

# MEMORANDUM OF UNDERSTANDING

## MIDDLE RIO GRANDE ENDANGERED SPECIES ACT COLLABORATIVE PROGRAM

### I. BACKGROUND

At the beginning of calendar year 2000, the Bureau of Reclamation (Reclamation), the U.S. Army Corps of Engineers (Corps), the U.S. Fish and Wildlife Service (Service), the Bureau of Indian Affairs (BIA), and non-Federal organizations executed a memorandum of understanding to form the Middle Rio Grande Endangered Species Act Workgroup (ESA Workgroup) to develop the Middle Rio Grande Endangered Species Act Collaborative Program (Program) for protecting and improving the status of listed species while simultaneously protecting existing and future water uses; to contribute to recovery of those species; and to secure interim and long-term funding, all while complying with state and federal law, including compact delivery obligations. For the purpose of this Memorandum of Understanding (MOU), listed species shall mean federally listed endangered species with special emphasis on the Rio Grande silvery minnow and the southwestern willow flycatcher. The signatories to the original memorandum of understanding recognized the potential conflicts between recovery efforts for endangered species and existing and future water uses in the Middle Rio Grande<sup>1</sup>. The signatories also realized that a collaborative effort offered a path towards resolving such conflicts, and committed to work together to develop the Program.

During the calendar years of 2000 and 2001, significant progress was made in developing this collaborative process; securing funding for planning and executing on-the-river restoration projects; conducting research and monitoring supportive of the Service's Rio Grande Silvery Minnow Recovery Plan; accomplishing restoration work and other actions to improve habitat for the southwestern willow flycatcher; and supporting the implementation of the Service's Middle Rio Grande Water Management Biological Opinion dated June 29, 2001.<sup>2</sup> The ESA Workgroup produced a draft Program document on January 19, 2001, which served as a guide for recovery activities during calendar year 2001. Other activities included securing short-term water supplies for the benefit of the Rio Grande silvery minnow and working towards development of a long-term, comprehensive recovery strategy.

---

<sup>1</sup> The Middle Rio Grande ESA Collaborative Program area (Program area) is here defined as the headwaters of the Rio Chama watershed and the Rio Grande, including tributaries, from the New Mexico-Colorado state line downstream to the elevation of the spillway crest of the Elephant Butte Reservoir at 4450 feet mean sea level. Indian Pueblo and Tribal lands and resources within the Program area will not be included in activities under this MOU and the Program without their express written consent.

<sup>2</sup> *Programmatic Biological Opinion on the Effects of Actions Associated with the U.S. Bureau of Reclamation's, U.S. Army Corps of Engineers', and Non-Federal Entities' Discretionary Actions Related to Water Management on the Middle Rio Grande, New Mexico*, June 29, 2001.

The ESA Workgroup finds that the collaborative process requires additional time and focus to build on the last two years' progress and define an interim strategy to develop the long-term Program to support recovery of the listed species, while complying with New Mexico state law, interstate compacts, and federal law. Parties interested in the recovery of these two species, including research and habitat restoration projects that benefit this effort, as well as those whose use of water potentially impacts these species, would be considered partners in this collaborative effort and are welcome to sign this MOU.

## **II. PURPOSE**

The signatories agree that an interim (two-year) strategy is necessary to build on accomplishments to date and create the long-term Program. Specifically, the intent of the signatories to this MOU includes, but is not limited to:

- A. Within the Middle Rio Grande Program area, act to prevent extinction, preserve reproductive integrity, improve habitat, support scientific analysis, and promote recovery of the listed species, in a manner that benefits the ecological integrity, where feasible, of the Middle Rio Grande riverine and riparian ecosystem.
- B. Exercise creative and flexible options under the ESA so that water use and development can proceed in compliance with applicable federal and state laws. This requires that the Program will not impair valid state water rights or federal reserved water rights of individuals and entities; federal or other water rights of Indian nations and Indian individuals, or Indian trust assets; San Juan-Chama Project contractual rights; and the State of New Mexico's ability to comply with Rio Grande Compact delivery obligations.
- C. Within six weeks of the signing of this MOU, the Interim Steering Committee will meet the following milestones:
  1. Negotiate and agree on the roles and responsibilities of each of the Interim Steering Committee members.
  2. Negotiate and agree on a plan for implementing this Interim MOU, including definition of the proposed actions for National Environmental Policy Act (NEPA) review, including but not limited to near-term and long-term water acquisition elements and habitat restoration elements, and related scheduling and reporting.
  3. Negotiate and agree on interim goals for monitoring and evaluating habitat restoration projects.
- D. The Interim Steering Committee will promptly establish procedures for determining jointly how funding will be spent and projects managed.
- E. Expand upon the progress that has been made toward an understanding of what is required for a permanent solution to the conflicts regarding ESA requirements on the Middle Rio Grande. The signatories agree that further negotiation toward a Program will include, but not be limited to, the following issues:
  1. Water needs, including changes in water management, for interim and long-term Program actions will be identified. A plan will be prepared for acquisition of Program water, including identification of the sources of water and funding.

