

# Committee on Resources

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Chairman Pombo, Members of the Committee:

My name is Eileen Grevey Hillson. I live in Albuquerque, New Mexico, where I own a water consulting business named AguaVida Resources. Both my academic training for my Bachelor's and Master's degrees in government, as well as my professional experience with local, state, and federal government and the private sector have been focused in the area of natural resources, most recently with a heavy emphasis on water policy issues. I am here today representing one of my clients, the Albuquerque Business Water Task Force, whose membership includes organizations such as the NM Chapter of the National Association of Industrial and Office Properties, (NAIOP), the Albuquerque Economic Forum, the Greater Albuquerque Chamber of Commerce and the Homebuilders of Central New Mexico. It is a privilege to be invited to appear before you today on their behalf. Thank you for coming to Belen and giving us this opportunity.

Chairman Pombo, in your letter soliciting our presentation of testimony at this hearing, you requested that we address the impact of the Rio Grande silvery minnow on New Mexico. From a business standpoint, it could simply be summed up thusly:

Businesses need certainty to stay here, to expand here and to locate here. To the extent that decisions about how to protect and recover the silvery minnow create uncertainty about the amount and reliability of water supplies available for human uses in the state, the impact of this fish is decidedly negative. However, the answer is really much more complicated than that. In keeping with the spirit of your holding this oversight hearing

in a western state, I will respond through the title of an old Clint Eastwood movie, "The Good, The Bad and The Ugly."

The Good

The late Adlai Stevenson once said that "Man is a curious animal. He never sees the writing on the wall 'til his back is up against it." The "good" impact of the silvery minnow, as well as its endangered species counterparts throughout the state, is that it has forced water onto the radar screens of New Mexicans, inspiring us to proactively, and expeditiously learn to manage our water resources so that we avoid having our backs up against that wall.

While in various parts of the state, among certain stakeholder groups and within directly-involved government agencies, water has always, or at least intermittently, been a concern, until quite recently, most of us were pretty ignorant of and/or complacent about the short hand Mother Nature dealt us in this area. In approximately the same time frame that the Endangered Species Act came into being, New Mexico entered a wet phase in its highly variable climate. With water readily coming out of the tap in most areas, it had easily escaped our attention that throughout the last few decades, we were receiving more water than we had in most of the last twenty centuries. Maintaining biodiversity was not threatening or even particularly noticeable in that environment. The drought changed everything, making the truth hit home: In wet years, we had barely made ends meet in terms of our supplies keeping up with our demands. Now in dry years, with increased populations and the same interstate compact obligations, we just might not have enough to go around if we don't take action.

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Getting the State's Water House in Order

The additional drought-induced demands placed by the silvery minnow and its endangered comrades on an already stressed resource helped spur us into putting our state's water house in order. Towards that end, and with our Governor, state legislature, offices of the State Engineer and Interstate Stream Commission leading the charge:

We have embarked on an ambitious program to, as quickly as possible, find out

who owns what water, where and since when – urban, rural and tribal - and to have water rights information well-preserved and accessible in a user-friendly computer data base format;

We are developing a State Water Plan to ensure the most effective, coordinated, comprehensive management of our water resources in a way that can address the state's very diverse and often competing, social, environmental and economic needs;

We are developing tools like measuring and metering; incentives like tax credits; rules for priority administration and water market transfer prototypes; pilot projects for "produced" water; water conservation educational materials -all to ensure the most efficient use of our water, compliance with our interstate and international treaty contractual obligations and the equitable allocation of the water necessary for sustaining urban, rural and ecosystem life;

We have institutionalized various funding mechanisms for meeting the approximately \$5 billion worth of infrastructure, watershed restoration, flood control, and endangered species recovery needs identified throughout the state for our present 13 listed aquatic species; and,

We have deliberately chosen to do all of the above in a collaborative fashion that involves a geographically-dispersed, very diverse group of stakeholders interacting with our elected and appointed government officials.

Last, but hardly least, at least in part due to the impact of endangered species issues,

We have recognized as New Mexicans that, like it or not, water winds like a liquid rope throughout the state, rendering us interconnected and interdependent.

