Nos. 05-2399, 06-2020 & 06-2021 (Consolidated)

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RIO GRANDE SILVERY MINNOW *et al.*,
Plaintiffs-Appellees,

vs.

WILLIAM RINNE, Commissioner & BUREAU OF RECLAMATION, *et al.*
Federal Defendants-Appellants,

vs.

STATE OF NEW MEXICO and
MIDDLE RIO GRANDE CONSERVANCY DISTRICT,
Intervenors-Defendants-Appellants.

On Appeal From The U.S. District Court for the District of New Mexico
Hon. James A. Parker, Presiding

PLAINTIFFS-APPELLEES' RESPONSE BRIEF
(Oral Argument Is Requested)

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CORPORATE DISCLOSURE STATEMENT

Plaintiffs-Appellees Defenders of Wildlife, Forest Guardians, National Audubon Society, New Mexico Audubon Society, Sierra Club, and Southwest Environmental Center (hereafter, "Plaintiffs"), are all non-profit conservation organizations that do not issue any shares, are not publicly traded corporations, and are not controlled or affiliated with any publicly traded corporations.

The Rio Grande Silvery Minnow and Southwestern Willow Flycatcher are federally-listed endangered species, which are nominal parties represented by the Plaintiffs listed above.

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STATEMENT OF RELATED APPEALS

Rio Grande Silvery Minnow v. Keys, 10th Cir. Nos. 02-2130 et al., Order and Judgment, 46 Fed. Appx. 929, 2002 WL 31027874 (Sept. 11, 2002), dismissed initial appeals by the Defendants and Intervenors in this case.

Rio Grande Silvery Minnow v. Keys, 333 F.3d 1109 (10th Cir. 2003), *vacated* 355 F.3d 1215 (10th Cir. 2004), addressed many of the same issues presented in these consolidated appeals, but arose from an injunction that expired at the end of 2003, at which time the panel issuing the initial appeal decision vacated that decision.

Rio Grande Silvery Minnow v. Rinne, 10th Cir. No. 05-2293, is a pending appeal by the Middle Rio Grande Conservancy District of the lower court's dismissal of its Quiet Title cross-claims, which has been consolidated with this case for purposes of panel consideration but is being separately briefed.

Rio Grande Silvery Minnow v. Martinez, 10th Cir. No. 2315, previously consolidated with 10th Cir. No. 05-2293, was dismissed on April 18, 2006.

STATEMENT OF ISSUES

In his November 2005 final judgment, Judge James A. Parker confirmed the Bureau of Reclamation's ("Bureau") discretion to manage the Middle Rio Grande Project ("MRG Project") in compliance with the Endangered Species Act ("ESA"). He also approved a settlement between Plaintiffs and the City of Albuquerque dismissing all San Juan-Chama Project claims in return for establishing innovative water mechanisms to aid the long-term survival of the endangered Rio Grande silvery minnow.

1. Should this Court throw out as moot the district court's final judgment that resolved the critical issue of the scope of the Bureau's discretion, even though the discretion issue remains hotly disputed and has "real world" impacts in determining the Bureau's ongoing and future management of the MRG Project?

2. Did Judge Parker properly exercise his broad authority to remedy the Bureau's previously adjudicated ESA violations, by ordering it to adhere to his discretion rulings in future consultations over its MRG Project operations, which he found are virtually certain to occur in the near future?

3. As this Court previously did in June 2003, should it again affirm Judge Parker's determination on the merits that the Bureau has discretion in managing the MRG Project to avoid jeopardizing the endangered silvery minnow,

because the United States owns the Project and federal statutes and contracts establish the Bureau's discretionary authority, rather than restrict it?

4. Even if this case were moot – which it is not – have Appellants shown that Judge Parker abused his discretion in declining to vacate his prior rulings, as this Court authorized him to do?

STATEMENT OF THE CASE

Federal Defendants Bureau of Reclamation *et al.*, along with Intervenor-Defendants State of New Mexico ("State") and Middle Rio Grande Conservancy District ("MRGCD"), bring these consolidated appeals of Judge Parker's November 2005 final judgment, which resolved this long-pending case.

Plaintiffs brought this action in November 1999 under the ESA to compel Federal Defendants to utilize their authority in managing Middle Rio Grande water operations to preserve the endangered Rio Grande silvery minnow from extinction. *App. 257-86.* At that time, federal agencies had not conducted any ESA consultation, and insisted they had very limited authority over water project operations. *App. 275-78.* When the agencies later completed ESA consultations resulting in June 2001 and September 2002 biological opinions based on the same assertions about their limited discretion, Plaintiffs amended their complaint to challenge those opinions as well. *App. 404-34, 496-529.*

The State and MRGCD intervened shortly after the case was filed, along with the City of Albuquerque and the Rio Chama Acequia Association. *App. 286, 386; Docket Nos. 11, 74, 83, 166.* MRGCD also filed cross-claims asserting that it, and not the United States, holds title to the MRG Project facilities and storage water right. *App. 286-98, 530-44.*

In April 2002, the district court ruled for Plaintiffs on their claim that the Bureau was violating the ESA by failing to consult fully over its discretionary authority in managing Middle Rio Grande water operations. *App. 153-202.* In September 2002, after an evidentiary hearing, the lower court found that the Bureau failed to follow the court's earlier instruction to consider its expanded discretion in future consultations, and that the Bureau's failure not only violated the court's earlier order but also limited options for protecting the silvery minnow. *App. 204-32, 1321-24.* The district court further enjoined the Bureau to release stored San Juan-Chama Project water if necessary to preserve the minnow from river drying during fall 2002, finding that "the potential harm to the silvery minnow" from the Bureau's ESA violations "is imminent and irreparable." *Id.*

On appeals from that injunction, this Court affirmed Judge Parker's rulings in all respects, holding that the Bureau has broad discretionary authority over Middle Rio Grande water operations and must consult under the ESA over the exercise of that discretion. *Rio Grande Silvery Minnow v. Keys*, 333 F.3d 1109,

1121 (10th Cir. 2003). The Court also praised "the district court's painstaking, patient, and persistent efforts to entertain and address the complex legal and equitable issues spawned by this litigation." *Id.*, at 1138.

The Court later vacated the June 2003 Opinion as moot, because the injunction expired without taking effect (due to arrival of rains) and the Federal Defendants adopted a March 2003 Biological Opinion ("2003 BO") in response to Judge Parker's rulings. *Rio Grande Silvery Minnow v. Keys*, 355 F.3d 1215 (10th Cir. 2004). Contrary to their position now, Appellants insisted at that time that the 2003 BO did not render the appeals moot. *State Supp. Mootness Br., 10th Cir. Nos. 02-2254 et al. (filed 10/27/03), p. 4; Fed. Supp. Br. on Mootness., 10th Cir. Nos. 02-2254 et al. (filed 10/27/03), p. 5.*

While vacating its own opinion, the Court declined to vacate the lower court opinions, explaining that the case was not fully adjudicated and the district court "must be allowed to enter a judgment it determines appropriate." 355 F.3d at 1222. The Court emphasized that "if the district court's conclusion that the Bureau of Reclamation has discretion under the contracts is embodied in a final order, that analysis will once again be subject to review, and sufficient time for the appellate process to run will be available." *Id.*

The June 2003 Opinion also echoed the district court's observation that the situation on the Middle Rio Grande is "complex, difficult to resolve, and *evolving*."

333 F.3d at 1118 (emphasis in original). That remains true today. Key developments that have occurred since the Court remanded the case include the following:

(1) In April 2005, Plaintiffs reached a settlement with Albuquerque (and the Albuquerque-Bernalillo County Water Utility Authority, which is the City's successor in interest to San Juan-Chama water), to dismiss with prejudice all claims relating to the San Juan-Chama Project. In return, Albuquerque and the Authority agreed to dedicate 30,000 acre-feet of storage space in Abiquiu Reservoir as an "environmental pool," and to institute residential water "check off" and agricultural "forbearance" programs aimed at obtaining more water from willing sellers, to help preserve flows in the Middle Rio Grande. *App. 1538-48.*

Judge Parker approved this settlement in the November 2005 final judgment. *App. 243-45, 253-55.* As a result, the contentious disputes seen previously over the San Juan-Chama Project have now been resolved and eliminated from this litigation, and important steps have been taken toward achieving a long-term solution on the Middle Rio Grande.[1]

[1] As part of the settlement, Plaintiffs and Albuquerque had asked the district court to state in its final order that the portions of its prior opinions dealing with the San Juan-Chama Project are no longer in effect, due to the settlement. *App. 1546.* Judge Parker declined to take that step when he approved the settlement and entered final judgment. *App. 245.* Albuquerque and Plaintiffs concur, however, that this does not undermine their settlement, which remains binding as a court-approved order.

(2) In July 2005, following extensive briefing and a trial, Judge Parker issued a comprehensive decision rejecting MRGCD's cross-claims to ownership of the MRG Project.[2] MRGCD has appealed that ruling. *10th Circuit No. 05-2293.* In that appeal, Plaintiffs and Federal Defendants are aligned in agreeing that the United States – not MRGCD – owns the MRG Project. Pursuant to this Court's order of April 18, 2006, that appeal is consolidated with these appeals for decision by the same merits panel.

In entering the November 2005 final judgment, Judge Parker also noted that his quieting title to the MRG Project "confirms and underscores the ongoing nature of BOR's ESA obligations in the region," showing the case is not moot. *App. 240.*

(3) In 2005 and again in 2006, the Bureau and U.S. Fish and Wildlife Service ("Service") reinitiated consultation over the 2003 BO to address the effects of river drying below MRG Project diversion dams in killing silvery minnows. *See App. 843, 911-16; Supp. App. 37-103.* Both consultations resulted in amendments to the 2003 BO's "incidental take" limits. *Id.* These represent the fourth and fifth consultations, respectively, that have occurred over the Bureau's Middle Rio Grande water operations in the last five years.[3]

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[2] The July 2005 opinion is included in the Appendix filed by MRGCD ("MRGCD Appendix") in the related appeal, No. 05-2293, pp. 1178-1224.

[3] Consultations resulting in biological opinions also occurred in 2001, 2002, and 2003, as noted above. *App. 917-1044, 1150-1320.*

(4) New information indicates that the Bureau will not be able to comply with the 2003 BO's requirements for minimum flows in various reaches of the Middle Rio Grande, which the BO adopted to protect the silvery minnow. *Supp. App. 31-36, 137-46.* A recent report by the New Mexico Interstate Stream Commission used federal hydrological models to project that the Bureau is unlikely to comply with the 2003 BO flow requirements as soon as April 2007. *Supp. App. 31-36.* In fact, the Bureau already violated the 2003 BO in May 2006 by allowing river drying during the minnow spawning season. *Supp. App. 37.*

The Bureau thus is expected to reinitiate ESA consultation again soon over its operation of the MRG Project, and amend the 2003 BO yet again. Indeed, the Middle Rio Grande Endangered Species Act Collaborative Program – which includes the Bureau as well as other state and federal agencies and MRGCD – just held a workshop on August 16-17, 2006, to discuss options for management alternatives to replace the current BO flow requirements. *Supp. App. 137-46.*[4]

[4] As explained in Plaintiffs' Motion To Supplement Record, submitted herewith, the Court may consider these events occurring since the lower court entered judgment, because they confirm this case is not moot and hence the Court has Article III jurisdiction. *See Morganroth & Morganroth v. Delorean,* 213 F.3d 1301, 1309 (10th Cir. 2000); *Paper Allied-Industrial Workers v. Continental Carbon Co.,* 428 F.3d 1285, n. 2 (10th Cir. 2005); *City of Albuquerque v. Browner,* 97 F.3d 415, 420-21 (10th Cir. 1996) (all considering supplemental materials to determine jurisdiction, and concluding appeals were not moot).

These developments confirm the need for resolution of the core question presented throughout this case: Does the Bureau have discretion to manage the MRG Project in ways that may avoid jeopardizing the endangered minnow? That question remains hotly disputed by the Bureau, the State, and MRGCD, as their opening briefs reflect.[5]

In issuing his November 2005 final rulings, Judge Parker determined that this dispute is not moot, because the scope of the Bureau's discretion continues to guide its current management of the MRG Project under the 2003 BO, yet is unaffected by the Congressional "minnow rider." *Nov. 2005 Opinion, at 2-10 (App. 234-42).* In addition, since considerations such as "climate, water availability, [and] the understanding of minnow biology . . . are subject to change," he found that future consultations in which the discretion issue will also play a large role are "virtually a certainty." *Id., at 9 (App. 241).* He thus determined to resolve this dispute once and for all by entering final judgment reaffirming his prior rulings that the Bureau has broad discretion under the MRG Project statutes and contracts, and ordering the Bureau to adhere to those rulings in future ESA consultations as a remedy for its past ESA violations. *App. 233-43, 253-55.*

[5] The Bureau's discretion is also the focus of the *amicus curiae* brief submitted by the State of Arizona and various Colorado River water entities, reiterating the same arguments made by Appellants.