2. The need for supplemental water.
3. How resolution of water resource issues in concert with conservation of listed species will be achieved.
4. The need for rigorous evaluation criteria for the Program, and a peer-review process.
5. Clarify the role of research, including priorities, integration, and synthesis, in the Program.
6. Address the extent of participation by eligible entities under the ESA consultation and NEPA processes.

### **III. COLLABORATIVE PROCESS**

- A. Under section 4(f)(2) of the ESA, 16 U.S.C. § 1536(f)(2), the Secretary of the Interior is directed to develop and implement plans for the conservation of endangered species. The Secretary of the Interior may procure the services of public and private agencies, individuals and institutions in developing and implementing such recovery plans. Advice from such agencies, individuals, and institutions, such as that offered by signatories to this MOU, is not subject to the Federal Advisory Committee Act, 5 U.S.C. app.2.
- B. The signatories recognize that this collaborative process does not constitute nor supplant the requirement for government-to-government consultation between the Federal government and potentially affected Indian Pueblos and Tribes pursuant to the Federal government's Indian trust responsibilities to those Indian Pueblos and Tribes, and furthermore, that the Federal government's participation in, and activity under, this MOU is subject to its trust responsibilities and its commitment to perform government-to-government consultation with Indian Pueblos and Tribes.
- C. The signatories commit to:
  1. Establish an Interim Steering Committee, pursuant to section 4(f)(2) of the ESA, to guide activities described in this MOU. Any signatory to this MOU may have a seat on the Interim Steering Committee. The Interim Steering Committee will determine its rules of order and operation, and establish interim committees or subgroups, as needed. The Interim Steering Committee shall terminate upon the expiration of this MOU. Membership on this Interim Steering Committee does not imply nor convey any right or obligation to membership on the governing body established under the Cooperative Agreement for the Program.
  2. Engage in civil dialogue and problem-solving activities, in order to make continued progress towards achieving the interim goals defined below.
  3. Meet regularly to receive progress reports, define upcoming issues, evaluate, and if necessary, adjust strategy, and attempt to achieve consensus on actions that will support the interim goals.
  4. To the extent possible, publicly support strategies collaboratively agreed upon by the signatories to achieve interim goals.

5. Conduct their activities in an open and public manner, unless constrained by applicable Federal or State law.
6. Participate in such subgroups or committees as may be designated by the signatories to efficiently address necessary actions to achieve interim goals and produce draft recommendations for the consideration of the signatories.
7. "...[C]ooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species." 16 U.S.C. §1531(c)(2).

#### **IV. GOALS OF THE SIGNATORIES OF THE INTERIM MOU**

- A. Development of the Middle Rio Grande Endangered Species Act Collaborative Program (Program) – The signatories to this MOU shall develop a long-term Program within the term of this MOU. The Program shall provide a framework for coordinated actions to enhance habitat, increase populations, and contribute to the recovery of the listed species. The Program shall outline a process for the development of an adaptive management plan, and identify practical solutions which can be fully funded, consistent with agreed upon cost sharing. The Program document shall describe the resolution of outstanding Program issues and include detailed descriptions of Program activities, including recognition of the legal and institutional framework within which Program activities will be conducted. The Program document shall also define a long-term budget.
- B. Support for the Development of a Long-Term Biological Assessment and Biological Opinion – The signatories recognize that it is the intent of Reclamation and the Corps (Federal action agencies) to develop a long-term biological assessment, and of the Service to develop a long-term biological opinion for ongoing and proposed actions that would occur under the Program.
- C. Support for Compliance Activities under the National Environmental Policy Act (NEPA) - The signatories recognize that it is the responsibility of the Federal agencies to conduct appropriate NEPA review for all activities of the Program to the extent applicable. The NEPA review process shall be conducted in accordance with federal law, including evaluation of potential socioeconomic and other impacts. The Federal agencies agree to proceed with NEPA review on the Program with the intent of completing a programmatic environmental impact statement, from which NEPA compliance on specific activities can be tiered, by September 2003. Pursuant to NEPA regulations, the Federal action agencies invite eligible entities to be Cooperating Agencies.
- D. Support for Federal and Non-Federal Funding of Interim Recovery Activities – The signatories recognize that the success of interim recovery activities is highly dependent on adequate Federal and non-Federal funding of those activities. The signatories agree to lend their active support to obtaining necessary funding, to the extent possible and appropriate.
- E. Support for the Development of Federal Authorizing Legislation for the Program – The signatories recognize that the success of the Program depends upon continued funding and requires Federal legislation. The non-Federal signatories agree that they will

