**DEPARTMENT OF THE INTERIOR**

**Fish and Wildlife Service**

**50 CFR Part 17**

**RIN 1018–AT88**

# Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Southwestern Willow Flycatcher (*Empidonax traillii extimus*)

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Final rule.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), are designating critical habitat for the southwestern willow flycatcher (*Empidonax traillii extimus*) pursuant to the Endangered Species Act of 1973, as amended (Act). In total, approximately 48,896 hectares (ha) (120,824 acres (ac)) or 1,186 kilometers (km) (737 miles (mi)) fall within the boundaries of the critical habitat designation. The critical habitat is located in Apache, Cochise, Gila, Graham, Greenlee, Maricopa, Mohave, Pinal, Pima, and Yavapai counties in Arizona (AZ), Kern, Santa Barbara, San Bernardino, and San Diego counties in southern California (CA), Clark County in southeastern Nevada (NV), Grant, Hidalgo, Mora, Rio Arriba, Soccoro, Taos, and Valencia counties in New Mexico (NM), and Washington County in Southwestern Utah (UT).

**DATES:** This rule is effective November 18, 2005.

**ADDRESSES:** Comments and materials received, as well as supporting documentation used in the preparation of this final rule, are available for public inspection, by appointment, during normal business hours at the AZ Ecological Services Office, U.S. Fish and Wildlife Service, 2321 West Royal Palm, Suite 103, Phoenix, AZ 85021 (telephone 602/242–0210). The final rule, final environmental analysis, final economic analysis, and maps are available via the Internet at *http://www.fws.gov/arizonaes.*

**FOR FURTHER INFORMATION CONTACT:** For information about Santa Barbara County in CA, contact Diane K. Noda, Field Supervisor, Ventura Fish and Wildlife Office, 2493 Portola Road, Suite B, Ventura, CA, 93003 (telephone 805/644–1766; facsimile 805/644–3958). For information about San Bernardino or San Diego Counties in CA, contact Jim Bartel, Field Supervisor, Carlsbad Fish and Wildlife Office, 6010 Hidden Valley Road, Carlsbad, CA 92011 (telephone 760/431–9440; facsimile 760/431–9624). For information about Kern County in CA, contact Wayne White, Field Supervisor, Sacramento Fish and Wildlife Office, 2800 Cottage Way, Room W–2605, Sacramento, CA 95825 (telephone 916/414–6600; facsimile 916/414–6713). For information about Grant, Hidalgo, Mora, Rio Arriba, Soccoro, Taos, or Valencia Counties in NM, contact Susan MacMullin, Field Supervisor, NM Fish and Wildlife Service Office, 2105 Osuna Road NE, Albuquerque, NM 87113 (telephone 505/346–2525; facsimile 505/346–2542). For information about Clark County in NV, contact Cynthia Martinez, Field Supervisor, Las Vegas Fish and Wildlife Service Office, 4701 North Torrey Pines Drive, Las Vegas, NV 89130 (telephone 702/515–5230; facsimile 702/515–5231. For information about Washington County in UT, contact Henry Maddux, Field Supervisor, Salt Lake City Fish and Wildlife Service Office, 2369 West Orton Circle, Suite 50, West Valley City, UT 84119 (telephone 801/975–3330; facsimile 801/975–3331). For information about Apache, Cochise, Gila, Graham, Greenlee, Maricopa, Mohave, Pinal, Pima, or Yavapai Counties in AZ, contact Steve Spangle, Field Supervisor, AZ Fish and Wildlife Service Office, 2321 West Royal Palm, Suite 103, Phoenix, AZ 85021 (telephone 602/242–0210; facsimile 602/242–2513).

**SUPPLEMENTARY INFORMATION:**

## Designation of Critical Habitat Provides Little Additional Protection to Species

In 30 years of implementing the Act, the Service has found that the designation of statutory critical habitat provides little additional protection to most listed species, while consuming significant amounts of available conservation resources. The Service's present system for designating critical habitat has evolved since its original statutory prescription into a process that provides little real conservation benefit, is driven by litigation and the courts rather than biology, limits our ability to fully evaluate the science involved, consumes enormous agency resources, and imposes huge social and economic costs. The Service believes that additional agency discretion would allow our focus to return to those actions that provide the greatest benefit to the species most in need of protection.

## Role of Critical Habitat in Actual Practice of Administering and Implementing the Act

While attention to and protection of habitat is paramount to successful conservation actions, we have consistently found that, in most circumstances, the designation of critical habitat is of little additional value for most listed species, yet it consumes large amounts of conservation resources. Sidle (1987) stated, ''Because the Act can protect species with and without critical habitat designation, critical habitat designation may be redundant to the other consultation requirements of section 7.'' Currently, only 466 species or 37 percent of the 1,268 listed species in the U.S. under the jurisdiction of the Service have designated critical habitat.

We address the habitat needs of all 1,268 listed species through conservation mechanisms such as listing, section 7 consultations, the section 4 recovery planning process, the section 9 protective prohibitions of unauthorized take, section 6 funding to the States, and the section 10 incidental take permit process. The Service believes that it is these measures that may make the difference between extinction and survival for many species.

We note, however, that two courts found our definition of adverse modification to be invalid (March 15, 2001, decision of the United States Court Appeals for the Fifth Circuit, *Sierra Club* v. *U.S. Fish and Wildlife Service et al.*, F.3d 434 and the August 6, 2004, Ninth Circuit judicial opinion, *Gifford Pinchot Task Force* v. *United State Fish and Wildlife Service*). In response to these decisions, we are reviewing the regulatory definition of adverse modification in relation to the conservation of the species.

## Procedural and Resource Difficulties in Designating Critical Habitat

We have been inundated with lawsuits for our failure to designate critical habitat, and we face a growing number of lawsuits challenging critical habitat determinations once they are made. These lawsuits have subjected the Service to an ever-increasing series of court orders and court-approved settlement agreements, compliance with which now consumes nearly the entire listing program budget. This leaves the Service with little ability to prioritize its activities to direct scarce listing resources to the listing program actions with the most biologically urgent species conservation needs.

The consequence of the critical habitat litigation activity is that limited listing funds are used to defend active lawsuits, to respond to Notices of Intent (NOIs) to sue relative to critical habitat, and to comply with the growing number of adverse court orders. As a result, listing petition responses, the Service's own proposals to list critically

imperiled species, and final listing determinations on existing proposals are all significantly delayed.

The accelerated schedules of court ordered designations have left the Service with almost no ability to provide for adequate public participation or to ensure a defect-free rulemaking process before making decisions on listing and critical habitat proposals due to the risks associated with noncompliance with judicially-imposed deadlines. This in turn fosters a second round of litigation in which those who fear adverse impacts from critical habitat designations challenge those designations. The cycle of litigation appears endless, is very expensive, and in the final analysis provides relatively little additional protection to listed species.

The costs resulting from the designation include legal costs, the cost of preparation and publication of the designation, the analysis of the economic effects, the cost of requesting and responding to public comment, and in some cases the costs of compliance with the National Environmental Policy Act (NEPA). None of these costs result in any benefit to the species that is not already afforded by the protections of the Act enumerated earlier, and they directly reduce the funds available for direct and tangible conservation actions.

## Background

Background information on the southwestern willow flycatcher can be found in our proposal of critical habitat for the southwestern willow flycatcher, published in the **Federal Register** on October 12, 2004 (69 FR 60706); the Southwestern Willow Flycatcher Recovery Plan (USFWS 2002); our previous designation of critical habitat for this species, published on July 22, 1997 (62 FR 39129), and August 20, 1997 (62 FR 44228); and the final rule listing this bird as endangered (February 27, 1995; 60 FR 10694). That information is incorporated by reference into this final rule. This rule becomes effective on the date listed under **DATES** at the beginning of this document, and replaces the July 22, 1997, critical habitat designation for this species that was set aside pursuant to a court order on May 11, 2001.

## Previous Federal Actions

Previous Federal actions for the southwestern willow flycatcher can be found in our proposal of critical habitat for the southwestern willow flycatcher published on October 12, 2004 (69 FR 60706). That information is incorporated by reference into this final rule.

## Summary of Comments and Recommendations

We requested written comments from the public on the proposed designation of critical habitat for the southwestern willow flycatcher in the proposed rule published on October 12, 2004 (69 FR 60706). The comment period was extended on December 13, 2004 (69 FR 72161), and on March 31, 2005 (70 FR 16474), resulting in the comment period being continuously open until May 31, 2005. The comment period was re-opened once more from July 7 to July 18, 2005 (70 FR 39227). We contacted the appropriate Federal, State, and local agencies, Tribes, scientific organizations, elected officials, and other interested parties and invited them to comment on the proposed rule. We contacted these groups by letter, electronic mail, and/or post card at the time of publication of the proposed rule; at each extension of the comment period; when we announced the availability of the draft economic analysis, draft environmental assessment, and location of public hearings (70 FR 21988); and during re-opening of the comment period (70 FR 39227). Following publication of each **Federal Register** notice, we widely distributed news releases and posted them on the Internet. We also sent two newsletter updates to these groups during the rulemaking process to update them on the status of the proposal and associated documents.

In addition, we invited public comment on the proposal through the publication of legal notices in 14 regional newspapers announcing 8 public hearings, 8 public information meetings, and the availability of the draft economic analysis and draft environmental assessment. These legal notices were published in the Arizona Republic, Silver City Daily Press, Santa Fe New Mexican, Grand Junction Sentinel, The Spectrum (St George, UT), Las Vegas Review Journal, Kern Valley Sun, The Bakersfield Californian, Riverside Press-Enterprise, San Bernardino Sun, San Diego Union Tribune, Albuquerque Journal, Albuquerque Tribune, and Valley Courier (Alamosa, CO). We published legal ads prior to NEPA scoping meetings and also when we announced the documents' availability and the public hearings.

We held public hearings and NEPA informational open houses at Escondido and Chino, CA (May 2–3, 2005); Las Vegas, NV, and Lake Isabella, CA (May 9–10, 2005); and Mesa, AZ, Silver City, NM, Albuquerque, NM, and Alamosa, CO (May 16–19, 2005). We also contacted and sent press releases to news media in Arizona, New Mexico, Southern California, Southern Nevada, Southern Utah and Southern Colorado. Additional public information meetings were held in Camp Verde, AZ (February 17, 2005—sponsored by the Verde Watershed Association); Albuquerque, NM (May 18, 2005—sponsored by Northern NM Pueblos), Bishop, CA (May 24, 2005—sponsored by Los Angeles Department of Water and Power), and Safford, AZ (July 7, 2005—sponsored by Graham County). All comments and new information received during the open comment period have been incorporated into this final rule as appropriate.

We received a total of 534 pieces of correspondence (e-mails, letters, and faxes) during the public comment periods. Of the 534 comment letters, 237 were received from individuals, 164 from government agencies, 31 from 21 different tribes, 62 from organizations, and 40 from businesses.

We received comments from each State represented in the proposed designation. We received 260 comments letters from AZ, 72 comment letters from CA, 64 from NM, 40 from CO, 8 from NV, and 5 from UT. A total of 85 were received from outside of these States or areas where critical habitat was proposed for designation. Comments from each piece of correspondence were identified, grouped by issue, and reviewed.

## Peer Review

In accordance with our peer review policy published on July 1, 1994 (59 FR 34270), we solicited independent opinions from at least three knowledgeable individuals who have expertise with the species, with the geographic region where the subspecies occurs, and/or familiarity with the principles of conservation biology. Of the seven individuals contacted, three responded. The peer reviewers that submitted comments generally supported the proposal and provided us with comments, which are included in the summary below and incorporated into the final rule, as appropriate. We received comments from the peer reviewers during the comment period on our proposed rule.

### *Peer Review Comments*

(1) *Comment:* Peer reviewers commented that we made good use of the current data, published and gray literature, expert opinion, and the Recovery Plan (USFWS 2002).

*Our Response:* We believe we have considered and applied to this designation the best available scientific

and commercial information regarding the southwestern willow flycatcher.

(2) *Comment:* One peer reviewer commented that while we described in detail the dynamic aspects of flycatcher habitat, that dynamic component is not reflected in the primary constituent elements (PCEs). Limiting critical habitat to only where vegetation currently exists undermines the dynamic component of its habitat.

*Our Response:* As we have described in the proposed rule and this final rule, the dynamic aspects of flycatcher habitat are an important component of its long-term suitability for nesting and the overall quality and presence of riparian vegetation. Because flycatchers commonly place nests in the dense riparian vegetation in early successional growth, recycling of habitat from natural disturbances (*i.e.*, flooding) is necessary to promote dense growth. Germination and growth of riparian vegetation is essential. As a consequence of river dynamics and proximity to water, the location and/or condition of its habitat can change from one season to the next due to drought, flooding, or simple growth of vegetation. Our PCEs focused on the end result of all the components that culminate in the development of flycatcher habitat. We described those components (*e.g.*, broad floodplain, surface water, fine sediments, hydrologic regime, channel-floodplain connectivity, elevated groundwater, etc.) in detail in the supporting text for the PCEs (69 FR 60712–60715). For example, we described in the *Sites for Germination and Seed Dispersal* section, the importance of appropriate floodplain conditions for the development, abundance, distribution, maintenance, and germination of flycatcher habitat, including features such as elevated groundwater, and fine/moist soils for seed germination and insect production.

As the peer reviewer mentioned, we described in great detail the dynamic aspects of flycatcher habitat location and growth in the proposed rule. However, we did not reflect the essential aspect of vegetation germination and growth (*i.e.,* succession) that should accompany these PCEs. In order to more accurately reflect our proposal and the PCEs for the southwestern willow flycatcher, we have added a ''successional'' component to the PCEs. The Act requires that Federal action agencies consider and consult on actions that affect the PCEs. Thus, projects that impede the regeneration and/or growth of riparian vegetation, depending on the scope of the project, could result in an adverse affect to riparian habitat, thus requiring consultation under section 7 of the Act.

(3) *Comment:* One peer reviewer commented, with respect to the PCEs, that flycatcher habitat is more than dense vegetation. Southwestern willow flycatchers require a mosaic of riparian vegetation in a variety of developmental (*i.e.*, successional) stages.

*Our Response:* We agree. Southwestern willow flycatcher habitat consists of riparian vegetation in a variety of growth stages used for a variety of life-history needs, such as foraging, migration, and dispersal. An area with dense vegetation for nest placement is the most defined structure and is captured in PCEs 1b through 1e. By emphasizing shorter/sparser vegetation, with a mosaic not uniformly dense as small as 0.1 ha (.25 ac), PCEs 1a and 1e not only encompasses riparian plant species, but important habitats for breeding and foraging southwestern willow flycatchers, but also accounts for habitat for dispersing and migrating southwestern willow flycatchers. Also, on the basis of the issue raised in this comment, and the need for further clarification, we expanded PCE number 1 in this final rule to accurately reflect other life-history needs of the southwestern willow flycatcher (*i.e.*, migration, dispersal, foraging, and shelter) fulfilled by riparian vegetation described in our proposed and final rules. However, we note that the methodology used for designating critical habitat for the southwestern willow flycatcher was based around nesting territories, and critical habitat is not being designated solely as an area that is used for migration, dispersal, foraging, and shelter.

(4) *Comment:* Two peer reviewers remarked that extant, large populations of southwestern willow flycatchers are the most important assets for recovery. But excluding other locations with smaller populations may fall short in providing specific areas essential to the conservation of a listed species and that may require special management considerations. Management Units where recovery goals exist that are not represented in this designation were used as examples.

*Our Response:* We recognize that there are locations and areas within the geographical area occupied by the southwestern willow flycatcher that were not proposed as critical habitat. We also agree with the comment that locations with smaller breeding populations or improvement of habitat conditions in areas with no breeding populations are important. However, section 3(5)(c) of the Act states that not all areas that can be occupied by a species should be designated as critical habitat unless the Secretary determines that all such areas are essential to the conservation of the species. As described below, the methodology used to define those areas that meet the definition of critical habitat focused on large populations that are in high connectivity to one another. Thus, while not all areas important for flycatcher recovery were proposed as critical habitat, we believe this designation defines those areas that are essential. We also acknowledge that while Recovery Plans formalize the recovery strategy for a species, they are not regulatory documents and that critical habitat can contribute to the overall recovery strategy for a listed species, but does not, by itself, achieve recovery plan goals.

We encourage Federal and State agencies, Tribal governments, municipalities, private groups, and landowners to continue conducting surveys for flycatchers, protect and strive to improve smaller populations of flycatchers, and manage flycatcher habitat to create more populations in order to reach recovery. Because an area is not designated as critical habitat, does not mean it is not important for flycatcher recovery.

(5) *Comment:* Two peer reviewers, who were involved with the development of the population viability analysis for the flycatcher, generally agreed that we interpreted the information correctly and appropriately identified 10 territories as a large population. One reviewer commented that, ''the recommendation in the Recovery Plan with regard to metapopulation stability was based on a population viability analysis conducted to answer questions about the relationship between individual flycatcher sites and their relative importance to overall flycatcher population size. The emphasis in the Recovery Plan of the importance of large populations to metapopulation stability is based on the positive relationship between population size and colonization potential. The relationship however is non-linear with increase in colonization potential diminishing for growth above 10 territories and virtually disappearing for growth above 25 territories. Given this, a biologically based break point of 10 territories to distinguish between large and small populations (sites) is appropriate.''

*Our Response:* We recognize that the use of numbers and break points can be difficult, and also agree that we interpreted and used the data appropriately.

(6) *Comment:* Peer reviewers generally agreed that our application of a 29 km (18 mi) radius, determined by the between-year movements recorded from banded southwestern willow flycatchers, was appropriate to delineate the limits of essential habitat and a high degree of connectivity between collections of smaller sites. However, two peer reviewers recognize that, given more time and with additional banding, survey, and monitoring efforts, it is likely that greater distance movements would be recorded more frequently.

*Our Response:* We acknowledge the input provided by the reviewers with respect to longer movements, and note that the researchers have also provided this perspective. We understand that there are some between-year flycatcher movements that are very large (greater than 400 km/248 miles) (E. Paxton, USGS, e-mail). However, these movements, while important to understand the connection of populations, are not common. Populations located hundreds of kilometers (miles) apart would not likely be considered ''highly'' connected. Conversely, sites only a kilometer or so apart could hardly be considered a different site. From 1997 to 2003, Paxton (USGS, e-mail) reported 267 of 292 band recoveries occurred within 29 km (18 mi) of previous year's location. Our approach with respect to use of the results of banding data, was to determine highly connected southwestern willow flycatcher sites in order to identify essential habitat and define population connectivity. We believe our interpretation of the data for the purposes used here was appropriate.

(7) *Comment:* Peer reviewers supported using the survey results from the years 1993 to 2002 to develop this designation of critical habitat for the southwestern willow flycatcher.

*Our Response:* The information collected throughout the bird's range by the public and surveyors completing and submitting forms, and State and Federal agencies summarizing and cataloging these results in databases is invaluable. It is this quality and level of data that provides us the ability to develop the appropriate guidance documents and regulations pursuant to the Act that assist in the recovery of federally listed species such as the southwestern willow flycatcher.

(8) *Comment:* Peer reviewers generally agreed that a lateral extent boundary tracking the extent of riparian vegetation within the 100-year floodplain was appropriate.

*Our Response:* As one peer reviewer noted and we pointed out in the proposed rule, flycatcher habitat will change its location and condition within the 100-year floodplain due to events such as flooding, drought, and vegetation growth. Therefore, a lateral extent that reasonably captures the boundaries of that dynamic habitat movement, we believe, is appropriate.

(9) *Comment:* One peer reviewer commented that rarely, flycatcher breeding habitat may persist outside of the 100-year floodplain in response to an artificial or man-made situation.

*Our Response:* We are aware that infrequently, flycatcher breeding habitat and migratory habitat may occur in unusual locations outside the floodplain. There may also be more natural situations where flycatchers use upland habitat for nesting or foraging. However, we believe we captured essential areas across the bird's range through our methodology as described in this rule. We point out, as the reviewer did, that direct or indirect adverse affects to those areas are still subject to consultation under section 7 of the Act and those birds are still protected by the prohibitions set forth in section 9 of the Act.

(10) *Comment:* One peer reviewer pointed out that there are significant anthropogenic influences throughout the bird's range that help support southwestern willow flycatcher habitat which we did not elaborate on in the proposed rule. Because of that, there may be some confusion over what constitutes a ''riparian developed'' area.

*Our Response:* As the peer reviewer noted, irrigation canals and/or agricultural run-off, among other things, can help develop and support flycatcher habitat. The Recovery Plan (USFWS 2002: D–15) discussed that ''* * * although some flycatcher breeding sites * * * are relatively un-impacted by human activities, most of the riparian vegetation patches in which the flycatcher breeds are supported by various types of supplemental water including agricultural and urban run-off, treated water outflow, irrigation or diversion ditches, reservoirs, and dam outflows. Although the water provided to these habitats might be considered ''artificial'', they are often essential for maintaining the habitat in a suitable condition for breeding flycatchers. However, reliance on such water sources for riparian vegetation persistence may be problematic because the availability (in quantity, timing, and quality) is often subject to dramatic changes based on human use patterns; there is little guarantee that the water will be available over the long-term.''

Our PCEs focused on the culmination of factors such as floodplain shape, soils, water, and groundwater elevation that resulted in vegetation and insects appropriate for southwestern willow flycatchers when they are breeding (flycatchers that are documented attempting to nest; breeding flycatchers are always territorial flycatchers), migrating (flycatchers traveling north to breeding grounds and south to wintering grounds), dispersing (young-of-the-year and adult flycatchers typically following nesting and prior to migration), territorial (flycatchers during the breeding season that defend a territory; territorial flycatchers often nest, however un-paired territorial birds may not), and non-breeding (flycatchers during a portion of or for the entire nesting season that do not defend a territory or attempt to nest; these birds can also be referred to as floaters). Anthropogenic (*i.e.,* man-made) factors can, if conditions are right, mimic some of those factors and help support southwestern willow flycatcher habitat. Also, these same types of activities, depending on the degree, location, and extent of their influence, can degrade southwestern willow flycatcher habitat. For example, dam operations can cause water to spread out over a wider area more consistently than there would be without the dam, potentially causing the development of riparian habitat over a large area. However, depending on how that dam is operated, flycatcher habitat may or may not be able to develop due to the amount and length of time water covers the floodplain/lake bottom. Additionally, some dams divert water from a river such that water rarely returns to the river channel, thereby removing the opportunities for habitat to develop below the dam.

Our description of riparian developed areas in the lateral extent section refers to infrastructures that do not grow riparian vegetation such as agricultural fields, roads, houses, landscaped areas surrounding houses, cement pads, bridge footings, bases of utility structures, and existing gravel pits.

Overall, we recognize the value of situations where man-made activities augment, maintain, enhance, or develop southwestern willow flycatcher habitat. We also recognize the potential difficulties that may arise with respect to a landowner's desire to change practices that could result in incidental take of flycatchers (regardless of a critical habitat designation). In these instances, we seek to work with landowners and/or agencies to provide Endangered Species Act coverage through section 7 consultations, a Safe Harbor Agreement, or Habitat Conservation Plan to ensure conservation of the flycatcher and to

provide regulatory authorization and unburden a landowner.

*Comments Related to Previous Federal Actions, the Act, and Implementing Regulations*

(11) *Comment:* Many commented that our discussion concerning the value of designating critical habitat, and the procedural and resource difficulties involved should be addressed in a different forum, not in a critical habitat rule.