Because Judge Parker did not err in these rulings, and because his final judgment helps promote solutions on the Middle Rio Grande, this Court should deny the appeals and affirm in all respects.

STATEMENT OF FACTS

This Court is already familiar with this case and the plight of the endangered Rio Grande silvery minnow. *Rio Grande Silvery Minnow*, 333 F.3d at 1114-1120, 1125-27 & 1134-37.[6] *See also MRGCD v. Norton*, 294 F.3d 1220 (10th Cir. 2002); *Forest Guardians v. Babbitt*, 174 F.3d 1178 (10th Cir. 1999) (prior litigation over silvery minnow critical habitat). The district court's July 2005 opinion rejecting MRGCD's ownership cross-claims and the briefings before this Court in the companion appeal from that ruling also address the MRG Project in detail. *See Plaintiffs-Appellees' Response Brief, 10th Cir. No. 05-2293* (filed July 21, 2006).

Accordingly, Plaintiffs will not belabor those facts here. Instead, the following discussion focuses on key facts responding to Appellants' opening briefs, and on Judge Parker's November 2005 Opinion and Final Judgment.

[6] The June 2003 Opinion has no preclusive effect because it was vacated. But its factual discussion remains valid, and it is persuasive precedent on the legal issues it addressed, including the Bureau's discretion over the MRG Project. As this and other courts have recognized, opinions vacated for mootness retain informational and even precedential value. *Oklahoma Radio Assocs. v. FDIC*, 3 F.3d 1436, 1437, 1440-44 (10th Cir. 1993); *Mahoney v. Babbitt*, 113 F.3d 219, 223 (D.C. Cir. 1997); *Harris v. Board of Governors*, 938 F.2d 720, 723 (7th Cir. 1991); *Roe v. Anderson*, 34 F.3d 1400, 1404 (9th Cir. 1998).

Status of the Endangered Rio Grande Silvery Minnow.

MRGCD would have this Court believe that the silvery minnow has rebounded magically since 2003, and "is now present in astronomical numbers." *MRGCD Br., pp. 8-10, 38.* In truth, the minnow remains deeply imperiled.

By 1994, the silvery minnow – once one of the most abundant fishes in the Rio Grande basin – was limited to about 170 miles of the river between Cochiti and Elephant Butte Reservoirs (or less than 5% of its historical range), and had been extirpated from the remainder of the Rio Grande and the Pecos River. *See* 59 Fed. Reg. 36,988 (7/20/94). In listing the minnow as endangered, the Service attributed its decline to "modification of stream discharge patterns and channel desiccation by impoundments, water diversion for agriculture, and stream channelization." *Id.,* at 36,988.

In spring 1996, the species suffered a further blow when MRGCD began diversions during a drought year, drying up large portions of the river below Isleta and San Acacia diversion dams, where the majority of minnows were located. *App. 638*. Tens of thousands of minnows died, and "the pre-spawn die-off of adult breeding Rio Grande silvery minnows adversely impacted the population of this species." *Id.*

After similar drying killed more minnows in 1998, *id.*, and efforts to reach a negotiated solution failed, Plaintiffs filed this action in November 1999 and moved

for an injunction to compel the Bureau to utilize its discretionary authority over water operations on the Middle Rio Grande to prevent similar episodes from recurring. *App. 257; Docket Nos. 43-51.* Those efforts produced two Agreed Orders that helped avert further river drying and harm to the species in 2000. *Supp. App. 1-23.* These Orders also prompted a number of important measures that have been instrumental in protecting the silvery minnow from extinction since then, including: (1) the Bureau installed pumps below San Acacia dam to return water from the Low Flow Conveyance Channel back into the river; (2) efforts began to improve the efficiency of MRG Project water conveyance and better coordinate efforts to protect the minnow; (3) funding for a captive breeding facility to augment natural minnow populations was initiated; and (4) studies were launched to reduce problems of entrainment of minnows, minnow eggs, and larvae in irrigation facilities. *Id.*

In the six years since the captive minnow breeding program began in 2000, Federal Defendants have released more than 600,000 captive-reared silvery minnows into the Middle Rio Grande. *Supp. App. 66.* Due to the augmentation of the wild minnow populations with captive-bred minnows, and good spring runoffs in 2004 and 2005, minnow counts were higher in 2005 than in the last several years – which is the data that MRGCD trumpets. *Supp. App. 49, 60, 66; MRGCD Br., pp. 8-8 & App. 11.*

Yet even with these favorable conditions, 2005 minnow numbers were still **below** the population levels found in 1994, when the silvery minnow was listed as endangered. *Supp. App. 104*. Further, the latest data for 2006 indicate that, due to resumed drought conditions and the Bureau's failure to provide "spike" flows this year, there was not a good minnow spawn in spring or early summer 2006. *See* R. Dudley *et al.*, "Summary Of The Rio Grande Silvery Minnow Population Monitoring Program Results From June 2006" (July 21, 2006) (*Supp. App. 104-07, 117).* Minnow counts to date in 2006 are thus far below 2005. *Supp. App. 104* (population charts). These facts belie MRGCD's assertion that "[i]n fact, there is an upward spiral" in minnow populations. *MRGCD Br., p. 9.*

Moreover, the basic equation facing the silvery minnow remains dire – the species is still confined to just a small part of its historic range, and continues to suffer from river drying and other human impacts. Hatching captive minnows in aquaria and reintroducing them to the river are laudable efforts, but do not guarantee that the species will continue to survive in the wild, as the district court found. *See Sept. 2002 Opinion, pp. 19-20 (App. 222-23)* (addressing lack of genetic diversity in captive breeding program and other concerns).

The Minnow Rider.

As Appellants' briefs discuss in detail, Congress in late 2003 enacted, and later amended twice, the so-called "minnow rider," which has two central

provisions.[7] The first provision responds to the Court's June 2003 Opinion by prohibiting the Bureau from reallocating San Juan-Chama water for the minnow, unless agreed by willing participants. This part of the rider is now irrelevant to these appeals, however, because the lower court dismissed all San Juan-Chama Project claims with prejudice in approving Plaintiffs' settlement with Albuquerque. *App. 1538.*

The second part of the minnow rider declares that federal agencies' compliance with the 2003 BO fulfills their ESA duties toward the minnow (and willow flycatcher) in MRG Project water operations. *Energy and Water Development Appropriations Act of 2005, § 205(b), as amended by Energy and Water Development Appropriations Act of 2006, § 121(b).* The 2003 BO adopts a "Reasonable and Prudent Alternative" ("RPA") to avoid jeopardizing the silvery minnow, requiring various minimum flows intended to help promote successful spawning (since the minnow generally lives for only one year and is a prolific spawner under the right conditions, as the 2005 data illustrate). *App. 1003-11.*

[7] The first minnow rider, passed on December 1, 2003, is § 208(a) of the Energy and Water Development Appropriations Act of 2004, Pub. L. No. 108-137, 117 Stat. 1827. The second minnow rider, passed one year later, extended the period of protection of the 2003 BO to its 2013 expiration date. Energy and Water Development Appropriations Act of 2005, Pub. L. No. 108-447, § 205, 118 Stat. 2809, 2949 (Dec. 8, 2004). The third minnow rider amended the second rider by extending its protection to "any amendments" to the 2003 BO. Energy and Water Development Appropriations Act of 2006, Pub. L. No. 109-103, § 121(b), 119 Stat. 2247 (Nov. 19, 2005).

The 2003 BO's RPA also requires "salvage" of minnows from occupied river reaches that dry; imposes numeric limits on the amount of minnows that can be "incidentally taken" as a result of river drying; directs that the captive breeding program continue; and imposes other conditions the Service believes are necessary to avoid jeopardizing the species. *App. 1003-18* (listing all requirements of Reasonable and Prudent Alternative). Thus, this second part of the "minnow rider" applies **only** if the federal agencies **comply** with this suite of requirements from the 2003 BO.

The District Court's November 2005 Final Order.

In his November 2005 opinion and final judgment, Judge Parker held that this case is not moot and that he would not vacate his 2002 decisions. *App. 233-55.* He also approved the settlement between Plaintiffs and Albuquerque resolving Plaintiffs' San Juan-Chama Project ESA claims; and reaffirmed his earlier rulings that the Bureau has discretion to alter its management of the MRG Project in order to comply with the mandates of the ESA and protect the silvery minnow. *Id.*

Judge Parker made detailed factual findings and legal conclusions supporting his determination that the case is not moot and his equitable decision not to vacate his earlier rulings. These include the following:

1. Although the minnow rider removed the Bureau's discretion to reallocate San Juan-Chama Project water unilaterally to protect the minnow, the

rider is **silent** about the Bureau's authority over the MRG Project. This supported Judge Parker's determination that the rider does not moot the continuing dispute about the Bureau's discretion over the MRG Project:

> Applying the maxim 'expressio unius est exclusio alterius,' I interpret the clear expressions by Congress regarding SJP water contrasted with the total silence about MRGP water, in both the 2003 minnow rider and the 2004 minnow rider, to mean that Congress deliberately left the issue of discretion over MRGP water for decision by the federal agencies and the courts. . . . Therefore, the scope of BOR's discretionary authority to direct water operations (including storage, release, and diversions) involving MRGP water, so as to aid the endangered silvery minnow in accordance with the mandates of the ESA, remains a live and justiciable issue for the agency and/or judicial interpretation.

Nov. 2005 Opinion, at 7-8 (App. 239-40).

2. The Bureau and Service analyzed **two** alternative management scenarios in developing the 2003 BO – one based on the Bureau's narrow view of its discretion, and the other reflecting Judge Parker's rulings that it has broader discretion. *Id., p. 4 (App. 236).* But as the Federal Defendants advised Judge Parker during an August 2005 hearing, the agencies in fact "have been using the full discretion option contained in the 2003 BO" in accordance with his prior rulings. *Id., at 9 (App. 241).* Accordingly, Judge Parker found:

> Federal Defendants' adoption of the March 2003 BO constitutes voluntary cessation of their previous refusal to consider the full scope of their discretion. . . The Court is convinced that Federal Defendants, in connection with the March 2003 BO, broadened the scope of consultation to cover the full range of their discretion to comply with this Court's September 23, 2002 injunction order. Previously, they had failed to consult fully in regard to the September 2002 BO despite the Court's April 29, 2002 ruling on discretion.

Id., p. 8 (App. 240).

3. Judge Parker additionally found that, despite adhering to his ruling on discretion in adopting the 2003 BO, the Federal Defendants "have never acknowledged that their prior limited use of discretion in their consultations violated the ESA, nor have they guaranteed that they will not limit their discretion in future consultations, nor have they repudiated the use of limited discretion." *Id., at 9 (App. 241).* Further, "[t]here is no evidence at all that, in the absence of court orders mandating use of BOR's full scope of discretion in their water operations in the middle Rio Grande under the MRGP, in future ESA consultations they would consider the full range of agency discretion." *Id.*

4. Judge Parker also found that it is "virtually a certainty that there will be more ESA consultations in the near future over water operations on the Middle Rio Grande," citing the many consultations that have occurred since this case was brought – including in August 2005 when the court conducted its final hearing. *Id., at 8-9 (App. 240-41).* Thus, he concluded the Federal Defendants "have failed to establish that it is absolutely clear they would not return to their wrongful use of an impermissibly narrow and limited scope of discretion in future ESA consultations." *Id.*

5. Judge Parker found that his July 2005 opinion rejecting MRGCD's cross-claims, and quieting title to the Middle Rio Grande Project in the name of the

United States, "confirms and underscores the ongoing nature of BOR's ESA obligations in the region. Thus, reiterating this Court's determination of the discretion issue 'will have some effect in the real world.' *State of Wyoming*, 414 F.3d at 1212." *Id., at 8 (App. 240).*

6. Based on his questioning of counsel at the August 2005 hearing and facts of common knowledge that had been widely reported in local newspapers, Judge Parker further found that "Intervenors and Defendants precipitated the passage of the minnow riders . . . in that they planned, sought, and/or supported the riders' passage." *Id. at 17 (App. 249); see also App. 853-54, 885-90.*

7. Additionally, Judge Parker found that a final resolution of the dispute over the Bureau's discretion was strongly in the public interest:

> the Court finds that the issue of federal discretion to reduce contract deliveries of MRGC water in order to comply with the ESA has the potential to affect day-to-day operations in the middle Rio Grande valley, and will continue to be a major factor in future formal consultation. During the course of the proceedings in this case, virtually all the parties, as well as this Court and the Tenth Circuit Court of Appeals, have recognized that it is beneficial for everyone involved in water operations in the middle Rio Grande to have the discretion issue be a settled matter. Conversely, to undo the present certainty over the discretion issue would create unnecessary problems and ambiguities. As long as there is federal agency action related to the MRGP, there will be a need to know the scope of BOR's discretion. Final resolution of the legal issue about BOR's discretionary authority over the MRGP, through entry of final judgment in this litigation, will greatly serve the public interest.
>
> * * *

> The scope of federal agency discretion in operating the MRGP is of vital importance for determining how best to manage the project consistent with the ESA, for the economy of the region, and for the survival of the endangered silvery minnow in its last remaining natural habitat. . . . The benefit of keeping the prior decision intact weighs heavily because doing so prevents the uncertainty that prevailed in the past.