collaboratively participate in the development of such draft legislation and, to the extent possible, publicly support such legislation before the Congress.

- F. Development of Long-Term Federal and Non-Federal Cost Sharing and Financing – The signatories recognize that within the context of potential Federal authorizing legislation, it is critical to develop a ratio for Federal and non-Federal cost sharing for the Program. The signatories agree to collaborate in the identification, justification, and support of an acceptable cost sharing approach.

**V. PUEBLO AND TRIBAL TRUST ASSETS AND RESOURCES  
POTENTIALLY AFFECTED BY THE PROGRAM – FEDERAL  
GOVERNMENT’S TRUST RESPONSIBILITIES**

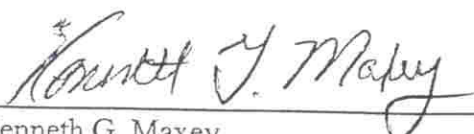
- A. Tribal Participation - Pueblos and Tribes are welcome and encouraged to become signatory members to this MOU. However, the signatories recognize that the Indian Pueblos and Tribes may rightfully elect to not sign this MOU, and rather, conduct their sovereign affairs privately, which may include activities that contribute to the interim goals of this MOU and expend interim funding under this MOU. Nothing in this interim MOU shall obligate any nonsignatory Indian Pueblo or Tribe to participate in, contribute to, or otherwise adopt elements of this MOU. The Federal government continues to have a trust responsibility to all potentially affected Indian Pueblos and Tribes, whether or not an Indian Pueblo or Tribe signs this MOU.
- B. Trust Responsibility - Executive Memoranda, Executive Orders, Secretarial Orders, and executive agency policies require that the federal government fulfill its trust obligation and consult with Pueblos and Tribes on a government-to-government basis. *See e.g.* Executive Memorandum of April 29, 1994; Executive Order #13084 issued May 14, 1998; superceded by Executive Order No. 13175 issued November 6, 2000; Secretarial Order #3206, dated June 5, 1997; and Secretarial Order #3215, dated April 28, 2000; Secretarial Order #3175, dated November 8, 1993, now incorporated in 512DM2; Reclamation’s August 31, 1994 ITA Policy; COE Policy Guidance Letter No. 57, Indian Sovereignty and Government-to-Government Relations with Indian Tribes. Accordingly, nothing in this MOU shall affect or impede the obligation of the Federal government to protect tribal trust assets and resources resulting from actions undertaken pursuant to this MOU or the Program. Nothing in this MOU shall diminish or impair the Federal government’s trust duties to any Indian Pueblo or Tribe, or the Federal government’s obligation to consult with the Pueblos and Tribes on a government-to-government basis. Specifically, the Federal signatories to this MOU commit to meeting their trust responsibilities in all matters arising under this MOU or in the Program. The Federal signatories will also make good faith efforts to identify opportunities for the Pueblos and Tribes to promote and protect their trust assets and resources and secure funding of projects on Pueblo and Tribal lands. The Federal signatories to the MOU agree to conduct government-to-government consultation with the Pueblos and Tribes, including but not limited to, timely communications regarding progress, proposed revisions and pending decisions regarding this MOU or the Program and/or related activities. Most importantly, the federal signatories hereby agree to advise and consult with the Indian Pueblos and Tribes on potential effects on any Indian trust assets and

resources, Tribal sovereignty, and specifically, any potential implications to Indian water rights and/or Indian water use.


