

# 1. Introduction

## 1.1 Biological Assessment Content and Scope

Section 7(a) (2) of the Endangered Species Act (ESA) requires Federal agencies to consult with the U.S. Fish and Wildlife Service (Service) over any discretionary actions that the agency authorizes, funds, or carries out, which may jeopardize a listed species or adversely modify its critical habitat. The Bureau of Reclamation (Reclamation), along with the other non-Federal members of the Middle Rio Grande Endangered Species Collaborative Program (Collaborative Program)/Recovery Implementation Program (RIP) (known collectively as “Collaborative Program/RIP”), are initiating a new consultation for those water management actions undertaken in and affecting the Middle Rio Grande (MRG) that may implicate ESA requirements.

This joint biological assessment (BA) analyzes water management effects on listed species in the project area: the Rio Grande silvery minnow (*Hybognathus amarus*; silvery minnow), the Southwestern willow flycatcher (*Empidonax traillii extimus*; flycatcher), the Pecos sunflower (*Helianthus paradoxus*, sunflower), and the interior least tern (*Sternula antillarum athalassos*, tern). The bald eagle (*Haliaeetus leucocephalus*) was removed from the Federal list of threatened and endangered species in August 2007 and is, therefore, not considered in this BA. There is no requirement to discuss de-listed species in an ESA consultation; however, activities conducted in the course of water management will be carried out in accordance with the Bald Eagle Protection Act and the Migratory Bird Treaty Act.

Reclamation and its non-Federal partners also are consulting on the programmatic aspects of maintenance activities as a separate component of this ESA, Section 7(a) (2), process.

The approach to this consultation differs in several ways from the approach of the 2003 consultation, which resulted in the March 17, 2003, Biological Opinion<sup>2</sup> (2003 BiOp). In the 2003 consultation, Reclamation and the U.S. Army Corps of Engineers (Corps) prepared a joint BA, which used a total river depletions-based analysis that looked only at the amount of water not reaching the species and critical habitat. It did not examine each action taken, the effect of discrete actions, or the extent of discretion exercised by each entity. As a result of this

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<sup>2</sup> 2003 Biological and Conference Opinions on the Effects of Actions Associated with the Programmatic Biological Assessment of Bureau of Reclamation’s Water and River Maintenance Operations, U.S. Army Corps of Engineer’s Flood Control Operation, and Related Non-Federal Actions in the Middle Rio Grande, New Mexico.

undifferentiated view of depletions, incidental take coverage was extended to most Federal and non-Federal MRG activities without evaluating the individual impacts associated with those activities.

At the time of the previous MRG consultation, the scope of Federal discretionary authority was uncertain, pending a decision from the Tenth Circuit Court of Appeals in *Rio Grande Silvery Minnow v. Bureau of Reclamation*. The 2003 Biological Assessment proposed several measures that the Federal agencies (Reclamation and the Corps) could take to avoid jeopardy to the silvery minnow, depending on the court's determination. Then, in December 2003, Congress enacted a rider to the 2004 Energy and Water Development Appropriations Act, which placed San Juan Chama Project (SJC Project) water beyond Reclamation's discretionary reach. Additionally, in 2010, the Tenth Circuit Court ordered that all prior rulings of the district court regarding the litigation be vacated, which included all of the lower courts' holdings regarding the scope of Reclamation's discretionary authority (601 F.3d 1096). In its opinion, the Tenth Circuit Court stated that the 2003 consultation was based on the "effects of total river depletions on listed species, without identifying particular aspects of the overall actions as 'discretionary or nondiscretionary'" and further found this approach to be incorrect.

To comply with the opinion of the 10th Circuit Court and to more fully meet the requirements of Section 7(a) (2) of the Endangered Species Act, for this BA Reclamation set out to more specifically identify and describe each of its actions, the actions of non-Federal members of the Collaborative Program/RIP, and the nature and extent of discretion attendant with each action. Reclamation parsed its discretionary actions related to the Middle Rio Grande Project (MRG Project, Project) from the actions within the Middle Rio Grande Conservancy District's (MRGCD's) authority. Reclamation determined that it does not have the discretion to operate the MRG Project diversion structures for several reasons, including that Reclamation does not and has never held any interest in the right to divert water for lands within the MRGCD.