November 2005 Opinion, at 10, 18-19 (App. 242, 250-51).

Finally, Judge Parker also ordered Federal Defendants to adhere to his rulings about the Bureau's discretion over the MRG Project in future consultations. *Nov. 2005 Order and Final Judgment, at 2 (App. 254).* He explained that this relief was appropriate in light of the fact that Federal Defendants continue to dispute the scope of the Bureau's discretion, and was necessary to remedy the prior ESA violations. *Nov. 2005 Opinion, at 9-10, 18-19 (App. 241-42, 250-51).* Contrary to the Bureau's argument here that no finding of irreparable harm supported the injunction, Judge Parker noted that current efforts underway on the Middle Rio Grande "do not ensure the survival of the species," and:

> Additionally, even though an unusually wet spring in 2005 resulted in a dramatic increase in minnow spawning, it may never be known how the agencies' dogged refusal to consider using project water in past years to prevent unnecessary river drying has affected the downward spiral of the silvery minnow.

Id., at 9-10 (App. 241-42). Hence, he concluded, "movants have failed to establish that the effects of the ESA violation have been completely and irrevocably eradicated." *Id.*

SUMMARY OF ARGUMENT

The central dispute in this case has always been over the scope of the Bureau's discretion in managing Middle Rio Grande Project water operations. That dispute continues to this day, demonstrating this case is not moot.

In entering the November 2005 final judgment, Judge Parker properly resolved this long-standing dispute by confirming his prior rulings on the Bureau's discretion, and ordering Federal Defendants to adhere to those rulings in future ESA consultations over the MRG Project, which he found are virtually certain to occur again in the near future. This Court owes considerable deference to the lower court's factual findings, which are supported by the record.

In challenging the final judgment, Appellants fail to acknowledge that Judge Parker previously adjudicated that the Federal Defendants violated the ESA in failing to consult fully over the Bureau's discretion, and that he found the Federal Defendants would revert to their unlawful practices without a court order. These findings were supported by the fact that Federal Defendants had previously failed to comply with his April 2002 ruling on Bureau discretion during the summer of 2002, which led to the crisis of September 2002 and Judge Parker's second order reaffirming the discretion decision and directing release of San Juan-Chama water if necessary to meet flow requirements of the BO. By enjoining the Federal Defendants to adhere to his discretion rulings in future ESA consultations over the

MRG Project, Judge Parker thus crafted a limited remedy for those violations, which is well within his broad authority and serves the purposes of the ESA.

Appellants have also failed to carry their "heavy burden" of demonstrating that this case is moot, based on the minnow rider and 2003 BO. The record confirms Judge Parker's determination that the question of the Bureau's discretion remains disputed by the parties, and is live because it continues to determine the Bureau's current and future management of the MRG Project. Judge Parker properly weighed all the factors under the mootness tests adopted by the Supreme Court and this Court. And he did not make any clear error in his factual findings upon remand that Defendants actively worked to secure the "minnow rider" in order to sidestep the prior rulings of this Court and the district court, and hence there is no mootness under the "voluntary cessation" doctrine.

With respect to the merits, this Court should affirm – as it did in its June 2003 Opinion – Judge Parker's ruling that the Bureau has discretion to manage the MRG Project to prevent jeopardy to the endangered silvery minnow, and must continue to consult over the full range of its discretion to comply with the ESA. The Bureau's discretion arises as a matter of federal law from the United States' ownership of the MRG Project facilities and storage water right, and from the relevant federal statutes as well as the Bureau's 1951 Contract with MRGCD. Many other cases confirm these sources of the Bureau's discretion.

Moreover, the United States' retention of sovereign authority and the doctrine of unmistakable terms also establish that the 1951 Contract cannot be read as prohibiting the Bureau from complying with ESA requirements to avoid jeopardizing the endangered silvery minnow.

Finally, even if the case were moot (which it is not), Judge Parker properly declined to vacate his prior opinions, based on the public interest and Appellants' own actions, carefully following this Court's vacatur standards.

Accordingly, this Court should affirm the lower court's final judgment in all respects, and deny these consolidated appeals.

ARGUMENT

I. APPLICABLE LEGAL STANDARDS.

A. Standards of Appellate Review.

Appellants emphasize that this Court reviews the lower court's legal determinations *de novo*, which of course is true.

However, Appellants fail to acknowledge that this Court applies the abuse of discretion standard in reviewing the final remedies that Judge Parker crafted to remedy the Bureau's ESA violations. *MRGCD v. Norton*, 294 F.3d at 1225; *Mootheart v. Bell*, 21 F.3d 1499, 1504-05 (10th Cir. 1994). "An abuse of discretion occurs when the district court's decision is arbitrary, capricious or whimsical, or

results in a manifestly unreasonable judgment." *Mootheart*, 21 F.3d at 1504-05 (quotations omitted).

Moreover, the district court's factual findings in determining relief are to be upheld under the abuse of discretion standard, unless clearly erroneous. *Id.*, at 1506. Clear error review "is significantly deferential, requiring a 'definite and firm conviction that a mistake has been committed.'" *Concrete Pipe & Prods. v. Construction Laborers Pension Trust*, 508 U.S. 602, 623 (1993). "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse. . . . This is so even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts." *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74 (1985).

B. Standards For Assessing Mootness.

A case is moot if "the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Los Angeles County v. Davis,* 440 U.S. 625, 631 (1979). Mootness exists only if "(1) it can be said with assurance that there is no reasonable expectation . . . that the alleged violation will recur . . . **and** (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *City of Albuquerque v. Browner,* 97 F.3d 415, 420 (10th Cir. 1996) (emphasis added). "The crucial question is whether granting

a present determination of the issues offered will have some effect in the real world." *State of Wyoming v. U.S. Dep't of Agriculture*, 414 F. 3d 1207, 1212 (10th Cir. 2005), *quoting Citizens for Responsible Government v. Davidson*, 236 F.3d 1174, 1182 (10th Cir. 2000).

"[T]he burden of demonstrating mootness 'is a heavy one.'" *Davis,* 440 U.S. at 631*, quoting United States v. W.T. Grant Co.,* 345 U.S. 629, 632-33 (1953). The party seeking dismissal must show two things: first, that "it is '**absolutely clear** that the alleged wrongful behavior could not be reasonably expected to occur,'" *Gwaltney v. Chesapeake Bay Foundation*, 484 U.S. 49, 66 (1987) (emphasis in original); and, second, that "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Davis*, 440 U.S. at 631; *City of Albuquerque*, 97 F.3d at 420. Where there is "some cognizable danger of recurrent violation, something more than the mere possibility," the case is not moot, even where defendants have disclaimed any intention to "revive the illegal practice." *W. T. Grant*, 345 U.S. at 633. In addition, the "public interest in having the legality of the practices settled" is an important factor affecting the mootness determination. *Id.,* at 632.

C. Endangered Species Act Requirements.

In enacting the ESA, "Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered

species the highest of priorities, thereby adopting a policy which it described as 'institutionalized caution.'" *TVA v. Hill*, 437 U.S. 153, 194 (1978). "The plain intent of Congress in enacting [the ESA] was to halt and reverse the trend toward species extinction, whatever the cost," and "require[s] agencies to afford first priority to the declared national policy of saving endangered species." *Id., at 184-85.*

ESA Section 7(a)(2) imposes the substantive command that federal agencies "shall. . . insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species. . . or result in the destruction or adverse modification" of critical habitat. *16 U.S.C. § 1536(a)(2).* "Jeopardize" means "to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." *50 C.F.R. § 402.02.*

Section 7(a)(2) also imposes procedural requirements that federal agencies must "consult" with the Service, through preparation of biological assessments and biological opinions, to evaluate the likely effects of their actions and develop alternatives to minimize harm and avoid jeopardy to listed species. *16 U.S.C. § 1536(a)(2); 50 C.F.R. Part 402.*

Agency "actions" subject to the ESA Section 7 jeopardy and consultation mandates are defined as:

> all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States . . . Examples include, but are not limited to: . . .(d) actions directly or indirectly causing modifications to the land, water, or air.

50 C.F.R. § 402.02. Consultation must address all aspects of federal agency actions, meaning direct and indirect impacts, and effects of other activities that are interrelated or interdependent, including private actions. *Id.; Riverside Irr. Dist. v. Andrews,* 758 F.2d 508 (10th Cir. 1985) (Corps properly considered "indirect" effects of dam in dewatering critical stream habitat).

When a federal action was previously initiated but ongoing, consultation is required if the agency retains "discretionary Federal involvement or control" within the meaning of 50 C.F.R. §§ 402.03 & 402.16. *PRC v. Thomas,* 30 F.3d 1050, 1054-55 (9th Cir. 1994). As directed by *TVA v. Hill*, courts take a broad view of what constitutes "agency action." *See NRDC v. Houston,* 146 F.3d 1118, 1125 (9th Cir. 1998), *cert. denied*, 526 U.S. 1111 (1999); *PRC v. Thomas*, 30 F.3d at 1054 ("there is little doubt that Congress intended to enact a broad definition of agency action in the ESA").

Finally, the substantive "no jeopardy" mandate of Section 7(a)(2) continues to apply to federal agencies even if they have conformed with its procedural requirements by conducting consultation. *See, e.g., NRDC v. Houston*, 146 F.3d at 1128-29 (issuance of BO did not moot ESA consultation claims); *Resources Ltd. v. Robertson*, 35 F.3d 1300, 1304-05 (9th Cir. 1994) (noting that "[c]onsulting with

FWS alone does not satisfy an agency's duty under the [ESA]," and holding that agency violated ESA "jeopardy" requirement by pursuing logging plans in grizzly bear habitat without considering best available science and data).

II. THE DISTRICT COURT PROPERLY ENTERED FINAL JUDGMENT TO RESOLVE THE KEY DISPUTE IN THIS LITIGATION AND REMEDY THE BUREAU'S ESA VIOLATIONS.

In insisting that this case is moot, Appellants mischaracterize both the claims presented and the jurisdictional basis on which Judge Parker acted in entering final judgment.

As explained below, this case has never been limited to judicial review of final biological opinions pursuant to the Administrative Procedure Act ("APA"), as Appellants assert. Instead it has always centered on ESA claims that the Bureau violated Section 7 in failing to consult over the full scope of its discretion, over which the district court had jurisdiction under the ESA citizen suit provision. *See Bennett v. Spear,* 520 U.S. 154, 171-75 (1997). Contrary to MRGCD's assertion that Judge Parker never adjudicated these claims, *see MRGCD Br., pp. 16-17,* in fact the lower court entered partial judgment in addition to injunctive relief on those ESA claims in Plaintiffs' favor. The following discussion underscores these points, to confirm Judge Parker's jurisdiction and ruling that the case is not moot. [8]

[8] Plaintiffs did not, as Appellants contend, concede this case is moot by moving to dismiss all their claims after this Court's January 2004 ruling. Rather, Plaintiffs

A. This Case Has Always Sought To Require The Bureau To Comply With The ESA By Fully Consulting Over Its Discretion.

When Plaintiffs filed this case in November 1999, they did not identify any biological opinion for judicial review – because there was none to challenge. Even though the minnow was listed as endangered in 1994, the federal agencies had not completed any ESA consultation over their Middle Rio Grande water management. *App. 275.*

In fact, the Bureau was **refusing** to consult over the full scope of its discretionary authority in managing Middle Rio Grande water operations. *Id.* As to the MRG Project, the Bureau's view was essentially that it must follow MRGCD's instructions in water storage, releases, and diversions, irrespective of whether they might cause river drying that would harm the minnow, as occurred in 1996 and 1998. *Id.* And the Bureau simply ignored its duty under the Reclamation laws to ensure that MRGCD was not diverting more water than it could actually put to beneficial use – even though the Bureau's own reports and other information indicated that MRGCD was among the most inefficient irrigation districts in the

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filed a motion to voluntarily dismiss their "remaining **unadjudicated** claims" that had not previously been resolved by Judge Parker in his April and September 2002 rulings. *App. 1633.* Plaintiffs did so believing that, since the discretion issue had been resolved by the court, such a motion would be an efficient vehicle to bring the case to conclusion. Subsequently, after Defendants raised mootness and vacatur issues, Plaintiffs withdrew that motion, and have always asserted that the case as a whole was not moot. *App. 1699.*

West, taking far more water out of the Middle Rio Grande than it actually needed for irrigation use. *See App. 275-77 & 622-24.*[9]

From the very first sentence of the original complaint, which "seeks declaratory and injunctive relief," Plaintiffs made clear that the focus of this action was on resolving the disputed question of federal agencies' discretionary authority over Middle Rio Grande water operations, to compel them to comply with the ESA. *See App. 258-84* (original complaint). This issue was squarely presented in the First Claim for Relief under the ESA citizen suit provision, *16 U.S.C. § 1540(g),* alleging that Federal Defendants' refusal to consult fully over their discretionary authority violated the procedural (consultation) and substantive (no jeopardy) mandates of ESA Section 7(a)(2). *App. 276-78.* It is also reflected in the Second Claim for Relief, alleging violations of the ESA Section 7(a)(1) "duty to conserve," and the Fourth Claim for Relief, alleging unlawful "take" of in violation of ESA Section 9. *App. 278-81.*

After the Service finally issued its first biological opinion on Middle Rio Grande water operations in June 2001, Plaintiffs amended their complaint to challenge it and its incidental take statement in new Sixth and Seventh Claims for

[9] As this Court noted, MRGCD in the 1990's was diverting over 11 acre-feet of water per acre, when the State Engineer stated that reasonable beneficial use was 7.2 acre-feet per acre, and the State's farm delivery requirement was only 3 acre-feet per acre. 333 F.3d at 1134 n.37. Then, and still to this day, MRGCD has never submitted proof of beneficial use to the New Mexico State Engineer to confirm the exact amount of its claimed water rights. *Id.*

Relief. *App. 405, 428-30.* And when the agencies adopted the September 2002 BO to replace the 2001 BO, Plaintiffs again amended their complaint to add an Eighth Claim for Relief challenging it. *App. 497, 522-25.* Yet the amended pleadings continued to reiterate the First, Second, and Fourth Claims for Relief under ESA Sections 7 and 9, because the Federal Defendants unduly narrowed the scope of these consultations.

