REMARKS OF THE INTERSTATE STREAM COMMISSION

2013 BIOLOGICAL OPINION FOR MIDDLE RIO GRANDE WATER MANAGEMENT

ROLF SCHMIDT-PETERSEN, ISC RIO GRANDE BASIN MANAGER

WATER AND NATURAL RESOURCES COMMITTEE MEETING
SILVER CITY, NEW MEXICO
AUGUST 2, 2011

Why is Endangered Species Act Compliance Important?

In 1973, the US Congress enacted the Endangered Species Act (ESA) to protect critically imperiled species from extinction. The ultimate goal of the ESA is to "recover" species so they no longer need protection under the ESA.

The ESA empowered the U.S. Fish and Wildlife Service (Service) to make determinations as to whether species need such protection. That is, whether species should be listed as "threatened" (likely to become endangered within the foreseeable future) or "endangered" (in danger of extinction throughout all or a significant portion of its range) and therefore given additional protections under the ESA.

If actions are proposed that might affect a threatened or endangered species, the Service issues a biological opinion (opinion) as to whether the action might result in jeopardy for the species. If so, the Service can require actions to mitigate the adverse impacts prior to allowing the proposed action to proceed.

In the litigation that occurred during the 2000's, attempts were made to force the federal government to take San Juan Chama Project Water and native Rio Grande water from New Mexico owners and use it for endangered species flows. The attempts were ultimately not successful.

A primary reason is that Senators Domenici and Bingaman sponsored certain Congressional budget appropriation riders that, in essence, codified a 2003 opinion saying that for its 10-year term compliance with the terms of the 2003 opinion is equivalent to compliance with the ESA. The riders also directed the Department of the Interior that San Juan Chama water can only be acquired for ESA purposes through agreements between willing lessors and willing lessees.

The 2003 Biological Opinion ends in March 2013. Additional litigation is likely and similar claims may be made.

A Short History of Selected ESA issues in the Middle Rio Grande

There are a number of threatened and endangered species in the middle Rio Grande including the Rio Grande silvery minnow (silvery minnow), the southwestern willow flycatcher (willow flycatcher), the Pecos sunflower, and the Interior Least Tern. However, two of these species are of greatest concern relative to water operations: the silvery minnow and willow flycatcher.

The silvery minnow was listed as an endangered species by the Service in 1994. By then, the fish, which was once abundant and widespread in the Rio Grande and its tributaries from Brownsville Texas to near Espanola New Mexico, was only found between Cochiti Dam and the Elephant Butte Reservoir delta

The Service listed the willow flycatcher as an endangered species under the ESA in 1995. The species occurs in southern California, Arizona, New Mexico, southern portions of Nevada and Utah, western Texas, and parts of southwestern Colorado.

In 1999, litigation began when certain environmental groups alleged that ongoing water management, river maintenance, and flood control operations were adversely impacting the species. Court decisions related to this litigation put both native Rio Grande and San Juan Chama Project water at risk of being taken under the authority of the ESA to ensure flows in the Rio Grande adequate to sustain the fish – to the detriment of New Mexico irrigators, the Cities of Albuquerque and Santa Fe, and other New Mexico water users.

In 2001, the Service issued a biological opinion that contained flow requirements that were unsustainable especially since a significant drought was upon us. This opinion was superseded, after additional litigation, by a 2003 opinion that allowed some river drying and took into account the highly variable nature of the Southwest's spring runoff and Rio Grande Compact restrictions.

The 2003 opinion covers federal and non-federal actions in the Middle Rio Grande, New Mexico from the near Velarde downstream to the headwaters of Elephant Butte Reservoir. It includes Bureau of Reclamation (Reclamation) water management operations and river maintenance activities, U.S. Army Corps of Engineers (Corps) flood control operations and various non-federal actions.