*Our Response:* As discussed in the sections ''Designation of Critical Habitat Provides Little Additional Protection to Species,'' ''Role of Critical Habitat in Actual Practice of Administering and Implementing the Act,'' and ''Procedural and Resource Difficulties in Designating Critical Habitat'' and other sections of this and other critical habitat designations, we believe that, in most cases, other conservation mechanisms provide greater incentives and conservation benefits than does the designation of critical habitat. These other mechanisms include the section 4 recovery planning process, section 6 funding to the States, section 7 consultations, the section 9 protective prohibitions of unauthorized take, the section 10 incidental take permit process, and cooperative programs with private and public landholders and tribal nations.

(12) *Comment:* Many commenters identified particular areas that they believed should not be designated because critical habitat will unnecessarily burden the regulated public and will overload Service staff with implementation of the designation. Specifically, many private landowners with agricultural fields, water diversions, and cattle ranches throughout the bird's range commented that this designation would cause them harm economically and delay projects through the regulatory process.

*Our Response:* Pursuant to the Act, we are statutorily required to designate critical habitat for a federally listed species if it is determined to be both prudent and determinable. We have previously made a determination that critical habitat was both prudent and determinable in our previous designation for this species (62 FR 39129, July 22, 1997). We further note that we are under court order to re-designate critical habitat for the southwestern willow flycatcher (please refer to our proposed rule (69 FR 60706, October 12, 2004) under Previous Federal Action for a discussion of the litigation history concerning this designation). Critical habitat designations do not constitute or create a regulatory burden, by themselves, in terms of Federal laws and regulations on private landowners carrying out private activities, but in certain areas they may trigger additional State regulatory reviews and other requirements. For example, actions occurring in critical habitat in California may be subject to additional regulatory reviews under the California Environmental Quality Act and other State laws and regulations. When a private action requires Federal approval, permit, or is federally funded, the critical habitat designation may impose a Federal regulatory burden for private landowners; absent Federal approval, permits, or funding, the designation should not affect farming and ranching activities on private lands. Similarly, a Federal nexus could result in the designation affecting future land use plans, and the designation may trigger State requirements which could impact such plans. However, we note that lands included in this proposal are waterways with limited development (housing or commercial structures) potential. As explained in this rule, we are required to and have developed an economic analysis of the effects of this designation pursuant to section 4(b)(2) of the Act which considers the issues raised by the commenters.

(13) *Comment:* Some commented that designation of critical habitat for the southwestern willow flycatcher conflicts with management of native fish (Lake Mead and Horseshoe Lake), and similarly, that critical habitat for the flycatcher is inappropriate because it results in single species management.

*Our Response:* Management for southwestern willow flycatcher habitat and native fish and other riparian/aquatic species should largely be compatible. A large number of riparian species are listed as threatened or endangered, species that naturally inhabit the riparian and/or aquatic habitats to which the flycatcher is also tied (USFWS 2002: 55–60). This underscores that southwestern riparian and aquatic habitats, while supporting disproportionately high levels of biodiversity, have also been degraded at a landscape level. The presence of so many listed species within this broad ecosystem does not mean that difficult decisions must be made of managing for one listed species rather than, or at the expense of, another. Rather this situation illustrates that if riparian and aquatic ecosystems are improved to a more natural, heterogeneous conditions (recognizing that restoring rivers to completely wild conditions is not possible), many imperiled species will benefit.

We do recognize however that there may be some specific instances where situations such as water storage could result in conflicts in somewhat artificial environments such as lakes for the flycatcher and listed fish. However, these instances throughout the flycatcher's range and this designation, we believe, are few and far between, and are site specific. The two locations brought up in comments, Lake Mead and Horseshoe Lake, are being excluded from this final rule pursuant to section 4(b)(2) of the Act.

(14) *Comment:* Some comments pointed out that our critical habitat proposal was significantly different in the amount and location of areas identified in our 1997 designation, and there was no discussion or analysis of the difference.

*Our Response:* As the comment points out, some areas designated as critical habitat in 1997 were not proposed for designation in this proposal, some of the same areas were proposed, and new areas were proposed. Our draft NEPA document described the specific streams that changed between the two proposals. Our specific methodology used to identify areas proposed as critical habitat provided our approach to critical habitat in contrast to the previous designation (which had no specific methodology). The science provided in the Recovery Plan (USFWS 2002) and our improved knowledge of the distribution and abundance of territories, use of river corridors for migration, year-to-year movements, and habitat use within territories helped guide our approach and provided support for the segments proposed. Therefore, it was largely our improved knowledge of the flycatcher and its habitat that provided the difference in areas proposed in 2004 compared to those in 1997.

(15) *Comment:* Some stated that our comment periods for the proposed rule, NEPA document, and economic analysis were inadequate to allow the public to understand and comment meaningfully on the proposed rule and should be extended.

*Our Response:* The proposed critical habitat rule for the southwestern willow flycatcher was available to the public for review and comment from October 12, 2004, to May 31, 2005, and for an additional 11 days from July 7 to July 18, 2005. The comment periods for the economic analysis and NEPA document extended from April 28, 2005, to May 31, 2005, plus the additional 11-day period in July. Therefore, there was an open comment period for 43 days for the draft economic analysis and NEPA documents, plus there was a total of just

over 70 days where the public was able to examine these documents. We believe these two public comment periods of over 8 months for the proposal, and 43 days (but over 70 days to review) for the NEPA and economic analysis, provided adequate opportunity for public comment. In addition, due to the large scope of this rule and in order to comply with our September 30, 2005, court ordered date for completion of the final rule it would not have been possible to extend the comment period beyond July 18, 2005.

(16) *Comment:* One commenter stated that the Service did not adequately notify landowners where proposed critical habitat was located. Another commenter expressed concern that the quality of the maps was poor and therefore, made it difficult for the public to adequately comment on the proposed revisions.

*Our Response:* Due to the large scope of the proposed designation it was not possible to contact each landowner. However, we issued a widely disseminated news release regarding our proposal and published legal notices in major newspapers in areas involved in the proposal. We published numerous **Federal Register** notices including a notice of intent to conduct scoping for critical habitat, the critical habitat proposal, comment period extensions, notice of availability of draft documents, notices of scoping meetings and hearings. We sent out thousands of letters and cards to State and Federal government agencies, private individuals and groups, elected officials, and tribal governments also announcing the proposal, document availability, and public meetings/hearings. We also developed and sent out press releases concurrent with **Federal Register** notice announcements. A web page of southwestern willow flycatcher critical habitat materials was maintained at Arizona Ecological Services Web Site *http://www.fws.gov/arizonaes*. Public meetings, open houses and/or hearings on the published proposal were held in the following locations: February 17, 2005—Camp Verde, AZ (sponsored by Verde Watershed Association); May 2, 2005, Escondido, CA; May 3, 2005, Chino, CA; May 9, 2005, Las Vegas, NV; May 10, 2005, Lake Isabella, CA; May 16, 2005, Mesa, AZ; May 17, 2005, Silver City, NM; May 18, 2005, Albuquerque, NM; May 19, 2005, Alamosa, CO; May 24, 2005—Bishop, CA (sponsored by Los Angeles Water and Power Authority); July 7, 2005—Safford, AZ (sponsored by Graham County). NEPA scoping meetings were held at Escondido, Chino, and Lake Isabella, CA; Phoenix, AZ; Las Vegas, NV; Silver City and Albuquerque, NM, and Alamosa, CO in early 2004.

Maps delineating the boundaries of critical habitat were included in the October 12, 2004, proposed rule, and posted at *http://criticalhabitat.fws.gov* were specific GIS layers of the proposed critical habitat. In the proposed rule we provided contact information for eight Service Field Offices for anyone seeking assistance with the proposed critical habitat. Therefore, we believe that we made every effort possible to reach all interested parties and provide avenues for them to obtain information concerning our proposal and supporting documents.

(17) *Comment:* One commenter stated that local land use controls provide sufficient protection for the southwestern willow flycatcher.

*Our Response:* Although there are other State, local, and Federal laws that offer some protection to endangered species and their habitats (*e.g.*, Clean Water Act and California Environmental Quality Act), none provide the same level of protection and review for threatened and endangered species as does the Act. These laws are not redundant and work in concert to provide protection for environmental resources.

(18) *Comment:* Some comments expressed that the Service failed to identify special management considerations related to a variety of lands across the subspecies range.

*Our Response:* In our proposed designation of critical habitat for the southwestern willow flycatcher that published on October 12, 2004 (69 FR 60706), we identified special management considerations shared by all stream segments proposed for southwestern willow flycatcher critical habitat. We cited threats such as loss and modification of habitat due to industrial, agricultural, and urban developments, and directed the reader to locations where the threats are described in great detail in the final listing rule (60 FR 10694, February 27, 1995), the previous critical habitat designation (62 FR 39129, July 22, 1997), and the final recovery plan (USFWS 2002). We note there are complete appendices included in the Recovery Plan (USFWS: Appendices A–O) that elaborate on rangewide southwestern willow flycatcher management issues focusing on water management, livestock grazing, recreation, cowbird parasitism, habitat restoration, exotic plants, fire management, recreation, etc.

(19) *Comment:* One comment asked whether on-going activities, such as routine inspections, road grading, and construction adjacent to designated critical habitat are considered to appreciably decrease habitat values or quality through indirect effects.

*Our Response:* The effects of any such activities on critical habitat must be considered by the Federal agency planning to conduct such activities. The action agency determines whether their action(s) ''may affect'' the southwestern willow flycatcher or its primary constituent elements within the adjacent critical habitat based on their analyses. If so, the action agency would enter into consultation with us under section 7. We do not anticipate that grading existing roads or inspection of existing developed areas would likely result in an effect to critical habitat. Construction, depending on the type of activity, could have adverse effects, especially if it indirectly resulted in impacts to habitat such as groundwater pumping, channel manipulation, habitat trampling, etc.

(20) *Comment:* Several comments expressed concern that commercial activities, such as mining, mineral prospecting, agriculture, etc. would be prohibited or severely restricted by a designation of critical habitat.

*Our Response:* Section 7(a)(2) of the Act requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of such a species or result in the destruction or adverse modification of critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. Through this consultation, the action agency ensures that their actions do not destroy or adversely modify critical habitat. Section 7 of the Act does not apply to activities on private or other non-Federal lands that do not involve a Federal nexus, and critical habitat designation would not provide any additional protections under the Act for private or non-Federal activities. Critical habitat does not prohibit private or commercial activities from occurring. However, all parties, Federal, State, private, and tribal are unable to take (*e.g.*, harm, harass, pursue) listed species under section 9 without the appropriate permit.

(21) *Comment:* Some comments suggested that the designation of critical habitat would prohibit mosquito abatement programs.

*Our Response:* The Service does not believe that mosquito abatement programs focused in communities and developed areas necessarily pose a risk to southwestern willow flycatchers. We

encourage cooperation and coordination from those applying chemicals to riparian areas in and around river water due to possible concerns regarding southwestern willow flycatchers, other wildlife dependent on insect populations, and water quality. We believe there are applications of mosquito abatement in riparian areas that could be compatible with southwestern willow flycatchers and reduce risk to other wildlife and people. For example, application of larvicide is typically most effective, target specific, and provides the least risk to non-target species (CDC 2003).

*Comments Related to Critical Habitat, Primary Constituent Elements, and Methodology*

(22) *Comment:* Some questioned the scientific evidence used to determine critical habitat, one describing it as junk science.

*Our Response:* In designating critical habitat for the southwestern willow flycatcher, we have used the best available scientific and commercial information, including results of numerous surveys, peer-reviewed literature, unpublished reports by scientists and biological consultants, habitat models (Hatten and Paradzick 2003; Dockens and Paradzick 2004), a stakeholder-driven Recovery Plan (USFWS 2002), and expert opinion from biologists with extensive experience studying the southwestern willow flycatcher and its habitat. Further, information provided in comments on the proposed designation and the draft economic analysis were evaluated and taken into consideration in the development of this final designation, as appropriate. The literature cited for this rule is posted at *http://www.fws.gov/arizonaes/*. Also, the proposed rule has undergone peer review, and those comments are included above.

(23) *Comment:* One commenter remarked that the information developed for the 29 km (18 mi) radius is inappropriate because it was site specific and is only a by-product of the study area.

*Our Response:* We disagree and note the support for this radius provided by peer reviewers in comment number 6. In the instance of the work conducted by U.S. Geological Survey (USGS) that provided the information on natural movements of southwestern willow flycatchers, we are familiar with no other study that has occurred for as many years (since 1997), over as large an area, and has trapped, banded, and re-sighted as many birds. The primary study area occurs along lower Tonto Creek, Roosevelt Lake, the Salt River immediately above Roosevelt Lake, the lower San Pedro River (encompassing an area from approximately Bingham Cienaga to Winkelman), and the Gila River from Dripping Springs Wash downstream past Kearny. However, the ability to detect banded flycatchers extends beyond this general study area to AZ, and to a lesser extent, across the entire bird's range.

Banding and re-sighting of birds by the USGS occurs primarily in conjunction with crews from Arizona Game and Fish Department. In some years, approximately 40 or more people are directly participating in this effort. In past years, the USGS has traveled to locations across AZ, such as Camp Verde; the Gila River near Safford; and Greer to trap, band, and/or re-locate banded southwestern willow flycatchers, and has traveled throughout the subspecies range to trap, band, collect genetic material, and possibly detect previously banded birds.

The primary study area encompasses a variety of habitats and conditions and locations over a large area. The habitat varies from free-flowing Tonto Creek and Salt River, to the regulated conservation space of Roosevelt Lake, to the regulated Gila River below Coolidge Dam, and the free-flowing San Pedro River. The work encompassed within-drainage and between-drainage movements. We believe these are diverse locations providing diverse habitats over a wide ranging study area. This large study area did not place artificial geographic limits on potential re-sightings of banded southwestern willow flycatchers.

A portion of each southwestern willow flycatcher recovery permit, issued by the Service for surveying in Region 2, identifies the importance of banded birds and the reporting requirements if one is detected. The USGS is able to respond to these reports to try and confirm these sightings. Also in support of this effort, the importance of documenting banded flycatchers is a section of each survey training session that every permitted surveyor attends. Therefore, the area and effort to determine the movements of flycatchers extends beyond the primary Roosevelt/San Pedro/Gila River area, to all survey sites across AZ, and to a lesser extent, across the bird's range. The USGS is also in contact with scientists studying flycatchers across their range, such as SWCA, Inc. and the Bureau of Reclamation along the lower Colorado River, and ongoing research on the Kern River, CA. Additionally, band recoveries are reported to the USGS Bird Banding Lab and reported back to the scientists.

We understand that the selection of a study area could limit the extent of data collected, but in this case, we do not believe it hampered our ability to make an appropriate conclusion on southwestern willow flycatcher movements to determine high connectivity between distant sites. The frequency (267 of 292) of band recoveries within 29 km (18 mi) radius; the approximate 150 km/93 mi distance between the limits of intensive monitoring (Tonto Creek inflow to Roosevelt Lake to Bingham Cienega on San Pedro River); the training, survey effort, and band recovery opportunities statewide and rangewide; and range of flycatcher movements recorded (0 km/mi to 440 km/276 mi) leads us to conclude that our application of the data collected was appropriate.

(24) *Comment:* One commented that the critical habitat designation is not consistent with the Recovery Plan's definition of occupied habitat.

*Our Response:* The Recovery Plan and survey protocols established for southwestern willow flycatchers define or describe the determination of an occupied nesting territory, but do not address, nor were intended to address, the amount or extent of area used by southwestern willow flycatchers for life-history needs, its home range, migration stopover areas, or how to delineate critical habitat. We note the Recovery Plan's (USFWS 2002: 16) conclusion that ''nesting habitat is only a small portion of the larger landscape that needs to be considered when developing management plans, recovery actions, biological assessments for section 7 consultations with the USFWS, or other documents defining management areas or goals for flycatcher recovery.'' The critical habitat designation follows this guidance.

(25) *Comment:* One individual commented that critical habitat should be designated and recovery should be conducted on a patch-by-patch basis.

*Our Response:* Flycatcher habitat is ephemeral and its mosaic-like distribution is dynamic in nature, because riparian vegetation is prone to periodic disturbance (*i.e.*, flooding) (USFWS 2002:17). Therefore, it is not realistic to assume that any breeding habitat patch will remain suitable over the long-term, or persist in the same location (USFWS 2002:17). Designation at the patch level is technologically unfeasible because comprehensive mapping of flycatcher habitat at the patch level does not exist.

Cardinal and Paxton (2005) described the extent of area or home range used by pre-breeding, breeding, and post-nesting southwestern willow flycatchers

and dispersing young-of-the-year southwestern willow flycatchers, and discovered flycatchers using a variety of habitats extending beyond the area where a nest is placed for foraging, territory establishment, mate discovery, and staging for migration. Koronkiewicz *et al.* (2004) and McLeod *et al.* (2005) described the use of the entire length of the lower Colorado River and its tributaries by willow flycatchers during migration. Also, southwestern willow flycatchers exhibit general site fidelity, rather than specific nest fidelity, largely in response to its dynamic habitat (USFWS 2002: 22). Breeding southwestern willow flycatchers typically move from one season to the next, regularly up to 29 km (18 mi). A few birds have been detected at greater than 400 km (248 miles) from a previous year's breeding location (E. Paxton, USGS, e-mail).

(26) *Comment:* Many commented that areas identified in the Recovery Plan for recovery should be designated as critical habitat, specifically river segments not proposed in the Hassayampa/Agua Fria, Amaragosa, Santa Cruz, San Francisco, lower Rio Grande, Powell, San Juan, and Santa Clara Management Units.

*Our Response:* Recovery plans are not regulatory documents, and as a result, there are no specific protections, prohibitions, or requirements afforded a species based solely on a recovery plan. Critical habitat contributes to the overall recovery strategy for listed species, but does not by itself achieve recovery plan goals. The Act states, at section 3(5)(c), that except in particular circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species. It is not the intent of the Act to designate critical habitat for every population and every documented historical location of a species. We have designated habitat that contain features essential for the conservation of the species.

While proposed critical habitat for the southwestern willow flycatcher does not mirror the exact goals identified in the Recovery Plan, it does reflect the concepts of conservation biology used by the Recovery Team (USFWS 2002: 74–77). Specifically, our methodology targeted large populations and small populations that exist in high connectivity which equaled a large population (USFWS 2002: 74–75). This approach was chosen by the Team because large populations contribute the most to metapopulation stability and those smaller sites arranged in high connectivity may provide as much or more stability (USFWS 2002: 74–75). This choice subsequently supports important conservation principles: (1) Populations should be distributed close to each other to allow for movement, and (2) those populations should provide for stable metapopulations, gene flow, connectivity, and protection against catastrophic losses. As a result, across 6 southwestern states, our proposal included river segments in 21 of the 29 Management Units with numerical conservation goals.

(27) *Comment:* Some commenters recommended that all areas occupied by the southwestern willow flycatcher be designated as critical habitat and more unoccupied areas should be designated.

*Our Response:* Section 3(5)(c) of the Act states that not all areas that can be occupied by a species should be designated as critical habitat unless the Secretary determines that all such areas are essential to the conservation of the species. Our regulations (50 CFR 424.12(e)) also state that, ''The Secretary shall designate as critical habitat areas outside the geographic area occupied by the species only when a designation limited to its present range would be inadequate to ensure the conservation of the species.'' In this instance, we have determined that all areas that can be occupied or are presently within the geographical area of the southwestern willow flycatcher are not essential for conservation of the bird.

(28) *Comment:* Some comments stated that our PCEs are too narrow in scope and omit important features such as water or moist soils.

*Our Response:* Our PCEs specifically refer to the following: (1) Riparian plant species needed for breeding, foraging, and shelter for breeding, non-breeding, territorial, migrating, and dispersing flycatchers, (2) the variety of structural vegetation features targeted for nest placement, (3) the range of more generalized riparian habitat used for migrating, foraging, dispersing, and non-breeding southwestern willow flycatchers; and (4) their food requirements. River hydrology and geomorphology, groundwater, surface water, channel-floodplain connectivity, overbank flooding, hydrologic regime, fine sediments, moist soils, micro-climate, and other processes such as erosion, precipitation, drought, humidity, etc. are important for the presence, development, location, abundance, growth, regeneration, suitability, and maintenance of the vegetation and insects identified as the PCEs. We described in great detail the setting and function of these components and their role in supporting southwestern willow flycatcher habitat in the proposal (69 FR 60712–60715).

(29) *Comment:* Several comments stated that we included areas where the southwestern willow flycatcher and their PCEs were absent, such as roads, developed areas, agricultural fields, bridges, or where the bird's status is uncertain. Some requested that we examine the segments more closely, particularly in Graham County, AZ, and more finely remove areas that do not contain PCEs. Others recommended that we also exclude right-of-way corridors adjacent to bridges or transmission lines.

*Our Response:* In the development of this final rule, we have reviewed lands included in our proposal and have revised and removed areas from critical habitat that we could determine did not contain features essential to the conservation of the species or in some cases entire river segments (see Summary of Changes section below). For example, we received GIS layers and aerial photos where we could identify, confirm, and subsequently eliminate portions of agricultural fields in the Verde Valley, AZ, that fell within the designation; we removed Pinto Creek and the South Fork of the Little Colorado River in AZ; and we shortened the Big Sandy River segment in AZ, etc. We made an effort to exclude all developed areas, such as towns, housing developments, and other lands not reasonably believed to contain features essential to the conservation of the southwestern willow flycatcher.

However, due to the limitations in technology, it is not possible to remove each and every one of these developed areas. Nor does the Service have the ability to ground truth and confirm each recommended developed area for removal. As a result, even at the refined mapping scale, the maps of the final designation may still include developed areas that do not contain primary constituent elements (see *Criteria Used to Identify Critical Habitat section*). Areas that do not contain the PCEs within the boundaries of critical habitat are not considered to be critical habitat and thus, actions in those areas would not trigger consultation unless they affected adjacent critical habitat.

With regard to the request that all right-of-ways be removed from critical habitat, we are familiar with flycatcher habitat within right-of-ways adjacent to bridges or underneath transmission lines; therefore, those locations would have the PCEs.

(30A) *Comment:* We received numerous comments that the designation of critical habitat for the southwestern willow flycatcher would prevent the restoration of native habitat for the southwestern willow flycatcher-

specifically, the conversion of exotic saltcedar/tamarisk to native cottonwood-willow habitat.

*Our Response:* Our 4(b)(8) determination in this final rule, and the approach provided in the Recovery Plan (USFWS 2002: Appendix H and K), supports site-specific restoration of habitat from exotic habitat to native vegetation (or possibly mixed native/exotic) of equal or better quality for the flycatcher. The approach provided in the Recovery Plan was designed to apply to general riparian restoration in addition to those efforts specifically for the southwestern willow flycatcher. While these efforts may require section 7 consultation due to temporary adverse effects to flycatchers and their habitat, we do not believe that a project would result in adverse modification if the results of site-specific analysis and restoration culminate in equal or better habitat quality for the flycatcher.

(30B) *Comment:* Those supportive of the use of biocontrol (introduction of nonnative insects) to degrade or kill tamarisk (an exotic plant species used by flycatchers for nesting, foraging, etc.) through leaf consumption expressed: (1) Opposition to designation of flycatcher critical habitat in general; (2) disapproval of the approach to biocontrol that is discussed in the final Recovery Plan for the flycatcher; (3) asserted that tamarisk does not provide suitable nesting habitat (*i.e.*, is inadequate) for flycatchers and other wildlife; and (4) that by removing tamarisk, it will reduce the amount of water consumed by tamarisk through evapo-transpiration from those drainages, which will in turn, increase the amount of water in the river.

