

# NEW MEXICO INTERSTATE STREAM COMMISSION

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March 30, 2018

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RE: Interstate Stream Commission 2018 Annual Priorities for the Strategic Water Reserve

Dear Commissioners and Attorney General Balderas:

In 2005, the Legislature passed the Strategic Water Reserve statute, NMSA 1978, § 72-14-3.3 (2007). The statute authorizes the Interstate Stream Commission (Commission) to establish a Strategic Water Reserve (Reserve) using leased, purchased, or donated water, water rights, and storage rights. Water in the Reserve is to be used for two purposes: to assist the State in complying with interstate stream compacts and court decrees, and to assist the State and water users in water management efforts to benefit threatened or endangered species.

The statute and regulations governing the Reserve require the Commission annually to determine river reach or groundwater basin priorities after consultation with the State Engineer, the Attorney General, and New Mexico's interstate compact commissioners. NMSA 1978, § 72-14-3.3(C) (2007); 19.25.14.9(A) NMAC. We have engaged in consultations to determine priorities for 2018. The purpose of this letter is to inform you of the river reach and groundwater basin priorities for 2018, and to provide an update of activities during 2017.

As you may recall, last year the Commission designated the Middle Rio Grande, the Canadian River, and the Pecos River as priority river reaches and the Middle Rio Grande Basin and the

Pecos River Basin as priority groundwater basins for the Reserve. This year, agency staff recommended that the Commission designate the Middle Rio Grande, the Pecos River, the Black River, and the Canadian River as priority river reaches and the Middle Rio Grande Basin, and the Pecos River Basin (which includes the Black River) as priority groundwater basins for 2018.

The Commission expects that the Reserve will be essential to meeting the requirements of the federal Endangered Species Act (ESA)<sup>1</sup> in the Middle Rio Grande, the Pecos River, and the Canadian River reaches in 2018. The Reserve will also assist the State in meeting its Rio Grande and Pecos River Compact obligations.

However, implementation of the Strategic Water Reserve statute is likely to suffer in 2018 from a lack of funding. Since creation of the Strategic Water Reserve in 2005, the Legislature has appropriated to the Commission a total of \$5,300,000 in capital funding for the Reserve, most recently \$2 million in 2014. The Commission allocated most of these funds to acquire water rights on the Pecos River, the Middle Rio Grande, and the Lower Rio Grande. Through December 2017, the Commission had expended \$3,293,795 of the total appropriations. In the 2017 session, however, the Legislature reallocated the balance – a little under \$2 million – for other purposes. More funding will be needed for the Commission to continue its efforts to acquire water rights for the Reserve.

### 1. Middle Rio Grande

The Middle Rio Grande has been a priority river reach each year since passage of the Strategic Water Reserve statute, and it continues to be a top priority in 2018. In 2018, the Commission will continue to use water rights in the Reserve both to benefit endangered species in the Middle Rio Grande and to comply with the Rio Grande Compact.

In 2018, the Commission expects to use water from the Reserve to supply water for several projects to benefit two species in the Middle Rio Grande, the Rio Grande silvery minnow (*Hybognathus amarus*) and the Southwestern willow flycatcher (*Empidonax traillii extimus*), which are listed as endangered<sup>2</sup> under the ESA. Water used for these projects will also benefit the distinct population segment of the Western yellow-billed cuckoo (*Coccyzus americanus*),<sup>3</sup> which is listed as threatened under the ESA. Further, these projects, supplied with water from the Reserve, will help ensure compliance with the December 2016 Biological Opinion, developed by the United States Fish and Wildlife Service to meet the requirements of the ESA.<sup>4</sup>

Also in 2018, the Commission expects to use water rights from the Reserve to assist the State in compliance with the Rio Grande Compact, which obligates the State of New Mexico to deliver a certain quantity of water to Elephant Butte Reservoir. Water from the Reserve will enhance the amount of water reaching Elephant Butte, thus assisting State compact compliance.