Additionally, this BA involves the commitment of all members of the Collaborative Program/RIP to carry out specific activities identified in the RIP Action Plan/Long-Term Plan as a conservation measure to help offset adverse effects of Federal and non-Federal actions. The conservation measure also will incorporate a RIP Program document, the adaptive management planning framework and the necessary agreements from each of the entities whose activities impact the MRG.

## 1.2 Projects Not Included in the Biological Assessment

Two projects, located along the Rio Grande to the north and south of the Middle Rio Grande Project, are outside of the action area and will not be considered in this BA. These are the San Luis Valley Project, which is located in Colorado and includes the Closed Basin Division and the Conejos Division, and the Rio Grande Project, which is located in southern New Mexico and west Texas.

The San Luis Valley Project, Closed Basin Division, located near Alamosa, Colorado, uses wells to salvage ground water from high water table conditions to assist Colorado in meeting its Rio Grande Compact (Compact) delivery requirements and the requirements of the 1906 Treaty between the United States and Mexico, to stabilize water levels in San Luis Lake and to provide mitigation water for the Alamosa Wildlife Refuge and the Blanca Wildlife Habitat Area. Flows delivered to the Rio Grande from the Closed Basin Division are part of the overall water supply available to Colorado, allowing Colorado to consume a like amount of water at a point upstream in the basin.

The San Luis Valley Project, Conejos Division, located in south-central Colorado, includes the Platoro Dam and Reservoir, which is operated for flood control and storage for irrigation, benefitting about 10,000 people on farms and six villages in the Conejos River area. The Conejos Division is a component of Colorado's Compact accounting and State line deliveries, and any changes in diversions simply would allow Colorado to minimize the accrual of debits or credits.

The Rio Grande Project, authorized by the United States Congress on February 25, 1905, extends from Elephant Butte Reservoir (New Mexico) to Ft. Quitman, Texas, and stores water for delivery to the Elephant Butte Irrigation District (EBID) in New Mexico, the El Paso County Water Improvement District No. 1 (EP#1) in Texas, and Mexico. Irrigation release rates and times are determined by Mexico, EP#1, and EBID and are calculated to meet daily irrigation demands. Reclamation manages water storage in Elephant Butte and Caballo Reservoirs in a manner that minimizes evaporation and maximizes the irrigation function of the Rio Grande Project. The total amount of water in storage in the Rio Grande Project is the result of inflows dictated by Compact guidelines for New Mexico and Colorado. The needs of irrigators and irrigation delivery orders are nondiscretionary. Reclamation cannot restrict or increase releases to affect Article VII restrictions on upstream States. The only discretionary measure in Reclamation's operational criteria not based upon irrigation delivery orders is when water is evacuated via a prerelease of storage water from Elephant Butte Reservoir to maintain space available for flood control purposes. Reclamation also has discretion to store SJC Project water in Elephant Butte Reservoir. Reclamation intends to reinstate ESA Section 7 consultation specifically on Rio Grande Project operations in the near future.

The Temporary Channel into Elephant Butte Reservoir, established to facilitate the water delivery to the Rio Grande Project and largely contained within the Rio Grande Project area, has been and will continue to be consulted upon separately as part of the aforementioned Rio Grande Project consultation; therefore, it will not be considered in this BA.