*Our Response:* As indicated above in our response to comment number 30, the Recovery Plan (USFWS 2002: Appendix H and K), supports site-specific restoration of exotic habitat to native vegetation (or possibly mixed native/exotic) of equal or better quality for the flycatcher. The Recovery Plan (USFWS 2002: Appendix H and K) provides guidance to determine the cause for exotic plant proliferation, long-term ecosystem solutions, measures to determine the success of restoration activities, and restoration strategies. Absent any new information on biocontrol, we continue to support the concern related to the use of biocontrols and guidance provided in the Recovery Plan regarding introduction of biocontrol into the breeding range of the flycatcher (USFWS 2002:121).

(31) *Comment:* We received comments that our approach in targeting occupied segments does not allow for the growth of southwestern willow flycatcher populations.

*Our Response:* We disagree and believe our approach in targeting river segments with large populations and collections of small sites in high connectivity that equal a large population provides for the growth of populations within designated critical habitat and outside of critical habitat. The focus on protection of large sites with the ability to produce dispersers was a conservation strategy of the Recovery Team (USFWS 2002:75). The Recovery Team (USFWS 2002:75) described that ''maintaining and augmenting existing breeding populations is a faster, easier, and more reliable way to maintain and achieve population goals * * *.'' ''Thus, maintenance and protection of existing populations is a priority.'' Existing sites have the opportunity to grow and produce dispersers to develop nesting areas within designated critical habitat segments, or disperse to pioneer sites outside of designated critical habitat. Because all potential or existing flycatcher habitat is not designated as critical habitat, this does not imply that non-designated areas are not important for southwestern willow flycatcher conservation.

(32) *Comment:* Some commented that our departure from our methodology in the Coastal CA Recovery Unit, specifically in the Santa Ana Management Unit, was arbitrary and capricious.

*Our Response:* We disagree and believe we described why we departed from our methodology, how we arrived at the proposed river segments, and the goals of this approach. We described in our proposal (69 FR 60716) that due to the wide diversity and conditions of habitat across the bird's range and complexity of the flycatcher's habitat needs, we believed it was necessary to consider other factors in the Coastal CA Recovery Unit. Because of the fractured and limited nature of habitat in Coastal CA Recovery Unit and due to nearly all sites being in high connectivity, we did not believe that every river segment was essential. As a result, we relied on the Recovery Plan recommendations, conservation goals, flycatcher habitat needs, and expert opinion to generate appropriate critical habitat segments. We sought to provide locations that would generate metapopulation stability by selecting the drainages with the largest amount of territories (Santa Ana, Santa Margarita, San Luis Rey, and Santa Ynez rivers) and nearby adjacent stream segments to allow for population connectivity, metapopulation stability, growth, dynamic river processes, and protection against catastrophic losses. We identified that there were some locations that held territories that were located within our 29 km (18 mi) radius that we did not select, because when considered within the entire range of habitats and stream segments selected, these were not believed to be essential.

(33) *Comment:* One comment asserted that the proposed rule did not support the concept that small sites are important.

*Our Response:* A metapopulation, as defined for the flycatcher, is a group of spatially disjunct local southwestern willow flycatcher populations connected to each other by immigration and emigration (USFWS 2002:72). Results of the status of the southwestern willow flycatcher population persistence or metapopulation stability vary geographically (Lamberson *et al.* 2000). Metapopulations are most stable where many connected sites and/or large populations exist (USFWS 2002:72). Many connected sites would include ''small'' sites, or those with few territories, but are closely connected with other ''small'' sites. The Coastal CA, Gila, and Rio Grande Recovery Units were the most stable, because of the abundance and proximity of breeding sites (USFWS 2002:72). This critical habitat designation focused on those areas with large populations or small sites in close proximity to each other that equaled a large population. While our target was on large populations or collections of smaller sites in close proximity, we emphasize that any southwestern willow flycatcher breeding site is important due to the bird's endangered status and the need to improve metapopulation stability, gene flow, and protect against catastrophic losses throughout the bird's range.

(34) *Comment:* Some commented that maps and legal descriptions fail to indicate the width of critical habitat. On the same topic, others wrote that because we described that critical habitat would be dynamic due to river flow, the boundary would also change, and using the floodplain boundary is inappropriate because the floodplain itself is constantly changing and difficult to define.

*Our Response:* The lateral extent of critical habitat, contrary to these comments, is a defined boundary. Southwestern willow flycatcher habitat is expected to be dynamic ''within'' the defined lateral extent boundaries. In our proposal, we provided a web site with a link to the specific boundaries and widths of proposed critical habitat. For the final rule, the same web site can be accessed with the specific information. The web address is *http://*

*criticalhabitat.fws.gov.* We also published legal descriptions in the proposed rule and this final rule identifying the lateral extent of critical habitat.

(35) *Comment:* Some commented that the lateral extent of critical habitat is too broad. One wrote that the Service may need to establish a corridor, but it need not be this broad. To simply say that because the river may wander it should encompass the entire alluvial plain is simply overreaching.

*Our Response:* We used the best available technology (existing digital sources and expert visual interpretation of aerial photographs and satellite imagery) to map the riparian zone within river corridors in proposed areas across six States. In developing the lateral extent, we found that using existing data sources such as the 100-year floodplain was in some places, too wide. However, in other areas, the entire 100-year floodplain was appropriate because it encompassed available flycatcher habitat. However, throughout the entire designation, the lateral extent is constrained to areas either equal to or less than the 100-year floodplain. Our visual interpretation examined the boundaries of actual riparian vegetation growth in order to ensure accuracy. Therefore, these locations are the areas where rivers flow and sandy soils exist and riparian vegetation grows. We do not extend our boundaries into traditionally developed areas (commercial and housing) outside of the 100-year floodplain.

(36) *Comment:* Some commented that we inappropriately omitted important plant species used by southwestern willow flycatchers under primary constituent element number 1.

*Our Response:* In order to not be redundant, we provided great detail in the text supporting the PCEs and the known plant species used by nesting southwestern willow flycatchers (69 FR 60714) by citing the Recovery Plan (USFWS 2002: D–3, 5, and 9). In response to this comment, we have altered the language of this PCE to include those known riparian plant species important for southwestern willow flycatchers.

(37) *Comment:* Comments were provided using the results of Arizona Game and Fish Department's Mapping and Monitoring Southwestern Willow Flycatcher Breeding Habitat in Arizona: A Remote Sensing Approach (Dockens and Paradzick 2004) to demonstrate that river segments were not occupied by the flycatcher and segments did not have the PCEs.

*Our Response:* We reviewed and considered this model, but did not rely solely on it in the development of our proposed designation due to the limitations of the results that the authors of the model described in their report. They described, ''this model provides a snapshot in time of predicted suitable (nesting) habitat * * * reoccurring disturbances influence the distribution and abundance of SWWF (southwestern willow flycatcher) breeding habitat in any one year.'' Therefore, the results of this model do not account for the dynamics of habitat over time. The authors also described other limitations in the use of the results of their model as a conservation tool. They wrote, ''The model only predicts suitable nesting habitat and does not predict all habitat used by nesting SWWF. Nesting habitat is one part of a larger matrix of habitat used by SWWF during the migration and breeding season.''

(38) *Comment:* Some provided comment that we should not designate critical habitat in Elephant Butte Reservoir on the Rio Grande in NM for a variety of reasons. Additionally, some commented that the power lines were an inadequate boundary for the southern boundary of the middle Rio Grande segment, because it may not be a permanent location.

*Our Response:* The conservation space of Elephant Butte Reservoir was not part of the proposal, and therefore, is not included in the critical habitat designation. The description of the southern boundary of the Middle Rio Grande segment as the power line crossing upstream of Elephant Butte Reservoir is to provide readers with an easily identifiable reference point. The mapping of critical habitat boundaries is permanent with legal descriptions for the boundaries, and mapped boundaries are found in GIS layers at *http://criticalhabitat.fws.gov.*

(39) *Comment:* Some commented that our proposal included segments of tributaries and washes not described in the text, specifically areas along the upper Rio Grande, Verde River, and San Pedro River.

*Our Response:* We agree. There were short stream segments of adjacent side drainages described in the legal descriptions and in the maps that were not described in the text of the proposal. We have re-examined the proposed segments and removed these short side drainages (creek, rivers, washes, etc.) that were not described in the text that extend beyond the stream segments proposed. We note that at the confluence of a tributary and main stem it is difficult to differentiate between habitats, therefore, we used our best judgment on where to specifically draw the line.

(40) *Comment:* Some commented that because numerical recovery goals were reached in the San Luis Valley Management Unit and the Santa Ana Management Unit, that critical habitat should not be designated within these areas.

*Our Response:* Our methodology for critical habitat specifically targeted the locations where large populations or small populations in high connectivity that equaled a large population exist. This, we believe, adheres to the principles of conservation biology described by the Recovery Team (USFWS 2002: 74–77). The Recovery Team (USFWS 2002: 75) described that ''maintaining and augmenting existing breeding populations is a faster, easier, and more reliable way to maintain and achieve population goals. * * *'' ''Thus, maintenance and protection of existing populations is a priority.''

The Santa Ana River and Santa Ana Management Unit possess a large population of flycatchers, with territories extending along the length of the Santa Ana River and along some of its tributaries. We note that the numerical goal for the Santa Ana Management Unit is 50 territories, and the most recent published information for this Management Unit cites 41 territories for 2003 (Durst *et al.* 2005). Compiled rangewide data does not yet exist for 2004. There are additional recovery goals associated with Management Units other than number of territories, such as maintenance of populations for at least 5 years, completed management plans, and habitat objectives not yet achieved (USFWS 2002: 77–81).

The San Luis Valley Management Unit, as commenters pointed out, has reached its numerical goal, reaching 73 territories in 2003 (Durst *et al.* 2005) and surpassing the goal of 50 territories. But other goals have not been met. For example, the population has not been maintained for 5 years and habitat objectives have not been reached. Please note though, that due to partnerships developed with the Service, we are excluding river segments found in the San Luis Valley Management Unit (see the *Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act* section for a detailed discussion of this exclusion below).

(41) *Comment:* Many commented that critical habitat should not be designated in areas such as the Middle Rio Grande due to the need to manage for fire.

*Our Response:* It is our belief that the need for fire management, especially areas such as the Middle Rio Grande or

the lower Colorado River, is consistent with the needs of the southwestern willow flycatcher, and if done appropriately, is not expected to result in adverse modification of critical habitat. The Recovery Plan (USFWS 2002: Appendix L) provides a description of changes that have lead to increased risk and occurrence of fire in riparian areas. It also describes measures to reduce occurrence of fire in riparian areas and appropriate management of areas to reduce the risk and damage of wildfire to riparian habitat and the southwestern willow flycatcher (USFWS 2002: Appendix H, K and L). Therefore, we do not believe, if conducted appropriately, that fire management is inconsistent with necessary flycatcher management activities.

(42) *Comment:* One comment remarked that the C-Spear Ranch along the San Pedro River, AZ, is not occupied by southwestern willow flycatchers.

*Our Response:* The C-Spear Ranch had a southwestern willow flycatcher territory detected in 2002 (Smith *et al.* 2003). Additionally, flycatchers are found nesting in close proximity upstream and downstream of the Ranch, and as a result, it is reasonably certain that, due to the use of riparian areas as migration corridors and dispersal areas, that non-breeding southwestern willow flycatchers visit the Ranch temporarily. Therefore, the C-Spear Ranch is within the geographical area occupied by the species. We refer to our discussion of the geographical area occupied by the southwestern willow flycatcher below for further explanation.

(43) *Comment:* We received many site-specific comments regarding the occupancy of stream segment proposed for designation, while others provided more general comments on the concept of occupancy. For example, some claimed that flycatchers do not occupy a particular stretch of the Santa Ynez River, but described that two migrants were recorded. Others remarked we improperly designated unoccupied areas, claiming that they were occupied. Some commented that our conclusion that an area we described as having ''no territories'' should be removed because it was not occupied. Others claimed that we determined that migration habitat was essential, but was not adequately addressed in the proposal. Additionally others indicated that we proposed areas not known to be occupied at the time of listing and provided no justification.

*Our Response:* In this final rule we provide specific language to clarify the geographic area occupied by the southwestern willow flycatcher (see *Geographic Area Occupied by the Species* section below) (including areas used by breeding, non-breeding, migrating, foraging, dispersing, and territorial southwestern willow flycatchers), and also describe why specific areas not known to be occupied at the time of listing are essential to the conservation of the subspecies (see *Justification of Including Areas Not Known To Be Within the Geographical Area Occupied by the Species at the Time of Listing* section below). Our methodology further describes how we arrived at determining essential and more specific locations to propose and subsequently designate as critical habitat.

(44) *Comment:* One comment described that flycatcher habitat at Roosevelt Lake, AZ, is not essential for the flycatcher because it is ephemeral.

*Our Response:* We disagree. The southwestern willow flycatcher population at Roosevelt Lake, depending on the year, can be the largest population of flycatchers across the subspecies' range. In 2004, it represented 40 percent (209/522) of all known flycatcher territories in AZ (Munzer *et al.* 2005) and 12 percent of the entire subspecies in the most recent 2003 rangewide summary report (Durst *et al.* 2005). This population not only provides territories to reach conservation goals for the Roosevelt Management Unit, but provides dispersers to other nearby Management Units, helps provide gene flow, populations stability, and protection against catastrophic losses. As a result, we believe it is a very important location and we made this conclusion in a biological opinion for raising Roosevelt Dam and for an HCP for dam operations. We described in our proposal (69 FR 60712) with respect to all flycatcher habitat that, ''Because riparian vegetation is prone to periodic disturbance (*e.g.*, flooding), flycatcher habitat is ephemeral and its distribution is dynamic in nature.''

(45) *Comment:* The proposed inclusion of reservoir bottoms as critical habitat could unnecessarily hinder reservoir operations by limiting the timing and magnitude of water elevation changes.

*Our Response:* Our 4(b)(8) determination in the proposed rule (69 FR 60732) describes how certain dam operations, like Roosevelt Dam in central AZ, are not likely to destroy or adversely modify critical habitat. Roosevelt Dam allows water to significantly increase and decrease in the conservation space depending on availability and demand. This fluctuation results in the exposure of fine/moist soils in the flat/broad floodplain of the exposed ground and has led to the development of hundreds of hectares (acres) of flycatcher habitat. The same operating regime that creates the habitat will also inundate and cause loss of habitat; at this particular location, habitat is expected to persist on the perimeter and over time will increase and decrease (USFWS 2003). It is this very process of the ebb and flow of the conservation pool that ensures persistence of habitat over time, although habitat will vary spatially and temporally, as does flycatcher habitat in natural settings.

(46) *Comment:* We received comment with respect to portions or lengths of many stream segments. In particular, we received comments about the Big Sandy River, Pinto Creek, and South Fork of Little Colorado River, AZ; Upper Gila River (Middle Gila Box), NM; Santa Ana River below Seven Oaks Dam, Temecula Creek, Temescal Creek, Santa Ysabel River, Mill Creek, and Cuyamaca Lake, CA; and Kern River, CA. We also re-evaluated segments that were not included in the comments.

*Our Response:* In refinements made to the delineation of critical habitat in the development of this final rule, we shortened segments (Big Sandy River, Verde River, Bill Williams River, Temecula Creek, Santa Ysabel River, Mill Creek, Oak Glen Creek, and Temescal Creek), removed segments (South Fork of Little Colorado River, Pinto Creek, San Diego River, Yucaipa Creek, Wilson Creek, San Timoteo Wash, Cuyamaca Lake, Cristianitos Creek), and removed sections (Middle Gila Box and Santa Ana River Wash) of stream segments in response to comments and our re-evaluation of these areas because we determined they were not essential for the conservation of the flycatcher. These changes are also listed in the *Summary of Changes* section below, and described in more detail with justification in the appropriate *Unit Description* section below.

*Comments Related to Military Lands*

(47) *Comment:* One commenter stated that they oppose the designation of critical habitat for the southwestern willow flycatcher on Naval Weapons Station, Seal Beach, Detachment Fallbrook because of the existence of an Integrated Natural Resources Management Plan (INRMP), potential complications in conservation efforts with other listed species, and adverse impacts on national security.

*Our Response:* We have reviewed Detachment Fallbrook's Fire Management Plan and INRMP. The

Secretary determined, in writing, that Detachment Fallbrook's INRMP provides a benefit to the southwestern willow flycatcher. Therefore, consistent with Public Law 108–136 (Nov. 2003): Nat. Defense Authorization Act for FY04 and Section 4(a)(3) of the Act, the Department of Defense's Detachment Fallbrook lands are exempt from critical habitat based on the adequacy of their completed and approved INRMP (see the *Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act* section for a detailed discussion of this exemption below).

(48) *Comment:* Some commenters recommended that the Service should exclude all essential lands on Camp Pendleton, including State lease lands because of their Integrated Natural Resource Management Plan (INRMP).

*Our Response:* We agree with the commenter and have exempted all essential areas, including State lease lands, from designated critical habitat on Camp Pendleton based on their INRMP (see *Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act* section for a detailed discussion). Because the INRMP provides an overall conservation benefit to the southwestern willow flycatcher, these lands are exempt from critical habitat pursuant to section 4(a)(3).

(49) *Comment:* One commenter strongly supported the designation of critical habitat for the southwestern willow flycatcher within those portions of Camp Pendleton that are leased to the State (San Onofre State Beach) because this area is important for southwestern willow flycatchers.

*Our Response:* We agree with the commenter that this area is important for the conservation of the southwestern willow flycatcher. However, we have exempted these lands that are leased to the State because they are within the area covered by Camp Pendleton's INRMP (see the *Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act* section for a detailed discussion). Because the INRMP provides an overall conservation benefit to the southwestern willow flycatcher, these lands are exempt from critical habitat pursuant to section 4(a)(3).

*Comments Related to Tribal Lands*

(50) *Comment:* A variety of commenters stated that the Service needs to work more closely to meaningfully contact the Bureau of Indian Affairs and/or Tribes to fully meet the tenet of Executive Order 13175 and Secretarial Order 3206.

*Our Response:* We agree that we need to work closely with Tribes and Pueblos potentially impacted by the designation of critical habitat. We increased our efforts to work with the Tribes/Pueblos throughout the process of developing this rule. Each Tribe possibly affected by this rule was contacted when we published our notice of intent to designate critical habitat and conduct NEPA. They were also provided with the location of scoping meetings we were holding near their area. We later contacted all Tribes/Pueblos specifically requesting management plans and offering Government-to-Government consultations. We provided two newsletters updating this process and contacted each Tribe/Pueblo when the proposed rule was published. We provided all Tribes/Pueblos included in the draft proposal a Management Plan template. Representatives from local field offices in AZ, CA, and NM contacted Tribes/Pueblos in person, through telephone calls, and/or during meetings to inform them about this rule and offer help with development of management plans. In many cases, the Service provided review and assisted Tribes in the development of management plans. We contacted each Tribe/Pueblo when the draft Economic Analysis and draft Environmental Assessment were made available and informed them of the dates and locations of public hearing and open house meetings. We held an open house meeting specifically for the Pueblos in NM. We intend to keep improving our relationships with the Tribes and the Bureau of Indian Affairs following the tenets of Secretarial Order 3206 and Executive Order 13175.

*Comments Related to HCPs, NCCP Programs, and Other Exclusion Areas*

(51) *Comment:* Several comments were supportive of the policy that lands covered by approved and nearly completed HCPs that provide take authorization for the southwestern willow flycatcher should be excluded from critical habitat. Several of these commenters also requested that HCP exclusions should also apply to draft HCPs, lands enrolled in the NCCP program, and lands covered by the Joint Water Agency (JWA) draft plan.

*Our Response:* While we trust that jurisdictions will attempt to fulfill their commitment to complete conservation plans, this voluntary enrollment does not assure that such plans will be finalized. Protections for southwestern willow flycatcher habitat provided through participating jurisdiction's enrollment in the California's Natural Communities Conservation Program (NCCP) processes are temporary and are not assured; such protections may be lost if the jurisdiction elects to withdraw from the NCCP program. Guidelines for the NCCP program direct habitat loss to areas with low long-term conservation potential that will not preclude the development of adequate NCCP/HCP plans and ensure that connectivity between areas of high habitat value will be maintained. We will consider excluding lands within pending HCP areas where we have received a permit application from the participants, an environmental analysis has been completed and released for public review and comment under the authority of NEPA, and we have completed a preliminary review of the HCP to ensure that the issuance of the associated incidental take permit would not result in a jeopardy or adverse modification finding for the subject species or its designated critical habitat. By completing these criteria, jurisdictions demonstrate their intent to finalize their HCP/NCCPs.

(52) *Comment:* Several comments stated that the designation of critical habitat removes incentives to participate in NCCP and HCP processes, in part because of added regulatory uncertainty, increased costs to plan development and implementation, weakened stakeholder support, delayed approval and development of the plan, and greater vulnerability to legal challenge.

*Our Response:* HCPs and NCCPs in California are one of the most important tools for reconciling land use with the conservation of listed species on non-Federal lands. We look forward to working with applicants to ensure that their plans meet the issuance criteria and that the designation of critical habitat on lands where a HCP/NCCP is in development does not delay the approval and implementation of their HCP/NCCP.

(53) *Comment:* One commenter asked whether the designation of critical habitat would be considered a changed and unforeseen circumstance with respect to the various HCPs presently approved or pending.

*Our Response:* If an area covered by a HCP was designated as critical habitat, it would cause the Service to reinitiate section 7 consultation on the issuance of that permit and evaluate critical habitat. However, approved or pending HCPs that were determined to provide a benefit to the conservation of the southwestern willow flycatcher and were excluded from the critical habitat designation would not cause a changed circumstance or reinitiation of section 7 consultation because no critical habitat would be designated in those areas (see

*Application of Sections 3(5)(A), 4(a)(3), and Exclusions Under Section 4(b)(2) of the Act*). The lone HCP where critical habitat is designated is along the Virgin River in Clark County, NV. In this instance, the Service would reinitiate section 7 consultation. See comment 56 below for further explanation. However, due to our ''no surprises'' regulation, we would expect no additional measures required above and beyond those already established in the HCP.

(54) *Comment:* Several comments stated multiple reasons for why essential southwestern willow flycatcher habitat within several HCPs, military installations, tribes, etc. should not be excluded from critical habitat. They stated that the benefit of designating these areas as critical habitat outweighs the benefits of excluding them because exclusions are based partly on speculative and unproven future activities and critical habitat provides a greater benefit than measures contained in draft and approved conservation plans. They also stated that the Service unlawfully predetermined the benefits of excluding essential habitat because our determination was made prior to soliciting public review.

*Our Response:* In many cases, partnerships with individual landowners and conservation agreements with a variety of stakeholders can provide a much greater conservation benefit for the southwestern willow flycatcher and other species, as they offer proactive positive management actions on private lands that cannot be achieved through a critical habitat designation. We have determined that the exclusion of certain lands covered by HCPs, INRMPs, tribal management plans, and others from critical habitat designation will not result in the extinction of the southwestern willow flycatcher and that a greater conservation benefit to the flycatcher than from a critical habitat designation will be provided (see the *Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act* section for a detailed discussion).

However, we did not reach this conclusion prior to receipt of public comment as contended in this comment; areas excluded from the draft proposal because of their inclusion in HCPs or coverage by INRMPs were identified as such, proposed justifications offered for public review, and notice was provided that these areas might be included in the final designation based on public comments.

(55) *Comment:* One commenter asked whether areas covered under existing section 7 permits can be excluded from critical habitat in a manner similar to areas under existing section 10 permits.