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<sup>1</sup> 16 U.S.C. §§ 1531 to 1599.

<sup>2</sup> 59 Fed. Reg. 36988 (July 20, 1994) (Rio Grande silvery minnow); 60 Fed. Reg. 10694 (Feb. 27, 1995) (Southwestern willow flycatcher).

<sup>3</sup> 79 Fed. Reg. 59992 (Oct. 3, 2014).

<sup>4</sup> U.S. Dep't of the Interior, Fish & Wildlife Service, *Final Biological and Conference Opinion for Bureau of Reclamation, Bureau of Indian Affairs, and Non-Federal Water Management and Maintenance Activities on the Middle Rio Grande, New Mexico* (No. 02ENNM00-2013-F-0033) (Dec. 2, 2016).

At the start of 2018, the Reserve consisted of a total of 1,099.20 acre-feet per year of consumptive use water rights in the Middle Rio Grande. The Commission holds these water rights under three lease agreements. These agreements, and the specific uses of the leased water rights, are described below.

#### New Mexico General Services Department Lease

Under a 2008 lease agreement, the Commission has leased from the Property Control Division of the New Mexico General Services Department, and transferred into the Reserve, 23.87 acre-feet per year consumptive use ground water rights (Atrisco water rights).<sup>5</sup> In 2017, the Commission used the Atrisco water rights in the Reserve both to benefit endangered species and to assist State compliance with the Rio Grande Compact. The Commission used 3.90 acre-feet per year of the Atrisco water rights in 2017 to offset depletions to the river resulting from the Atrisco Habitat Restoration Project. The Commission is implementing this project to enhance habitat ponds on the west bank of the river in the Rio Grande State Park. And in 2018, the Commission applied the remaining 19.97 acre-feet per year of the Atrisco water rights towards compliance with the Rio Grande Compact.

In 2018, the Commission expects to use the Atrisco water rights for similar endangered species habitat restoration projects, and to use the remaining water rights for Rio Grande Compact compliance.

#### Village of Los Lunas Lease

The Commission has leased 921.33 acre-feet per year consumptive use pre-1907 Rio Grande surface water rights from the Village of Los Lunas under a lease agreement signed in 2011.<sup>6</sup> In 2017, the Commission used 99.48 acre-feet of these water rights to offset depletions to the river resulting from five Middle Rio Grande endangered species habitat restoration projects. The Commission is implementing the first of the projects, the Rio Rancho Bosque Open Space Habitat Restoration Project, to improve habitat in Rio Rancho open space lands near the river. The Commission is using water rights from the Reserve to offset the depletions resulting from that project. The Army Corps of Engineers (Corps) is implementing another three habitat restoration projects on the Rio Grande. Under a Memorandum of Agreement between the Commission and the Corps, signed in 2011 and amended in 2014, the Commission agreed to use water rights from the Reserve to offset depletions resulting from these projects. The fifth project is a silvery minnow habitat restoration project the State Land Office is implementing on State-owned property in the South Valley of Albuquerque. Under a 2014 water supply agreement, the Commission agreed to offset depletions from this project using water rights from the Reserve. In 2017, the Commission applied the remaining 821.848 acre-feet per year of the Village of Los Lunas leased water rights to assist State compliance with the Rio Grande Compact.

#### Bureau of Reclamation Lease

Under a 2014 lease agreement with Bureau of Reclamation (Reclamation), the Commission has leased 154 acre-feet per year of pre-1907 consumptive use surface water rights – called the “Valle de Oro water rights” – in the Middle Rio Grande, and has transferred those rights into the

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<sup>5</sup> See Office of the State Engineer permit No. (RG-85365-B into RG-5847-S)-T (2008).

<sup>6</sup> Office of the State Engineer permit No. (RG-17065-Enlgd into SP-05052)-T (2012).