### **1.3 Reclamation’s Tribal Trust Responsibility and ESA Compliance**

The United States Government has an Indian trust responsibility to protect and maintain rights reserved by or granted to Indian tribes by treaties, statutes, and Executive orders. Reclamation shares this responsibility and carries out its activities to protect trust assets and to avoid adverse impacts to tribes when possible. Consistent with the June 7, 1997, Secretarial Order on “American Indian Tribal Rights, Federal-Tribal Trust Responsibility, and the Endangered Species Act” (Secretarial Order No. 3206), the Bureau of Indian Affairs (BIA) has the primary responsibility for carrying out the Federal responsibility to administer tribal trust property and represent tribal interests during formal Section 7 consultation under the ESA. Reclamation implements its ESA responsibilities to respect the exercise of tribal sovereignty over the management of Indian lands and tribal trust resources.

The federally recognized Cochiti, Santo Domingo, San Felipe, Santa Ana, Sandia and Isleta Pueblos (the Six MRG Pueblos or Pueblos), as well as the San Ildefonso, Ohkay Owingeh, and Santa Clara Pueblos, exist within the action area of this BA. The interests of other federally recognized pueblos or tribes may also be affected. Reclamation is aware that the Indian pueblos and tribes do not concede that the ESA applies to their actions. Nonetheless, through this BA process, Reclamation has initiated government-to-government consultations with all pueblos and tribes in the action area or that may be affected by the actions to provide each with an opportunity to voice its comments and concerns. Reclamation has endeavored to address each pueblo’s comments and concerns to date in this BA.

#### **1.3.1 Indian Water Rights Settlements**

Recently, several long standing water rights adjudications involving Indian claims to water rights in the Rio Grande Basin (Basin) have reached settlement. This BA does not include the actions or impacts related to the Indian water right settlements described below, since they will be included in separate consultations.

The Aamodt Adjudication is a complex, long-running adjudication of water rights in the Nambe-Pojoaque-Tesuque watershed north of Santa Fe. It has been the leading litigation to establish the nature and extent of pueblo Indian water rights.

It began in the 1960s and has involved numerous lawsuits and appeals. In 2000, after a series of court rulings, settlement discussions began in earnest. A settlement has been reached that involves a large water development project. On December 8, 2010, Congress signed the Claims Resolution Act of 2010 (Public Law 111-291) into law. Title VI of that Act authorizes the Aamodt Litigation Settlement and allocates major Federal funding to implement the regional water system project.

The other recent settlement involved the adjudications of the Rio Pueblo de Taos and Rio Hondo stream systems, which were filed in Federal court in 1969. The cases were consolidated and are now often referred to as simply *Abeyta*. In 2006, a settlement was reached among the Taos Pueblo, the State of New Mexico, the Taos Valley Acequia Association, the Town of Taos, El Prado Water and Sanitation District, and the 12 Taos-area Mutual Domestic Water Consumer Associations regarding the pueblos' and non-Indian water rights. In Title V of the Claims Resolution Act of 2010, Congress authorized the Taos Pueblo Indian Water Rights Settlement and appropriated significant funding towards its implementation.

For the Aamodt Settlement, Reclamation will contract for 1,079 acre-feet per year (AFY) of SJC Project water for use by the San Ildefonso, Pojoaque, Nambe, and Tesuque Pueblos. This water is intended, in part, to compensate the pueblos for agreeing to not fully exercise their right to call priority within the Rio Grande Basin. This water may not be physically exported out of the Basin. For the Abeyta Settlement, Reclamation will contract for 2,621 AFY of SJC Project water to the Taos Pueblo (2,215 AFY) and to the other settlement parties (406 AFY).

Like the claims of other non-Indian water users in the basin, the claims of other tribes that assert rights to water in the Rio Grande Basin, including the Six MRG Pueblos, are not yet quantified, are not in adjudication, and are not in settlement negotiations. The Federal Indian water rights of these pueblos and tribes are not:

1. Impaired by the Rio Grande Compact of 1938 (53 Statute [Stat.] 785).
2. Subject to State law restrictions.
3. Administered by the State of New Mexico.

Reclamation recognizes that who depletes and the amount they deplete based on these unquantified and unadjudicated rights may vary from year to year and in the future. Consequently, Reclamation and the non-Federal water users assume the risk that the future development of senior water rights, including Indian pueblo and tribal water rights, may result in shortages of water to junior users.

