



# United States Department of the Interior



BUREAU OF RECLAMATION  
Albuquerque Area Office  
555 Broadway NE, Suite 100  
Albuquerque, NM 87102-2352

IN REPLY REFER TO:

ALB-710  
2.2.1.06

VIA ELECTRONIC MAIL ONLY

Ms. Wendy Mason  
Wildfire Prevention and Communications Coordinator  
New Mexico Energy, Minerals, and Natural Resources Department, Forestry Division  
1220 South Saint Francis Drive  
Santa Fe, NM 87505  
wendy.mason@state.nm.us

Subject: Comments on a proposal to amend 19.21.2 New Mexico Annotated Code on  
Endangered Plant Species and Collection Permits to include incidental take

Dear Ms. Mason:

On September 28, 2021, the Energy, Mineral, and Natural Resources Department (EMNRD) proposed a rule to add the American Hart's-tongue fern (*Asplenium scolopendrium variant Americanum*; fern) to the New Mexico Endangered Plant Species List. However, this notice also included a proposed rulemaking to amend the definition of 'take' for state-listed plants in New Mexico to include incidental removal, harm, killing, or destruction of endangered plants (or parts thereof) through establishment of an incidental take permit system. The proposed incidental take permit system could potentially add immense time and expense to essential new or ongoing land and water management actions taken by the Bureau of Reclamation, Albuquerque Area Office and, therefore, given its potential largescale implications we recommend it be clarified and noticed separately from the amendment to add the fern to the New Mexico Endangered Plant Species List.

Reclamation conducts a variety of water operations and river maintenance activities in New Mexico. Reclamation staff help manage delivery of water for agriculture on the Rio Grande, Rio Chama, Pecos, and Canadian Rivers, and oversee the management of nine major dams and reservoirs (including those associated with agricultural irrigation, tribal agricultural practices, and agricultural employment). Reclamation implements a variety of facility maintenance actions to maintain water delivery, protect infrastructure, and deliver water to meet tribal needs and agricultural uses in New Mexico and downstream, as well as in compliance with water conveyance requirements under interstate Compact agreements. We recommend that activities supporting water operation and river maintenance be included as part of the definition of excepted agricultural practices (19.21.2.7.A.) as they are authorized and required by federal laws.

Reclamation also has concerns with the apparent scope of incidental take permitting that may be required, including for seed beds. For example, if Reclamation's irrigation facility or river

maintenance activities that result in the removal of vegetation and sediment from the channel of the Rio Grande Floodway encountered a seed bed of state listed endangered plant, a permit could be required. Subsequent processing, analysis, description, transplantation, monitoring planning and implementation, access and ownership agreements, and long-term arrangements could substantially increase the costs for our activities supplying essential and limited water resources to citizens and key sectors of New Mexico and across state lines. We therefore also recommend that “or parts thereof” not be included in the definition of “Taking” at 19.21.2.7.K or alternatively that the endangered plant parts be specifically described or listed separately.

Given that incidental take permit systems are complicated and require specific and clear language, as well as adequate staff resources to implement successfully, Reclamation has concerns about the feasibility and implementation of the proposed amendment. We would offer the opportunity for discussions between ENMRD and our office to identify any specific concerns related to state listed plants and Reclamation activities to identify a feasible path forward. Additionally, with the proposed amendment and permitting process, it would be necessary for EMNRD to provide the specific locations of endangered plants and plant parts, the mechanisms of impairing endangered plant survival or reproductive potential, and their current recovery status across their range in order for Reclamation to include that as part of any potential permit application for our activities in New Mexico. We recommend that this proposed rule for an incidental take permit system be refined, clarified, and be separately noticed; and we welcome specific discussions between our offices to identify a mutually beneficial path forward.

Should you have any questions, please contact Jen Bachus at (505) 462-3596 or email [jbachus@usbr.gov](mailto:jbachus@usbr.gov). For the hearing impaired please call the Federal Relay System at (800) 877-8339 (TTY).

Sincerely,

Jennifer Faler, P.E.  
Area Manager

VIA ELECTRONIC MAIL ONLY

cc: Ms. Kathy Callister  
Resource Management Division  
Bureau of Reclamation  
Upper Colorado Basin Region  
[kcallister@usbr.gov](mailto:kcallister@usbr.gov)