Reserve.<sup>7</sup> In 2017, Reclamation augmented flow in the Rio Grande below the Isleta Diversion Dam at times when the river flow was insufficient to sustain the silvery minnow. The Commission used the leased Valle de Oro water rights to offset depletions to the river that occurred due to the augmentation, thus benefitting the species. The Commission expects to put these water rights to similar use in 2018.

#### Bureau of Reclamation-Town of Bernalillo Lease

In November 2017, the Commission entered into a three way lease agreement with Reclamation and the Town of Bernalillo whereby the Commission and Reclamation will lease 139.61 acre feet of consumptive use pre-1907 water rights that Bernalillo does not currently need. In early 2018 the parties will submit a joint application to the Office of the State Engineer to temporarily transfer those rights into the Strategic Water Reserve. Once the transfer is approved, the Commission expects to use these rights to offset depletions to the river that occur due to augmentation of the river when the river flow is insufficient to meet the needs of the silvery minnow.

## **2. Pecos River**

Like the Middle Rio Grande, the Pecos River (or, in prior years, the Lower Pecos River) has been a priority each year since the passage of the Strategic Water Reserve statute. In 2018, the Commission will continue to use water rights from the Reserve to benefit threatened species and to assist the State in Pecos River Compact compliance.

In 2018, the Commission expects to use water from the Reserve to increase flows in the river for the benefit of the Pecos bluntnose shiner (*Notropis simus pecosensis*), which is listed as threatened under the ESA.<sup>8</sup> The Commission expects the Reserve to continue to play an essential role in helping to meet the minimum flow requirements in the biological opinion for the shiner,<sup>9</sup> as it has over the past several years.

In 2018, the Commission also expects to continue to augment flow in the Pecos River using water from the Reserve, both for the benefit of threatened species and to assist the State in compliance with the Pecos River Compact, which requires New Mexico to deliver an amount of water to Texas. Water rights placed in the Reserve have augmented the flow in the Pecos River reaching the state-line delivery point, thereby supporting New Mexico's compact compliance.

At the beginning of 2018, the Reserve consisted of a total of 1,582.99 acre-feet per year (consumptive use) of owned water rights in the Pecos River reach. In addition, a lease for a 2,326.18 acre-feet per year (consumptive use) of water rights, a pending purchase of 66.24 acre-feet per year (consumptive use) of water rights, and an assignment of 709.93 acre-feet per year farm delivery requirement (FDR) of water rights will be added to the Reserve. These water rights are described below.

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<sup>7</sup> Office of the State Engineer permit No. (SD-05010 into SP-5052-T) (May 18, 2015).

<sup>8</sup> 52 Fed. Reg. 5295 (Feb. 20, 1987). The Pecos bluntnose shiner is also listed as endangered by the State of New Mexico under the Wildlife Conservation Act, NMSA 1978, §§ 17-2-37 to 17-2-46.

<sup>9</sup> U.S. Dep't of the Interior, Fish & Wildlife Service, *Final Biological Opinion for the Carlsbad Project Water Operations and Water Supply Conservation, 2016-2026* (No. 02ENNM00-2016-F-0506) (Dec. 5, 2017).

### Vaughan Conservation Pipeline

In 2018, the Commission begins its eleventh year of operation of the Vaughan Conservation Pipeline project. The purpose of the pipeline project is to augment Pecos River flows to benefit the Pecos bluntnose shiner – and thus ensure Carlsbad Project compliance with the ESA – without impairing existing water rights. The Commission has permits to deliver pumped groundwater directly to the Pecos River, at a location just above the upper critical habitat reach for the shiner. The Commission operates the pipeline project under a 2007 supply contract with Reclamation. Under the contract, the Commission delivers water to the Pecos River through the pipeline, while Reclamation directs the timing and quantity of the deliveries. Reclamation reimburses the Commission for operating and maintenance expenses. Beginning in the 1990s, the Commission purchased groundwater rights totaling 1,582.99 acre-feet per year (consumptive use) for placement in the Reserve and use for river augmentation through the Vaughan Conservation Pipeline. The Commission is receiving reimbursement from Reclamation for that initial capital expenditure over the term of the 25-year contract.