## **1.4 The Middle Rio Grande Endangered Species Collaborative Program/RIP**

In April 2002, Reclamation together with Corps, the State of New Mexico, Pueblos, and other parties executed a Memorandum of Understanding (MOU) to establish the Collaborative Program. In 2008, Congress directed the Secretary of the Interior (Secretary) to establish an Executive Committee for the Collaborative Program consistent with the Collaborative Program's bylaws (Bylaws) (110 Public Law 161), subsequently a new Memorandum of Agreement (MOA) was signed by the parties. The Bylaws cite Section 4(f)(2) of the ESA as authority for the Collaborative Program: the Secretary is directed to develop and implement plans for the conservation of endangered species, and the Secretary may enlist the services of public and private agencies, individuals, and institutions in developing and implementing such recovery plans.

In 2009, the Collaborative Program Executive Committee directed the transition of the Collaborative Program to a Recovery Implementation Program to enhance the focus on recovery activities and serve as an ESA compliance vehicle. A new RIP Action Plan/Long-Term Plan will be the mechanism for advancing the Collaborative Program based on the framework of the silvery minnow and flycatcher recovery plans.

The goals of the RIP are to:

1. Alleviate jeopardy to the listed species in the RIP area.
  - Avoid actions that preclude survival or recovery of the listed species.
  - Continually identify the critical scientific questions and uncertainties that will be addressed through adaptive management (AM) in support of a hydrologically and biologically sustainable MRG water operations BiOp
2. Conserve and contribute to the recovery of the listed species within the constraints of the RIP.
  - Stabilize existing populations through ongoing and future management activities.
  - Support the development of self-sustaining populations.
3. Protect existing and future water uses.
  - Provide a mechanism for ESA compliance for identified Federal actions and ongoing non-Federal water-related actions that do not create additional net depletions to the MRG

- Provide a process for streamlined Section 7 consultation for future water uses needing compliance with the ESA
4. Be transparent to stakeholders, the public, and other interested parties

The Collaborative Program signatories intend that the RIP be implemented, following its evaluation during the programmatic ESA Section 7 consultation on water operations and maintenance activities in the MRG, to avoid jeopardy to the listed species, to avoid adverse modification of their designated critical habitats, and to contribute to their conservation and ultimate recovery. It is anticipated that implementation of this RIP will be identified in the new BiOp and any subsequent opinions to offset the effects of the proposed actions described in chapter 3 for ESA compliance. The RIP Action Plan includes activities of the Long-Term Plan inventory for which there is commitment from the responsible entities and is based on recovery actions of the silvery minnow and flycatcher recovery plans. Through implementation of the RIP Action Plan, linkages to recovery actions are expected to achieve progress toward recovery of the species. The Collaborative Program/RIP anticipates using extensively a formal adaptive management process.

There is currently disagreement within the Collaborative Program/RIP on many of the aspects of silvery minnow life history and monitoring techniques and interpretation of associated scientific information. The biological information presented throughout this BA represents a summary of the multitude of information available and an analysis of effects on the listed species using this information based on the professional conclusions of Reclamation technical personnel. The analysis presented is not intended to be a population viability level analysis. The Collaborative Program/RIP is currently working on the development of two independent Population Viability Analysis/Biology (PVA) models that will aid the Service in their analysis of effects for the new BiOP.

## 1.5 Consultation and Litigation History

Reclamation has completed numerous ESA consultations since 1996, including individual and joint consultations with the Corps for Federal water operations on the MRG. From 1996–99, Reclamation and the Corps consulted informally on their water operations and river maintenance activities in the MRG. In May 1998, Reclamation and the Corps submitted to the Service a joint Programmatic BA addressing both agencies' water management actions.