It is thus wrong for Appellants to contend this case is only about APA review of biological opinions. Instead, as Judge Parker noted, "From the beginning of this litigation, Plaintiffs have asserted as their main point that BOR and the Corps have failed to consult fully with FWS under the ESA over all the action in regard to which BOR and the Corps have discretion (Count 1)." *April 2002 Opinion, at 20 (App. 172).* This Court recognized this same point. *See* 333 F.3d at 1113 ("The issue in this appeal is whether the Bureau . . . has discretion").

B. The ESA Establishes Federal Jurisdiction Over These Claims.

Neither are Appellants correct in asserting that federal jurisdiction only exists in this case under the APA. The ESA citizen suit provision expressly authorizes federal jurisdiction and injunctive relief for the Bureau's failure to consult over the full range of its discretionary authority over the MRG Project, aside from any "final agency action" which is the basis for federal jurisdiction under the APA. *See* 16 U.S.C. § 1540(g)(1) ("the district courts shall have

jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce any such provision or regulation" under the ESA, including "to enjoin any person, including the United States and any other governmental instrumentality or agency. . . who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof").

As the U.S. Supreme Court has held, the ESA thus provides the basis for federal jurisdiction over claims alleging violation of the mandatory duties imposed by the ESA, including during the consultation process. *See Bennett v. Spear*, 520 U.S. 154, 171-78 (1997). *Bennett* explained that the ESA citizen suit provision "is a means by which private parties may enforce the substantive provisions of the ESA against regulated parties," including "both private entities and Government agencies." *Id.*, at 173. At the same time, the APA establishes the basis for judicial review of "final agency actions" that the Service takes, providing the avenue for review of claims such as whether final biological opinions are arbitrary or capricious. *Id.* *Bennett* thus upheld federal jurisdiction under the ESA over a claim that the Service violated mandatory duties concerning critical habitat designation in issuing a biological opinion, but ruled that challenges to the opinion itself properly lie under the APA's judicial review provisions, not the ESA citizen suit provision. *Id.*, at 172-76.

Bennett is squarely applicable here, yet is ignored by Appellants. The district court, however, properly followed its guidance in distinguishing between Plaintiffs' **ESA-based claims** against the Bureau for violating its mandatory ESA duties (First, Second, and Fourth Claims for Relief), and their **APA claims** challenging the Service's final biological opinions (Sixth and Eighth Claims for Relief). *See April 2002 Opinion, 20-34 (App. 172-86); Sept. 2002 Opinion 2-10, 24-28 (App. 205-13, 227-31; Nov. 2005 Opinion, pp. 3-10 (App. 235-42).*

C. Judge Parker Properly Entered Final Judgment Based On His Prior Rulings That Defendants Violated The ESA.

MRGCD further argues the district court never ruled on the merits of any of Plaintiffs' claims, such that federal jurisdiction supposedly evaporated by the time Judge Parker entered final judgment in November 2005. *MRGCD Br. at 16-17.*

To the contrary, Judge Parker's April 2002 ruling adjudicated the merits of several of Plaintiffs' claims, as his opinion noted at the outset. *See April 2002 Opinion, at 1(App. 153)* ("The parties submitted detailed legal memoranda on the merits of Plaintiffs' claims, and a hearing on the merits was held on November 19, 2001"). He expressly ruled for Plaintiffs that the Bureau violated the ESA by failing to consult fully about the scope of its discretion over both the MRG and San Juan-Chama Projects, pursuant to the First Claim for Relief. *Id., pp. 20-45 (App. 172-97).* Judge Parker found this claim was not moot despite the Service's

issuance of the 2001 BO, citing the Ninth Circuit's decision in *NRDC v. Houston*, 146 F.3d 1118 (9th Cir. 1998), *cert. denied* 526 U.S. 1111 (1999), which held:

> Procedural violations of the ESA are not necessarily mooted by a finding by the FWS that a substantive violation of the ESA had not occurred. The [proper consultation] process, which was not observed here, itself offers valuable protections against the *risk* of a substantive violation and ensures that environmental concerns will be properly factored into the decision-making process as intended by Congress.

146 F.3d at 1128-29 (emphasis in original), *cited in April 2002 Opinion at p. 22 (App. 174).*

Although Judge Parker did rule against Plaintiffs on their Sixth Claim for Relief in the April 2002 Opinion, holding the 2001 BO was not arbitrary and capricious despite the Bureau's failure to fully consult, he explained this was because the BO would only last until 2003, after which a new consultation would be conducted in accordance with his rulings concerning the scope of the Bureau's discretion. *April 2002 Opinion, pp. 41-45 (App. 193-97).* He concluded by confirming that "Plaintiffs have prevailed on at least one significant issue in the case," *i.e.*, the question of the Bureau's discretion. *Id., at 49-50 (App. 201-02).*

In the September 2002 decision, Judge Parker reiterated these rulings about the scope of the Bureau's discretion over Middle Rio Grande water operations, and this time he reversed the 2002 BO as arbitrary and capricious, thus granting Plaintiffs partial summary judgment on their Eighth Claim for Relief. *Sept. 2002 Opinion And Partial Judgment (App. 204-231; 1321-23).* He specifically faulted

the Federal Defendants for failing to adhere to his prior rulings on the scope of the Bureau's discretion. *Id.* He also held that, if the 2002 BO were allowed to be implemented, it would "jeopardize" and "take" silvery minnows by causing excessive river drying that imperiled the remaining minnow populations, which then were at extremely low numbers. *Sept. 2002 Opinion, at 21-22 (App. 224-25*. Judge Parker thus ruled that Plaintiffs were "likely to succeed on the merits of their First (jeopardy), Second (failure to conserve), and Fourth (take) Claims for Relief in their Third Amended Complaint." *Id., at 27 (App. 230).*

In his November 2005 opinion and final judgment, Judge Parker concluded this case is not moot, because relief was still needed to remedy these adjudicated violations of the ESA. As quoted above, he made express findings to support these rulings, including that: (1) the minnow had suffered incalculable harm as a result of the prior violations, (2) the effects of the violations were not "completely and irrevocably eradicated," and (3) the Bureau would return to its prior narrow view of its discretion, unless ordered otherwise by the court. *See November 2005 Opinion, pp. 8-9 (App. 240-41).*

Under the mootness standards discussed above, a case can only be found moot if "it is '**absolutely clear** that the alleged wrongful behavior could not be reasonably expected to occur,'" *Gwaltney, supra*, 484 U.S. at 66 (emphasis in original); and "interim relief or events have completely and irrevocably eradicated

the effects of the alleged violation." *Davis*, 440 U.S. at 631; *City of Albuquerque*, 97 F.3d at 420. Judge Parker specifically found **neither** of these criteria were met, and hence he determined that the case is not moot and that he should enter final judgment to remedy the adjudicated ESA violations. Because his factual findings were not clearly erroneous, and he committed no legal error in following the relevant mootness standards, this Court must affirm.

III. THE 2003 BO AND MINNOW RIDER DO NOT MOOT THIS CASE.

Judge Parker also correctly rejected Appellants' arguments that the 2003 BO and the minnow rider mooted the dispute about the Bureau's discretion. *See Statement of Facts, supra, pp. 15-18.* As discussed below, he did not clearly err in his factual findings underlying these rulings; and his legal conclusions again follow the mootness standards enunciated by the Supreme Court and this Court.

A. The Discretion Issue Continues To Have "Real World" Effects.

As described above and confirmed in the rulings of both this Court and the district court, the scope of federal discretion over MRG Project operations is of overwhelming and ongoing importance to all Middle Rio Grande stakeholders. When Plaintiffs filed this case in 1999, there had never been any consultation over the impacts of these operations on the silvery minnow. Since then, consultations resulting in new or revised biological opinions have occurred almost every year: 2001, 2002, 2003, 2005, and 2006. *App. 843, 911-16, 917, 1150-1320; Docket No.*

670; Supp. App. 24-31 & 37-103. Another consultation is about to be initiated, in view of the agencies' looming inability to meet the 2003 BO flow requirements. *Supp. App. 31-36, 137-46.*

Judge Parker correctly found that the Bureau's discretion over the MRG Project continues to have immediate importance in these ongoing and upcoming consultations. Indeed, every time the agencies conduct ESA consultation over MRG Project water operations, the Bureau must take a position on how much discretion it has over those operations, *i.e.*, to what extent it can revise operations in order to avoid jeopardy to the Rio Grande silvery minnow.

Moreover, the scope of its discretion is critical to the Bureau even when it is not the midst of a consultation. The extent of the Bureau's authority to alter operations of El Vado Dam or the MRG Project diversion dams affects the success of its efforts every day to comply with the flow requirements of the 2003 BO. If the Bureau has broad discretion to control water operations, it is also more likely to be able to purchase necessary water, because water rights holders will know that, one way or another, the Bureau will have to obtain enough water to avoid jeopardy. And, if it accepts its full scope of discretion over water operations, the Bureau is more likely to be able to take action necessary to avoid violations of the BO's flow requirements, as occurred this spring. Thus, the repercussions of the

Bureau's scope of discretion are felt in every day of MRG Project water operations, regardless of the legal protections provided by the minnow rider.

The "crucial question" in assessing mootness "is whether granting a present determination of the issues offered will have some effect in the real world." *State of Wyoming,* 414 F. 3d at 1212. Judge Parker expressly found that the discretion issue remains live under this test, because of its importance to the Bureau's ongoing and future management of the MRG Project under the ESA. *Nov. 2005 Opinion, p.8 (App. 240).* Because the record supports that determination, this Court should affirm it.

B. Appellants Agree That The Discretion Issue Remains Vitally Important Despite Issuance of the 2003 BO.

Indeed, Appellants themselves have acknowledged that the discretion issue remains directly at issue in the Bureau's Middle Rio Grande management, and is not mooted by the 2003 BO – as they insisted to this Court in their supplemental briefings on mootness in the last appeals.

For instance, the Federal Defendants explained that even after adoption of the 2003 BO, "the legal question of Reclamation's discretion to use Project water for endangered species may well recur," including because the Bureau might be unable to obtain sufficient water to comply with the BO's flow requirements. *See Fed. Supp. Br. on Mootness, 10th Cir. Nos. 02-2254 et al., p. 5.* That forecast has

now proven accurate, as the Bureau already failed to meet flow requirements this year and faces even greater problems in the coming years.

Likewise, the State asserted that the 2003 BO "did not terminate the live controversy," because it "contains actions that will only be implemented if this Court affirms the district court's order concerning the USBR's discretion." *See State Supp. Mootness Br., 10th Cir. Nos. 02-2254 et al., p. 4.* Indeed, the State's arguments to this Court three years ago aptly summarize why the dispute over the Bureau's discretion remains a very live and important controversy today:

> The drought cycle of the Rio Grande Basin is the driving force behind both the brevity of the challenged action in this case and the likelihood that it will recur. The record in this case amply shows that flows in the Rio Grande are subject to drought, depending upon both the snow pack and summer monsoons. When both are lacking, as they were in 1999, 2000, 2001, and 2002, everyone who depends upon flows in the Rio Grande, including the silvery minnow, is at risk. In the Rio Grande Basin as elsewhere in the West, such drought cycles are common, and therefore there is a "reasonable expectation" that flows will again reach a critically low level in the future, triggering the need for consultation to address the impact of the low flows on the silvery minnow.

Id., p.7.

These prior admissions by Appellants thus confirm the lower court's similar findings that the discretion issue remains alive and of daily importance. At a minimum, having previously asserted that the issue is live, the Appellants fail to carry their heavy burden of showing mootness now.