*Our Response:* Consultation under section 7 of the Act does not always result in the issuance of an incidental take permit for listed species. Federal actions where we conclude that the project is not likely to jeopardize the continued existence of a listed species are exempted from the prohibition against take of listed animal species under section 9 of the Act when the Federal agency, and any permittee comply with the terms and conditions of the incidental take statement accompanying the Service's biological opinion. Proposed Federal projects do not necessarily commit a Federal agency to protect an area for a listed species, and in many instances the Federal agency is only permitting an action and does not have land management authority. Section 7 of the Act only commits a Federal agency to not jeopardize a species or cause adverse modification of critical habitat due to a specific project it initiates, permits, or funds. Typically HCPs provide greater conservation benefits to a covered species by assuring the long-term protection and management of a covered species and its habitat, and funding for such management is assured through the standards found in the 5-Point Policy for HCPs (64 FR 35242), the HCP No Surprises regulation (63 FR 8859), and relevant regulations governing the issuance and implementation of HCPs, such as those requiring the permittee to minimize and mitigate the taking to the maximum extent practicable. However, such assurances are typically not provided in connection with Federal projects subject to section 7 consultations which, in contrast to activities on non-Federal lands covered by HCPs, are not required to and often do not commit to long-term special management or protections. Thus, a consultation unrelated to a HCP typically does not accord the lands it covers the extensive benefits a HCP provides. However, management of some Federal lands included in this designation, such as Lake Isabella, Roosevelt Lake, and Horseshoe Lake provide protection of southwestern willow flycatcher habitat in conjunction with section 7 consultation and/or HCPs (see the *Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act* section). In cases where we have determined that conservation by a Federal landowner provides a substantial, long-term benefit to the species, we have excluded these Federal lands from the critical habitat designation (see the *Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act* section).

(56) *Comment:* We received a few comments recommending we exclude the Virgin River as a result of the Clark County HCP.

*Our Response:* The Clark County Multiple Species Habitat Conservation Plan (MSHCP) was completed in November 2000, and the incidental take permit was issued on January 9, 2001. The southwestern willow flycatcher, as well as five additional riparian obligate species, was included in the MSHCP and permit application. The permit issued for the MSHCP covered the County, the Cities of Clark County, and Nevada Department of Transportation (permittees) for take of the covered species on all non-Federal Land with the County, up to a maximum loss of 58,681 ha (145,000 ac) of habitat within a 30-year period. However, due to the relatively large percentage of riparian habitat that occurs on non-Federal lands, the permit obligated the County to fulfill certain conditions prior to authorization of take of the avian riparian obligate species. These conditions include (1) the development of conservation management plans that identify the management and monitoring actions needed for desert riparian habitats along the Muddy River, Virgin River, and Meadow Valley Wash; and (2) the acquisition of private lands in desert riparian habitats along the Muddy River, Virgin River, and Meadow Valley Wash, with the total number and location of hectares (acres) within each watershed to be identified in the conservation management plans. These two conditions have not yet been fulfilled, as the development of the conservation management plans has not yet begun. A habitat conservation planning process has been initiated for the Virgin River, but planning efforts have not yet identified the activities that may impact the species, or the conservation actions that would be required to offset those impacts. Until these conditions are met, the permittees are not authorized for take of the flycatcher, or the other covered riparian obligate species in the event they are listed under the Act. Given the lack of progress the permittees have demonstrated in fulfilling these conditions, we have determined that the status of the conservation planning for the Virgin River falls short of meeting the criteria for exclusion under section 4(b)(2) of the Act.

*Comments Related to Economic Impacts and Analysis; Other Relevant Impacts*

Policy Issues

(57) *Comment:* Several commenters state that the economic analysis should incorporate the recent ruling in the Ninth Circuit Court of Appeals, *Gifford Pinchot Task Force* v. *U.S. Fish and Wildlife Service*.

*Our Response:* The economic analysis acknowledges that a recent Ninth Circuit judicial opinion, *Gifford Pinchot Task Force v. United States Fish and Wildlife Service*, has invalidated the Service's regulation defining destruction or adverse modification of critical habitat. The Service is currently reviewing the decision to determine what effect it (and to a limited extent *Center for Biological Diversity* v. *Bureau of Land Management* (Case No. C–03–2509–SI, N.D. Cal.)) may have on the outcome of consultations pursuant to section 7 of the Act.

(58) *Comment:* Several comments stated that the economic analysis fails to use the proper baseline for analysis as determined in *New Mexico Cattlegrowers' Association* (10th Circuit Court of Appeals). Two comments stated that the economic analysis should differentiate between impacts of listing and impacts of critical habitat designation. Another comment stated that the economic analysis should describe the costs of designation above and beyond those costs associated with past and future conservation activities, including listing, ongoing activities, and potential future conservation costs.

*Our Response:* The economic analysis estimates the total cost of species conservation activities without subtracting the impact of pre-existing baseline regulations (*i.e.*, the cost estimates are fully co-extensive). In 2001, the U.S. 10th Circuit Court of Appeals instructed the Service to conduct a full analysis of all of the economic impacts of proposed critical habitat designation, regardless of whether those impacts are attributable co-extensively to other causes (*New Mexico Cattle Growers Ass'n* v. *USFWS*, 248 F.3d 1277 (10th Cir. 2001)). The economic analysis complies with direction from the U.S. 10th Circuit Court of Appeals.

This analysis identifies those economic activities believed to most likely threaten the flycatcher and its habitat and, where possible, quantifies the economic impact to avoid, mitigate, or compensate for such threats within the boundaries of the critical habitat designation. In instances where critical habitat is being proposed after a species is listed, some future impacts may be unavoidable, regardless of the final designation and exclusions under 4(b)(2). However, due to the difficulty in making a credible distinction between listing and critical habitat effects within critical habitat boundaries, this analysis considers all future conservation-related impacts to be coextensive with the designation.

(59) *Comment:* One comment stated that the economic analysis did not identify the criteria or analytical methods by which the Secretary will make the decision on where benefits of including areas in the critical habitat designation for flycatcher outweigh the benefits of excluding areas from the critical habitat designation. One comment stated that the economic analysis failed to determine whether benefits of inclusion outweigh the benefits of exclusion within each flycatcher management unit. Another comment specifically noted that the economic analysis does not identify biological terms that are used to balance the benefits and costs of designation. Finally, one comment stated that the cost-effectiveness approach is the appropriate method to use in weighing the costs and benefits of critical habitat designation, and that the economic analysis does not use this method.

*Our Response:* In the context of a critical habitat designation, the primary purpose of the rulemaking (*i.e.*, the direct benefit) is to designate areas in need of special management that contain the features that are essential to the conservation of listed species.

The designation of critical habitat may result in two distinct categories of benefits to society: (1) Use; and (2) non-use benefits. Use benefits are simply the social benefits that accrue from the physical use of a resource. Visiting critical habitat to see endangered species in their natural habitat would be a primary example. Non-use benefits, in contrast, represent welfare gains from ''just knowing' that a particular listed species'' natural habitat is being specially managed for the survival and recovery of that species. Both use and non-use benefits may occur unaccompanied by any market transactions.

A primary reason for conducting this analysis is to provide information regarding the economic impacts associated with a proposed critical habitat designation. Section 4(b)(2) of the Act requires the Secretary to designate critical habitat based on the best scientific data available after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat. Economic impacts can be both positive and negative and by definition, are observable through market transactions.

Where data are available, this analysis attempts to recognize and measure the net economic impact of the proposed designation. For example, if the fencing of a species' habitat to restrict motor vehicles results in an increase in the number of individuals visiting the site for wildlife viewing, then the analysis would recognize the potential for a positive economic impact and attempt to quantify the effect (*e.g.*, impacts that would be associated with an increase in tourism spending by wildlife viewers). In this particular instance, however, the economic analysis did not identify any credible estimates or measures of positive economic impacts that could offset some of the negative economic impacts analyzed earlier in this analysis.

Under Executive Order 12866, OMB directs Federal agencies to provide an assessment of both the social costs and benefits of proposed regulatory actions. OMB's Circular A–4 distinguishes two types of economic benefits: Direct benefits and ancillary benefits. Ancillary benefits are defined as favorable impacts of a rulemaking that are typically unrelated, or secondary, to the statutory purpose of the rulemaking. In the context of critical habitat, the primary purpose of the rulemaking (*i.e.*, the direct benefit) is the potential to enhance conservation of the species. The published economics literature has documented that social welfare benefits can result from the conservation and recovery of endangered and threatened species. In its guidance for implementing Executive Order 12866, OMB acknowledges that it may not be feasible to monetize, or even quantify, the benefits of environmental regulations due to either an absence of defensible, relevant studies or a lack of resources on the implementing agency's part to conduct new research. Rather than rely on economic measures, the Service believes that the direct benefits of the proposed rule are best expressed in biological terms that can be weighed against the expected cost impacts of the rulemaking.

We have accordingly considered, in evaluating the benefits of excluding versus including specific area, the biological benefits that may occur to a species from designation (see below, Exclusions Under section 4(b)(2) of the Act), but these biological benefits are not addressed in the economic analysis.

*General Issues*

(60) *Comment:* One comment stated that the economic analysis should

combine efficiency and distributional impacts for each management unit.

*Our Response:* As stated in Section 1 of the economic analysis, efficiency and distributional economic impacts are fundamentally different measurements of economic impact, and as such, cannot be added or directly compared. See section 1 of the economic analysis for a more detailed discussion of the distinctions between these terms.

(61) *Comment:* One comment stated that the economic analysis should consider the cumulative effects of flycatcher habitat and other existing and proposed critical habitat designations in Southern California.

*Our Response:* The economic analysis quantifies economic effects associated with flycatcher conservation activities. This information is intended to assist the Service in determining whether the benefits of excluding particular areas from the designation outweigh the benefits of including those areas. It is therefore beyond the scope of the economic analysis to evaluate the cumulative effects of all previous designations.

(62) *Comment:* Two comments stated that the economic analysis underestimates the length of delay on projects that are subject to Section 7 consultations (*e.g.* water facility maintenance, fire management activities).

*Our Response:* The revised analysis includes a discussion of the potential impacts of delay in Section 4 (Water Management), Section 6 (Development) and Section 10 (Other Activities).

*Mining Issues*

(63) *Comment:* Several comments stated that the economic analysis failed to consider potential economic impacts of the flycatcher critical habitat designation on mining activities in the southwestern United States.

*Our Response:* The draft economic analysis did not discuss potential impacts to mining activities. Based on information provided during the public comment period from mining interests, the economic analysis has been revised to include a chapter that considers potential impacts to the mining industry.

*Water Issues*

(64) *Comment:* At least two public comments question how flycatcher critical habitat designation may impact existing state and Federal water law.

*Our Response:* The Recovery Plan recognizes a number of legal constraints on the Service's or other action agencies ability to modify water management practices to protect for the flycatcher, including water rights, delivery contracts, legal commitments to power generation, and requirements for flood control. These types of arrangements exist on many of the rivers included in critical habitat designation areas. However, where legal precedents exist, no changes to water law are anticipated to result from this rulemaking. For example, currently there is no legal requirement for USBR to maintain water levels below flycatcher habitat at the lake created by Hoover Dam [Southwest Center for Biological Diversity v. U.S. Bureau of Reclamation, 143 F.3d 515 (9th Cir. 1998)]. The Department of the Interior has interpreted the U.S. Supreme Court's injunction [*Arizona* v. *California*, 376 U.S. 340 (1964)] as precluding the release of water from Lake Mead for the sole purpose of protecting flycatcher habitat. Congress has also enacted legislation to prohibit USBR from releasing San Juan/Chama water for flycatcher management purposes at Heron Reservoir.

(65) *Comment:* One comment questioned a number of water price and supply assumptions in the economic analysis. First, the comment stated that the economic analysis makes water price assumptions that are inappropriate given the large water supply potentially impacted by the critical habitat designation, the probable difference in the marginal value of water across different scenarios, and the variation in water prices over time. This comment also stated that the economic analysis makes water supply assumptions that fail to consider the costs of alternate water supply sources, barriers to water reallocation and marketing, and water supply conditions in relatively dry years.

*Our Response:* Scenario 2 provides context for understanding the magnitude of impacts that could occur if operators are forced to alter water management in order to avoid adverse modification of habitat. As stated in Section 4 of the economic analysis, considerable uncertainty surrounds Scenario 2 and the probability of various outcomes is unknown. As discussed in the economic analysis, detailed assessment of the economic impacts on facilities and end users would require detailed system-wide hydrologic and economic models. That is, the analysis would require models that predict changes in water allocation under alternative water management regimes and the behavioral responses of various water users when faced with potential shortfalls and/or higher water prices. Such models do not exist for most areas potentially affected by flycatcher conservation activities. As a result, this analysis utilizes best available data and simplifying assumptions to provide estimates that bound the magnitude of potential impacts that could result from alterations to water operations.

Given the geographic and hydrological variation across systems, it is unlikely that all facilities will lose storage capacity in the same year. Furthermore, the economic analysis assumes that flycatcher conservation measures will not affect regional water markets or prices because the potential storage capacity lost represents a very small component of the total available storage capacity. Refer to Exhibits 4–3, 4–7, and Appendix exhibits A–2, A–3 and A–4.

This analysis conservatively assumes that any spilled water is lost from consumptive (*i.e.*, municipal, industrial, commercial, etc.) use and develops an approximate estimate of related economic losses using information on water rights prices and other replacement costs. This analysis assumes that these costs are a reasonable proxy for the value of water in conservation storage, and the value lost when storage is limited. Note that the market value of consumptive water rights is dependent on a variety of considerations, including priority and point of diversion, among other factors. If the actual cost of water is higher (or lower) than the reported cost, the economic impacts will also be higher (or lower).

The economic analysis estimates costs to water storage facilities based on average conditions. In reality, some years are wetter or dryer than others. Dry-year constraints may create an additional economic burden for water managers. The revised economic analysis presents information on the likely amount of spill that would be needed in the 50th and 95th percentile driest water years, to provide a sense of the sensitivity of the results presented.

(66) *Comment:* Several comments highlight water supply and flood control structures and projects that are not considered in the economic analysis, and for which they claim potential impacts are possible pursuant to critical habitat designation for flycatcher. In addition, two comments state that the economic analysis failed to consider the potential loss of the ability to divert surface and groundwater in the Little Colorado MU and the Upper Gila MUs.

*Our Response:* The revised economic analysis incorporates a discussion of potential economic impacts on water users in the Little Colorado, Upper Gila MUs, and other concerned areas for

which public comments were submitted.

Section 4 of the economic analysis provides an analysis of economic impacts associated with flycatcher conservation activities related to water management activities, including dam operations, hydropower production, water diversion, groundwater pumping, river channelization, and bank stabilization. As discussed in Section 4, detailed assessment of the economic impacts on facilities and end users would require detailed system-wide hydrologic and economic models. This analysis utilizes best available data and simplifying assumptions to provide estimates that bound the magnitude of potential impacts that could result from alterations to water operations in proposed critical habitat designation areas.

(67) *Comment:* One commenter states that the assumption that, in the case of Horseshoe Reservoir, reservoir managers will adapt water management to avoid water losses caused by a reduction in reservoir capacity over time is unrealistic because the storage capacity of the reservoirs is small in relation to the flow of the river system, and thus water losses would occur. Second, the commenter states that the economic analysis inappropriately downplays the loss of water resulting from flycatcher critical habitat designation by stating that some windfall use by downstream users may occur. Another comment states that the assumption made in the economic analysis related to Scenario 2 do not consider the recent drought and current low water levels, or ongoing population growth and resulting increases in water demand.

*Our Response:* The ability of storage facilities to adapt water management practices is unique for each facility based on hydrology, water management system, and current legal water agreements. Some facilities may be able to adapt management practice to reduce water losses due to flycatcher conservation measures, while others may not. As stated in Section 4 of the economic analysis, analysis does not subtract any costs associated with ''windfall'' downstream use of water following spillage—that is, this analysis assumes that all water released will be not be used by downstream users (*i.e.*, lost to the ocean).

However, we agree that flycatcher conservation measures may impose additional costs and changes on top of significant ongoing trends, including long-term drought, in the Southwest. The economic analysis notes in Section 4 that flycatcher conservation measures may accelerate and compound ongoing trends in natural resource use in the Southwest, including increasing population growth and long-term droughts.

*Tribal Issues*

(68) *Comment:* Numerous comments state that the economic analysis does not address the full suite of impacts to affected Tribes. Two comments state that estimates included in the economic analysis grossly understate the real economic costs to Tribal governments of critical habitat designation on Tribal lands. Another comment states that administrative costs to Tribes are not adequately discussed in the economic analysis. Three Tribes were concerned that they were overlooked in the economic analysis: Taos Pueblo, the Pueblo of Isleta, and the Santo Domingo Tribe.

*Our Response:* Section 7 of the economic analysis presents all available information regarding potential flycatcher conservation activities that have affected or which may affect the fifteen Tribes whose lands fall within proposed critical habitat designation areas. Attempts were made to contact each Tribe with lands in proposed critical habitat designation, as well as a number of other Tribes outside of critical habitat designation that expressed concern about potential impacts on them. Exhibit 7–3 summarizes potential impacts on the Tribes, and highlights where costs to the Tribes are unknown. Section 7 of the economic analysis also notes that publicly available information was not always available to fully assess the potential costs of flycatcher conservation activities. The revised economic analysis now includes a statement that ''in many cases, information was not available for costs of flycatcher conservation activities [to Tribes], such as species surveys. In addition, administrative costs [to Tribes] of compliance with the Act are often not known. Overall, the absence of cost information related to the potential impacts of flycatcher conservation on Tribal lands results in a probable underestimate of future costs to Tribal entities in this section.''

Known potential administrative costs are included Section 3 of this analysis. However, some additional administrative costs of compliance with ESA are unknown and therefore not included in estimates. To the extent that these unknown administrative costs relate to southwestern willow flycatcher, administrative costs estimates for the Tribes may be underestimated. Section 7 acknowledges this limitation.

The economic analysis did not include Taos Pueblo or Santo Domingo in the its analysis of potential economic impacts to tribal activities since they fall outside of critical habitat designation areas. The economic analysis discussed potential impacts on the Pueblo of Isleta in Section 7 of the economic analysis. However, public comments submitted by the Tribe expressed concerns related to economic, cultural, and treaty impacts of critical habitat designation. Additional information provided in these comments were incorporated into the economic analysis.

*Grazing Issues*

(69) *Comment:* Numerous comments state that the economic analysis underestimates impacts of flycatcher critical habitat designation to grazing and does not consider the impact that even a small reduction in AUMs may have on ranching operations.

*Our Response:* Section 5 of the economic analysis examines potential impacts on grazing activities that include exclusion or removal of livestock grazing from riparian areas year-round or during the flycatcher breeding season. In many cases, the estimates include impacts that may be associated with other riparian habitat initiatives and other endangered species. Estimates also include potential impacts on private lands grazing, although the Service questions the assumption that private grazing will be affected in the future. The analysis includes a range that includes the potential for all private grazing to be removed from the riparian are due to flycatcher conservation activities. As a result, Section 5 acknowledges that the loss of 89,000 AUMs is conservative, that is, estimates are more likely to overstate than understate impacts due to flycatcher.

Section 5 of the revised economic analysis now recognizes the possibility that small reductions in AUMs could affect the viability of some ranching operations. The analysis now places impacts that could occur in the context of the economics of ranching, and points out that ''ranchers often have debts to repay that rely on the current number of AUMs grazed. NMCA states that even small cuts in the number of AUMs grazed by these ranchers can affect the financial stability of those operations.''

(70) *Comment:* One commenter states that estimated impacts on grazing activities are overstated. The commenter states that the economic analysis inappropriately assigns grazing impacts to flycatcher, as opposed to other species or causes.

*Our Response:* Section 5.2.2 of the economic analysis discusses factors that affect the number of permitted and authorized AUMs approved by USFS and BLM for a given Federal grazing allotment. These factors include the presence of endangered species, tree encroachment, fire suppression, forage availability, and forage by other ungulates. The analysis states that ''on a particular allotment containing flycatcher habitat, reductions to authorized or permitted AUMs made by USFS or BLM may be: (1) Directly related to flycatcher conservation; (2) indirectly related to flycatcher conservation; (3) not related to flycatcher conservation at all; or (4) resulting from a combination of factors.'' The analysis then explains each scenario in detail, and suggests that in most cases, reductions in AUMs result from a combination of factors. The analysis also concludes that because of the spatial and temporal overlap of past reductions in AUMs with flycatcher habitat, it is difficult to separate flycatcher-related causes from other causes of changes that occur in flycatcher critical habitat designation areas. Section 5 acknowledges that the loss of 89,000 AUMs is conservative, that is, estimates are more likely to overstate than understate impacts due to flycatcher.

(71) *Comment:* One comment states that the economic analysis does not consider impacts to ranching activities outside of flycatcher critical habitat designation.

*Our Response:* Ranching activities located outside of the proposed critical habitat designation were not expected to experience direct economic impacts related to the designation, and therefore these activities are not specifically addressed in the analysis. However, to the extent that there are regional economic impacts related to restrictions on grazing activities, these have been captured in the regional economic impact analysis of grazing. This analysis is presented in Section 5 of the final economic analysis.

*Transportation Issues*

(72) *Comment:* One comment states that the economic analysis underestimates impacts of flycatcher critical habitat designation on future transportation projects based on the uncertainty associated with these projects; however, the economic analysis should use caveats and assumptions as it does with other activities to estimate future transportation projects. One comment states that the economic analysis does not take into account economic impacts on the Foothill/Eastern Transportation Corridor Agency and the Corridor.

*Our Response:* The economic analysis analyzes potential impacts transportation activities in Section 8. Conversations with state transportation agency staff, identified 11 transportation projects in NV (1), NM (3), and AZ (7) expected to occur in critical habitat designation areas in the future. No projects were identified in critical habitat designation areas by UT Department of Transportation or the CO Department of Transportation. Using the CA Transportation Investment System, the economic analysis identified 8.4 km (5.2 mi) of highway construction and improvements expected to occur within critical habitat designation areas in the future in CA. The economic analysis relied on the expertise of state transportation agencies to identify future projects that occur within critical habitat designation areas. In addition, major road projects are generally planned and constructed over a very long time horizon. As such, it is reasonable to assume that state transportation agencies will have the best information available regarding future transportation projects.

The economic analysis did not take into account economic impacts to the Foothill/Eastern Transportation Corridor Agency (TCA). Analysis of this project has been added in Section 8.2.1. based on public comments submitted by TCA.

*Development Issues*

(73) *Comment:* One comment states that the economic analysis mistakenly assumes that there is no projected development in proposed critical habitat designation in San Diego County.

*Our Response:* As described in section 6 of this analysis, floodplain development is assumed to be most probable in those census tracts that are densely populated and largely devoid of opportunities for new development (thereby necessitating development within the floodplain). Specifically, in CA, those census tracts intersecting flycatcher habitat that are both the most densely populated (*i.e.*, the densest 25 percent of tracts intersecting habitat) and least developable (*i.e.*, the least developable 25 percent of tracts intersecting habitat) are isolated for further analysis. This included the census tract discussed in the comment.

To analyze development projections, GIS maps of the proposed critical habitat designation boundaries were correlated with census tract level data provided by the San Diego Association of Governments (SANDAG). SANDAG is a quasi-governmental agency responsible for providing official demographic projections for San Diego County. The SANDAG land use projections are used to identify undeveloped acres slated for residential, retail, office, or industrial development. SANDAG provides acreage estimates for these land use categories. At this time, SANDAG does not project growth in proposed critical habitat designation areas in San Diego County.

(74) *Comment:* Two comments raised concerns concerning impacts of flycatcher critical habitat designation on the regional real estate market. One comment states that the DEA incorrectly concludes that critical habitat designation will not have a significant impact on the regional real estate market. Another comment states that the DEA makes unrealistic conclusions about how the critical habitat designation would affect residential real estate downstream of Seven Oaks Dam and along the San Ana River's tributaries.