In November 1999, environmental groups collectively filed suit *Rio Grande Silvery Minnow v. Keys, et al.*, CIV 99-1320-JP/KBM, against Reclamation and the Corps for alleged ESA and National Environmental Policy Act (NEPA) violations. The plaintiffs identified the central issue as the scope of discretionary

authority that Reclamation and the Corps have over the MRG and SJC Projects' water deliveries and river operations.

Reclamation and the Corps resubmitted a joint BA June 2001, resulting in a BiOp covering actions during the period June 2001 through December 2003.

“Completion of consultation resulted in the issuance of a Biological Opinion (BiOp) by the FWS in June of 2001, which was subsequently challenged by the plaintiffs. They sought to require that the BOR exercise discretion to utilize San Juan-Chama water from Heron Reservoir and curtail deliveries of water to the San Juan-Chama contractors to meet the minimum flows required for the minnow. They also sought curtailment of native Rio Grande water deliveries to irrigators, primarily in the MRGCD. The Federal district court ruled in April 2002,<sup>3</sup> upholding the 2001 BiOp but also holding that the Reclamation had discretion over use of both the SJC Project and native water in the MRG Project for ESA purposes while the Corps did not have such discretion over its operations.” (Kelly, 2011)

In June 2002, Reclamation predicted it would not be able to meet the 2001 BiOp flow requirements due to extreme drought.

“Environmental plaintiffs filed for emergency injunctive relief to seek release of a limited amount of SJC water from Heron Reservoir in order to comply with the June 29, 2001, BiOp and avoid massive drying in the Middle Rio Grande. A hearing was held immediately and the court subsequently ruled in favor of the plaintiffs that the September 2002 BiOp was arbitrary and capricious. However, the Court imposed its own interim flow standards, allowing the U.S. to meet lower flow levels than those required by the 2001 BiOp. The Court directed Reclamation to take SJC water from the contractors if necessary...The ruling on the injunctive relief was immediately appealed to the Tenth Circuit Court of Appeals by the Federal defendants and interveners, which stayed the ruling pending the appeal. Oral arguments were heard in January 2003 before a three-judge panel, which affirmed the district court's ruling in June 2003.<sup>4</sup> The Federal defendants and interveners petitioned for rehearing *en banc*.” (Kelly 2011).

Meanwhile, in August 2002, Reclamation and the Corps re-initiated Section 7 consultation to address proposed water management through December 2002; and in September 2002, the Service issued a new “jeopardy” biological opinion with

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<sup>3</sup> *Rio Grande Silvery Minnow v. Keys, et al.*, CIV 99-1320-JP/KBM, April 2002, Memorandum Opinion and Order.

<sup>4</sup> *Rio Grande Silvery Minnow v. Keys*, 333 F.3d 1109 (10<sup>th</sup> Circuit Court, 2003).



no Reasonable and Prudent Alternative (RPA). Late season rains enabled Reclamation to maintain operations consistent with the June 2001 BiOp, including the incidental take statement and, therefore, the June 2001 BiOp remained in effect.

In February 2003, Reclamation and the Corps jointly re-initiated consultation with the Service; and, subsequently, a BiOp was issued in March 2003 covering continued operations through February 2013. In 2004, Congress enacted legislation that limited Reclamation's discretion to use San Juan Chama project water for ESA purposes (Public Law 108-447).

“In October 2003, the Tenth Circuit requested additional briefing from all parties on the question of whether the case was moot and its June 2003 ruling should be vacated. On January 5, 2004, the Tenth Circuit vacated the panel opinion as moot because the time frame covered by the District Court's 2002 ruling had expired. Furthermore, the New Mexico delegation had introduced, and Congress later enacted, legislation restricting the Federal Government from using San Juan-Chama Project water to meet ESA obligations. The district court was ordered to determine whether there were unresolved issues to be tried.