In the late 1990's and early 2000's stakeholders began to seek alternative solutions to address ESA mandates in the middle Rio Grande. This began with the formation of a workgroup and followed with a federally-sponsored program, now called the Middle Rio Grande Endangered Species Collaborative Program (Collaborative Program), which currently has 16 signatories including:

- NMISC,
- NM Attorney General's Office,
- NM Game & Fish Department,
- NM Department of Agriculture,
- Santo Domingo Pueblo,
- Santa Ana Pueblo,
- Sandia Pueblo,
- Isleta Pueblo,
- Middle Rio Grande Conservancy District (MRGCD),

- Albuquerque Bernalillo County Water Authority (ABCWUA),
- City of Albuquerque,
- University of New Mexico,
- Assessment Payers Association for the MRGCD,
- the Corps,
- Reclamation, and
- the Service.

Since 2001, about $120 million total of federal dollars (from $4 to $16 million per year) has been allocated to the Collaborative Program to address the requirements of the 2003 Opinion as well as conduct activities that assist in species recovery, for example, reintroduction of the silvery minnow into Big Bend National Park in Texas.

Reclamation manages the Collaborative Program and the federal funding for the Program primarily comes directly from its budget. Under the federal authorizing legislation, the non-federal cost share requirement is 25%. However, the non-federal entities do not share in the cost of water acquisition or federal program management. To date, about $12 million of the non-federal funds have come from the state of New Mexico through the ISC. This represents the majority of non-federal Program funds.

And, projects implemented by the Collaborative Program have been successful. The ISC believes the projects have had positive results for the species without adversely impacting water users. Flow targets have been met yearly and the silvery minnow and the flycatcher populations have improved since 2003. Both species habitat needs are better understood. However, the 2003 opinion is set to expire in 2013 and a new one is needed.

ISC Involvement

The ISC and other state agencies have been actively engaged in the Collaborative Program for a number of reasons. It is important to insure that compliance with ESA mandates does not create hurdles for Rio Grande Compact compliance. Also, where possible, it is important to find flexibility in Compact management to assist in ESA compliance. Additionally, it is part of the ISC's statutory charge to investigate, protect and develop New Mexico's waters, so part of the reason for the ISC involvement is to protect existing and planned future water uses. Finally, and perhaps most importantly, we are working to assure that water is not taken from New Mexico water users.

The ISC has taken the lead in the following projects or initiatives:

- habitat restoration for both species;
- constructed two off-stream silvery minnow refugia (hatcheries);
- operate the Los Lunas Silvery Minnow Refugium;
- worked to modify reservoir operations to provide spawning flows;
- provided water through Rio Grande Compact relinquishment operations and water rights acquisitions;
- conducted numerous scientific studies to increase the understanding of minnow needs; and
- published peer-reviewed reports on study results.

Where do we go from here?

The 2003 opinion is set to expire in 2013.

Given that the ABCWUA and the City and County of Santa Fe have begun to directly utilize their San Juan Chama Project water from the Rio Grande, there will be considerably less water available to supplement river flows. Additionally, even if that water was able, ISC's technical evaluation shows that the 2003 opinion flow requirements are unachievable over a multi-year timeframe because even one drought year can deplete the available water reserves. The ISC believes that increased flexibility in water and species management would be more sustainable and ultimately better for the ESA species, the ecosystem, and water users. Retaining the flow requirements from the 2003 opinion will not work.

We are working with other federal and non-federal stakeholders to develop the basis for a new biological opinion by 2013 when the 2003 opinion expires. Many challenges remain. Drought, increasing demands on surface and groundwater, remaining uncertainties regarding the needs of the species, and of course, reduced availability of funds to address the problems face us today.

The ISC's objectives for new biological opinion are that it:

- Provides Equal or better protections and certainty for New Mexico Water Users than the 2003 opinion;
- Is based on best available science including hydrologic realities;
- Is long-term (30 years or greater) such that water users and other stakeholders have more certainty
- Utilizes an adaptive management approach;
- Acknowledges the importance of improving habitat and maximizing nonwater solutions
- Reduces with time a dependence on managing the species in order to achieve self-sustaining populations
- Includes or ties in actions of all the federal and nonfederal parties; and
- If multiple opinions are issued for water operations and flood control there must still be programmatic ESA coverage through the Collaborative Program.

In conclusion, the State and its water users have a lot at stake in this consultation for a new biological opinion. Continued active engagement is the only way to potentially avoid costly litigation. The NMISC and other state agencies have remained engaged because disengagement would likely result in worsened conditions for the species and a greater likelihood that New Mexicans will have their water taken against their will.