*Our Response:* To determine the regional significance of flycatcher conservation activities on the real estate market, the economic analysis compares the reduction in acres slated for development to market-wide demand and supply conditions. Ideally, land set-aside requirements should be compared with the total supply of developable acreage in the region. However, accurate estimates of total regional development potential were not readily available. Consequently, projected acres of growth through 2023 in the three Counties where floodplain development is most probable are used as proxies for regional market supply. Total land development potential is based on SCAG and SANDAG forecasts.

As discussed in Section 10 of the analysis, impacts are estimated to be 0.04 percent of projected real estate supply. Thus, the set-aside land associated with flycatcher protection is not expected to affect the dynamics of the regional real estate market. Hence, housing prices in each County are not likely to be affected. However, regulated landowners will bear the cost associated with flycatcher protection, in the form of lower property values. As this analysis assumes that the total supply of housing will be met, some projects may be distributed to other locations while others may proceed with higher flycatcher protection costs and lower land values. No broader effects on regional real estate prices are anticipated.

*Fire Management Issues*

(75) *Comment:* Two comments state that the economic analysis does not consider economic impacts to fire management activities in certain areas. One comment states that the economic analysis failed to consider impacts to the Rio Grande Valley State Park, and specifically the potential impacts to fire management within the park that is undertaken to prevent damage to adjacent residential and commercial areas. The other comment states that the economic analysis does not address potential wildland fire prevention and suppression costs for Arizona counties, including Graham County.

*Our Response:* Section 10 of the revised economic analysis states that fire was probably uncommon in flycatcher habitat. However, fire in some riparian zones (primarily low and mid-elevation areas) has increased as a result of flood suppression, dewatering of rivers, and other manmade effects. These changes to the environment have led to the proliferation of more flammable exotic vegetation such as tamarisk, giant reed, and red brome. Ignition sources have also increased due to greater use of riparian areas from recreation and urbanization.

In areas that are in relatively close proximity to large urban populations, fire management, including exotic species removal and fuels management, is a critical component of urban planning efforts. Thus, local officials in areas proximal to urban areas have understandable concerns with about ongoing and future plans for these activities, particularly exotic species removal (most particularly, tamarisk control). The revised economic analysis includes an expanded discussion of potential impacts on fire management activities.

*Agricultural Issues*

(76) *Comment:* Three comments state that the economic analysis does not adequately address the impact of flycatcher critical habitat designation on agricultural activities. One of these comments states that the economic analysis underestimates future consultation requirements because it does not consider the Federal nexuses that are present.

*Our Response:* Section 5 of the economic analysis describes and quantifies potential impacts on ranching activities. Regarding potential impacts on crop agriculture, these are addressed as part of Scenario 2 for water management activities in Section 4. Because several water districts potentially affected under Scenario 2 for water management provide water for agricultural purposes, reductions in available water to these districts could result in corresponding reductions in irrigated crop acres for end users, if farmers are unable to switch to less water-intensive crops or find substitute water sources. Vail Dam, Isabella Dam, Horseshoe Dam, Roosevelt Dam, and the Lower Colorado systems dams all serve a significant number of agricultural users and are projected to lose water under Scenario 2. As detailed in Exhibit A–4, estimated water losses to districts supplying agricultural end users may reduce irrigated agricultural acreage in the affected counties by up to 12,520 ha (30,938 ac), assuming all reservoir facilities are affected. A cropland reduction of that magnitude would represent approximately 1.05 percent of total irrigated and non-irrigated cropland in the affected areas. Additional detail is provided in Section 4 and Appendix A of the economic analysis.

*Small Business Issues*

(77) *Comment:* Numerous comments state that the economic analysis did not adequately estimate impacts of flycatcher critical habitat designation on small businesses. One comment states that the economic analysis does not quantify county-level impacts of AUM reductions, such as lost tax revenues. The other comment states that the economic analysis does not, and should, provide an economic and social analysis of how flycatcher critical habitat designation may impact each rural locality in the designation.

*Our Response:* Appendix A considers the extent to which the analytic results presented in the main body of the economic analysis reflect potential future impacts to small businesses. Appendix A, Small Business Impacts, has been revised to provide additional details about the estimated location of potential impacts by county as well as by water user, where appropriate. The revised economic analysis presents impacts on grazing activities organized by county and on a per ranch basis in Appendix A.

*Recreational Issues*

(78) *Comment:* One commenter states that a late spring-early summer drawdown under Scenario 2 could affect recreation, including sport fisheries, at several reservoirs. One comment states that the economic analysis does not provide dollar values for the impacts of forest service closures.

*Our Response:* Facility managers were consulted as to the potential for flycatcher conservation activities to impact recreational activities at affected reservoirs. To the extent that recreational impacts were identified, recreational impacts are presented in Chapter 10 of the final economic analysis. Section 10 of the revised economic analysis discusses the impacts of closures that have occurred for flycatchers, and quantifies these estimates where possible. Restrictions (primarily already in place) on certain uses of recreation areas in Tonto NF, AZ; San Bernardino NF, CA; and at Lake Isabella, CA, are discussed in detail in Section 10 of the revised economic analysis.

Several studies have investigated how recreational impacts could change with varying reservoir levels (Cordell, K. H. and J. C. Bergstrom. 1993. Comparison of Recreation Use Values Among Alternative Reservoir Water Level Management Scenarios. *Water Resources Research.* 29 (2): 247–258; Huszar *et al.* 1999. Recreational damages from reservoir storage level changes. *Water Resources Research*) However, these studies were case specific, and were conducted in geographic areas distinct from those affected by potential flycatcher conservation activities. Conducting a site specific study of the impact of alternative water management regimes on recreation is beyond the scope of this analysis.

**Summary of Changes From the Proposed Rule**

In developing the final designation of critical habitat for the southwestern willow flycatcher, we reviewed public comments received on the proposed designation of critical habitat published on October 12, 2004; the draft economic analysis and draft environmental assessment published on April 28, 2005 (70 FR 21988); conducted further evaluation of lands proposed as critical habitat; refined our mapping methodologies; excluded additional habitat containing features essential to the conservation of the subspecies from the final designation pursuant to section 4(b)(2) of the Act; and exempted those military lands that met the criteria for statutory exemptions pursuant to section 4(a)(3) of the Act. Table 1, included at the end of this section, outlines changes in area for each subunit. Specifically, we are making the following changes to the final rule from the proposed rule published on October 12, 2004:

(1) In AZ, in response to comments, we made further site visits and/or re-evaluated information through habitat models, maps, and reports, and made

changes to Pinto Creek, South Fork Little Colorado River, Big Sandy River, lower Verde River, and Bill Williams River. Further site visits, surveys, and evaluation occurred for Pinto Creek, the South Fork of the Little Colorado River, and lower Verde River segment below Bartlett Dam that resulted in determining that these segments were not essential for inclusion in critical habitat, and therefore we removed these entire segments. We examined habitat models and further analyzed the quality of habitat that resulted in shortening the Big Sandy River segment to more accurately reflect habitat with essential features. Through site-specific habitat evaluation reports, we re-examined the quality of habitat upstream from the Bill Williams National Wildlife Refuge at Planet Ranch, and determined that it contained features important, but not essential, to the conservation of the subspecies, and removed it from critical habitat. More discussion on these segments can be found in the appropriate Unit Descriptions below.

(2) In NV, we identified in our proposal the Muddy River within the boundaries of the Overton State Wildlife Area, as an essential location we may consider for exclusion as a result of assurances, protections, and conservation benefit the flycatcher and its habitat receive from the State of Nevada's ownership and management of the property. We did not identify in the text of the proposed rule that a segment of the Virgin River containing features essential to the conservation of the subspecies also lies within the boundaries of the Overton Wildlife Area. Our maps did however identify this essential segment of the Virgin River within the boundaries of the Overton Wildlife Area. We considered both the Muddy and Virgin River segments within the Overton Wildlife Area for exclusion, and subsequently, as described below under *Relationship of Critical Habitat to State and Federal Wildlife Areas—Exclusions Under Section 4(b)(2) of the Act*, have excluded these river segments from critical habitat.

(3) In NV, we identified a 1.2 km (2 mi) (approximately 158 ha/390 ac) segment of the Virgin River located between two distinct conservation lands on the Overton Wildlife Area, NV. As a result of this segment being surrounded by conservation lands, being detached from a considerably larger designated segment, being a very small piece of an overall large segment, and because a significant portion was purchased for conservation of wildlife, it is our determination that this segment is no longer essential for critical habitat and was removed from consideration. More discussion on this segment can be found in the appropriate Unit Description below.

(4) In CA, in response to comments and further evaluation, we identify below entire proposed stream segments and portions of segments that we are not including in the final designation. We are not including Cuyamaca Lake in the final designation due to our re-evaluation that the habitat included in the proposed designation provided minimal habitat for flycatchers, metapopulation stability, or prevention against catastrophic loss. Due to Forest Service, Bureau of Land Management, and Southern California Edison comments and our re-evaluation of river segments, portions of the Santa Ana River (below Seven Oaks Dam), Temescal Creek, Temecula Creek, Santa Ysabel River, Oak Glen Creek, and Mill Creek were determined to not be essential and removed. Due to these same comments and our further scrutiny, remaining segments of the San Diego River, San Timoteo Wash, Yucaipa Creek, and Wilson Creek were determined to not be essential which left no remaining designated habitat on those streams. The re-evaluation of these segments resulted in us more accurately reflecting essential habitat in this final rule. We also re-evaluated and removed the segment of Cristianitos Creek proposed upstream of Marine Corps Base, Camp Pendleton, because we determined it was not essential due to it unlikely being able to support flycatcher nesting habitat. More discussion on these segments can be found in the appropriate Unit Descriptions below.

(5) In NM, in response to comments and further evaluation of maps, we removed the middle Gila Box, located primarily on the Gila National Forest upstream of Red Rock and downstream of the Gila Bird Area, because it does not have, nor can it support abundant vegetation and is unlikely to be able to support flycatcher nesting and migration habitat as a result of it being a narrow canyon. Also, four small pieces of vegetation surrounding the San Juan, Santa Clara, and San Illdefonso Pueblos are being removed from this designation. More discussion on this segment can be found in the appropriate Unit Description below.

(6) Although we attempted to remove as many developed areas (areas that have no conservation value as southwestern willow flycatcher habitat) as possible before publishing the proposed rule, we were not able to eliminate all developed areas. Since publication of the proposed rule and the receipt of more accurate mapping data and information, we were able to further refine the designation, which has resulted in a more precise delineation of essential habitat containing one or more of the primary constituent elements. This resulted in a minor reduction from the total area published in the proposed rule. However, it is not possible to remove each and every one of these developed areas even at the refined mapping scale used; therefore, the maps of the designation may contain areas that do not contain primary constituent elements. Lands within the boundaries of the designation that do not contain one or more of the PCEs are not considered to be critical habitat for the flycatcher.

(7) While mapping the lateral extent of critical habitat, some side drainages, tributaries, and/or washes were included in the Little Colorado, Middle Colorado, Verde, Middle Gila/San Pedro, Upper Gila Management Unit, and Upper Rio Grande Management Units that extend beyond the rivers we described in the proposal. These pieces of habitat sometimes extended about 2 km (3 mi) along a tributary or wash not described in the proposal. We did not describe these segments in the text of the proposed rule. As a result, to the best of our ability, we have truncated these segments, so only those habitats on the rivers described are included in the final designation. We defer to the specific mapped boundaries of the final designation (*http://criticalhabitat.fws.gov*). These areas extending up side drainages, tributaries, and/or washes are not intended to be included as critical habitat and are removed from the designation, leading to a minor reduction in the total area published in the proposed rule.

(8) Due to peer review, comments, and re-evaluation of the PCEs, we re-organized and revised PCE numbers 1 through 5 (as PCE 1, 1a, 1b, 1c, 1d, and 1e) to more accurately reflect the content of our proposal by describing flycatcher uses of riparian habitat, the importance of a dynamic system and succession (*i.e.*, germination and growth of riparian plants), and identifying specific riparian plant species. See the *Primary Constituent Elements* section below for specific language.

(9) To more accurately reflect our proposal, we updated PCE number 6 to include the order Odonata (dragonflies) to the list of flying insects consumed by southwestern willow flycatchers and re-numbered PCE number 6 as PCE number 2. See the *Primary Constituent Elements* section below for specific language.

(10) Due to comments received, we have added two specific sections to this critical habitat rule that describe the geographical area occupied by the southwestern willow flycatcher and the nature of essential habitat not known to be within the geographical area occupied by the species at the time of listing. Please see the: *Geographic Area Occupied by the Species* and *Justification of Including Areas Not Known To Be Within the Geographic Area Occupied by the Species at the Time of Listing* sections below.

(11) We have exempted State Lease lands (primarily Cristianitos Creek) included within the boundary of Marine Corps Base, Camp Pendleton per section 4(a)(3). See the *Relationship of Critical Habitat to Military Lands—Application of Section 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act section below.*

(12) We excluded river segments and reservoir bottoms under section 4(b)(2) of the Act and exempted two Military Areas under section 4(a)(3) of the Act from the final critical habitat designation (see *the Application of Sections 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act* section below). This is the primary source of reduction in total designated critical habitat area that was identified in the proposed rule. Exemptions under section 4(a)(3) included identified streams within Marine Corps Base, Camp Pendleton and Naval Weapons Station, Seal Beach, Detachment Fallbrook based on their approved INRMPs. Exclusions pursuant to section 4(b)(2) based on approved HCPs include San Diego County MSCP, Western Riverside County MSHCP, City of Carlsbad HMP, Roosevelt Lake HCP, and the Lower Colorado River MSCP. State Wildlife Areas excluded under section 4(b)(2) include the Overton and Key Pittman State Wildlife Areas, NV, and Alamo State Wildlife Area, AZ. Additional Wildlife Conservation Areas excluded include the South Fork Kern River Wildlife Area and Sprague Ranch, Kern River, CA. We excluded, pursuant to section 4(b)(2) of the Act, various Tribal lands and Pueblos that completed approved southwestern willow flycatcher management plans from the final designation. These include the following: Yavapai-Apache, Chemehuevi, Colorado River, Quechan (Fort Yuma), Fort Mohave, Hualapai, and San Carlos Apache Tribes in AZ, Pueblo of Isleta in NM, and Rincon and La Jolla Tribes in CA. We also excluded, pursuant to section 4(b)(2) of the Act, the San Illdefonso, San Juan, and Santa Clara Pueblos in Northern New Mexico along the Rio Grande due to partnerships associated with southwestern willow flycatcher habitat management. National Wildlife Refuges (NWR) excluded from the final designation under section 4(b)(2) of the Act due to wildlife conservation management include: Alamosa NWR, CO; Sevilleta and Bosque del Apache NWR, NM; Bill Williams, Havasu, Imperial, and Cibola NWR, AZ; and Pahranagat NWR, NV. Other lands excluded under section 4(b)(2) of the Act due to southwestern willow flycatcher/riparian habitat conservation plans/programs/easements and/or partnerships include: Los Angeles Department of Water and Power, Owens River, CA; San Luis Valley Partnership, Rio Grande and Conejos Rivers, CO; Hafenfeld Ranch, Kern River, CA; Salt River Project—Horseshoe Lake, Verde River, AZ; the City of Albuquerque/Rio Grande Valley State Park, Rio Grande, NM; and U-Bar Ranch, Gila River, NM.

TABLE 1.—CRITICAL HABITAT UNITS FOR THE SOUTHWESTERN WILLOW FLYCATCHER

| Critical habitat management units | Final rule ha (ac) / km (mi) |
|---|---|
| Santa Ynez Management Unit | 1560 (3855) / 32 (20) |
| Santa Ana Management Unit | 1103 (2727) / 97 (60) |
| San Diego Management Unit | 1944 (4805) / 102 (64) |
| Owens Management Unit | 0 |
| Kern Management Unit | 1241 (3067) / 15 (10) |
| Mohave Management Unit | 1033 (2553) / 55 (34) |
| Salton Management Unit | 84 (206) / 11 (7) |
| Little Colorado Management Unit | 216 (534) / 35 (22) |
| Virgin Management Unit | 3903 (9643) / 119 / 74) |
| Middle Colorado Management Unit | 0 |
| Pahranagat Management Unit | 0 |
| Bill Williams Management Unit | 1883 (4654) / 30 (19) |
| Hoover to Parker Management Unit | 0 |
| Parker to Southerly International Border Management Unit | 0 |
| Verde Management Unit | 2191 (5414) / 96 (59) |
| Roosevelt Management Unit | 3064 (7572) / 60 (37) |
| Middle Gila/San Pedro Management Unit | 9692 (23949) / 170 (106) |
| Upper Gila Management Unit | 6897 (17043) / 162 (101) |
| San Luis Valley Management Unit | 0 |
| Upper Rio Grande Management Unit | 664 (1640) / 66 (41) |
| Middle Rio Grande Management Unit | 13410 (33137) / 135 (84) |

## Critical Habitat

Critical habitat is defined in section 3(5)(A) of the Act as—(i) the specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features (I) essential to the conservation of the species and (II) that may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. ''Conservation'' means the use of all methods and procedures that are necessary to bring an endangered or a threatened species to the point at which listing under the Act is no longer necessary.

Critical habitat receives protection under section 7 of the Act through the prohibition against destruction or adverse modification of critical habitat with regard to actions carried out, funded, or authorized by a Federal agency. Section 7 requires consultation on Federal actions that are likely to result in the destruction or adverse

modification of critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation does not allow government or public access to private lands.

To be included in a critical habitat designation, the habitat within the area occupied by the species at the time of listing must first have features that are ''essential to the conservation of the species.'' Critical habitat designations identify, to the extent known using the best scientific and commercial data available, habitat areas that provide essential life cycle needs of the species (*i.e.*, areas on which are found the primary constituent elements, as defined at 50 CFR 424.12(b)).

Specific areas within the geographic area occupied by the species at the time of listing may be included in critical habitat only if the essential features may require special management or protection. As discussed below, such areas may also be excluded from critical habitat pursuant to section 4(b)(2). When the best available scientific and commercial data do not demonstrate that the conservation needs of the species so require, we will not designate critical habitat in areas outside the geographical area occupied by the species at the time of listing. An area currently occupied by the species but that was not known to be occupied at the time of listing will likely be essential to the conservation of the species and, therefore, included in the critical habitat designation.

Our Policy on Information Standards Under the Endangered Species Act, published in the **Federal Register** on July 1, 1994 (59 FR 34271), and our associated Information Quality Guidelines, provides criteria and guidance, and establishes procedures to ensure that our decisions represent the best scientific and commercial data available. Our biologists are required, to the extent consistent with the Act and with the use of the best scientific and commercial data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat. When determining which areas are designated as critical habitat, a primary source of information is generally the listing package for the species. Additional information sources include a recovery plan for the species, articles in peer-reviewed journals, conservation plans developed by States and counties or other entities that develop HCPs, scientific status surveys and studies, biological assessments, or other unpublished materials and expert opinion or personal knowledge. All information is used in accordance with the provisions of Section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658) and the associated Information Quality Guidelines issued by the Service.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific data available. Habitat is often dynamic, and species may move from one area to another over time. Furthermore, we recognize that designation of critical habitat may not include all of the habitat areas that may eventually be determined to be necessary for the recovery of the species. For these reasons, critical habitat designations do not signal that habitat outside the designation is unimportant or may not be required for recovery.

Areas that support populations, but are outside the critical habitat designation, will continue to be subject to conservation actions implemented under section 7(a)(1) of the Act and to the regulatory protections afforded by the section 7(a)(2) jeopardy standard, as determined on the basis of the best available information at the time of the action. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans, or other species conservation planning efforts if new information available to these planning efforts calls for a different outcome.

## Methods

As required by section 4(b)(1)(A) of the Act, we use the best scientific and commercial data available in determining areas that are essential to the conservation of the southwestern willow flycatcher. Our methods for identifying the southwestern willow flycatcher critical habitat included in this final designation are those methods we used to propose critical habitat for the southwestern willow flycatcher, published on October 12, 2004 (69 FR 60706). In addition, we used information and data received during both the October 12, 2004 to May 31, 2005, and July 7 to 18, 2005 public comment periods, the economic analysis, environmental assessment National Environmental Policy Act (NEPA) document, and communications with individuals inside and outside the Service who are knowledgeable about the species and its habitat needs.

We have also reviewed available information that pertains to the habitat requirements of this species. The material included data in reports submitted during section 7 consultations and by biologists holding section 10(a)(1)(A) recovery permits; research published in peer-reviewed articles, agency reports, and databases; and regional Geographic Information System (GIS) coverages and habitat models.

A variety of sources were used to determine territory site information and locations. The Recovery Plan (USFWS 2002), the U.S. Geological Survey (USGS 2004) southwestern willow flycatcher rangewide database, and 2002 (Sogge *et al.* 2003) and 2003 (Durst *et al.* 2005) rangewide status report of the flycatcher were the most authoritative and complete sources of information. The database maintained by USGS, Colorado Plateau Research Station, Flagstaff, AZ compiles the results of surveys conducted throughout the bird's range. We had compiled 2004 data from AZ (Munzer *et al.* 2005), but did not have compiled data from other states. A summary of known historical breeding records can be found in the Recovery Plan (USFWS 2002: 8 to10).

## Geographic Area Occupied by the Species

The geographic area occupied by the southwestern willow flycatcher is widespread as a result of its behavior, breeding range, known migration and dispersal habits, and the dynamics of its habitat development. Unlike other animals whose habitat changes slowly or where movements are limited, the southwestern willow flycatcher is a neo-tropical migrant that travels annually between its breeding grounds in the United States of America (U.S.) and wintering grounds in Central and South America. The riparian habitat it uses for breeding, foraging, migrating, dispersing, and shelter can change (is dynamic) in its quality, growth, and location due to its proximity to water and susceptibility to flooding (USFWS 2002; Koronkiewicz *et al.* 2004; Cardinal and Paxton 2005). As a result of the dynamic nature of its habitat, the southwestern willow flycatcher will typically move its breeding location from year-to-year (Luff *et al.* 2000; Kenwood and Paxton 2002; USFWS 2002; Newell *et al.* 2003, 2005). The bird does not usually exhibit nest fidelity (using the same nest tree year-to-year), but commonly demonstrates site-fidelity (Luff *et al.* 2000; Kenwood and Paxton 2002; USFWS 2002; Newell

*et al.* 2003, 2005). In other words, flycatchers do not typically return to use the same nest tree or habitat patch for breeding from year-to-year, but commonly returns to or near the general area (or site) where they previously bred or hatched (Luff *et al.* 2000; Kenwood and Paxton 2002; USFWS 2002:22; Newell *et al.* 2003, 2005). As result of these factors, the geographical area occupied by the flycatcher is much broader than the specific locations used while nesting.

The southwestern willow flycatcher currently breeds across six southwestern states (southern CA, southern NV, southern UT, southern CO, AZ, and NM) from sea level to about 2438m (8000 feet) above sea level. While the bird occupies a broad area, its breeding locations are irregularly distributed within its range. Genetic studies conducted by Paxton (2000) helped confirm the subspecies and refine the northern boundary of the bird's breeding range (particularly in UT and CO) in the U.S. The current breeding range of the southwestern willow flycatcher is reflected in the maps found in the Recovery Plan (USFWS 2002).

The southwestern willow flycatcher, a neo-tropical migrant, travels between its breeding areas in the U.S. to wintering grounds in Central and South America. During these migrations, it occupies habitat (primarily riparian habitat along river corridors) across a wide geographic area during spring and fall migration. These essential migration stopover habitats are used for shelter, and to forage in order to sustain life, continue migration, and be in appropriate condition for breeding. These stopover areas are used briefly, can differ from year-to-year, are less habitat-specific than areas where nests are placed, but cover a greater geographic area than breeding locations. Birds have even been detected occupying non-riparian areas during migration (USFWS 2002:19). Current work along extensive sections of river drainages has provided the best information on the bird's migration habits (Yong and Finch 1997, 2002; Koronkiewicz *et al.* 2004; McLeod *et al.* 2005).