We are coming to understand that we can either use it together as a life-rope or allow it to hang us. In that spirit, we have collectively endorsed having our taxpayer money used to defend the right to have New Mexico's water preserved and put to beneficial use in New Mexico for New Mexicans.

#### Minnow Recovery Spurs Regional Collaboration

At a regional level, in the Middle Rio Grande, the silvery minnow has had a positive effect, in that, to be in compliance with meeting its water needs through the Endangered

Species Act, diverse stakeholders who might otherwise never have met, much less

worked together, have come together to begin the arduous process of recovery in a

world of competing claims for the same resource. One example of this is the

Middle Rio Grande Water Assembly, where a regional water plan is being developed.

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The example most timely and appropriate for today's discussion is the Middle Rio Grande Endangered Species Act Collaborative Program, on whose Steering Committee I am honored to serve as Vice Chair. The Program was established in January of 2003 "...to strive for the survival and recovery of threatened and endangered species in the Middle Rio Grande while simultaneously protecting existing and future uses of water."

The 19 signatories who signed the Interim Memorandum of Understanding, committing to participate in its efforts, represent federal, state, local and tribal governments, farmers, environmentalists, universities and the business community. With such a diverse membership, procedural and financial constraints and programmatic unknowns, the program remains a work-in-progress. While signatories have yet to gather 'round the campfire, arms entwined, singing "Cumbiya," they have realized that it is in everyone's best interests, not to mention those of the fish, to get down to work on the innately-right, statutorily-mandated job of recovering the species. The Program has developed and implemented a number of recovery programs for the silvery minnow and southwestern willow flycatcher, with the aid of almost \$30 million in funding from federal congressional appropriations and considerable matching cash and in-kind contributions from non-

federal signatories. Further, and quite importantly, even when we have had to agree to disagree, and ended up in litigation against one another, at least through our discussions we probably narrowed the areas of potential courtroom dispute - and in the meantime moved the species that much closer to recovery. In addition, program participants have actually engaged in mutually beneficial collaborative efforts on non-species-related water issues as a result of our program "networking," - a great side-benefit in New Mexico, where money, labor and time are at a premium.

#### Albuquerque Goes the Extra Mile and Educates its People

At a local level, the ESA most assuredly had an impact on the City's Water Resource Management Strategy, both in terms of the comprehensiveness of its programmatic content and the funds required for its successful implementation. While the City, on its own initiative, has for years been developing and implementing programs to preserve and enhance its bosque areas in an environmentally-sound manner, the coincidence of it being declared as part of the critical habitat for the minnow no doubt speeded up and expanded its own riparian habitat restoration activities. To their credit, the City leaders, such as our Mayor, and his Public Works staff, have publically promoted actions to sustain a healthy river environment as positive contributions, rather than as onerous obligations.

In the process of informing its residents about the threats to the City's San Juan-Chama Project water brought on by the Minnow v Martinez (aka Minnow v McDonald and now Minnow v Keyes) litigation, the City has made its citizenry aware of the significant potential social, economic and environmental challenges involved in protecting the minnow. In so doing, it has educated its citizenry to recognize the scarcity and value of water. Thus, the minnow, may have inadvertently assisted the City in making us all

more aware and responsible stewards of this natural resource.

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#### The Business Community Comes to the Table:

Five years ago, with few exceptions, the Albuquerque business community was not seated at the tables where water policy decisions were being developed and implemented.

Organizations such as the Economic Forum and the Greater Albuquerque Chamber of

Commerce (GACC) had studied various water quality and quantity issues and adopted resolutions strongly supporting the San Juan-Chama Project, but organized interaction with other stakeholder groups had not occurred.

The Minnow V Martinez lawsuit, which had environmental plaintiffs arguing that

our San Juan-Chama Project water should be on the table for helping to meet minnow needs, and the MRGCD v Babbitt case, where it appeared that a critical habitat designation for the minnow had been made without sufficient sound scientific and economic data, changed all of that.