During 2017, a total of approximately 1,199 acre-feet of water was delivered to the Pecos River via the Vaughan Conservation Pipeline. In 2017, the Commission received payments totaling \$289,089.92 from Reclamation for pipeline project capital costs and operations. Given the extremely low stream flow forecasts for 2018, it is likely that all permitted water rights will be used at the Vaughan Conservation Pipeline in 2018.

### Fort Sumner Lease

Under a 25-year lease agreement signed in 2015 with VP Bar LLC, the Commission has leased 3,553 acre-feet per year FDR (2,326.18 acre-feet per year consumptive use) of water rights at an initial price of \$100 per acre-foot. These water rights will be deposited in the Reserve to benefit the Pecos bluntnose shiner and support Carlsbad Project compliance with the ESA. The Commission and Reclamation have entered into a separate contract under which the Commission could deliver a portion of the water leased from VP Bar to the Pecos River via the Vaughan Conservation Pipeline to benefit the shiner. Alternatively, Reclamation is preparing a cost-benefit analysis for the construction of a second pipeline project to deliver a portion of the leased water directly from the VP Bar wells to Sumner Reservoir for placement in the Santa Rosa Reservoir fish and wildlife pool described below. Reclamation expects to complete the analysis in the first half of 2018. Reclamation pays all the costs associated with this lease. In 2018, the Commission expects to file, jointly with VP Bar, an application with the Office of the State Engineer to change the place and purpose of use of these water rights, and then to place the water rights into the Reserve.

### Santa Rosa Reservoir Storage Pool

In 2017, the Commission continued its efforts to assist Reclamation with the establishment of a fish and wildlife storage pool in Santa Rosa Reservoir. The Army Corps of Engineers has designated 30,000 acre-feet of Santa Rosa Reservoir storage for this purpose. This storage pool will be used to support the Pecos bluntnose shiner during periods of drought, without infringing on existing irrigation storage for the Carlsbad Project. Reclamation is preparing an Environmental Assessment of the storage pool under the National Environmental Policy Act, which it expects to complete in early 2018. Once the assessment is completed, water rights will need to be acquired to fill the Santa Rosa Reservoir pool. Water rights in the Reserve may be

used for this purpose. The Commission, in collaboration with Reclamation, will be working on this project in 2018.

#### Richard Vaughan Purchase

On November 9, 2016, the Commission entered into a purchase and sale agreement with Richard Vaughan to acquire water rights for 110.4 acre-feet per year FDR (66.24 acre-feet per year consumptive use). The agreed upon purchase price, determined through an appraisal obtained by the Commission, is \$265,000. In February 2017, the Commission, jointly with Mr. Vaughan, filed an application with the Office of the State Engineer to change the place and purpose of use of the water rights. The Office of the State Engineer approved the permit on December 4, 2017. Closing on the purchase will take place in 2018, and the water rights will be placed in the Reserve to benefit the bluntnose shiner.

#### Bureau of Land Management Assignment

On October 12, 2016, the Commission entered into an Assignment of Water Rights agreement with the United States Bureau of Land Management (BLM) by which BLM assigned 709.93 acre-feet per year FDR of water rights to the Commission to place into the Reserve. The water rights are on the Rio Bonito, which is a tributary to the Rio Hondo, which in turn is a tributary to the Pecos River. The Commission will use these water rights to increase flows in the tributary system, and thus to benefit threatened or endangered species, and to assist the State in compact compliance.

### **3. Black River**

The Black River is a tributary to the lower Pecos River in southeastern New Mexico. It was first specifically designated as a priority stretch for 2017, as part of the Pecos River Basin. This year, the Commission is designating it independently as a priority stretch.