C. The Public Interest Confirms The Discretion Issue Is Not Moot.

As quoted above, the district court also made detailed findings that resolution of the Bureau's discretion over MRG Project operations is of vital public importance. *Nov. 2005 Opinion, pp. 10, 18-19 (App. 242, 250-51).*

Again, there is no error here. The "public interest in having the legality of the practices settled" is an important consideration in determining mootness. *W. T. Grant Co.,* 345 U.S. at 632. This Court itself emphasized these same concerns, in holding that the discretion issue was ripe for resolution in the June 2003 Opinion. *See* 333 F.3d at 1121 ("resolution of the purely legal question as the heart of this appeal may permit the parties to fully address the array of long-term planning and water management issues which lurk beneath the surface").

D. Federal Defendants' Refusal To Acknowledge Their ESA Violations Also Shows The Case Is Not Moot.

Judge Parker also found that the case is not moot because the Federal Defendants had never acknowledged or repudiated their past ESA violations; they had signaled their "willingness to return to their old ways;" and there was no evidence that in the absence of court orders, they would "consider the full range of agency discretion." *Nov. 2005 Opinion at 9 (App. 241).*

This Court owes considerable deference to these factual findings by the district court, and Judge Parker committed no error of law in concluding that the case was not moot based on the findings. As the Supreme Court stated in *Walling*

v. Helmerich & Payne, Inc., 323 U.S. 37, 43 (1944), "it is long recognized that likelihood of recurrence of challenged activity is more substantial when cessation is not based on recognition of initial illegality of that conduct." There the Court found the case not moot where the defendant withdrew its allegedly illegal contract but failed to acknowledge its illegality.

Similarly, in *Sierra Club v. Cargill*, 732 F. Supp. 1095 (D. Colo. 1990), plaintiffs challenged the Forest Service's adoption of a seven-year regeneration standard for logging as violating the Forest Plan, and the Forest Service then issued a directive requiring regeneration in five years (as mandated by the Plan). The court found that the case was not moot because, *inter alia*, the Service had "not repudiated the legality of the longer standard." 732 F. Supp. at 1098. Because the Forest Service still considered the seven-year standard to be legal, "there is no guarantee the Forest Service will not revert to its use." *Id.*

The court came to a similar conclusion in *NRDC v. EPA*, 595 F. Supp. 1255 (S.D.N.Y. 1984), where the agency withdrew a challenged notice of proposed rulemaking. In finding the case not moot, the court stated, "when an administrative agency withdraws an order while still maintaining that the legal position is justified, repetition is likely and the claim should not be considered moot." 595 F. Supp. at 1263, *citing Doe v. Harris*, 696 F.2d 109, 113 (D.C. Cir. 1982) ("when a complaint identifies official conduct as wrongful and the legality

of that conduct is vigorously asserted by the officers in question, the complainant may justifiably project repetition"). *See also Blue Ocean Preservation Soc. v. Watkins*, 767 F. Supp. 1518, 1524-25 (case not moot where DOE "consistently claimed" that it had no duty to prepare EIS but was simply choosing to do so); *Gray Panthers Project Fund v. Thompson*, 273 F. Supp. 2d 32, 36 (D.D.C. 2002) (case not moot where "the court is troubled by the Secretary's failure to confess error regarding his past conduct . . .Given this position, the court cannot be convinced that the violations will not reoccur").

In this case, as Judge Parker found, there is ample evidence that Federal Defendants will revive their original narrow view of their discretion if given the opportunity. Their pursuit of this appeal further confirms this fact. Appellants have thus failed to show it is "absolutely clear" their wrongful behavior could not reasonably be expected to recur; and thus this case cannot be moot.

E. The Case Law Supports the District Court's Determination That This Case Is Not Moot.

Appellants cite *SUWA v. Smith*, 110 F. 3d 724, 727 (10th Cir. 1997), *American Rivers v. Nat'l Marine Fisheries Serv.*, 126 F. 3d 1118, 1124 (9th Cir. 1997), and *Forest Guardians v. U.S. Forest Service*, 329 F. 3d 1089, 1096 (9th Cir. 2003), to argue that issuance of the 2003 BO moots Plaintiffs' claims, including the dispute over the Bureau's discretion. But those cases are easily distinguishable from this one, and do not support a mootness finding here.

Indeed, while the State now joins the other Appellants in citing these cases, previously it argued to this Court that they "are readily distinguishable." *State Supp. Br. on Mootness, 10th Cir. Nos. 02-2254 et al., at 4, n.1.* As the State pointed out, because the terms of the 2003 BO were dictated by Judge Parker's rulings and would not have been followed in the absence of those rulings, this dispute is live and not moot.

As Judge Parker also held, *SUWA* is not controlling here because plaintiffs there only sought to compel agencies to undertake an ESA consultation, and hence issuance of a BO provided the requested relief. By contrast, in this case, the key question is and remains the scope of the Bureau's discretion in complying with the ESA. *See April 2002 Opinion, at 22-23 (App. 174-75)* (addressing *SUWA*). In addition, *SUWA* noted that the agency was unlikely to violate Section 7(a)(2) in any future agency action, *see* 110 F. 3d at 729; whereas here Judge Parker has expressly found otherwise – that the Bureau would revert to its narrow views of its discretion, in violation of the ESA, unless ordered to comply with his rulings. *Nov. 2005 Opinion, at 9-10 (App. 241-42).*

Likewise, both *American Rivers* and *Forest Guardians* concerned challenges to biological opinions or alleged violations of BOs, rather than claims that the agency unlawfully narrowed its scope of discretion in consultation. In those cases

also, there was no indication that the agency would repeat its same ESA violations in the future, as there is here.

Cases with facts more in line with this one confirm that adoption of a valid biological opinion does not moot out ESA consultation claims, particularly over the scope of an agency's discretion. *See NRDC v. Houston*, *supra*, 146 F. 3d at 1128-29 (completion of BO did not moot claims that agencies unduly narrowed the scope of the consultation by failing to address Bureau's discretion in limiting water deliveries to aid endangered fish); *Center for Marine Conservation v. Brown*, 917 F. Supp. 1128 (S.D. Tex. 1996) (ESA claims not mooted by supplemental BOs).

In addition, as this Court has held, "courts still consider [environmental] claims after the proposed action has been completed when the court can provide **some remedy** if it determines that an agency failed to comply" with law. *See Airport Neighbors Alliance, Inc. v. US*, 90 F.3d 426, 428-29 (10th Cir. 1996) (emphasis added).

The Ninth Circuit held the same in a recent ruling, which is apposite authority here. *See Forest Guardians v. Johanns*, 450 F.3d 455 (9th Cir. 2006). *Johanns* found the case was not moot where plaintiff sought reinitiation of consultation over Forest Service grazing permits and the agency did reinitiate consultation, noting "that is not the only form of effective relief" that the plaintiff sought or the district court could grant. 450 F.3d at 462. The court explained that

"a declaratory judgment that [the agency] violated the ESA would provide effective relief by governing the Forest Service's actions for the remainder of the allotment's permit term and by prohibiting it from continuing to violate the law," as well as guide grazing management on other Forest Service lands. *Id*. Hence, the relief would "resolve a dispute with present and future consequences." 450 F.3d at 463. The same scenario exists here, as Judge Parker's findings make clear in determining that the Bureau would revert to its old unlawful view of its discretion unless the court ordered it to do otherwise.

In short, Judge Parker did not err in concluding that the dispute in this case is different than *SUWA*, and remains live, because the Federal Defendants continue to dispute their discretion and ESA consultation duties. As confirmed by this Court's *Airport Neighbors* and the Ninth Circuit's *Johanns* decisions, the lower court's final order provides "some relief" for the Bureau's ESA violations, and "resolves a dispute with present and future consequences," thus demonstrating the case is not moot.

F. The Minnow Rider Does Not Moot The Discretion Issue.

Contrary to Appellants' claims, this Court did **not** determine that the minnow rider made the prior appeals moot. Instead, the January 2004 Opinion held the appeals moot exclusively because of "[t]he climatological circumstances that occurred during the appeal and the passage of time." *See* 355 F.3d at 1219.

Neither did the district court err in its legal reading that the minnow rider does not moot this case. As a matter of statutory construction, the fact that Congress responded to this Court's 2003 Opinion by forbidding the Bureau from utilizing its discretion to reallocate San Juan-Chama water, yet did not adopt similar language for the MRG Project, underscores that the rider on its face cannot be read to moot out the parties' dispute about the Bureau's discretion over MRG Project operations, as Judge Parker held. *Nov. 2005 Opinion, at 7-8 (App. 239-40).*

This omission of the MRG Project from the minnow rider is even more telling in light of MRGCD's admission that it went to Congress and asked that MRG Project water be taken off the table for ESA compliance, just as other Defendants were asking for San Juan-Chama water. *App. 893.*[10] Yet Congress chose not to grant MRGCD's request.

Moreover, the second part of the minnow rider – declaring that compliance with the March 2003 BO fulfills the federal agencies' ESA duties – does not eliminate the MRG Project discretion issue either. First, this congressional

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[10] The following exchange occurred between Judge Parker and counsel for MRGCD at the August 2005 hearing:

> THE COURT: Did the Middle Rio Grande Conservancy District make an effort to have Congress remove discretion of the BOR over Middle Rio Grande Project waters?
>
> MR. DUMARS: That was the initial position . . .

App. at 893. Earlier in the hearing, Mr. DuMars stated that he was "involved" in the rider process. *App. at 891.* MRGCD's Brief here also confirms that "MRGCD and others sought" the rider from Congress. *MRGCD Br. at 33.*

affirmation of the 2003 BO is conditional upon the agencies' **compliance** with the BO, and the scope of the Bureau's discretion authority to manage the MRG Project directly affects its daily efforts to do so.

In addition, as discussed above, the Bureau and Service have already revisited the 2003 BO twice so far, and are about to do so yet again. Every time a new consultation occurs, the scope of the Bureau's discretion determines the actions that can be considered to protect the minnow. The scope of discretion thus determines what steps will be taken – this year and every year – to avoid extinction of the minnow. Nothing in the minnow rider eliminates the ongoing importance of that vital issue.

G. Judge Parker Also Properly Applied The Voluntary Cessation Doctrine To Find The Case Is Not Moot.

Finally, Judge Parker also held that this case is not moot based on the "voluntary cessation" doctrine. *See Nov. 2005 Opinion, pp. 8-9 (App. 240-41).* There is no reversible error in this separate ground for rejecting Appellants' mootness claim.

"It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *Buckhannon v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598, 609 (2001). In *W. T. Grant Co., supra,* the Supreme Court explained why voluntary cessation of conduct does not render a case moot:

> A controversy may remain to be settled in such circumstances, e.g., a dispute over the legality of the challenged practices. The defendant is free to return to his old ways. This, together with a public interest in having the legality of the practices settled, militates against a mootness conclusion. For to say that the case has become moot means that the defendant is entitled to a dismissal as a matter of right. The courts have rightly refused to grant defendants such a powerful weapon against public law enforcement. . . .
>
> Along with its power to hear the case, the court's power to grant injunctive relief survives the discontinuance of the illegal conduct.

345 U.S. at 632-33 (internal citations omitted).

Courts consider compliance with a judicial order to constitute "voluntary cessation" which does not moot a case. *See Ass'n of Greeting Card Publishers v. U.S. Postal Service*, 569 F.2d 570, 595 (D.C. Cir. 1976) (defendant's corrective action was response to court order and did not moot case); *New York State Nat. Organization for Women v. Terry*, 159 F. 3d 86, 91-92 (2d Cir. 1998) (compliance with injunction for seven years did not render the case moot); *Milwaukee Police Ass'n v. Jones*, 192 F. 3d 742, 747 (7th Cir. 1999) (defendant's voluntary cessation in complying with temporary restraining order did not moot case); *Gray Panthers Project Fund v. Thompson*, 273 F. Supp. 2d 32, 34-37 (D.D.C. 2002) (defendant's compliance with preliminary injunction did not moot case because defendant failed to provide "adequate assurances that he intends to comply with the applicable provisions in the long run").

Here, Judge Parker specifically found that the 2003 BO does not moot the case, because "Federal Defendants' adoption of the March 2003 BO constitutes

voluntary cessation of their previous refusal to consider the full scope of their discretion." *Nov. 2005 Opinion, at 8 (App. 240).* This Court has similarly noted that the 2003 BO "was in part, at least, the consequence of remedies ordered by the district court." *See* 355 F. 3d at 1221. Judge Parker thus did not clearly err in finding voluntary cessation here with respect to the 2003 BO, as the cases above confirm.