## **VI. EFFECTIVE DATE, DURATION, MODIFICATIONS AND SOVEREIGNTY**

- A. Duration - This MOU shall be effective upon execution by any agency of the United States and any additional non-Federal signatory. This MOU shall terminate on December 31, 2003, or upon execution of a Cooperative Agreement, whichever is earlier. It is intended that this MOU will be succeeded by a Program document and execution of a Cooperative Agreement.
- B. Individual and Full Termination – During the term of this MOU, any signatory may terminate its participation in the MOU by written notice to the other signatories. Termination by individual Federal or non-Federal signatories shall not terminate this MOU, which shall continue to apply with respect to the remaining signatories. Termination by all of the Federal signatories, or by all non-Federal signatories, shall fully terminate this MOU.
- C. Recommitment not Prejudiced – Any signatory who terminates its participation pursuant to paragraph B of this section may elect to reinstate its participation during the term of this MOU; however, one precondition is that the signatory seeking reinstatement must accept all decisions arising under the MOU up to the date of its recommitment.
- D. Modification of MOU – Existing or potential signatories may propose modification or amendment of this MOU, which shall be effected by written consent of all current signatories to the MOU.
- E. Sovereignty - This MOU does not constitute a waiver or alteration of any sovereign rights and immunities.
- F. Execution in Part and Additional Signatories – This MOU may be executed by the signatories through multiple signature pages. New signatories to this MOU may be added at any time through the duration of this MOU.
- G. Contingent on Appropriation or Allotment of Funds – The expenditure or advance of any money or the performance of any obligation of the United States or non-Federal entities under this MOU shall be contingent upon appropriation or allotment of funds. No liability shall accrue to the United States or any non-Federal entities in the event that funds are not appropriated or allotted.
- H. Nothing in this MOU shall obligate any signatory to participate in, contribute to, or otherwise adopt elements of the Program, when adopted.
- I. This MOU is not intended to conflict with or abrogate any legal rights or responsibilities of any signatory or other party.

VII. SIGNATURES

  
Kenneth G. Maxey  
Area Manager, Albuquerque Area Office  
Bureau of Reclamation

4/23/02  
Date

  
Raymond G. Midkiff, Lieutenant Colonel, EN  
District Engineer  
U. S. Army Corps of Engineers

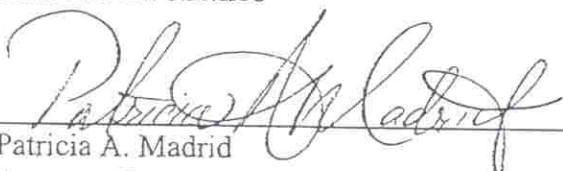
4/23/02  
Date

  
H. Dale Hall  
Acting Regional Director  
U.S. Fish and Wildlife Service

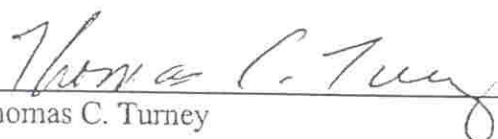
4/23/02  
Date

  
Walter Bradley  
Lieutenant Governor  
State of New Mexico

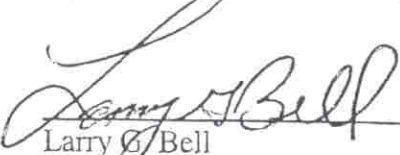
4/23/02  
Date

  
Patricia A. Madrid  
Attorney General  
State of New Mexico

4/23/02  
Date

  
Thomas C. Turney  
Secretary  
NM Interstate Stream Commission

4/23/02  
Date

  
Larry G. Bell  
Director  
NM Department of Game and Fish

4/23/02  
Date

*Peter Maggiore*

Peter Maggiore  
Cabinet Secretary  
NM Environment Department

4/23/02

Date

*Frank A. DuBois*

Frank A. DuBois  
Secretary  
NM Department of Agriculture

4/23/02

Date

*Steve Harris*

Steve Harris  
Chair  
Alliance for Rio Grande Heritage

4/23/02

Date

*Charles T. Asbury*

Charles "Ted" Asbury,  
Director, Public Works Department  
for Jay Czar, Chief Administrative Officer  
City of Albuquerque

April 22, 2002

Date

*Janine E. Powell*

Janine E. Powell  
Assistant Station Director for Research  
USDA FS, Rocky Mountain Research Station

4/23/02

Date

*I. Miley Gonzalez*

I. Miley Gonzalez  
Interim Vice Provost for Research  
New Mexico State University

4/25/02

Date

*Terry L. Yates*

Terry L. Yates  
Vice Provost for Research  
University of New Mexico

4/23/02

Date





José U. Otero  
Chairman of the Board  
Middle Rio Grande Conservancy District

05-13-02

Date



Carolyn Monroe,  
2002 NAIOP-NM President

April 2002

Date



Francisco Guevara, President  
Rio Grande Restoration

5-20-02

Date

---

Date

---

Date

---

Date

---

Date