The most current and comprehensive drainage-wide look at the use of migration habitat by willow flycatchers has occurred along the Lower Colorado River and its major tributaries (Koronkiewicz *et al.* 2004; McLeod *et al.* 2005). A total of 15 large study areas (comprised of over 90 smaller survey sites) exist along the length of the Colorado River from the Grand Canyon above Lake Mead to Yuma, AZ (including the lower Virgin and Bill Williams rivers) and also include separate locations in southern Nevada along other tributaries of the Colorado River (the Pahranagat River and Meadow Valley Wash) (Koronkiewicz *et al.* 2004; McLeod *et al.* 2005). In 2003, willow flycatchers were recorded at 13 of 15 study areas and 54 of 94 survey sites, occupying each large study area along the length of the Colorado River from the Grand Canyon above Lake Mead downstream to Yuma, AZ (Koronkiewicz *et al.* 2004). Also, study areas on the Virgin, Bill Williams, and Pahranagat rivers were occupied by willow flycatchers (Koronkiewicz *et al.* 2004). Similarly, in 2004, each of the 15 study areas and 72 of 92 survey sites were occupied by willow flycatchers (McLeod *et al.* 2005). This comprehensive view of willow flycatcher migration shows occupancy of a variety of riparian habitats along the entire length of a major drainage (Lower Colorado River) and its significant tributaries (Virgin, Bill Williams, and Pahranagat rivers), occupancy of different sites from one season to the next, and occupancy of a major drainage and its significant tributaries where breeding locations are interspersed (Koronkiewicz *et al.* 2004; McLeod *et al.* 2005). As a result of, (1) the study along the Lower Colorado River and its major tributaries (discussed above), (2) studies of willow flycatchers occurring along the Rio Grande (Yong and Finch 1997, 2002), and (3) detections of willow flycatchers along the same major drainages where breeding occurs throughout AZ (Munzer *et al.* 2005), we expect similar flycatcher migration behavior for the other major drainages where southwestern willow flycatchers breed throughout its range and where these locations are included within this designation.

While southwestern willow flycatchers place their nests in dense riparian habitat (USFWS 2002), occupancy of habitat in river corridors by pre-breeding, breeding, and post-nesting southwestern willow flycatchers extends beyond the dense vegetation where a nest is placed (Cardinal and Paxton 2005). Results from radio-telemetry studies determined that southwestern willow flycatchers explored a variety of riparian habitats of varying quality (Cardinal and Paxton 2005). Mixed (native and exotic) mature habitat was used 53 percent of the time (Cardinal and Paxton 2005). Smaller and younger immature vegetation comprised of willow and salt cedar was used 25 percent of the time (Cardinal and Paxton 2005). Also used were habitats classified as young (17 percent), open (4 percent), and mature exotic (1 percent) (Cardinal and Paxton 2005). Therefore, while vegetation required for nest placement is the most dense and specific of all habitats used by southwestern willow flycatchers, matrices of open spaces and shorter/sparser vegetation are also used. However, during the entire time southwestern willow flycatchers were tracked, none were found using upland habitat (*i.e.*, habitat that extended outside of the floodplain to non-riparian habitat) (Cardinal and Paxton 2005).

The distances traveled and areas occupied by telemetered breeding and dispersing young-of-the year fledgling southwestern willow flycatchers varied, but were larger than the nest area (Cardinal and Paxton 2005). Breeding southwestern willow flycatcher home ranges varied from 0.15 ha (0.4 ac) to 360 ha (890 ac) (Cardinal and Paxton 2005). Movements by male southwestern willow flycatchers prior to and after nesting were the farthest, while birds did not travel as far while nesting (Cardinal and Paxton 2005). One post-nesting male traveled through many territories, moving over 500 m (0.31 mi) in one day and collectively over several days, 2 km (1.2 mi). Other post-nesting southwestern willow flycatchers were also observed traveling long distances to exploit a spike in food availability that may indicate staging behavior for migration (Cardinal and Paxton 2005). As a result, Cardinal and Paxton (2005) concluded that previous home ranges estimated for nesting southwestern willow flycatchers underestimated the actual home range of an individual southwestern willow flycatcher throughout the entire nesting season. In addition, to demonstrate how mobile flycatchers can be, a dispersing young-of-the-year fledgling southwestern willow flycatcher was detected traveling over 24 km (15 mi) in a single day (Cardinal and Paxton 2005). Therefore, the use and occupancy of riparian habitat surrounding nesting areas by breeding and dispersing southwestern willow flycatchers is greater than previously believed, and is likely important for flycatchers to seek territories, to detect future nesting areas, search for mates, forage, and/or stage for migration (Cardinal and Paxton 2005).

Therefore, the boundary of the current geographic area occupied by the southwestern willow flycatcher in the U.S. is supported by genetic studies (Paxton 2000) and is reflected in the range map included in the Recovery Plan (USFWS 2002) that describes its breeding range across southern CA, southern NV, southern UT, southern CO, AZ, and NM. Because this bird is a neotropical migrant traveling mainly along riparian areas where habitat

rapidly changes condition and location, its use of riparian habitat within this boundary along migration corridors is widespread (*i.e.*, more extensive than specific breeding locations) and less predictable. However, all studies and surveys support that the flycatcher uses riparian habitat for migration stopover areas along the same major drainages where breeding sites are known to occur. Because of the bird's site fidelity to general breeding areas and the dynamics of its habitat, its nesting and foraging areas will also change over time, but will occur primarily along the same major river drainages where it is currently found in locations that can support the necessary vegetation qualities. Based upon continued surveys and recent telemetry studies on the use of habitat during the nesting season, the extent and diversity of habitat used is more widespread than previously believed. Pre-breeding, breeding, dispersing, and non-territorial flycatchers can use a wide variety of riparian habitats that can encompass hundreds of hectares (acres).

In the methodology section below, we further describe how we address the dynamic aspects of flycatcher habitat, the subspecies biology, and its life history needs (breeding, migration, dispersing, foraging, and shelter) and how we arrived at specific essential river segments for the designation of critical habitat occupied by breeding, non-breeding, migrating, foraging, dispersing, and territorial southwestern willow flycatchers.

**Primary Constituent Elements**

In accordance with section 4(b)(2) of the Act and regulations at 50 CFR 424.12, in determining which areas to designate as critical habitat, we are required to base critical habitat determinations on the best scientific data available. Critical habitat is defined in section 3(5)(A)(i), in part, as areas occupied by the species at the time of listing and containing those physical and biological features (PCEs) that are essential to the conservation of the species, and that may require special management considerations or protection. These general requirements include, but are not limited to: Space for individual and population growth and for normal behavior; food, water, air, light, minerals, or other nutritional or physiological requirements; cover or shelter; sites for breeding, reproduction, and rearing (or development) of offspring; and habitats that are protected from disturbance or are representative of the historic geographical and ecological distributions of a species.

The specific PCEs required for the southwestern willow flycatcher are derived from the biological needs of the southwestern willow flycatcher. Supporting details are found below and can also be found in the Background section of the October 12, 2004, proposed rule (69 FR 60706) and the Recovery Plan (USFWS 2002). The specific biological and physical features, or PCEs, which are essential to the conservation of the southwestern willow flycatcher, are described below. Identified lands provide aquatic and terrestrial habitat containing the essential PCEs supporting the maintenance of self-sustaining populations and metapopulations (see description below) of southwestern willow flycatchers throughout its range.

The southwestern willow flycatcher currently breeds in relatively dense riparian habitats in all or parts of six southwestern states, from near sea level to over 2438 meters (m) (8000 feet) (USFWS 2002: D–1) (Munzer *et al.* 2005). The southwestern willow flycatcher breeds in riparian habitats along rivers, streams, or other wetlands, where relatively dense growths of trees and shrubs are established, near or adjacent to surface water or underlain by saturated soil. Habitat characteristics such as dominant plant species, size and shape of habitat patch, canopy structure, vegetation height, and vegetation density vary widely among sites. Southwestern willow flycatchers nest in thickets of trees and shrubs ranging in height from 2 m to 30 m (6 to 98 ft). Lower-stature thickets (2–4 m or 6–13 ft tall) tend to be found at higher elevation sites, with tall-stature habitats at middle and lower elevation riparian forests. Nest sites typically have dense foliage at least from the ground level up to approximately 4 m (13 ft) above ground, although dense foliage may exist only at the shrub level, or as a low dense canopy. Nest sites typically have a dense canopy.

As a neotropical migrant (migrating between Central and South America and the United States), migration stopover areas for the southwestern willow flycatcher, even though not used for breeding, are critically important, (*i.e.*, essential) resources affecting productivity and survival (Sogge *et al.* 1997b; Yong and Finch 1997; Johnson and O'Brien 1998; McKernan and Braden 1999; and USFWS 2002: E–3 and 19). Use of riparian habitats along major drainages in the Southwest during migration has been documented (Sogge *et al.* 1997; Yong and Finch 1997; Johnson and O'Brien 1998; McKernan and Braden 1999; Koronkiewicz *et al.* 2004, McLeod *et al.* 2005, Munzer *et al.* 2005). Many of the willow flycatchers found migrating through riparian areas are detected in riparian habitats or patches that would be unsuitable for breeding (*e.g.*, the vegetation structure is too short or sparse, or the patch is too small). Migrating flycatchers use a variety of riparian habitats, including ones dominated by native or exotic plant species, or mixtures of both (USFWS 2002: E–3). Willow flycatchers, like most small passerine birds, require food-rich stopover areas in order to replenish energy reserves and continue their northward or southward migration (Finch *et al.* 2000; USFWS 2002: E–3 and 42).

Southwestern willow flycatchers breeding populations are believed to exist and interact as groups of metapopulations (Noon and Farnsworth 2000; Lamberson *et al.* 2000; and USFWS 2002: 72). A metapopulation is a group of spatially disjunct local southwestern willow flycatcher breeding populations connected to each other by immigration and emigration (USFWS 2002: 72). The distribution of the southwestern willow flycatcher varies geographically and is most stable where many connected sites and/or large populations exist (Coastal CA, Gila, Rio Grande Recovery Units) (Lamberson *et al.* 2000 and USFWS 2002: 72). Metapopulation persistence or stability is more likely to increase by adding more breeding sites (see definition below) rather than adding more territories (see definition below) to existing sites (Lamberson *et al.* 2000; USFWS 2002: 72; and USFWS 2003). This strategy distributes birds across a greater geographical range, minimizes risk of simultaneous catastrophic loss, and avoids genetic isolation (USFWS 2002: 72). In consideration of habitat that is dynamic and widely distributed, flycatcher metapopulation stability, population connectivity, and gene flow can be achieved through: Distributing birds throughout its range; having birds close enough to each other to allow for interaction; having large populations; having a matrix of smaller sites with high connectivity; and establishing habitat close to existing breeding sites, thereby increasing the chance of colonization (USFWS 2002: 75). As the population of a site increases, the potential to disperse and colonize increases; and an increase/decrease in one population affects other populations because populations are affected by the proximity, abundance, and reproductive productivity of neighboring populations (USFWS 2002: 75).

Breeding site and territory are common terms used to describe areas where southwestern willow flycatchers

breed or attempt to breed. A breeding site may encompass a discrete nesting location (*i.e.* territory) or several (USFWS 2002: 72). A territory is defined as a territorial or singing male detected during field surveys and generally equates to an area where both a male and female are present (Sogge *et al.* 1997). For more specific information on southwestern willow flycatcher presence/absence survey protocol, please see Sogge *et al.* (1997) and any subsequent updates at *http://fws.gov/arizonaes* or *http://www.usgs.nau.edu/swwf*. Breeding site and patch (a ''patch'' is defined as a discrete piece of southwestern willow flycatcher habitat) fidelity and habitat use by adult, nestling, breeding, and non-breeding southwestern willow flycatchers are just beginning to be understood (Kenwood and Paxton 2001; Koronkiewicz and Sogge 2001; USFWS 2002: 17, Cardinal and Paxton 2005).

Southwestern willow flycatchers have higher site fidelity than nest fidelity and can move among sites within drainages and between drainages (Kenwood and Paxton 2001). Within-drainage movements are more common than between-drainage movements (Kenwood and Paxton 2001). From nearly 300 band recoveries, within-drainage movements generally ranged from 1.6 to 29 kilometers (km) (1 to 18 miles (mi), but were as long as 40 km (25 mi) (E. Paxton, USGS, e-mail). Movements of birds between drainages are more rare, and the distances are more varied. Banding studies have recorded 25 between-drainage movements ranging from 40 km (25 mi) to a single movement of 443 km (275 mi) (average = 130 km or 81 mi) (E. Paxton, USGS, e-mail).

The Recovery Plan for the southwestern willow flycatcher (USFWS 2002) provides reasonable actions believed to be required to recover and protect the bird. The Recovery Plan (USFWS 2002: 105 to 136) provides the strategy for recovering the bird to threatened status and to the point where delisting is warranted. The Recovery Plan states that either one of two criteria can be met in order to downlist the species to threatened (USFWS 2002: 77–78). The first relies on reaching a total population of 1,500 territories strategically distributed among all Recovery Units and maintained for three years with habitat protections (USFWS 2002: 77–78). Habitat protections include a variety of options such as Habitat Conservation Plans, conservation easements, and Safe Harbor Agreements. The second criterion calls for reaching a population of 1,950 territories also strategically distributed among all Recovery and Management Units for five years without additional habitat protection (USFWS 2002: 77–78). For delisting, the Recovery Plan recommends a minimum of 1,950 territories must be strategically distributed among all Recovery and Management Units, and these habitats must be protected from threats and create/secure sufficient habitat to assure maintenance of these populations and/or habitat for the foreseeable future through development and implementation of conservation management agreements (USFWS 2002: 79–80). All of the delisting criteria must be accomplished and demonstrated their effectiveness for a period of 5 years (USFWS 2002: 79–80).

All the PCEs of critical habitat for the southwestern willow flycatcher are found in the riparian ecosystem within the 100-year floodplain or flood prone area. Southwestern willow flycatchers use riparian habitat for nesting, feeding, and sheltering while breeding, migrating, and dispersing. Because riparian vegetation is prone to periodic disturbance, flycatcher habitat is ephemeral and its distribution is dynamic in nature (USFWS 2002: 17). In other words, riparian trees and shrubs used by flycatchers will be altered by flood waters, drought, or possibly succumb to fire, but will be replaced by new trees or shrubs which grow in their place (but not necessarily in the same location). Sapling riparian trees and shrubs must germinate and grow to reach the appropriate height and structure to be used by flycatchers. After reaching appropriate structure for nesting, flycatcher habitat may become unsuitable for breeding through maturation or disturbance, but suitable for migration or foraging (though this may be only temporary, and patches may cycle back into suitability for breeding) (USFWS 2002: 17). Over a five-year period, southwestern willow flycatcher habitat can, in optimum conditions, germinate, be used for migration or foraging, continue to grow, and eventually be used for nesting. Therefore, the riparian vegetation used by flycatchers is part of a gradually changing system, not only in its rapid growth due to its proximity to water, but its location within the floodplain due to the dynamic riverine environment. As a result of this dynamic riverine environment, it is not realistic to assume that any given breeding habitat patch will remain suitable over the long-term, or persist in the same location (USFWS 2002: 17), or always be used for the same purpose by flycatchers. Feeding sites and migration stopover areas are essential components of the flycatcher's survival, productivity, and health, and they can also be areas where new breeding habitat develops as established nesting sites are lost or degraded (USFWS 2002: 42). Thus, habitat that is not currently suitable for nesting at a specific time, but useful for foraging and/or migration can be essential to the conservation of the flycatcher. Therefore, the germination and growth of riparian vegetation (*i.e.* succession) in this dynamic environment is integral for developing and maintaining appropriate habitat for use by southwestern willow flycatchers.

Based on our current knowledge of the life history and ecology of the southwestern willow flycatcher and the relationship of its essential life history functions to its habitat, as described below in the text supporting the PCEs, and in more detail in the Recovery Plan (USFWS 2002: Chapter II), it is important to recognize the combined nature of the relationships between river function, water, hydrology, floodplains, soils, aquifers, and plant growth to form and support the vegetation and insect populations (PCEs) important for the conservation of the southwestern willow flycatcher.

The natural hydrologic regime (*i.e.*, river flow frequency, magnitude, duration, and timing) and supply of (and interaction between) surface and subsurface water will be a driving factor in the maintenance, growth, recycling, and regeneration of southwestern willow flycatcher habitat (USFWS 2002:16). As streams reach the lowlands, their gradients typically flatten and surrounding terrain open into broader floodplains (USFWS 2002: 32). Combine this setting with the integrity of stream flow frequency, magnitude, duration, and timing (Poff *et al.* 1997), and conditions will occur that provide for proper river channel configuration, sediment deposition, periodic inundation, recharged aquifers, lateral channel movement, and elevated groundwater tables throughout the floodplain that develop flycatcher habitat (USFWS 2002:16). Maintaining existing river access to the floodplain when overbank flooding occurs is integral to allow deposition of fine moist soils, water, nutrients, and seeds that provide essential material for plant germination and growth. An abundance and distribution of fine sediments extending farther laterally across the floodplain and deeper underneath the surface retains much more subsurface water, which in turn supplies water for the development of flycatcher habitat and micro-habitat conditions (USFWS 2002:16). The interconnected

interaction between groundwater and surface water contributes to the quality of riparian community (structure and plant species), and will influence the germination, density, vigor, composition, and ability to regenerate and maintain itself (AZ Department of Water Resources 1994).

The areas designated as critical habitat provide riparian habitat for breeding, non-breeding, territorial, dispersing, and migrating southwestern willow flycatchers and to sustain southwestern willow flycatchers across their range. No areas are being designated as critical habitat solely because they serve as a migration corridor; rather areas designated serve a variety of functions that include use by southwestern willow flycatchers as migration habitat. The habitat components essential for conservation of the species were determined from studies of southwestern willow flycatcher behavior and habitat use throughout the birds range (USFWS 2002: Chapter II and Appendix D). Due to the natural history of this neotropical migrant and the dynamic nature of the riparian environments in which they are found (USFWS 2002: Chapter II and Appendix D), one or more of the primary constituent elements described below are found throughout each of the specific areas that are being designated as critical habitat.

**Space for Individual and Population Growth, and for Normal Behavior**

Streams of lower gradient and/or more open valleys with a wide/broad floodplain are the geological settings that support willow flycatcher breeding habitat from near sea level to over 2438 m (8000 ft) in southern CA, southern NV, southern UT, southern CO, AZ, and NM (USFWS 2002: 7). Lands with moist conditions which support riparian plant communities are areas that provide habitat for the southwestern willow flycatcher. Conditions like these develop in lower floodplains as well as where streams enter impoundments, either natural (*e.g.*, beaver ponds) or human-made (reservoirs). Low-gradient stream conditions may also occur at high elevations, as in the marshy mountain meadows supporting flycatchers in the headwaters of the Little Colorado River near Greer, AZ, or the flat-gradient portions of the upper Rio Grande in south-central CO and northern NM (USFWS 2002: 32). Sometimes, the low-gradient wider floodplain exists only at the habitat patch itself, on streams that are generally steeper when viewed on the large scale (*e.g.*, percent gradient over kilometers or miles) (USFWS 2002).

Relatively steep, confined streams can also support flycatcher habitats (USFWS 2002: D–13). The San Luis Rey River in CA supports a substantial flycatcher population, and stands out among flycatcher habitats as having a relatively high gradient and being confined in a fairly narrow, steep-sided valley (USFWS 2002: D–13). It is important to note that even a steep, confined canyon or mountain stream may present local conditions where just a portion of a hectare or acre of flycatcher habitat may develop (USFWS 2002; D–13). Such sites are important individually, and in aggregate (USFWS 2002: D–13). Flycatchers are known to occupy very small, isolated habitat patches, and may occur in fairly high densities within those patches.

Many willow flycatchers are found along riparian corridors during migration (McCabe 1991; Yong and Finch 1997, 2002; USFWS 2002; E–3, Koronkiwiecz *et al.* 2004; McLeod *et al.* 2005; Munzer *et al.* 2005). Migration stopover areas can be similar to breeding habitat (McCabe 1991) or riparian habitats of less density and abundance than areas for nest placement (*i.e.*, the vegetation structure is too short or sparse or the patch is too small) (USFWS 2002: E–3). For example, many locations where migrant willow flycatchers were detected on the lower Colorado River (Koronkewiecz *et al.* 2004; McLeod *et al.* 2005) and throughout AZ in 2004 (Munzer *et al.* 2005) were areas surveyed for nesting birds, but no breeding was detected. Such migration stopover areas, even though not used for breeding, are critically important resources affecting productivity and survival (USFWS 2002: E–3). The variety of riparian habitats occupied by migrant flycatchers range from smaller patches with shorter/sparser vegetation to larger, more complex breeding habitats.

**Water**

Flycatcher nesting habitat is largely associated with perennial (*i.e.*, persistent) stream flow that can support the expanse of vegetation characteristics needed by breeding flycatchers. However, flycatcher nesting habitat can also persist on intermittent (*i.e.*, ephemeral) streams that retain local conditions favorable to riparian vegetation (USFWS 2002: D–12). The range and variety of stream flow conditions (frequency, magnitude, duration, and timing) (Poff *et al.* 1997) that will establish and maintain flycatcher habitat can arise in different types of both regulated and unregulated flow regimes throughout its range (USFWS 2002: D–12). Also, flow conditions that will establish and maintain flycatcher habitat can be achieved in regulated streams, depending on scale of operation and the interaction of the primary physical characteristics of the landscape (USFWS 2002: D–12).

In the Southwest, hydrological conditions at a flycatcher breeding site can vary remarkably within a season and between years (USFWS 2002: D–12). At some locations, particularly during drier years, water or saturated soil is only present early in the breeding season (*i.e.*, May and part of June) (USFWS 2002: D–12). At other sites, vegetation may be immersed in standing water during a wet year, but be hundreds of meters from surface water in dry years (USFWS 2002: D–12). This is particularly true of reservoir sites such as the Kern River at Lake Isabella, CA, Roosevelt Lake, AZ, and Elephant Butte Reservoir, NM (USFWS 2002: D–12). Similarly, where a river channel has changed naturally there may be a total absence of water or visibly saturated soil for several years (Sferra *et al.* 1997). In such cases, the riparian vegetation and any flycatchers breeding within it may persist for several years (USFWS 2002: D–12).

In some areas, natural or managed hydrologic cycles can create temporary flycatcher habitat, but may not be able to support it for an extended amount of time, or may support varying amounts of habitat at different points in the cycle. Some dam operations create varied situations that allow different plant species to thrive when water is released below a dam, held in a lake, or removed from a lakebed, and consequently, varying degrees of flycatcher habitat are available as a result of dam operations (USFWS 2002: 33).

The riparian vegetation that constitutes southwestern willow flycatcher breeding habitat requires substantial water (USFWS 2002: D–12). Because southwestern willow flycatcher breeding habitat is often where there is slow moving or still water, these slow and still water conditions may also be important in influencing the production of insect prey base for flycatcher food (USFWS 2002: D–12)

*Sites for Germination or Seed Dispersal*

Subsurface hydrologic conditions may, in some places (particularly at the more arid locations of the Southwest), be equally important to surface water conditions in determining riparian vegetation patterns (Lichivar and Wakely 2004). Where groundwater levels are elevated to the point that riparian forest plants can directly access

those waters it can be an area for both breeding, and non-breeding, territorial, dispersing, foraging, and migrating southwestern willow flycatchers, and elevated groundwater helps create moist soil conditions believed to be important for nesting conditions and prey populations (USFWS 2002: 11 and 18), as further discussed below.