Two of Albuquerque's major business organizations NAIOP and the Economic Forum - formed a Joint Water Task Force. One of the key rallying points and first action items was to hire a consultant to research and report on the economic implications to the City and the region of the contested issues involving the minnow and to enter amici positions with that report attached in both lawsuits to help protect the sanctity of our San Juan-Chama water. In the process, we began to realize the complexity of our state, regional and local water issues and the direct connection between how they were resolved and our very economic sustainability. Other business organizations, such as the GACC, were invited to join our efforts and that marked the beginning of the Albuquerque Business Water Task Force which I am representing here today.

Members are actively involved in a multitude of collaborative water efforts around the state, including the Governor's Blue Ribbon Task Force on Water, the State Water Trust Board, the Water Quality Control Commission, the Middle Rio Grande Water Assembly, and the Town Hall on the State Water Plan. We have started our own Business Water Conservation Task Force with activities ranging from helping build New Mexico's first water-efficient Habitat for Humanity home to conducting internal studies to determine

what more we can do to improve water conservation in the business sector and the city as a whole.

We have brought our concerns on a number of water policy issues before our City Council, to the Governor and state legislature and to our congressional delegation. In short, in part thanks to the minnow getting our attention, we are now fully engaged in the water policy arena. And the minnow continues to hold our attention. Most recently, we organized the submission of resolutions/letters of support from 17 business organizations representing several hundred thousand local citizens to be included in the BOR's Draft EIS on the City's Preferred Alternative for the San Juan-Chama Drinking Water Project

(The Preferred Alternative includes a significant number of projects to protect the minnow) and, we are, of course before you today on the subject of the Tenth Circuit Court ruling centered around the minnow.

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#### US Fish and Wildlife Service: A Flexible Partnership

The last example of a positive impact that has come from the silvery minnow in

New Mexico is the positive effort made by the regional and local field service

staff of the FWS over the last few years to allow for increased flexibility and regulatory

certainty in the process of conserving the silvery minnow. There has truly been an

admirable attempt to develop innovative ways to work cooperatively with stakeholders in keeping with both the 1982 amendment to the ESA (ESA section 2(c)(2)) and the spirit of the FWS's 1997 10 Point Plan to "Making the ESA Work Better" (printed, 1997, reprinted, 1998) To the extent that this positive "can-do," adaptive management-type of approach is carried out, it minimizes stakeholder conflicts and thus contributes to the ultimate success of species recovery efforts. The March 13th, 2003 Ten Year Biological Opinion is an example of trying to interpret and implement the ESA in such a way that, in wet and dry years, the feds and non-feds can work together to protect the silvery minnow without making humans endangered in the process. From an economic standpoint, the business community heartily welcomes these efforts, as they promote a greater sense of stability about what is needed to protect the species, as well as expectations that positive outcomes will come to all water users through the recovery process.

#### The Bad

It is pretty easy to sum up "The Bad" in two words: "The Ruling." The Tenth Circuit

US Court of Appeals ruling in the Rio Grande Silvery Minnow et al. v. John W. Keyes III:

Takes the unprecedented step of ordering water imported from the Colorado River Basin into the Rio Grande Basin for use by the people of Albuquerque

and other cities, farmers and Pueblos to be used instead for the silvery minnow;

"...sends cracks through the foundation of our State water laws and creates a climate of uncertainty for our users." (News release quoting NM Attorney General Patricia Madrid, 8/11/03)

Quoting from Judge Paul Kelly's dissent, "The court holds that the

BOR has discretion to deliver less than the full amount of available San Juan-Chama ("SJC") and Middle Rio Grande ("MRG") project water to its contractors." "...thus, the BOR, without any recognized property right to the water in question, may use this stored project water to provide instream flows for the silvery minnow to alleviate jeopardy to that species under the Endangered Species Act ("ESA"). In so holding, the court injects uncertainty into settled contractual expectations and profoundly alters, in disregard of relevant statutory and regulatory authority, the obligations of federal agencies under the ESA." (Judge Paul Kelly in dissent in Minnow v Keyes, p1) (Emphasis added); (Attorney General Madrid and Judge Kelly's remarks may explain why nine other western states with Reclamation contracts are joining New Mexico in attempting to overturn the decision);