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Plaintiffs filed a Motion to Dismiss Remaining Claims without prejudice. The defendants responded that the prior rulings (Memorandum Opinions and Orders of April 19, 2002, and September 23, 2002) should be vacated for mootness and lack of subject matter jurisdiction. Subsequently, on April 26, 2004, plaintiffs withdrew their motion to dismiss. Plaintiffs asked Judge Parker not to vacate his rulings but to incorporate them into a final judgment that could be appealed yet again to the Tenth Circuit should defendants wish to do so.

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On November 22, 2005, the Court ruled on the mootness and vacatur issues sent down from the 10th Circuit Court of Appeals from the appeal in 2003. Judge Parker held that, because of the 2003 and 2004 minnow riders, the issue of BOR discretion to reduce water deliveries to the San Juan-Chama Project was moot. However, he ruled that because Congress was silent on the issue of BOR discretion regarding Middle Rio Grande Project waters, this issue remained justiciable.” (Kelly, 2011)

The judge ruled that, in future consultations under the ESA, Reclamation must consult with the Service over the full scope of Reclamation's discretion

concerning MRG Project operations. Judge Parker’s November rulings were appealed to the 10th Circuit Court of Appeals.

“On April 21, 2010, the [Tenth Circuit Court of Appeals] ruled that the intervening 2003 Biological Opinion and subsequent minnow riders had mooted the claims of the environmental groups. The court based its mootness ruling on the fact that the environmental groups’ claims and relief sought were related to consultation over discretionary aspects of the 2001 and 2002 BiOps. Therefore, even though the Middle Rio Grande Project water was not explicitly mentioned in the minnow riders, the 2003 BiOp had superseded the earlier BiOps, taking away any claim for relief.” (Kelly, 2011)

The Court dismissed the appeal, remanded to the district court to vacate its memorandum opinions and orders of 2002 and 2005, and to dismiss the environmental groups’ complaint with regard to their scope-of-consultation claim under the ESA.

### **1.5.1 Early Coordination Efforts**

As early as 2006, Reclamation anticipated insufficient supplies of Supplemental Water available to meet environmental needs (Supplemental Water) coupled with hydrologic conditions that will prevent Reclamation from meeting the flow requirements of the 2003 BiOp in the future. Therefore, Reclamation and the Corps began planning for reinitiating Section 7 consultation with the Service.

In 2008, the Collaborative Program’s ad hoc workgroup, Population and Habitat Viability Assessment/Hydrology (PHVA workgroup), was created to perform hydrologic analyses and develop water management scenarios for use in this consultation process and for input into the PVA models developed by the PHVA workgroup. The PHVA workgroup began this work by performing an interagency review of potentially hydrologically viable actions that might impact or benefit listed species in the MRG ecosystem. It evaluated available water, operational flexibility, management considerations in key reaches (Angostura, Isleta, and San Acacia Reaches), and biological considerations for the silvery minnow and identified a suite of alternate water management scenarios or strategies for evaluation to meet operational and ESA needs.

Originally, 11 operational scenarios were identified and modeled. Supplemental water needs to meet target flows for the 11 scenarios were identified, and shortages against the projected available Supplemental Water were quantified. Reclamation completed a screening procedure to rank scenarios considering numerous parameters, including the duration and extent of river drying in critical river reaches, May–June flow volumes to promote effective species reproduction, Supplemental Water use requirements, and the ability to bank Supplemental Water for critical situations.

By 2009, the PHVA workgroup had narrowed the suite to five management scenarios that considered the use of available water to support the habitat needs of the silvery minnow while maintaining operational flexibility to adapt to unforeseen circumstances. These five scenarios included:

- **BiOp Targets:** The same operations and flow targets as were specified under the 2003 BiOp
- **Dry-Year Targets:** Use in all years of the flow targets specified in the 2003 BiOp for “dry years”
- **BiOp Targets - No Continuous Flow:** Use of the 2003 BiOp flow targets without the requirement for continuous flows in the winter
- **Angostura-Isleta Management A:** Flow targets in the Angostura Reach (100 cubic feet per section [cfs]at Central Avenue gage at all times) and Isleta Reach (100 cfs at Isleta diversion structure at all times) only
- **Angostura-Isleta Management B:** Flow targets in the Angostura Reach (100 cfs at Central Avenue gage at all times) and Isleta Reach (50 cfs at Isleta diversion structure at all times) only.