Depth to groundwater plays an important part in the distribution of riparian vegetation (AZ Department of Water Resources 1994) and consequently, southwestern willow flycatcher habitat. The greater the depth to groundwater below the land surface, the less abundant the riparian vegetation (AZ Department of Water Resources 1994). Localized perched aquifers (*i.e.*, a saturated area that sits above the main water table) can and do support some riparian habitat, but these systems are not extensive (AZ Department of Water Resources 1994).

The abundance and distribution of fine sediment deposited on floodplains is critical for the development, abundance, distribution, maintenance, and germination of flycatcher habitat, and possibly conditions for successful breeding (USFWS 2002: 16). Fine sediments provide seed beds for flycatcher habitat. In almost all cases, moist or saturated soil is present at or near breeding sites during wet or non-drought years (USFWS 2002: 11). The saturated soil and adjacent surface water may be present early in the breeding season, but only damp soil is present by late June or early July (Muiznieks *et al.* 1994; USFWS 2002: D–3). Microclimate features (*i.e.,* temperature and humidity) facilitated by moist/saturated soil, are believed to play an important role where flycatchers are detected and nest, their breeding success, and availability/abundance of food resources (USFWS 2002).

*Reproduction and Rearing of Offspring*

Southwestern willow flycatchers nest in thickets of trees and shrubs ranging in height from 2 m to 30 m (6 to 98 ft) (USFWS 2002: D–3). Lower-stature thickets (2–4 m or 6–13 ft tall) tend to be found at higher elevation sites, with tall-stature habitats at middle- and lower-elevation riparian forests (USFWS 2002: D–2). Nest sites typically have dense foliage at least from the ground level up to approximately 4 m (13 ft) above ground, although dense foliage may exist only at the shrub level, or as a low, dense tree canopy (USFWS 2002: D–3).

Riparian habitat characteristics such as dominant plant species, size and shape of habitat patches, tree canopy structure, vegetation height, and vegetation density are essential qualities of southwestern willow flycatcher breeding habitat, although they may vary widely at different sites (USFWS 2002: D–1). The accumulating knowledge of flycatcher breeding sites reveals important areas of similarity which constitute the basic concept of what is suitable breeding habitat (USFWS 2002: D–2). These habitat features are generally discussed below.

Regardless of the plant species composition or height, breeding sites usually consist of dense vegetation in the patch interior, or an aggregate of dense patches interspersed with openings (USFWS 2002: 11). In most cases this dense vegetation occurs within the first 3 to 4 m (10 to 13 ft) above ground (USFWS 2002: 11). These dense patches are often interspersed with small openings, open water or marsh, or shorter/sparser vegetation, creating a mosaic that is not uniformly dense (USFWS 2002: 11).

Common tree and shrub species currently known to comprise nesting habitat include Goodings willow (*Salix gooddingii*), coyote willow (*Salix exigua*), Geyers willow (*Salix geyerana*), arroyo willow (*Salix lasiolepis*), red willow (*Salix laevigata*), yewleaf willow (*Salix taxifolia*), pacific willow (*Salix lasiandra*), boxelder (*Acer negundo*), tamarisk (*Tamarix ramosissima*), and Russian olive (*Eleagnus angustifolia*) (USFWS 2002: D–2, 11). Other plant species used for nesting have been buttonbush (*Cephalanthus occidentalis*), cottonwood, stinging nettle (*Urtica dioica*), alder (*Alnus rhombifolia, Alnus oblongifolia, Alnus tenuifolia*), velvet ash (*Fraxinus velutina*), poison hemlock (*Conium maculatum*), blackberry (*Rubus ursinus*), seep willow (*Baccharis salicifolia, Baccharis glutinosa*), oak (*Quercus agrifolia, Quercus chrysolepis*), rose (*Rosa californica, Rosa arizonica, Rosa multiflora*), sycamore (*Platinus wrightii*), giant reed (*Arundo donax*), false indigo (*Amorpha californica*), Pacific poison ivy (*Toxicodendron diversilobum*), grape (*Vitus arizonica*), Virginia creeper (*Parthenocissus quinquefolia*), Siberian elm (*Ulmus pumila*), and walnut (*Juglans hindsii*) (USFWS 2002: D–3, 5, and 9). Other species used by nesting southwestern willow flycatchers may become known over time as more studies and surveys occur.

Nest sites typically have a dense tree and/or shrub canopy (USFWS 2002: D–3). Canopy density (the amount of cover provided by tree and shrub branches measured from the ground) at various nest sites ranged from 50 percent to 100 percent.

Southwestern willow flycatcher breeding habitat can be generally organized into three broad habitat types—those dominated by native vegetation (willow and cottonwood), by exotic (*i.e.,* non-native) vegetation (salt cedar), and those with mixed native and exotic plants (salt cedar and willow). These broad habitat descriptors reflect the fact that southwestern willow flycatchers inhabit riparian habitats dominated by both native and non-native plant species. Salt cedar and Russian olive are two exotic plant species used by flycatchers for nest placement and also foraging and shelter (USFWS 2002: D–4).

The riparian patches used by breeding flycatchers vary in size and shape (USFWS 2002: D–2). They may be relatively dense, linear, contiguous stands or irregularly-shaped mosaics of dense vegetation with open areas (USFWS 2002: D–2 and 11). Southwestern willow flycatchers have been recorded nesting in patches as small as 0.1 ha (0.25 ac) along the Rio Grande (Cooper 1997), and as large as 70 ha (175 ac) in the upper Gila River in NM (Cooper 1997). The mean reported size of flycatcher breeding patches was 8.6 ha (21.2 ac). The majority of sites were toward the smaller end, as evidenced by a median patch size of 1.8 ha (4.4 ac) (USFWS 2002: 17). Mean patch size of breeding sites supporting 10 or more flycatcher territories was 24.9 ha (62.2 ac). Aggregations of occupied breeding patches within a breeding site may create a riparian mosaic as large as 200 ha (494 ac) or more, such as at the Kern River (Whitfield 2002), Roosevelt Lake (Paradzick *et al.* 1999) and Lake Mead (McKernan 1997).

Flycatchers often cluster their territories into small portions of riparian sites (Whitfield and Enos 1996; Paxton *et al.* 1997; Sferra *et al.* 1997; Sogge *et al.* 1997), and major portions of the site may be occupied irregularly or not at all. Recent habitat modeling based on remote sensing and GIS data has found that breeding site occupancy at reservoir sites in AZ is influenced by vegetation characteristics of habitat adjacent to the actual nesting areas (Hatten and Paradzick 2003); therefore, areas adjacent to nest sites can be an important component of a breeding site. How size and shape of riparian patches relate to factors such as flycatcher nest site selection and fidelity, reproductive success, predation, and brood parasitism is unknown (USFWS 2002: D–11).

Flycatchers are generally not found nesting in confined floodplains (*i.e.*, those bound within a canyon) (Hatten

and Paradzick 2003) or where only a single narrow strip of riparian vegetation less than approximately 10 m (33 ft) wide develops (USFWS 2002: D–11). While riparian vegetation too mature, immature, or of lesser quality in abundance and breadth may not be used for nesting, it can be used by breeders for foraging (especially if it extends out from larger patches) or during migration for foraging, cover, and shelter (Sogge and Tibbitts 1994; Sogge and Marshall 2000).

*Food*

The willow flycatcher is somewhat of an insect generalist (USFWS 2002: 26), taking a wide range of invertebrate prey including flying, and ground-, and vegetation-dwelling species of terrestrial and aquatic origins (Drost *et al.* 2003). Wasps and bees (Hymenoptera) are common food items, as are flies (Diptera), beetles (Coleoptera), butterflies/moths and caterpillars (Lepidoptera), and spittlebugs (Homoptera) (Beal 1912; McCabe 1991). Plant foods such as small fruits have been reported (Beal 1912; Roberts 1932; Imhof 1962), but are not a significant food during the breeding season (McCabe 1991). Diet studies of adult southwestern willow flycatchers (Drost *et al.* 1997; DeLay *et al.* 1999) found a wide range of prey taken. Major prey items were small (flying ants) (Hymenoptera) to large (dragonflies) (Odonata) flying insects, with, Diptera and Hemiptera (true bugs) comprising half of the prey items. Willow flycatchers also took non-flying species, particularly Lepidoptera larvae. From an analysis of southwestern willow flycatcher diet along the South Fork of the Kern River, CA, (Drost *et al.* 2003) flycatchers consumed a variety of prey from 12 different insect groups. Willow flycatchers have been identified targeting seasonal hatchings of aquatic insects along the Salt River arm of Roosevelt Lake, AZ (E. Paxton, USGS, e-mail).

Southwestern willow flycatcher food availability may be largely influenced by the density and species of vegetation, proximity to and presence of water, saturated soil levels, and microclimate features such as temperature and humidity (USFWS 2002). Flycatchers forage within and above the canopy, along the patch edge, in openings within the territory, over water, and from tall trees as well as herbaceous ground cover (Bent 1960; McCabe 1991). Willow flycatchers employ a ''sit and wait'' foraging tactic, with foraging bouts interspersed with longer periods of perching (Prescott and Middleton 1988).

Pursuant to our regulations, we are required to identify the known physical and biological features or PCEs, essential to the conservation of the southwestern willow flycatcher, together with a description of any critical habitat that is designated. Based on our current knowledge of the life history, biology, and ecology of the species and the requirements of the habitat to sustain the essential life history functions of the species, we have determined that the southwestern willow flycatcher's primary constituent elements are:

(1) Riparian habitat in a dynamic successional riverine environment (for nesting, foraging, migration, dispersal, and shelter) that comprises:

(a) Trees and shrubs that include Gooddings willow (*Salix gooddingii*), coyote willow (*Salix exigua*), Geyers willow (*Salix geyerana*), arroyo willow (*Salix lasiolepis*), red willow (*Salix laevigata*), yewleaf willow (*Salix taxifolia*), pacific willow (*Salix lasiandra*), boxelder (*Acer negundo*), tamarisk (*Tamarix ramosissima*), Russian olive (*Eleagnus angustifolia*), buttonbush (*Cephalanthus occidentalis*), cottonwood (*Populus fremontii*), stinging nettle (*Urtica dioica*), alder (*Alnus rhombifolia, Alnus oblongifolia, Alnus tenuifolia*), velvet ash (*Fraxinus velutina*), poison hemlock (*Conium maculatum*), blackberry (*Rubus ursinus*), seep willow (*Baccharis salicifolia, Baccharis glutinosa*), oak (*Quercus agrifolia, Quercus chrysolepis*), rose (*Rosa californica, Rosa arizonica, Rosa multiflora*), sycamore (*Platinus wrightii*), false indigo (*Amorpha californica*), Pacific poison ivy (*Toxicodendron diversilobum*), grape (*Vitus arizonica*), Virginia creeper (*Parthenocissus quinquefolia*), Siberian elm (*Ulmus pumila*), and walnut (*Juglans hindsii*).

(b) Dense riparian vegetation with thickets of trees and shrubs ranging in height from 2 m to 30 m (6 to 98 ft). Lower-stature thickets (2 to 4 m or 6 to 13 ft tall) are found at higher elevation riparian forests and tall-stature thickets are found at middle- and lower-elevation riparian forests;

(c) Areas of dense riparian foliage at least from the ground level up to approximately 4 m (13 ft) above ground or dense foliage only at the shrub level, or as a low, dense tree canopy;

(d) Sites for nesting that contain a dense tree and/or shrub canopy (the amount of cover provided by tree and shrub branches measured from the ground) (*i.e.*, a tree or shrub canopy with densities ranging from 50 percent to 100 percent);

(e) Dense patches of riparian forests that are interspersed with small openings of open water or marsh, or shorter/sparser vegetation that creates a mosaic that is not uniformly dense. Patch size may be as small as 0.1 ha (0.25 ac) or as large as 70 ha (175 ac); and

(2) A variety of insect prey populations found within or adjacent to riparian floodplains or moist environments, including: flying ants, wasps, and bees (Hymenoptera); dragonflies (Odonata); flies (Diptera); true bugs (Hemiptera); beetles (Coleoptera); butterflies/moths and caterpillars (Lepidoptera); and spittlebugs (Homoptera).

The discussion above outlines those physical and biological features essential to the conservation of the southwestern willow flycatcher and presents our rationale as to why those features were selected. The primary constituent elements described above are results of the dynamic river environment that germinates, develops, maintains, and regenerates the riparian forest and provides food for breeding, non-breeding, dispersing, territorial, and migrating southwestern willow flycatchers. Anthropogenic factors such as dams, irrigation ditches, or agricultural field return flow can assist in providing conditions that support flycatcher habitat. Because the flycatcher exists in disjunct breeding populations across a wide geographic and elevation range, and is subject to dynamic events, critical habitat river segments described below are essential for the flycatcher to maintain metapopulation stability, connectivity, gene flow, and protect against catastrophic loss. All river segments designated as southwestern willow flycatcher critical habitat are within the geographical area occupied by the species and contain at least one of the primary constituent elements. It is important to recognize that the PCEs are present throughout the river segments selected (PCE 1a and 2), but the specific quality of riparian habitat for nesting (PCE 1b, 1c, 1d, 1e), migration (PCE 1), foraging (PCE 1 and 2), and shelter (PCE 1) will not remain constant in their condition or location over time due to succession (*i.e.*, plant germination and growth) and the dynamic environment in which they exist.

**Criteria Used To Identify Critical Habitat**

We are designating critical habitat on lands that (1) we have determined are occupied at the time of listing and contain the primary constituent elements of the southwestern willow

flycatcher, and (2) in some instances, designated areas not known to be within the geographical area occupied at the time of listing, but have been determined to be essential to the conservation of the species. See the *Justification of Including Areas Not Known To Be Within the Specific Geographical Area Occupied by the Species at the Time of Listing* section below for our rationale for including such areas. This critical habitat designation focuses on providing riparian habitat for breeding, non-breeding, territorial, dispersing, and migrating southwestern willow flycatchers, thus promoting the conditions for maintaining self-sustaining southwestern willow flycatcher populations and metapopulations across their range in areas of AZ, CA, NM, NV, CO, and UT. Since southwestern willow flycatchers are found in a variety of ecologically and geographically disjunct areas that are prone to disturbance, it is important to preserve metapopulation stability, connectivity, gene flow, and protect against catastrophic loss for populations distributed across a large geographic and elevational range, as well as the variety of ecological environments in which it lives.

To identify areas containing features essential to the conservation of the southwestern willow flycatcher, we first considered the Recovery Plan's strategy, rationale, and science behind the conservation of the flycatcher and removing the threat of extinction (USFWS 2002: 61–95). This led to us to focus on the wide, but irregular distribution of this bird, the dynamic nature of its habitat, and scientific principles behind southwestern willow flycatcher metapopulation stability, gene flow, ecological connectivity among disjunct populations, and prevention of catastrophic losses (USFWS 2002: 61–95). In addition, information provided during the comment periods for this proposed rule and the draft economic and draft NEPA analyses were evaluated and considered in the development of the final designation for southwestern willow flycatcher.

The Recovery Plan (USFWS 2002: 61–95) identifies important factors to consider in minimizing the likelihood of extinction: (1) Populations should be distributed throughout the bird's range; (2) populations should be distributed close enough to each other to allow for movement among them; (3) large populations contribute most to metapopulation stability; smaller populations can contribute to metapopulation stability when arrayed in a matrix with high connectivity; (4) as the population of a site increases, the potential to disperse and colonize increases; (5) increase/decrease in one population affects other populations; (6) some Recovery/Management Units have stable metapopulations, others do not; (7) maintaining/augmenting existing populations is a greater priority than establishing new populations; and (8) establishing habitat close to existing breeding sites increases the chance of colonization.

The Recovery Plan (USFWS 2002) outlined a recommended recovery strategy for the southwestern willow flycatcher. We reviewed and considered the pertinent information contained in the Recovery Plan (USFWS 2002) in developing this critical habitat designation because it represents a compilation of the best scientific data available to us. We are required to base listing and critical habitat decisions on the best scientific and commercial data available (16 U.S.C. 1533(b)(1)(A)). We may not delay making our determinations until more information is available, nor can we be required to gather more information before making our determination (*Southwest Center for Biological Diversity* v. *Babbitt*, 215 F. 3d 58 (D.C. Cir. 2000)). This critical habitat designation focuses on those Recovery Plan recommendations that we believe are important in determining areas that have essential features for the conservation of the species.

The focus of this designation is a conservation strategy which relies on protecting large populations as well as small populations with high connectivity (USFWS 2002: 74 to 75). Large populations, centrally located, contribute the most to metapopulation stability, especially if other breeding populations are nearby (USFWS 2002: 74). Large populations persist longer than small ones, and produce more dispersers capable of emigrating to other populations or colonizing new areas (USFWS 2002: 74). Smaller populations in high connectivity can provide as much or more stability than a single isolated population with the same number of territories because of the potential to disperse colonizers throughout the network of sites (USFWS 2002: 75). This approach for defining critical habitat areas supports other key central strategies tied to flycatcher conservation identified in the Recovery Plan (USFWS 2002: 74 to 76) such as: (1) Populations should be distributed close enough to each other to allow for movement; (2) maintaining/augmenting existing populations is a greater priority than establishing new populations; and (3) a population's increase improves the potential to disperse and colonize.

Because large populations, as well as small populations with high connectivity, contribute the most to metapopulation stability (USFWS 2002: 74), we identified these areas to help guide the delineation of areas with features essential to the conservation of the southwestern willow flycatcher (*i.e.*, critical habitat). This rule defines a large population as a single site or collection of smaller connected sites that support 10 or more territories. We chose the baseline survey period as the time from 1993 to 2003 (USFWS 2002: 23; Sogge *et al.* 2003; U.S. Geological Survey 2003; Smith *et al.* 2004; S.O. Williams, NMGFD, e-mail 2004). This includes all known reliable survey information that is available to us. We chose 10 or more territories to identify a large population area because the population viability analysis and the expertise of the Technical Recovery Team indicates a breeding site exhibits greatest long-term stability with at least 10 territories (Lamberson *et al.* 2000; USFWS 2002: 72).

We are designating stream ''segments'' as critical habitat for the southwestern willow flycatcher. The reaches designated provide for flycatcher habitat (nesting, foraging, migrating, regenerating, etc.) and allows for the changes in habitat locations or conditions from those that exist presently. The actual riparian habitat in these areas is expected to expand, contract, or change as a result of flooding, drought, inundation, and changes in floodplains and river channels (USFWS 2002: 18, D–13 to 15) that result from current flow management practices and priorities. Stream segments include breeding sites in high connectivity and other essential flycatcher habitat components needed to conserve the subspecies. Those other essential components of flycatcher habitat (foraging habitat, habitat for non-breeding flycatchers, migratory habitat, regenerating habitat, streams, elevated groundwater tables, moist soils, flying insects, and other alluvial floodplain habitats, etc.) adjacent to or between sites, along with the dynamic process of riparian vegetation succession and river hydrology, provide current and future habitat for the flycatcher which is dependent upon vegetation succession. As a result, these segments represent the boundaries within which flycatcher habitat of all types currently persist, and due to dynamic river processes, is expected to persist over time. We used expert opinion, location of territories, habitat models, existing dam and river operations, and the physical and

biological features essential to flycatcher conservation to determine the boundaries of each river segment that would be proposed as critical habitat for the subspecies.

In order to determine the degree of connectivity to assign populations, we examined the known between-year within-drainage (same river drainage) and between-drainage (separate river drainages) movements of southwestern willow flycatchers (Luff *et al.* 2000; Kenwood and Paxton 2002; USFWS 2002; Newell *et al.* 2003, 2005; E. Paxton, USGS, e-mail). Using banding studies from 1997 to 2003 which were focused in central AZ, scientists re-sighted 292 banded southwestern willow flycatchers that, between years, moved within the same river drainage and to different river drainages (Luff *et al.* 2000; Kenwood and Paxton 2001; E. Paxton, USGS, e-mail). Most recorded between-year movements (n = 267) occurred within the same river drainage from 1.6 to 29 km (1 and 18 mi), but movements ranging from 40 km (25 mi) to as far as 440 km (276 mi) were recorded for movements occurring between different river drainages (Luff *et al.* 2000; Kenwood and Paxton 2001; E. Paxton, USGS, e-mail). Flycatchers are not restricted to within river drainage movements, but longer distance movements were infrequent and would not be indicative of highly connected populations (USFWS 2002: 22, E. Paxton, USGS, e-mail). Therefore, as a result of the known movements of banded southwestern willow flycatchers, the ability of birds to move between drainages, and the intent to capture collections of small separate breeding sites, we chose a 29 km (18 mi) radius as the distance to identify the high connectivity of collections of flycatcher breeding sites.

As a result of defining the degree of connectivity to assign populations, we identified territories (with a minimum of 10 territories) and areas containing features essential to the subspecies' conservation or areas defined as essential habitat within a 29 km (18 mi) radius of each other to include as proposed critical habitat. This approach captures habitat for the persistence of the largest and most stable breeding populations in the best habitat throughout the subspecies' range. These populations within these areas provide metapopulation stability, gene flow, connectivity, and protects against catastrophic losses. The large breeding populations found within these segments provide dispersers that can colonize new breeding sites within and outside of designated critical habitat. These segments also capture habitat with features essential for non-breeding, dispersing, migrating, and territorial southwestern willow flycatchers. As a result of using this radius to identify areas containing features essential to the subspecies' conservation or areas defined as essential habitat, it accounts for the dynamic aspects of riparian habitat and allows for a change in location, distribution, abundance, and quality of flycatcher habitat over time.

Large populations or small populations with high connectivity did not exist throughout the entire range of the bird (USFWS 2002: 30–33; 84 (Table 9)). For example, in the Amargosa, Santa Cruz, Hassayampa/Agua Fria, San Juan, Lower Rio Grande, and Powell Flycatcher Management Units there are no large sites with 10 or more territories, nor are any known territories in these Units in high connectivity (less than 29 km/18 mi) with a large population (greater than 10 territories). We are not designating these areas as critical habitat because the areas do not meet the criteria that we established for containing essential features or essential habitat.

We adjusted the methodology used to determine essential habitat in the Coastal CA Recovery Unit. Unlike the other Recovery Units in the flycatcher's range, streams in the Coastal CA Recovery Unit are located in closer proximity to each other and territories exist on a greater number of streams. As a result, flycatcher breeding sites in this Recovery Unit are almost all located in close proximity to one another. Because of this, our methodology could not distinguish habitat with essential features for the flycatcher. This caused us to further scrutinize stream segments in these Management Units to determine which had essential features for the flycatcher and which ones did not. In order to do that, we had to rely on Recovery Plan recommendations, distribution and abundance of territories, conservation goals, habitat quality, and expert opinion to determine those segments with essential features for this critical habitat designation.

Our approach in these Coastal CA Management Units was to still target large populations and smaller breeding sites that together equaled a large population. In the Santa Ynez, Santa Ana, and San Diego Management Units we selected segments from streams with large populations (Santa Ynez, Santa Ana, Santa Margarita and San Luis Rey Rivers). In addition to these stream segments with large populations, we selected other nearby stream segments with high quality habitat and smaller numbers of territories to provide for population connectivity, metapopulation stability, population growth, and protection against catastrophic loss. We however, omitted some locations with lone territories that were not believed to be essential. These omitted locations were, compared to other habitat segments, believed to be of lesser quality and did not contribute as much to connectivity, stability, or protect against catastrophic loss. Consequently, there are stream segments in the Coastal CA Recovery Unit, specifically in the Santa Ana and San Diego Management Units in CA, where lone territories exist that fell within the 29 km (18 mi) radius, but are not being designated as critical habitat because they, when considered within the entire range of habitats and stream segments selected in the Coastal CA Recovery Units, are not believed to be essential for inclusion in this critical habitat designation.