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Takes water that the forefathers of the City of Albuquerque had the vision and commitment to contract for decades ago, for use by future generations of its citizenry - and that two or three generations of

Albuquerqueans have now paid tens of millions for through their water rates - and puts it on the table for uses other than those for which it was intended, AND DOES THIS exactly at the time that the City is ready to begin diverting, treating and distributing that water to its population;  
 Puts real and painful meaning into the cliché that “no good deed goes unpunished,” considering that the City has gone considerably more than the extra mile in regards to assisting with recovery of the silvery minnow

itself, for example:

- The City has leased unused SJC water which has ultimately allowed for supplemental minnow water to become available;
- The City has contributed large amounts of funding, personnel and operating costs since 1999 for the minnow breeding program at the Albuquerque Zoo and now contributed again, with the donation of land and design and construction participation for the minnow's Naturalized Refugium;
- The City has conducted silvery minnow swimming speed studies to achieve design criteria for fishways;
- The City is participating in minnow monitoring studies for the Albuquerque reach;
- The City organized and helped staff the 2003 minnow egg collection;
- The City has contributed staffing and management for the ESA Collaborative Program; and last, but not least,
- The City has created a plan for its diversion project which tries to mitigate any potential negative effect on the minnow of that diversion.

In sum, the ruling threatens to wreak havoc with the cornerstone of the City's 1997 environmentally and financially-sound, Water Resource Management Strategy which would transition the City away from continuing the environmentally unsustainable practice of mining its aquifer for drinking water to using instead its imported surface water;

The ruling has different but similarly grave consequences for the farmers and Pueblos of the Middle Rio Grande, thus threatening region-wide disruption

of the livelihoods of hundreds of thousands of New Mexicans.

The ruling flies in the face of fostering greater cooperation between the ESA's implementing federal agencies and the states, as was statutorily

directed by the 1982 ESA amendment Sec 2 (c)(2); and,

Instead, the ruling creates an atmosphere of highly unproductive mistrust into Federal/state and/or local relationships. Just as groups like the Western States

Water Council are recognizing the significant need for federal/state collaboration

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to reduce conflicts between the water use needs of endangered species and human water users, the Tenth Circuit ruling tears them apart.

The Ugly

Judge Kelly notes in his dissent that “This case has enormous significance. Although the contracts at issue establish certain bilateral rights and duties, the court's interpretation renders the contracts somewhat illusory because the BOR will have the discretion to modify those rights and duties, thereby rendering uncertain the parties' settled contractual expectations.” (p. 34 of his dissent in Minnow v Keyes)

Now, at long last, I return to my initial response to your inquiry. If business needs certainty to stay here, expand or locate here, and an available and reliable water supply is

important to their perception of “certainty,” then, as Judge Kelly implies above, the

majority ruling involving meeting the minnow’s water needs with supplemental flows that come from our contracted San Juan-Chama water could create a very negative

economic impact for Albuquerque and in fact, the entire Middle Rio Grande.

Albuquerque itself has been counting on this water to supply 70% of its water

needs to the year 2060, as it cannot safely continue its current rate of groundwater pumping. All its prudent, farsighted planning is now put at risk.

As our economist consultant, Dr Brian McDonald said in his report, “Water, Regional

Economic Development and the Public Welfare,” “With future water physically constrained and less reliable, Albuquerque’s continued economic health will be undermined.” McDonald goes on to explain that “...If businesses perceive our area as less attractive due to uncertain water supplies, there will be less economic growth, which will result in the local tax base being insufficient to provide public goods and services which are an important component of the region’s quality of life and public welfare.” (McDonald report, p. 2)

As a mother of four children, I would like them to have the option to live here.