Further, in making his findings of voluntary cessation with respect to the minnow rider, Judge Parker had the benefit of substantial evidence that was not available to this Court when it issued the January 2004 Opinion stating, in dicta, that "[t]he actions of the Congressional delegation are not acts of the parties in this case." *See* 355 F. 3d at 1221. As Judge Parker found, the evidence clearly shows that the Defendants in this case sought the minnow riders expressly to reverse this Court's June 2003 ruling. *App. 893; MRGCD Br. at 33; Supp. App. 147-59.* As noted above, MRGCD has admitted that it sought the rider (and also unsuccessfully sought additional language to moot out claims relating to MRG Project operations). *MRGCD Br. at 33; App. 891, 893.* Counsel for Federal Defendants informed Judge Parker that, although federal agencies are prohibited from lobbying Congress, both he and the Bureau had reviewed and commented on the draft rider language, and had "probably" edited it. *App. 885-86.*

Well-documented public accounts from 2003 confirm the close involvement of State and Albuquerque officials in lobbying for the rider, which was common knowledge in New Mexico. *See App. 1148-49*; *Supp. App. 147-59.*[11] Newspaper accounts document Mayor Chavez's meetings with all members of New Mexico's congressional delegation and other influential members of Congress in an effort to get legislation to overrule this Court's ruling on San Juan-Chama Project water. *Id.* An article written after the congressional conference committee approved the rider noted that Chavez had "helped negotiate the final minnow language." *Supp. App. 159.* Similarly, articles and press releases from New Mexico Governor Richardson confirmed that he conferred with congressional leaders after this Court's decision, and he also sought the rider. *Supp. App. 147-53.* While this Court did not have this information in issuing its January 2004 ruling, it was

[11] Plaintiffs request the Court take judicial notice of the articles contained in their Supplemental Appendix under Fed. R. Evid. 201, because their information is "(1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *Ieradi v. Mylan Lab., Inc.*, 230 F.3d 594, 598 n. 2 (2000) (taking judicial notice of news article); *Peters v. Delaware River Port Authority*, 16 F.3d 1346, 1356-57 (3d Cir. 1994) (same). The articles are readily available (for a small fee) on the websites of the newspapers: http://www.abqjournal.com and http://www.abqtrib.com. The press release from Governor Richardson's office is available at: http://www.governor.state.nm.us/press/2003/press-jun03.php.

readily available to Judge Parker through the media, as his final opinion acknowledges.[12]

This abundant evidence of Defendants' close involvement in obtaining passage of the minnow rider distinguishes this case from the cases cited by Federal Defendants, wherein courts found that legislative enactments rendered cases moot and subject to vacatur. In those cases there was no evidence that the defendant had sought enactment of the administrative or legislative provision in order to reverse the court decision and moot the case. *See Wyoming v. U. S. Dep't of Agriculture*, 414 F. 3d 1207, 1213 (10th Cir. 2005); *Utah v. Andrus*, 636 F. 2d 276, 278 (10th Cir. 1980); *New Mexico v. Goldschmidt*, 629 F. 2d 665, 667 (10th Cir. 1980) (dispute between New Mexico and federal agency is "but one of many similar disputes between other states and Secretary Goldschmidt" that the legislation was intended to resolve); *Valero Terrestrial Corps. v. Paige*, 211 F. 3d 112, 121 (4th Cir. 2000); *Khodara Envtl., Inc. v. Beckman*, 237 F. 3d 186, 194-95 (3d Cir. 2001).

In sum, the central issue in this case – the scope of the Bureau's discretion over MRG Project operations – remains a hotly disputed issue with every day impacts on both the human residents of the Middle Rio Grande area and the

[12] Indeed, Judge Parker noted that issuing his final ruling was important because Mayor Chavez asserted in the media that "Someone's Stealing Our Water!" which could be construed as an accusation of criminal intent on the part of Judge Parker or the 10th Circuit, and so the public record needed to be clear to protect the integrity of the judiciary. *See Nov. 2005 Opinion, p. 19, n. 9 (App. 251).*

endangered silvery minnow. This issue has been in litigation for nearly seven years, and the parties' dispute is as vigorous today as it was the day this case was filed. There is no doubt that in the absence of a court order, the Bureau will return to its original narrow interpretation of its discretion, which Judge Parker has found to be illegal. Because Judge Parker did not err in determining this case is not moot, this Court should affirm his rulings.

IV. THE BUREAU HAS DISCRETION IN MANAGING THE MIDDLE RIO GRANDE PROJECT.

The Court also should affirm – as it did in the June 2003 Opinion – Judge Parker's rulings on the merits that the Bureau has broad discretion in managing the MRG Project, and must consult over the exercise of that discretion under the ESA.

As explained below, this conclusion flows from the United States' ownership of the MRG Project, which Judge Parker upheld in quieting title in the name of the government (and which this Court should affirm in MRGCD's related appeal of that ruling); and from the relevant federal statutes and the 1951 Contract. It also flows from the doctrine of unmistakable terms, which confirms the United States' sovereign authority to modify the Bureau's operation of the MRG Project, if necessary to comply with the ESA's requirements.

A. The Bureau Owns All Key Middle Rio Grande Project Facilities.

This Court's 2003 Opinion, Judge Parker's July 2005 decision rejecting MRGCD's ownership cross-claims, and the briefs filed by Plaintiffs and Federal

Defendants in MRGCD's related appeal of that decision (No. 05-2293) discuss in detail the history and extent of the United States' ownership of the Middle Rio Grande Project facilities and storage water right.

As those materials establish, the MRG Project was based on a 1947-48 coordinated plan by the Bureau and the Corps, which proposed to rescue MRGCD from bankruptcy, reconstruct and expand its existing irrigation facilities, and develop new flood/sediment control works. *See* 333 F.3d at 1125-27, 1134-37; *July 2005 Opinion (MRGCD App., 10th Cir. No. 05-2293, at 1178-1224 & 1467-1552).* Congress approved the MRG Project in the 1948 and 1950 Flood Control Acts, adopting the Project plan. *Flood Control Act of 1948, Pub. L. 80-858, 62 Stat. 1171 (June 30, 1948); Flood Control Act of 1950, Pub. L. 81-516, 64 Stat. 163 (May 17, 1950).* MRGCD expressly agreed to the Plan by executing the 1951 Contract and subsequent contract amendments, easements, and other conveyances.

Based on the legislation, 1951 Contract, and subsequent conveyances, the United States assumed ownership of all the MRG Project facilities that MRGCD originally owned, and all those on which the United States performed work, as well as numerous additional properties and rights-of-way that MRGCD subsequently acquired and conveyed to the United States so that the federal rehabilitation and extension of the Project could be carried out. *July 2005 Opinion at 4-27, 36-45 (MRGCD App. 1181-1204, 1213-21).*

As the district court held, the facilities owned by the United States include El Vado Dam and Reservoir, the various diversion dams, and virtually all of the irrigation ditches and drains and related facilities. *Id.*[13] In addition, the United States owns the storage water right for El Vado Reservoir, State Permit No. 1690, which allows the Bureau to store and release water from El Vado. *Id.*

Although MRGCD recently completed its repayment obligations, under federal reclamation law and the 1951 Contract the title to all these Project works remains in the United States, unless and until Congress authorizes reconveyance to MRGCD. 333 F.3d at 1136. MRGCD's interest-free payments over a fifty year period reimbursed only a small fraction of the costs of federal work on the MRG Project, as they did not cover any of the costs of levee work, channel rectification, and other flood control work that directly benefited MRGCD. *See July 2005 Opinion at 17 (MRGCD App. 1194); MRGCD App. 3257-61.*

The Bureau still operates and maintains El Vado, but has transferred operation of the irrigation diversion facilities back to MRGCD, which acts as the United States' "agent" under Paragraph 13 of the 1951 Contract. *April 2002*

[13] The district court opinion directly addressed only those specific MRG Project facilities addressed in MRGCD's cross-claim: El Vado Dam and Reservoir, Angostura Diversion Dam, San Acacia Diversion Dam, and the Albuquerque Main Canal and Riverside Drain. *July 2005 Opinion at 38 (MRGCD App. 1215).* However, the same rationale that explains the conveyance of those properties confirms that all key MRG Project facilities passed from MRGCD to the United States. *Id.*

Opinion at 29 (App. 181); App. 1198; 1886-88 (1951 Contract, ¶ 13); MRGCD App. 2529, 2578. The United States can terminate that agency and resume operation of the MRG Project facilities on six-months notice. *Id.*

B. The Court Rulings Addressing the Bureau's Discretion Over Middle Rio Grande Project Operations.

Judge Parker found that federal ownership of the Project irrigation facilities, together with applicable legislation and provisions in the 1951 Contract, gave the Bureau discretion "over its actions resulting in the delivery of water to MRGCD under the Middle Rio Grande Project." *April 2002 Opinion at 27-34 (App. 179-86).* In addition, he held that the Bureau has a statutory duty under federal reclamation laws to determine whether MRGCD is excessively diverting water, which could free up water to meet the requirements of the ESA. *Id. (App. 182).* He incorporated these rulings into his September 2002 opinion and injunction that was appealed earlier to this Court. *Sept. 2002 Opinion at 26 (App. 229).*

In its June 2003 Opinion, this Court affirmed Judge Parker's rulings in all respects. *See* 333 F.3d at 1120-38. It held that negotiating and executing the 1951 Contract constitutes ongoing "agency action" triggering ESA consultation requirements. *Id.*, at 1128. Considering the MRG Project authorizing legislation and the 1951 Contract, the Court found that the Bureau retained discretion to comply with the ESA, in part because the Contract expressly stated that it was subject to future legislation amending the reclamation laws then in effect. *Id*., at

1129. The Court also found that in addition to the ESA, other federal legislation including the Reclamation States Emergency Drought Relief Act, and the Fish and Wildlife Coordination Act, provided a further basis for the retained federal discretion. *Id.*, at 1136-37.

As explained below, there is no reason for the Court to change its analysis now. Both the United States' ownership of the MRG Project, and the relevant statutes and 1951 Contract confirm the Bureau's discretion, as Judge Parker reaffirmed in entering final judgment.

C. The Bureau's Ownership Gives It Discretion Over Project Operations.

As Judge Parker noted, the United States' ownership of the MRG Project "confirms and underscores the ongoing nature of BOR's ESA obligations in the region." *See Nov. 2005 Opinion at 8 (App. 240).*

The Federal Defendants fully concur that the United States owns the MRG Project facilities, as underscored in their recent brief to this Court opposing MRGCD's appeal of Judge Parker's July 2005 decision quieting title for the United States. *See Fed. Brief, 10th Cir. No. 05-2293* (corrected version filed 7/31/06). Nevertheless, Federal Defendants do not even **mention** ownership in their briefing on these consolidated appeals, when they dispute that the Bureau has discretion in operating the Project. *See Fed. Br., pp. 42-55.* Instead, they simply

focus on the 1951 Contract to claim – wrongly, as explained below – that it restricts the Bureau's authority. *Id.*[14]

The federal government's ownership of the MRG Project underscores the Bureau's duties to comply with the ESA in its management to ensure that it does not jeopardize the endangered Rio Grande silvery minnow, as the Supreme Court has emphasized: "The plain intent of Congress in enacting [the ESA] was to halt and reverse the trend toward species extinction, whatever the cost," and "require[s] agencies to afford first priority to the declared national policy of saving endangered species." *TVA v. Hill*, 437 U.S. at 184-85.

Indeed, as the Ninth Circuit has held, the fact the United States owns the MRG Project facilities and the El Vado storage right underscores that the Bureau retains broad authority over the Project operations, and hence must comply with the ESA to ensure its operations do not jeopardize the minnow:

> Because Reclamation retains authority to manage the Dam, and **because it remains the owner in fee simple of the Dam,** it has responsibilities under

[14]Federal Defendants even assert that Section 7 does not apply here, because there is no "action" in the Bureau's "mere performance of a binding contract." *Fed. Br., at 43.* But as many cases confirm, the Bureau's ongoing reclamation project operations – including annual water deliveries, as well as reservoir storage and releases – are agency "action" requiring consultation. *See Bennett v. Spear*, 520 U.S. 154 (1997) (consultation over operation of Bureau's Klamath Project); *Klamath Water Users Protective Association v. Patterson,* 204 F.3d 1206 (9th Cir. 2000) (further consultation over Klamath Project)*; O'Neill v. U.S.*, 50 F.3d 677 (9th Cir.), *cert denied*, 516 U.S. 1028 (1995) (consultation over Central Valley Project)*; Pyramid Lake Paiute Tribe*, *supra* (consultation over Carson-Truckee Project)*; NRDC v. Houston*, *supra* (consultation over San Joaquin Basin Project).

> the ESA as a federal agency. These responsibilities include taking control of the Dam when necessary to meet the requirements of the ESA, requirements that override the water rights of the Irrigators.

Klamath Water Users, 204 F. 3d at 1213 (emphasis added).

The *Klamath Water Users* decision – which this Court cited with approval in the June 2003 Opinion, *see* 333 F.3d at 1130 – thus strongly supports Judge Parker's ruling that the Bureau's discretion, and its duty to comply with the ESA, derives in the first place from federal ownership of the MRG Project.

D. Federal Legislation Also Establishes The Bureau's Discretion.

It is not only federal ownership that establishes the Bureau's discretion over the MRG Project. A number of federal laws also confirm the Bureau's discretion, even aside from the ESA, as this Court previously held. *See* 333 F.3d at 1136-37.