The Black River continues to be an important candidate for future water rights acquisitions. Stream flows on the Black River comprise approximately 20 percent of the flows at the Pecos River at Red Bluff gage, New Mexico's principal delivery point for the Pecos River Compact. Moreover, the U.S. Fish and Wildlife Service recently listed the Texas hornshell (*Popenaias popeii*), a freshwater mussel with habitat in the Black River, as endangered under the ESA.<sup>10</sup> Water rights acquisitions on the Black River would both support Compact compliance and help protect local land-owners from the consequences of a possible designation of critical habitat for the hornshell on the Black River.

### **4. Canadian River**

The Canadian River Basin was first designated as a Strategic Water Reserve priority in 2011 so that the State could more readily comply with endangered species obligations along the Canadian River, particularly below Ute Dam, and it remains a priority in 2018. However, New Mexico's obligations under the Canadian River Compact are merely to store a certain amount of water in Ute Reservoir; therefore, the Reserve has not been used to assist the State in meeting Canadian River Compact obligations.

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<sup>10</sup> 83 Fed. Reg. 5720 (Feb. 9, 2018).

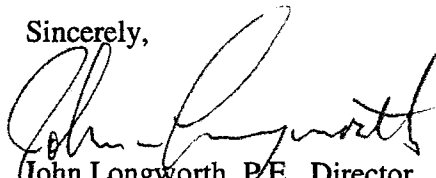
In 2018, the Commission expects to continue its efforts to acquire water rights for the Reserve to benefit the Arkansas River shiner (*Notropis girardi*), which is listed as threatened under the ESA.<sup>11</sup> ESA compliance will be particularly important in the Canadian River Basin given the 2009 federal authorization of the Eastern New Mexico Rural Water System Project, also known as the "Ute Pipeline Project," currently under construction, which will divert 16,450 acre-feet per year of water from Ute Reservoir and transport it approximately 150 miles to Curry and Roosevelt counties. The Commission is the primary State agency charged with administering New Mexico's commitments under the Arkansas River Management Plan,<sup>12</sup> adopted to meet the requirements of the ESA. The Management Plan was developed to promote a healthy, self-sustaining population for the shiner by preserving habitat along the stretch of the Canadian River east (downstream) of Ute Dam. Under the Management Plan, the State's obligations along the Canadian River are to maintain stream flows on the Canadian River below Ute Dam at existing levels, as well as to monitor the fish population below Ute Dam to the Texas state line to guard against possible adverse effects resulting from construction of the Ute Pipeline Project.

#### Ute Dam to Texas State Line Appropriation

In 2015, the Commission filed with the Office of the State Engineer an (amended) application to appropriate a minimum flow of water (up to 5 cubic feet per second) on the Canadian River from Ute Dam to the Texas state line to help meet the State's obligations under the Management Plan, and thus benefit the Arkansas River shiner habitat. Although several parties protested the application, the Commission negotiated a Settlement Agreement with the protestants, signed in October 2016, resolving the protests. In December 2016, based on the Settlement Agreement, the Commission filed with the Office of the State Engineer a motion to dismiss the protest proceeding and process the permit application. The motion is still pending with the Office of the State Engineer. Once the permit has been issued, the Commission will place the water rights in the Reserve.

In conclusion, thank you for your review of our priority designations of river reaches and groundwater basins for the Strategic Water Reserve for 2018. Should you have any additional thoughts regarding prioritization, or the Reserve generally, please call me at (505) 827-6103.

Sincerely,



John Longworth, P.E., Director  
New Mexico Interstate Stream Commission

<sup>11</sup> 63 Fed. Reg. 64772 (Nov. 23, 1998). The Arkansas River shiner is also listed as endangered by the State of New Mexico under the Wildlife Conservation Act, NMSA 1978, §§ 17-2-37 to 17-2-46.

<sup>12</sup> Canadian River Municipal Water Authority, *Arkansas River Shiner Management Plan for the Canadian River from U.S. Highway 54 at Logan, New Mexico to Lake Meredith, Texas* (June 2005).

