez, Director  
New Mexico Interstate Stream Commission

  
Patricia A. Madrid, New Mexico Attorney-General



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CERTIFIED - RETURN RECEIPT REQUESTED

Mr. Kevin Flanigan  
New Mexico Interstate Stream Commission  
121 Tijeras Ave NE, Ste. 2000  
Albuquerque, NM 87102

Subject: Transmittal of Amendment No. 1 to the 2003 Emergency Drought Water Agreement

Mr. Flanigan:

Amendment No. 1 to the 2003 Emergency Drought Water Agreement was executed on March 31, 2008. Enclosed, please find one (1) original of the amendment for your records.

Should you have any questions regarding this amendment, please contact Ms. Tammie Padilla at 505-462-3590.

Sincerely,

**James P. Wilber**

James P. Wilber, Manager  
Facilities and Lands Division

Enclosure

WBR:TPadilla:kmichel:505-462-3590:04/16/08  
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**EMERGENCY DROUGHT WATER AGREEMENT  
AMENDMENT NO. 1**

The Emergency Drought Water Agreement of 2003 ("Agreement") is hereby amended to allow the State of New Mexico to make additional relinquishment water available for storage and release by the United States.

1. The first sentence of Section 4(A) of the Agreement is revised as follows:

New Mexico shall make available to the United States up to 82,000 acre-feet of Emergency Drought Water over the term of this Agreement.

2. Section 5(F) of the Agreement is replaced by the following:

To offset new or additional net depletions, if any, resulting from Rio Grande habitat restoration projects by the United States and New Mexico pursuant to an agreement with the State Engineer. The United States agrees that up to 2,000 acre-feet of additional Emergency Drought Water made available to it by New Mexico pursuant to amended Section 4(A) shall be reserved and released by the United States only as directed by the New Mexico Interstate Stream Commission for offset of habitat restoration project depletions.

3. The first sentence of Section 6(A) of the Agreement is revised as follows:

For purposes of this Agreement only, New Mexico and the United States agree that the value of the release of Emergency Drought Water pursuant to the terms of the Agreement is One Hundred Dollars (\$100.00) for each acre-foot released on behalf of the listed species up to and not to exceed 80,000 acre-feet.

4. The following provision shall be added to the Agreement as the last sentence of Section 6(A):

No Payment shall be made by the United States to New Mexico for the release of up to 2,000 acre-feet of water pursuant to amended Section 5(F).

5. The first sentence of Section 6(E) of the Agreement is revised as follows:

Subject to the completion of all necessary approvals and regulatory requirements, the United States will seek to capture, store, and release up to 232,000 acre-feet of Emergency Drought Water over the term of this agreement,



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to be allocated as follows: 82,000 to the United States, 150,000 to the MRGCD, or *pro rata* if due to insufficient runoff such capture, storage and release is not possible.

Except as specifically provided above, this amendment shall not modify the Agreement, the terms of which shall remain in full force and effect.

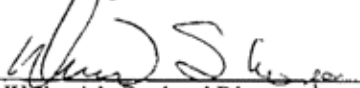
Dated this 31<sup>st</sup> day of March, 2008.

State of New Mexico

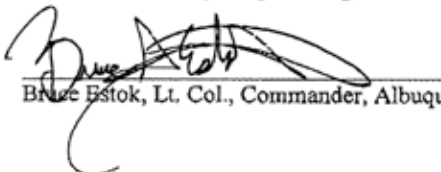
  
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Estevan R. Lopez  
Director, New Mexico Interstate Stream Commission

  
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Gary King, New Mexico Attorney-General

United States Department of the Interior

  
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Larry Walkoviak, Regional Director  
Department of the Interior

United States Army Corps of Engineers

  
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Bruce Estok, Lt. Col., Commander, Albuquerque District