First, the MRG Project authorizing legislation provides that Project water "shall be deemed to be useful primarily for domestic, municipal, and irrigation purposes." *Pub. L. No. 80-858, 62 Stat. 1171.* On its face, this provision does not **prohibit** operation of Project facilities to protect endangered species. Indeed, Appellants agree that use of MRG Project water for endangered species is consistent with the authorizing legislation, because for years they have endorsed the practice of "exchanging" San Juan-Chama Project water for native Rio Grande water, which is run through the MRG Project to protect the silvery minnow. *App. 1196, 1202.*

Second, the MRG Project authorizing legislation specifies that, in managing the Project, the Secretary of Interior "shall be governed by and have powers conferred upon him by the Federal reclamation laws . . . and Acts amendatory thereof or supplementary thereto, except as is otherwise provided in this Act or in the [1947-48 Project] reports referred to above." *P.L. 80-858, Title II, § 203.* Reclamation Act Section 8 thus applies to the Project, and it restricts use of Project water to the amounts reasonably needed for beneficial use. *See 43 U.S.C. § 372* (beneficial use is the "basis, measure, and limit" of water use under the Reclamation Act).

Section 8 thus imposes a duty on the Bureau to ensure that use of reclamation project water does not exceed reasonable beneficial use. *See Jicarilla Apache Tribe v. United States*, 657 F.2d 1126, 1133-34 (10th Cir. 1981) (enforcing Section 8 to prohibit Bureau from delivering San Juan-Chama Project water for storage in Elephant Butte Reservoir, where about 93% of the water would evaporate); *United States v. Alpine Land & Reservoir Co.,* 697 F.2d 851, 854-55 (9th Cir. 1983), *cert. denied 464 U.S. 863 (1983)* (addressing Reclamation Act's "binding congressional directive that the water right must be . . . governed by beneficial use," and "cannot include any element of 'waste' which, among other things, precludes unreasonable transmission loss and use of cost-ineffective methods"); *Yuma County Water Users Ass'n v. Udall,* 231 F. Supp. 548 (D.D.C.

1964) (upholding Bureau's decision to reduce project deliveries by 10%, finding that irrigators had wasted water).[15] Compliance with this duty will likely leave more water in the river for the minnow. *April 2000 Opinion at 30 (App. 182).*

Third, another reclamation law amendment applicable to the MRG Project is the Reclamation States Emergency Drought Relief Act of 1991, *43 U.S.C. § 2201 et seq.*[16] The Drought Relief Act authorizes the Bureau to operate El Vado (both storing and releasing water) and other MRG Project facilities to protect the silvery minnow during dry conditions, like those that have prevailed in the Middle Rio Grande much of the last few years:

> [t]he Secretary may make water from Federal Reclamation projects and nonproject water available on a nonreimbursable basis for the purposes of protecting or restoring fish and wildlife resources, including mitigation losses, that occur as a result of drought conditions or the operation of a Federal Reclamation project during drought conditions. The Secretary may store and convey project and nonproject water for fish and wildlife purposes,

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[15] This federal law requirement matches New Mexico water law, which likewise limits diversions to reasonable beneficial uses. *See N.M. Const. Art. XVI, § 3; NMSA 1978,§ 72-1-2; State v. McDermett*, 901 P.2d 745, 748-49 (N.M. 1995) (diversions without actually irrigating crops do not constitute beneficial use); *State v. McLean*, 308 P.2d 983, 987-9 (N.M. 1957**) ("**no matter how early a person's priority of appropriation may be, he is not entitled to receive more water than is necessary for his actual use").

[16] This Act was recently renewed for an additional five years, through September 30, 2010. *P.L. 109-234, 120 Stat. 457, § 2306 (June 15, 2006)*. It applies to current operations in the Middle Rio Grande and has been used as authority by the Bureau for leasing water rights to benefit the silvery minnow, as Federal Defendants previously acknowledged to this Court in their Opening Brief in the 2002 Appeal (Case Nos. 02-2254, 02-2295, 02-2255, 02-2304, 02-2267). *See Fed. 2002 Br. at 16, 31-2.*

> and may provide conveyance of any such water for both State and Federal wildlife habitat and for habitat held in private ownership.

43 U.S.C. § 2212(d).

Fourth, the Fish and Wildlife Coordination Act is another statute confirming the Bureau's authority to operate El Vado and other facilities of the MRG Project to benefit fish and wildlife, including the silvery minnow, even when there is no drought. It provides, for preexisting projects such as this, that "[f]ederal agencies authorized to . . . operate water-control projects are authorized to modify . . . [the] operations of such projects" in order to accommodate "conservation, maintenance, and management of wildlife resources," as long as such modification is compatible with the project's purposes. *16 U.S.C. § 662(c).*

This Court held previously in its June 2003 Opinion that both the Drought Relief Act and the Fish and Wildlife Coordination Act directed the Bureau to alleviate the harm to fish and wildlife habitat that has resulted from operations of the MRG Project, and thus supported a finding of Bureau discretion over such water operations. *See* 333 F. 3d at 1136-37. Although Appellants again dispute those rulings, nothing has changed to alter this Court's reading.

Accordingly, the Court should affirm that the relevant statutes establish – not restrict – the Bureau's discretion in managing the MRG Project to avoid jeopardizing the minnow.

E. The 1951 Contract Also Affirms The Bureau's Discretion.

Given the federal ownership of MRG Project works, as well as the statutory authority discussed above, the real question is whether the 1951 Contract **took away** the Bureau's existing operational discretion – not whether it provided any **additional** grants of discretion. Several cardinal principles govern the Court's review and interpretation of federal contracts, including the 1951 Contract.

First, "sovereign power, even when unexercised, is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms." *Bowen v. Public Agencies Opposed to Social Security Entrapment,* 477 U.S. 4, 52 (1986) (quotation omitted). *See also Peterson v. U.S. Dept. of Interior,* 899 F.2d 799, 807, 812 (9th Cir. 1990) (applying this principle to reclamation contracts). Thus, "contractual arrangements, including those to which a sovereign itself is party, 'remain subject to subsequent legislation' by the sovereign." *Bowen*, 477 U.S. at 52. This Court recognized this principle in its June 2003 Opinion, as discussed further below. *See* 333 F.3d at 1129 n.25 & 1139-41.

A second related principle is that federal contracts "should be construed, if possible, to avoid foreclosing exercise of sovereign authority." *Bowen,* 477 U.S. at 52-53. Third, federal contracts should be interpreted in the context of the legislative scheme that authorized them, and interpretations of ambiguous terms

should be made in light of the policies underlying the controlling legislation. *Peterson*, 899 F.2d at 807.

Under these principles, the 1951 Contract cannot be construed as giving up federal authority to comply with subsequent federal legislation – including the ESA – unless such authority is clearly and unmistakably surrendered. It has not been, as this Court previously ruled. *See* 333 F.3d at 1127-31.

Appellants make much of the fact that the 1951 Contract is a repayment contract, rather than a water service contract, such as the contracts considered in the *O'Neill, NRDC v. Houston,* and *Klamath Water Users* cases. But this distinction supports the district court's ruling, not Appellants' arguments. Water service contracts require the Bureau to deliver a specified amount of water. *See, e.g., O'Neill,* 50 F.3d at 680. Failure to deliver the precise amount of water specified could thus constitute a breach of contract, unless other contract provisions held the Bureau harmless or otherwise specified that no breach occurred. Hence, the shortage clauses in those contracts hold particular importance where deliveries are reduced in order to meet ESA obligations.

The 1951 Contract, by contrast, does **not** require delivery of any particular amount of water. Thus, operation of MRG Project facilities such that some water is used for endangered species does not constitute a "shorting" of a required water delivery, as it would if the contract specified a required water delivery amount.

Therefore, the "shortage" provision in the 1951 Contract is not necessary to show the Bureau has discretion to comply with the ESA. It merely confirms that the Bureau's exercise of its existing authority to comply with the Act will not result in liability.

Moreover, the terms of the shortage clause in the 1951 Contract are, if anything, broader than the shortage provisions considered in the water service contracts in the cases above, and which are also in the San Juan-Chama contracts. *Compare App. 1892 to MRGCD App. 2301* (shortage clause in San Juan-Chama contract). The language of the 1951 Contract shortage clause is sweeping – it makes clear that the United States is not subject to any liability whenever water deliveries are less than "would normally be available," no matter what the cause of shortage might be. *App. 1892.*[17] The language clearly permits the United States to comply with ESA requirements; and provides that if such compliance results in water deliveries that are below "normal," the United States has no liability.

F. The Case Law Confirms The Bureau Has The Discretion Found by the District Court.

Both Judge Parker and this Court reviewed the three most relevant appellate court decisions – *O'Neill, NRDC v. Houston,* and *Klamath Water Users* – and explained why they support a ruling that the Bureau has discretion to alter MRG Project water operations to comply with the ESA. See 333 F.3d at 1129-31; *April*

[17] The United States' position that the shortage provision in the 1951 Contract does not support Bureau discretion to comply with the ESA is directly contrary to the position it took in *O'Neill, supra.*

2002 Opinion at 30-34. See also Klamath Irr. Dist. v. United States, 67 Fed. Cl. 504, 535-36 (Fed. Cl. 2005) (reviewing case law on reclamation contract shortage clauses, and noting that "from a contractual standpoint the shortage clauses thus limit plaintiffs' contractual rights"). Nothing in Appellants' briefs supports a contrary reading of these cases, or establishes good cause for this Court to change its prior approval of those cases.

As noted above, the fact that the contracts considered in *O'Neill* and *Houston* were water service contracts requiring delivery of a specified quantity of water, rather than repayment contracts like the 1951 Contract, only further supports the court rulings here, because reducing MRG Project deliveries to comply with the ESA would not violate any provision of the 1951 Contract as it might if delivery of a particular amount of water were required by the contract.

Moreover, the shortage clause in the 1951 Contract provides the same basis for federal discretion that the Ninth Circuit found in *O'Neill*, *Houston*, and *Klamath Water Users*. Federal Defendants conceded in their earlier appeal that the shortage clause in the 1951 Contract is "functionally similar" to the shortage clause in the San Juan-Chama contracts and these water service contracts. *Fed. Ptn. for Panel Rehrg. and Rhrg. En Banc, 10th Cir. Nos. 02-2254 et al. (filed 8/8/03), p.7.*

Although Appellants claim that the decision in *O'Neill* was based entirely on the Central Valley Project Improvement Act ("CVPIA"), in fact the legal mandates

requiring reduced water deliveries to protect listed species derived from both the ESA and the CVPIA, as this Court held. *See* 333 F.3d at 1130 & n.28. And *Klamath Water Users* provides particular support for upholding Judge Parker's ruling because of its holding that the Bureau's discretion derived directly from its ownership of the facility – a fact that again Federal Defendants fail to address in their discussion of that case. *See Fed. Br., pp. 50-52.*

In summary, the Bureau's discretion derives from federal ownership of the MRG Project, as well as the relevant statutes and the 1951 Contract. The lower court made no error of law in reaching these conclusions; and this Court should again affirm them.

G. The Bureau's Discretion To Alter MRG Project Operations To Protect Endangered Species Can Take Many Forms.

Appellants (joined by the *amici curiae*) seek to dissuade this Court from reaffirming its prior discretion ruling by characterizing the consequences as requiring the Bureau to "short" water deliveries to MRGCD (even though no amount of water is set under the 1951 Contract), or "requiring Reclamation to ignore its pre-ESA contractual obligations," or otherwise creating havoc in the administration of reclamation projects. *See, e.g., Fed. Br., pp. 41-46; Arizona Amicus Brief.*

These characterizations fail to recognize that the Bureau's discretion to alter MRG Project operations in order to ensure compliance with the ESA can take many forms. While it is possible that water could be reallocated from irrigation use to

preserve the minnow, Plaintiffs have always recognized that the main uses of MRG Project water are for irrigation and related purposes, as directed by the authorizing statutes, and Plaintiffs have encouraged the Bureau and MRGCD to become more efficient so that currently "wasted" water can be freed up for the minnow. Affirming Judge Parker's rulings on the discretion issue will help motivate the parties to ensure that these efficiencies are realized.

Moreover, the range of discretionary actions that the Bureau can take to avoid jeopardizing the minnow includes many lesser steps. Indeed, MRGCD hydrologist David Gensler has listed a number of actions that could be or have been taken by MRGCD in recent years to aid the silvery minnow, including: (1) controlling the timing of El Vado storage operations to aid minnow spawning; (2) releasing water behind San Acacia Dam to augment a spawning flow spike; (3) reducing diversions at diversion dams during spawning to avoid egg entrainment; (4) altering timing of diversions at diversion dams to aid minnow spawning and egg survival; (5) providing small extra water deliveries to locations where there is river drying to aid minnow rescue efforts or prolong wet conditions until rescue crews can arrive; (6) allowing Isleta or other diversion dams to "leak" and thereby provide a stretch of minnow habitat below the dam; (7) controlling diversions and releases so as to ensure that minimum flow requirements of the BO are met; and (8) managing diversions at Isleta and San Acacia to ensure the smoothest possible flow reductions. *App. 1585-88.*

While MRGCD contends it may take these steps, it and the other Appellants nevertheless insist that the Bureau – as owner and manager of all the relevant facilities – has no ability to do so, if MRGCD chooses not to take them. Under Appellants' theory, in those circumstances the Bureau would be helpless to step in with these kinds of measures to protect the silvery minnow, even if it were on the brink of extinction and even if the actions did not significantly impair irrigation operations. Clearly, this argument is wrong, as such actions are in fact authorized not only by the ESA – which requires the Bureau to avoid jeopardizing the minnow in all its actions, including management of the MRG Project – but also by the Reclamation Act, the Fish and Wildlife Coordination Act, and the Drought Relief Act, and they are not prohibited by anything in the 1951 Contract.