From these scenarios, Reclamation implemented a screening process that identified Angostura-Isleta Management B option as the initial preferred option.

The five alternative management scenarios, along with the recommendation from Reclamation, were presented at the April 16, 2009, meeting of the Executive Committee of the Collaborative Program. This information also was presented to the Service at this time, but further evaluation was needed. Therefore, no alternate water management scenarios are presented for consideration or analysis in this BA.

In February 2009, the Corps decided to pursue its own Section 7 consultation and to develop a BA addressing only the Corps’ authorized, discretionary flood control operations. Therefore, both agencies are submitting separate BAs addressing their respective operations.

Reclamation has requested, and the Service has tentatively agreed, that the new biological opinion will not have a specified termination date.

## 1.6 Quiet Title Litigation History

“In 2002 the MRGCD filed a cross-claim to quiet title to ownership of El Vado Reservoir and the Angostura and San Acacia Diversion Dams and other land and irrigation works within the MRGCD. MRGCD also sought a declaratory judgment interpreting the effect of their 1963 transfer of State Water Rights Permit No. 1690 to the United States. The Federal defendants opposed this claim and environmental plaintiffs sided with the Federal Government on this issue.” (Kelly, 2011)

The United States’ position in this cross-claim was that the MRGCD conveyed the MRG Project properties to the United States and that these properties remain in the name of the United States until, among other things, Congress authorizes title transfer; additionally, that the repayment contract also stays in effect until such time.

“On July 25, 2005, the Federal District Court ruled on the cross-claim by MRGCD to quiet title to El Vado Reservoir and other Middle Rio Grande Project works. The District Court ruled the 12-year statute of limitation under the Quiet Title Act had run because MRGCD had been on notice since 1951 that the United States claimed an adverse interest in the properties. The District Court went on to rule that ownership of these properties and certain specific tracts identified in the cross-claim was declared to be in the United States of America. The Court also ruled that Permit No. 1690 must remain in the name of the United States unless Congress authorizes its conveyance to the MRGCD. The MRGCD appealed.

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The 10th Circuit Court of Appeals ruled...[i]n March [2010] that the District Court did not clearly err in finding that the MRGCD action to quiet title in El Vado Reservoir and the other properties conveyed to [Reclamation] through the 1951 contract was untimely under the 12-year statute of limitations.<sup>5</sup> The Court adopted the District Court’s account of the evidence as plausible, and ruled against MRGCD’s argument that because the property may have been conveyed as easements and not in fee simple, that the MRGCD did not have notice of the adverse claim of the United States until 2000. The Court held further that any abandonment of property rights by the United States would have to be explicitly authorized by Congress. However, because timely filing of a quiet title action is what confers jurisdiction on the Court, the lack of

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<sup>5</sup> *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 599 F.3d 1165 (2010).

timely filing meant that the District Court did not have jurisdiction to rule on the merits. The 10th Circuit vacated the District Court's judgment on the merits quieting title in the [Reclamation]. Therefore, the title issue remains unresolved." (Kelly, 2011)

For the purpose of this BA, Reclamation acknowledges that the MRGCD disagrees with Reclamation's position regarding title to El Vado, the Cochiti heading, and Angostura, Isleta, and San Acacia Diversion Dams (Diversion Dams), other land and irrigation works within the MRGCD, and New Mexico Office of the State Engineer (NMOSE) Permit No. 1690 for storage in El Vado Reservoir. El Vado was constructed and paid for by MRGCD funds, and MRGCD claims that title to El Vado was never transferred to Reclamation; even if it were, it would have been only as a security interest for repayment of the 1951 Contract. That contract having been paid, the title reverted as a matter of law.