Dr. McDonald dashes those hopes with his next statement, “...With less expected economic growth, the Albuquerque economy will be unable to meet the employment needs of its next generation of young people, narrowing or closing their options to live and work in Albuquerque.” In other words, not only may I, and hundreds of thousands of other responsible citizens here, have agreed to seven annual water rate increases since 1997 to secure our San Juan-Chama water to have it, through this ruling, possibly taken away at the last moment, but the result of that action may be that our community will not have the economic wherewithal to sustain our own children. NOW THAT IS UGLY.

Since we would assumedly not put up with abandonment of our City for a lack of water,

what would we do? Here are some unpleasant possibilities:

- Faced with a groundwater resource that is depleting, causing subsidence

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and having increasing water quality issues, we would have to swallow an

over \$50 million dollar loss and go out looking for replacement supplies;

- Replacing 48,200 AF of San Juan-Chama water, at today’s cost of approximately \$4,500/AF for water rights, including transaction costs could cost the City over \$300 million dollars -and that doesn’t begin to touch the

opportunity cost for what we could have done with our San Juan-Chama

payments or this \$300 million...

- Now we are faced with the question of where are we going to get this much water in the time frame we need it? Desalination and oil and gas “produced”

water could not fill the bill in such short order, even if there were

not economic, environmental and legal obstacles involved.

Could we lease that much water from the other stakeholders on the Middle Rio Grande? For many, sure, if we could pry it out of their cold, dead fingers..

- Even assuming that were possible, now we are talking about destroying an entire way of life for farming folks, many who have had that livelihood as

an integral part of their family heritage for generations and generations.

- Even if that were a viable, desirable option, the Middle Rio Grande

has not been adjudicated, thus rendering almost moot the idea of ensuring

timely acceptance by the State Engineer for such a whole-scale place and purpose of use transfer of water.

- Obviously, to use the roadmap set forth through these hypothetical responses to the loss of our San Juan-Chama water would set urban dwellers against

agricultural water users. It would polarize our entire region, and make water policy options a zero-sum game. We do not want to re-enact Klamath on

the Rio Grande or worse, thank you very much.

Our City Fathers, in the 1960's, took bold steps to ensure an adequate public water supply for future generations living in a growing, prosperous and peaceful Albuquerque, through the purchase of the San Juan-Chama water. They charted a forward-looking path and started down it. We are fortunate to actually have one of those gentlemen involved in our Business Water Task Force today. It is time for him to pass the baton to us so that we can cross the finish-line with the diversion, treatment and distribution of water to Albuquerque that translates his dream and that of his colleagues into our present reality and our children's water future. And that's a peaceful water future without a concurrent civil war with our rural neighbors. We truly can do no less.

So, how do we propose to do this?

- By offering support to all those presently engaged in securing an

en banc rehearing of the Tenth Circuit Court's decision. It should be overturned;

- By wishing all the parties well who are engaged in

Governor Richardson's efforts to find a negotiated settlement to

the competing water users' needs which have led us to this point;

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- By supporting the legislative remedies offered by our Congressional

delegation, through added language to the Water and Energy Appropriations Bills, to take our San Juan-Chama Project Water off the table as a

mandated BOR "discretionary" fix to the supplemental water needs of the Rio Grande Silvery Minnow, unless there are willing sellers;

- By working with you and the rest of your House Resource Committee members to understand if avoiding rulings of this nature necessitates a

review of how the Endangered Species Act reads, or of how it is

interpreted and implemented.

We agree with our Congresswoman Heather Wilson that "The court's decision has enormous consequences for all western states where water is such a valuable resource and critical part of the economy" and that therefore, "This sets a precedent we can't allow to stand." (press release, August 30) and with our Congressman Steve Pearce, that we "need to find a balanced approach to satisfy the needs of both human water users and endangered species." (press release, August 30)

We look forward to working with you all to ensure we reach that balanced approach.

Only then can we rest assured that the saga of "The Good, The Bad and the Ugly" doesn't end with a "shoot-out at the OK Corral!"

Once again, on behalf of the Albuquerque Business Water Task Force, we greatly appreciate your interest in and commitment to making the ESA work in the west for both human and endangered species, and your giving us the chance to share our views.