H. The Doctrine Of Unmistakable Terms Preserves The Bureau's Discretion.

Finally, as this Court noted in the June 2003 concurring opinion (which was a majority opinion), the doctrine of "sovereign acts" or "unmistakable terms" applies here as well, and confirms that the 1951 Contract cannot be read as somehow overriding the Bureau's ESA obligations. *See* 333 F.3d at 1139-41.

This doctrine supports a reading that reconciles the 1951 Contract with subsequently enacted legislation, including not only the ESA, but also the Drought Relief Act and the Fish and Wildlife Coordination Act. Although a finding that the Bureau has discretion to operate the Project in compliance with the mandates of

these laws is not contrary to the terms of the 1951 Contract (as discussed above), the doctrine of unmistakable terms, in combination with the powerful mandate of the ESA to give endangered species "priority over the primary missions of federal agencies," underscores that existing contracts should not be interpreted as prohibiting compliance with the ESA, unless such a conflict is inescapably unambiguous. *TVA v. Hill*, 473 U.S. at 185.

This Court, in its June 2003 concurring opinion, applied this doctrine to hold that, because enforcement of the contractual provisions as demanded by Defendants would "frustrate the government's obligations under the ESA," the doctrine applies to modify the 1951 Contract to provide the Bureau with the discretion necessary to comply with the ESA. 333 F.3d at 1139-41.

Plaintiffs do not believe that the Court now needs to reach the question whether the ESA modifies the 1951 Contract, because under the applicable legislation and the Contract itself, the Bureau already has the necessary discretion to comply with the ESA, as explained above. If, however, the Court finds that the 1951 Contract does not allow the Bureau that discretion, then it should follow the reasoning of the 2003 concurring opinion, and hold that, under the doctrine of unmistakable terms, the ESA modifies the 1951 Contract and provides the Bureau with discretion to comply with its mandates.

V. JUDGE PARKER PROPERLY ENTERED THE FINAL INJUNCTIVE RELIEF.

Federal Defendants also challenge the propriety of Judge Parker's final injunction order, directing them to adhere to his discretion rulings in future consultations over the MRG Project. *See Fed. Br., pp. 56-58.* They fail to show any abuse of discretion by the district court, as they must. *MRGCD v. Norton,* 294 F.3d at 1225.

A district court has "broad latitude in fashioning equitable relief when necessary to remedy an established wrong." *NRDC v. Southwest Marine, Inc.,* 236 F.3d 985, 999 (9th Cir. 2000). The hallmark of a court's equity jurisdiction is "flexibility," which allows it "to mould each decree to the necessities of the particular case." *Weinberger v. Romero-Barcelo,* 456 U.S. 305, 312 (1982). Where, as here, the public interest is involved, the court's "equitable powers assume an even broader and more flexible character than when only a private controversy is at stake." *Porter v. Warner Holding Co.,* 328 U.S. 395, 398 (1946).

The ESA vests district courts with jurisdiction "to enjoin any person, including the United States and any other governmental instrumentality or agency" that is violating the ESA's provisions or regulations. *16 U.S.C. § 1540(g)(1).* As the Supreme Court has held, the ESA also altered normal injunction standards to tip the balance of harms and interests sharply in favor of injunctive relief to "afford[] endangered species the highest of priorities." *TVA v. Hill,* 437 U.S. at

180, 184-85. This Court has thus recognized that the ESA afforded the district court broad discretion in crafting remedies for the Bureau's ESA violations. *See* 333 F.3d at 1138 (citing cases).

The district court surely did not abuse that discretion in the narrow remedy it adopted here, which simply orders the Federal Defendants to comply with its discretion rulings in future consultations over the MRG Project.[18] Indeed, this relief closely follows the Supreme Court's direction in *Weinberger* that district courts may order an agency to adhere to environmental law requirements, if that is a sufficient remedy. *See Weinberger*, 456 U.S. at 315. Moreover, the relief is particularly justified in light of Federal Defendants' previous failure to comply with the district court's original order regarding Bureau discretion.

Neither can the Federal Defendants legitimately complain that Judge Parker "did not identify any basis for concluding that an injunction is warranted." *Fed. Br., pp. 57-58*. Judge Parker explained precisely why he was entering relief, including: (1) Federal Defendants previously "had failed to consult fully in regard to the September 2002 BO despite the Court's April 29, 2002 ruling on discretion," (2) they "have failed to establish that it is absolutely clear that they would not

[18] Federal Defendants argue the district court "overlooked the limitations on the scope of its review of agency actions under the APA." *Fed. Br., p. 57.* This mischaracterizes the jurisdictional basis of Plaintiffs' claims and the district court's relief, which arose under the ESA and not the APA, as explained above and confirmed by *Bennett v. Spear*, 520 U.S. at 171-76.

return to their wrongful use of an impermissibly narrow and limited scope of discretion in future ESA consultations," and (3) it is "virtually a certainty that there will be more ESA consultations in the near future over water operations in the middle Rio Grande." *Nov. 2005 Opinion, pp. 8-9 (App. 240-41).* He also found that "it may never be known how the agencies' dogged refusal to consider using project water in past years to prevent unnecessary river drying has affected the downward spiral of the silvery minnow," and Defendants "have failed to establish that the effects of the ESA violation have been completely and irrevocably eradicated." *Id., at 9-10 (App. 241-42).*

Nor is the injunction too vague to comply with Rule 65. Federal Defendants are clearly and simply instructed that they must adhere to Judge Parker's discretion rulings in future ESA consultations over the MRG Project. There is nothing uncertain about this command. *See E&J Gallo Winery v. Gallo Cattle Co.,* 955 F.2d 1327, 1345-46 (9th Cir. 1992) ("injunctions are not set aside under Rule 65(d) unless they are so vague that they have no reasonably specific meaning").

VI. JUDGE PARKER DID NOT ABUSE HIS DISCRETION IN DECLINING TO VACATE HIS PRIOR OPINIONS.

Finally, even if this case were moot – which it is not – Appellants fail to show that Judge Parker abused his discretion in deciding not to vacate his prior opinions, as they must do.

Vacatur is an equitable doctrine, allowing courts to vacate decisions as an "extraordinary remedy" in narrow circumstances. *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 26 (1994). Where mootness results from voluntary action of the moving party, vacatur normally should be denied. *Id.*, at 25-29. The public interest also usually weighs against vacatur: "Judicial precedents are presumptively correct and valuable to the legal community as a whole." *Id.*, at 26.

This Court has held that vacatur will be denied when an appellant voluntarily **contributed** to the cause of mootness. *In re Western Pacific Airlines, Inc.*, 181 F.3d 1191, 1197 (10th Cir. 1999). *See also 19 Solid Waste Dep't Mechanics v. City of Albuquerque*, 76 F.3d 1142, 1144-45 (10th Cir. 1996 (denying vacatur where city caused mootness by voluntarily withdrawing challenged policy); *Oklahoma Radio Associates v. FDIC*, 3 F.3d 1436 (10th Cir. 1993) (motion to vacate appellate opinion denied when case settled during pendency of petition for rehearing); *Martinez v. Winner*, 800 F.2d 230 (10th Cir. 1986) (judgment vacated due to mootness, but not appellate opinions).

In its January 2004 Opinion, this Court declined to vacate the lower court's opinions under these standards, holding that the "district court should determine whether there are unresolved issues that remain to be tried" and "must be allowed to enter a judgment it determines appropriate." 355 F.3d at 1222. On remand,

Judge Parker followed this direction by ruling that he would not vacate his prior opinions, even if the case were deemed moot. *Nov. 2005 Opinion, pp. 5-10, 13-19 (App. 237-42, 245-51).*

Judge Parker specifically noted that the "case in this Court is in a different posture than was the appeal before the Tenth Circuit," and held that any mootness of his prior discretion rulings "cannot fairly be described as happenstance" for two principal reasons. *Id., pp. 16-17.* First, the Federal Defendants' issuance of the 2003 Biological Opinion was a direct response to his order. Second, "Intervenors and Defendants precipitated the passage of the minnow riders . . . in that they planned, sought, and/or supported the riders' passage." *Id., at 17.* Thus, the "losing parties took their cause to the halls of Congress, as was and continues to be their right, but they cannot now complain that their appeal rights in the court system have been curtailed through no action on their own parts." *Id.*[19]

The evidence supporting Judge Parker's determination that there was no "happenstance" justifying vacatur is the same evidence reviewed above demonstrating that, under the "voluntary cessation" doctrine, this case is not moot. Whereas the earlier appeal in this case was rendered moot by the arrival of rain and

[19] MRGCD repeatedly asserts that Judge Parker characterized Appellants' lobbying for and participating in the drafting of the minnow rider as "bad faith" and "improper manipulation of the federal judiciary." *MRGCD Br. at 11, 13, 31, 33.* As the quoted passage from Judge Parker's decision makes clear, however, he did nothing of the kind. Rather, he simply followed Supreme Court precedent in conducting the required equitable vacatur analysis.

the expiration of the district court's injunction, neither of which were the fault of any party, the situation is different with respect to the underlying case. Federal Defendants' issuance of the 2003 BO, which complied with the district court's order, is considered "voluntary" for purposes of vacatur analysis. *Constangy, Brooks & Smith v. N.L.R.B.*, 851 F.2d 839 (6th Cir. 1988) (cited in *Oklahoma Radio Assocs.*, 3 F.3d at 1443).

In addition, Judge Parker's finding that Appellants sought the minnow riders from Congress was based on extensive evidence that was not before this Court in January 2004. That factual finding and the evidence on which it was based thus supported Judge Parker's decision not to vacate his opinions.

Judge Parker also found that his prior opinions have substantial historical and ongoing public importance, which further compelled the conclusion not to vacate them. *Nov. 2005 Opinion, at 18-19 (App. 250-51).* He noted in particular that the question of the Bureau's discretion over the MRG Project was not affected by the minnow rider, and is "of vital importance for determining how best to manage the project consistent with the ESA, for the economy of the region, and for the survival of the endangered silvery minnow in its last remaining natural habitat." *Id., at 18.* "If this issues arises again in litigation in connection with this or other endangered species in the middle Rio Grande system or elsewhere, this Court's factual and legal analysis may provide a baseline to inform the debate,

even though this Court's decisions are not binding precedent for other courts." *Id.* In addition, the "benefit of keeping the prior decisions intact weights heavily because doing so prevents the uncertainty that prevailed in the past." *Id., at 19.*

Judge Parker did not abuse his broad discretion here in citing these public interest considerations as reasons not to vacate his prior opinions. *See U.S. Bancorp,* 513 U.S. at 26 (addressing importance of public interest in determining whether to vacate).

CONCLUSION

For the foregoing reasons, and those explained by the district court, this Court should affirm the district court's November 2005 final judgment.

DATED: August 18, 2006

Respectfully submitted,

ADVOCATES FOR THE WEST

/s/
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STATEMENT OF REASONS FOR ORAL ARGUMENT

Plaintiffs-Appellees believe that oral argument will assist the Court in analyzing the legal and factual issues presented by these appeals, and in the related appeal that have been consolidated for consideration by the same panel.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

As required by Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that the foregoing Brief for Plaintiffs is printed in proportionately spaced typeface of 14 points and contains 16,878 words; which is within the 18,000 word limit authorized by this Court per order dated August 2, 2006 (granting Plaintiffs-Appellees' Motion To File Oversized Brief). I relied on my word processor (Microsoft Office WORD 2003) to obtain the count (excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii)). I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

Dated: August 18, 2006 _/s/_____
Laird J. Lucas

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Plaintiffs-Appellees' Response Brief, along with the accompanying Plaintiffs-Appellees' Supplemental Appendix, are being filed in accordance with the Federal Rules of Appellate Procedure 25(a)(2)(B), sent to the Clerk by overnight mail delivery on the 18th day of August 2006; and pursuant to Tenth Circuit Emergency General Order dated October 20, 2004 (subsequently amended) also submitted in digital form to esubmissioni@ca10.uscourts.gov.

I further certify that an electronic PDF file of the foregoing Response Brief has been served upon counsel by email to the addresses below and that two paper copies of the Response Brief and one copy of the Supplemental Appendix have been served upon counsel by first class mail to the addresses below on August 18, 2006.

Pursuant to the October 20, 2004, Tenth Circuit Emergency General Order, I further certify that:

(a) all required privacy redactions have been made and, with the exception of these redactions, every document submitted in Digital Form or scanned PDF format is an exact copy of the written document filed with the Clerk; and

(b) the digital submissions have been scanned for viruses with the most recent version of AVG Anti-Virus 7.1, Soho Edition, and are free of viruses.
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