**Lateral Extent**

In order to determine the lateral extent of critical habitat for the flycatcher, we considered the variety of purposes riparian habitat serves the southwestern willow flycatcher, the dynamic nature of rivers and riparian habitat, the relationship between the location of rivers, flooding, and riparian habitat, and the expected boundaries, over time, of these habitats.

Southwestern willow flycatchers use riparian habitat in a variety of conditions for breeding, feeding, sheltering, cover, dispersal, and migration stopover areas. Riparian habitat is dependent on the location of river channels, floodplain soils, subsurface water, floodplain shape, and is driven by the wide variety of high, medium, and low flow events. Rivers can and do move from one side of the floodplain to the other. Flooding occurs at periodic frequencies that recharge aquifers and deposit and moisten fine floodplain soils that create seedbeds for riparian vegetation germination and growth within these boundaries.

Over time, flycatcher habitat is expected to change its location (Dockens and Paradzick 2004) as a result of shifting river channels, flooding, drought, springs, seeps, and other factors such as agricultural run-off, diversions, dam operations, and modifications of riverbeds, etc. The methodology that we used to generate river segments and map the river channel and associated alluvial areas within the riparian zone is intended to identify locations where dynamic river functions exist that create and maintain southwestern willow flycatcher habitat for nesting, feeding, sheltering, cover, dispersal, and migration.

In this designation, we consider the riparian zone to be the area surrounding the select river segment which is directly influenced by river functions. The boundaries of the lateral extent or riparian zone (*i.e.*, the surrogate for the delineation of the lateral boundaries of critical habitat) were derived by one of two methods. The area was either captured from existing digital data sources (listed below) or created through expert visual interpretation of remotely sensed data (aerial photographs and satellite imagery—also listed below). Geographic Information System (GIS) technology was utilized throughout the lateral extent determination. ESRI, Inc. ArcInfo 8.3 was used to perform all mapping functions and image interpretation.

Pre-existing data sources used to assist in the process of delineating the lateral extent of the riparian zones for this designation included: (1) National Wetlands Inventory (NWI) digital data from the mid 1980's, 2001, 2002; (2) Federal Emergency Management Agency (FEMA) 1995, Q3 100 year flood data; (3) U.S. Census Bureau Topologically Integrated Geographic Encoding and Referencing; and (4) (TIGER) 2000 digital data.

Where pre-exiting data may not have been available to readily define riparian zones, visual interpretation of remotely sensed data was used to define the lateral extent. Data sources used in this included: (1) Terraserver online Digital Orthophoto Quarter Quads (DOQQs), black & white, 1990's era and 2001 (2) U.S. Geological Survey (USGS) DOQQs 1997: (3) USGS aerial photographs, 1 meter, color-balanced, and true color, 2002; (4) Landsat 5 and Landsat 7 Thematic Mapper, bands 4, 2, 3, 1990–2000 (5) Emerge Corp, 1 meter, true color imagery, 2001; (6) Local Agency Partnership, 2 foot, true color, 2000; and (7) National Wetlands Inventory aerial photographs, 2001–2002.

We refined all lateral extents for this designation by creating electronic maps of the lateral extent and attributing them according to the following riparian sub-classifications. Riparian developed areas, as defined below, are not included in our critical habitat designation since these areas do not contain the primary constituent elements (see ''Primary Constituent Elements'' section above) and, therefore, do not meet the definition of critical habitat.

(1) Riparian Vegetated: This class is used to describe areas which can still support southwestern willow flycatcher habitat and features essential to the subspecies' conservation (*i.e.*, riparian forest, vegetated and unvegetated wetlands, water bodies, any undeveloped or unmanaged lands within the approximate riparian zone). Some of these areas may encompass man-made features which support flycatcher habitat such as ditches or canals.

(2) Riparian Developed: This class is used to describe all developed areas found within the boundary of critical habitat with existing physical infrastructure features that do not contain the PCEs to support southwestern willow flycatcher habitat. Developed lands include, urban/suburban development, agricultural fields, utility structures, roads, mining/extraction pits, cement pads, and landscaped residential areas which no longer contain the ability to develop the PCEs.

**Critical Habitat Designation**

Critical habitat for the southwestern willow flycatcher is being designated across a wide portion of the subspecies' range and is organized in Management Units (as described in the Recovery Plan). We are designating stream segments in 15 Management Units found in 5 Recovery Units as critical habitat for the southwestern willow flycatcher and excluding or exempting from this designation various river or stream segments previously proposed as critical habitat within many of those units. For those areas that have been excluded or exempted, a brief description of the segment is included and why it is being excluded or exempted. More thorough discussions are provided in the Exclusions under Section 4(a)(3) and 4(b)(2)of the Act and Summary of Changes from the Proposed Rule portions of this rule. The stream segments designated occur in southern CA, southern NV, southwestern UT, AZ, and NM. Lands we are designating are under private, local agency, county, State, Tribal, and Federal ownership.

In the development of southwestern willow flycatcher critical habitat, we determined which lands have features essential to the conservation of the species by defining the physical and biological features essential to the species' conservation and delineating the specific areas containing them. We then evaluated those lands determined to have essential features to ascertain if any specific areas are appropriate for exemption or exclusion from critical habitat pursuant to either sections 4(a)(3) or 4(b)(2) of the Act. On the basis of our evaluation, we have determined that the benefits of excluding certain approved HCPs, lands owned and managed by the Department of Defense, State and Federal Wildlife Areas, National Wildlife Refuges, and Tribal and private lands under appropriate management for the southwestern willow flycatcher outweighs the benefits of their inclusion. We have subsequently excluded those lands from southwestern willow flycatcher critical habitat pursuant to section 4(a)(3) and 4(b)(2) of the Act (refer to *Exclusions under Section 4(b)(2) of the Act* section below).

The resulting designation, after exclusions and exemptions, is a subset of lands that have features essential to the conservation of the southwestern willow flycatcher or lands determined to be essential to the conservation of the subspecies. Following exclusions and exemptions some proposed river segments are completely removed, some are effectively divided in half, and others had a variety of sections removed. In a few cases, after exclusion or exemption, such a small piece of the segment is left, that it was removed from critical habitat because in the context of the protected segment, it was no longer essential. In those instances, we provide an explanation below of those small sections.

The value and purpose of each segment to flycatcher conservation are shared throughout the designation; segments provide riparian habitat for breeding, migrating, non-breeding, territorial, and dispersing southwestern willow flycatchers. This is especially true due to the dynamic nature of riparian habitat and the variety of purposes and conditions that are used by the flycatcher for life-history needs. A location in these segments that has a specific purpose today, such as a breeding site, foraging location, or areas used for migration or dispersal, can change over time (sometimes within a year or over a few years). Changes can occur due to flooding, drought, fire, or choices in land management. These changes can result in an increase or decrease in habitat suitability, growth, and location depending on which influence is exercised. Current breeding site locations, with few exceptions, are described in the Recovery Plan with a code describing (USFWS 2002: Figs. 3–11, 67–71) its general location. In this designation's proposal (69 FR 60706), we described each segment and the most recent known distribution of sites and territories.

The critical habitat areas described below constitute our best assessment of the areas: (1) With essential habitat features within the geographical area occupied by the species at the time of listing; (2) that contain the PCEs; and (3) that may require special management. Although all of the segments are within

the geographical area occupied by the species, we are not designating all of the areas known to be occupied by the southwestern willow flycatcher. We provide separate discussions on (1) the reasons why these segments contain features essential for the conservation of the southwestern willow flycatcher; (2) special management considerations for these Units; and (3) if a unit was not known to be occupied at the time of listing, we have described why we have determined the segment to be essential to the conservation of the species.

*Special Management Considerations or Protection*

Section 3(5)(A) of the Act defines critical habitat as the specific areas within the geographic area occupied by the species on which are found those physical and biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection. As we undertake the process of designating critical habitat for a species, we first evaluate lands defined by those physical and biological features essential to the conservation of the species for inclusion in the designation pursuant to section 3(5)(A) of the Act. Secondly, we then evaluate lands defined by those features to assess whether they may require special management considerations or protection. As discussed throughout this rule, the southwestern willow flycatcher and its habitat are threatened by a multitude of factors occurring at once. Threats to those features that define essential habitat (PCEs) are caused by various factors.

We believe the areas designated as critical habitat will require some level of management and/or protection to address the current and future threats to southwestern willow flycatchers and maintain the PCEs essential to its conservation in order to ensure the overall conservation of the species. Areas in need of management include not only the immediate locations where the species may be present, but additional areas adjacent to these that can provide for normal population fluctuations and/or habitat succession that may occur in response to natural and unpredictable events. The southwestern willow flycatcher may be dependent upon habitat components beyond the immediate areas where individuals of the species occur if they are important in maintaining ecological processes such as hydrology; stream flow; hydrologic regimes; plant germination, growth, maintenance, regeneration (succession); sedimentation; groundwater elevations; plant health and vigor; or maintenance of prey populations. The designation of critical habitat does not imply that lands outside of critical habitat do not play an important role in the conservation of the flycatcher. Federal activities outside of critical habitat are still subject to review under section 7 of the Act if they may affect the flycatcher or its critical habitat (such as groundwater pumping, developments, watershed condition, etc.). Prohibitions of section 9 of the Act also continue to apply both inside and outside of designated critical habitat.

A detailed discussion of threats to the southwestern willow flycatcher and its habitat can be found in the final listing rule (60 FR 10694, February 27, 1995), the previous critical habitat designation (62 FR39129, July 22, 1997), and the final Recovery Plan (August 2002). Special management that may be needed for the southwestern willow flycatcher is briefly summarized below:

(1) Manage fire to maintain and enhance habitat quality and quantity. Suppress fires that occur. Restore groundwater, base flows, flooding, and natural hydrologic regimes to prevent flammable exotic species from developing and reducing fire risk. Reduce recreational fires.

(2) Manage biotic elements and processes. Manage livestock grazing to increase flycatcher habitat quality and quantity by determining appropriate areas, seasons, and use constituent within the natural historical norm and tolerances. Reconfigure grazing units, improve fencing, and improve monitoring and documentation of grazing practices. Manage wild and feral ungulates to restore desired processes to increase flycatcher habitat quality and quantity. Manage keystone species such as beaver to restore desired processes to increase habitat quality and quantity.

(3) Manage exotic plant species such as tamarisk or Russian olive by reducing conditions that allow exotics to be successful, and restoring or re-establishing conditions that allow native plants to thrive. To a large extent, abundance of exotic plants is a symptom of land management (groundwater withdrawal, surface water diversion, dam operation, over grazing) that has created conditions favorable to exotics over native plants. Eliminate or reduce dewatering stressors such as surface water diversion and groundwater pumping to increase stream flow and groundwater elevations. Reduce salinity levels by modifying agricultural practices and restoring natural hydrologic regimes and flushing flood flows. Restore natural hydrologic regimes that favor germination and growth of native plant species. Improve timing of water draw down in lake bottoms to coincide with the seed dispersal and germination of native species. Restore ungulate herbivory to intensities and levels under which native riparian species are more competitive.

(4) Retain native riparian vegetation in the floodplain. Prevent clearing channels for flood flow conveyance or plowing of flood plains. Manage projects to minimize clearing of native vegetation will help ensure that the desired native species persist.

(5) Exotic plant species removal and native plant restoration should be evaluated and conducted on a site-by-site basis. If habitat assessment reveals sustained increase in exotic abundance, conduct habitat evaluation of underlying causes and conduct restoration pursuant to measures described in the Plan. Remove exotics only if: Underlying causes for dominance have been addressed; there is evidence that exotic species will be replaced by vegetation of higher functional value; and the action is part of an overall restoration plan. Restoration plans should include at least; a staggered approach to create mosaics of different aged successional stands; and consideration of whether the sites are presently occupied by nesting flycatchers. Biocontrol agents should not be used within the occupied range of the southwestern willow flycatcher.

(6) Protect riparian areas from recreational impact. Manage items such as trails, campsites, off-road vehicles, fires, etc. to prevent habitat degradation in order to maintain, protect, and develop flycatcher habitat.

*Justification of Including Areas Not Known To Be Within the Specific Geographical Area Occupied by the Species at the Time of Listing*

The areas included in this designation not known to be within the specific geographic area occupied by the species at the time of listing are portions of the bird's range associated with the large populations in CA, NV, UT, and AZ. In the Santa Ana Management Unit, breeding southwestern willow flycatchers were not known from streams associated with the Santa Ana Drainage including the: Santa Ana River, Bear Creek, Mill Creek, Oak Glen Creek, and Waterman Creek. In the San Diego Management Unit, breeding southwestern willow flycatchers were not known from the Santa Margarita River, Temecula Creek, Agua Hedionda Creek, Santa Ysabel River, and Temescal Creek. In the Mohave Management Unit, breeding southwestern willow

flycatchers were not known from the Deep Creek, Holcomb Creek, and Mohave River. In the Virgin Management Unit, breeding southwestern willow flycatchers were not known from the Virgin River in NV and UT. And finally, breeding southwestern willow flycatchers were not known from the East Fork of the Little Colorado River and the Little Colorado River in AZ.

The river segments listed above are essential because they represent areas with large breeding populations or a collection of smaller breeding populations that together equals a large population. Together with other areas known to be occupied at the time of listing, these segments provide for a wide distribution of flycatcher populations and other essential habitat needs such as migration, dispersal, foraging, shelter, etc. As a result of targeting these large populations, these segments represent the highest quality flycatcher habitat, protection against simultaneous catastrophic loss, maintenance of gene flow, prevention of isolation and extirpation, and colonizers to new areas.

The known geographical area historically occupied by the subspecies was once much larger (USFWS 2002). Historical records described nesting birds in CA, NV, UT, CO, AZ, NM, and TX. At the time of listing in February 1995 (USFWS 1995), the distribution and abundance of nesting southwestern willow flycatcher populations, its habits, and areas occupied by non-breeding, migrating, and dispersing southwestern willow flycatchers were not well known. At the time of listing in February 1995, 359 territories (from limited 1994 survey data) were known only from CA, AZ, and NM. Unitt (1987) estimated the entire population was ''well under a 1000 pairs, more likely 500,'' and 200 to 500 territories were estimated to exist in the proposal to list the flycatcher (USFWS 1993).

Since listing, the known distribution and abundance of flycatcher territories has increased primarily due to increased survey effort (Durst *et al.* 2005). Population increases have also been detected at specific areas where habitat improved. As a result of re-establishing occupancy of nesting areas (especially in NV, UT, and CO) and from more extensive surveys and research, the extent of riparian corridors currently occupied by migrating, non-breeding, and dispersing southwestern willow flycatchers has also expanded. As of the end of the 2003 breeding season (Durst *et al.* 2005), 1137 territories were known in CA, NV, UT, CO, AZ, and NM. Territories have still not been detected in TX. However migrant southwestern willow flycatchers may still move through TX.

At the time of listing, breeding areas in CA, NV, UT, and CO described by Unitt (1987) were adopted as the subspecies northern boundary. However, the collection of genetic material across this part of the bird's range has since refined this boundary (Paxton 2000). The results of the DNA work reduced the extent of the northern boundary of the southwestern subspecies. Territories once believed to be occupied by southwestern willow flycatchers in UT and CO, now are more accurately known to be of a different subspecies of the willow flycatcher that is not currently listed. This genetic work also confirmed the southwestern willow flycatcher subspecies throughout the rest of its range.

As discussed above, southwestern willow flycatchers are believed to exist and interact as groups of metapopulations (Lamberson *et al.* 2000; Noon and Farnsworth 2000; USFWS 2002). A meta-population is a group of spatially disjunct local willow flycatcher populations connected to each other by immigration and emigration (USFWS 2002). The distribution of willow flycatchers varies geographically (currently over a six-state region) and is most stable where many connected sites and/or large populations exist (Lamberson *et al.* 2000; USFWS 2002).

Most southwestern willow flycatcher breeding sites contain small numbers of territories (Durst *et al.* 2005). Eighty-two percent of all breeding sites between 1993 and 2003 contained five or fewer flycatcher territories (Durst *et al.* 2005). Some locations no longer contain flycatcher territories which can largely be attributed to a variety of reasons that can in some cases be inter-related such as: Site isolation; small numbers of territories; degraded habitat conditions; habitat loss due to inundation, fire or drought; and the overall small rangewide population size of this endangered subspecies.

Our methodology focused on identifying those areas with large populations and those populations in high connectivity that together constitute a large population. In areas such as the Santa Ana and San Diego Management Units, where habitat was more fragmented and nearly all territories were in close proximity, we had to be more selective, because we did not believe all habitat was essential and thus should be designated as critical habitat. We therefore targeted the largest populations surrounding the Santa Margarita, Santa Ana, and San Luis Rey river drainages (including adjacent tributaries). A by product of targeting river segments with the largest populations is that they also have the highest quality flycatcher habitat, the greatest chance of long-term persistence, and the greatest source of dispersers. Also as a result of the flycatcher's site fidelity, migration, and dispersal behaviors, these habitats are reasonably certain to be used for migrating and dispersing, and offer the greatest opportunity for growth in the breeding population.

There are also many areas occupied at the time of listing that we are not considering for inclusion in the critical habitat proposal. We did not propose critical habitat along Bluewater Creek, Rio Chama, San Francisco River, the lower Rio Grande, and the Little Colorado River drainage in NM, the upper Santa Ynez River and Santa Clara River in CA, and the Colorado River in Grand Canyon and San Francisco River in AZ. Our methodology for identifying critical habitat segments only included large populations or small populations that in high connectivity were large, and these areas did not meet our criteria.

Because flycatcher habitat is dynamic, distribution of populations throughout the bird's range is important to retain meta-population stability, gene flow, prevention of simultaneous catastrophic loss, and therefore prevention of local extirpation. For example, in central AZ in early 2005, flooding caused the temporary loss or alteration of habitat for approximately 200 pairs of flycatchers (about 42 percent of the state's population) and about 15 percent of the entire subspecies due to inundation and other flood related damages. While river flows caused some significant change to nesting areas along the Verde, Salt, Tonto, and Big Sandy river drainages, river flow was not as severe on the San Pedro, Gila, Lower Colorado, and Bill Williams river drainages. Habitat on these drainages that were not as severely changed will be important for existing and displaced flycatchers. In turn, the critical habitat designation will be important in those areas which were disturbed in order for them to recover. This scenario is expected to occur across the subspecies range in any given year and over time.

Conservation of the flycatcher is largely focused on increasing the number of populations and decreasing the distance between them (USFWS 2002). Meta-population persistence or stability is more likely to increase by adding more sites rather than adding more territories to existing sites (Lamberson *et al.* 2000; USFWS 2002). Because riparian habitat is dynamic and

is widely, but sparsely distributed, flycatcher meta-population stability, population connectivity, gene flow, and avoidance of simultaneous catastrophic loss can be achieved by: Birds being distributed throughout its range, birds being close enough to each other to allow for interaction; having large populations and a matrix of smaller sites with high connectivity; and establishing habitat close to existing breeding sites, thereby increasing the chance of colonization (USFWS 2002). As the population at a site increases, the potential to disperse and colonize new areas increases (Lamberson *et al.* 2000). The segments not known to be occupied at the time of listing are essential individually to the stability and persistence of a local breeding population, metapopulation, and connectivity of the entire subspecies, plus habitat for migrating, dispersing, and nonbreeding southwestern willow flycatchers.

**Critical Habitat Unit Descriptions**

Below are tables, lists, and descriptions of the critical habitat segments. In order to help further understand the location of these stream segments please see the associated maps found within this rule and examine additional maps at *http://www.fws.gov/arizonaes/*. These additional maps will show areas that have been excluded from this final designation. To determine with specificity, the lateral extent boundaries of critical habitat, please see the electronic data layers found at *http://criticalhabitat.fws.gov*. The following tables describe: (1) Lands being excluded and exempted from this critical habitat designation pursuant to section 4(b)(2) and 4(a)(3) of the Act (Table 2); (2) approximate area designated by land ownership per State (Table 3).

TABLE 2.—APPROXIMATE AREA HA (AC)/KM (MI) EXCLUDED AND EXEMPTED FROM SOUTHWESTERN WILLOW FLYCATCHER CRITICAL HABITAT PURSUANT TO SECTION 4(B)(2) AND 4(A)(3)OF THE ACT

| | AZ | CA | CO, NM, NV, UT |
|---|---|---|---|
| Exempted and Excluded Area Totals | 36871 (91111) / 303 (188) | 18884 (46563) / 361 (224) | 38875 (96063) / 267 (166) |

TABLE 3.—SOUTHWESTERN WILLOW FLYCATCHER CRITICAL HABITAT BY LAND OWNERSHIP PER STATE IN HA (AC)/KM (MI)

| | Federal | State | Private | Other | Totals |
|---|---|---|---|---|---|
| AZ | 5296 (13087) / — | 1136 (2806) / — | 15856 (39182) / — | 89 (221) — | 22377 (55296) / 519 (323) |
| CA | 846 (2092) / — | 333 (823) / — / — | — / — | 5658 (17212) / — | 6966 (17212) / 313 (195) |
| CO | — / — | — / — | — / — | — / — | — / — |
| NM | 2596 (6416) / — | 86 (214) / — | 14052 (34724) / — | 16735 (41353) / — | 16735 (41353) / 510 (317) |
| NV | 1118 (2763) / — | — / — | 495 (1223) — / | — / — | 1613 (3986) /30 / (19) |
| UT | 195 (483) / — | 10 (26) / — | 999 (2468) — | — / — | 1205 (2977) / 37 (23) |
| Totals | 10052 (24840) /— | 1566 (3869) / — | 31403 (77598) / — | 5875 (14518) / — | 48896 (120824) / 1186 (737) |

The 5 Recovery and 15 Management Units, and designated stream segments are:

Coastal California Recovery Unit

(1) Santa Ynez Management Unit—Santa Ynez River
(2) Santa Ana Management Unit—Santa Ana River, Bear Creek, Mill Creek, Oak Glen Creek, and Waterman Canyon.
(3) San Diego Management Unit—Santa Margarita River, San Luis Rey River, Pilgrim Creek, Agua Hedionda Creek, San Ysabel River, Temescal Creek, and Temecula Creek.

Basin and Mohave Recovery Unit in California

(4) Kern Management Unit—South Fork Kern River
(5) Mohave Management Unit—Deep Creek, Holcomb Creek, and Mohave River
(6) Salton Management Unit—San Felipe Creek

Lower Colorado Recovery Unit—Nevada, California/Arizona Border, Arizona, Utah

(7) Little Colorado Management Unit—Little Colorado River, and West and East Forks of the Little Colorado River, AZ
(8) Virgin Management Unit—Virgin River, NV/AZ/UT
(9) Bill Williams Management Unit—Big Sandy River, AZ

Gila Recovery Unit in Arizona and New Mexico

(10) Verde Management Unit—Verde River, AZ
(11) Roosevelt Management Unit—Salt River and Tonto Creek, AZ
(12) Middle Gila/San Pedro Management Unit—Gila and San Pedro River, AZ
(13) Upper Gila Management Unit—Gila River in AZ/NM

Rio Grande Recovery Unit in New Mexico

(14) Upper Rio Grande Management Unit—Coyote Creek, Rio Grande, and Upper Rio Grande del Rancho, NM
(15) Middle Rio Grande Management Unit—Rio Grande, NM

Coastal California Recovery Unit

The Coastal CA Recovery Unit stretches along the coast of southern CA from just north of Point Conception south to the Mexico border. In 2003, there were an estimated 165 southwestern willow flycatcher territories in this Recovery Unit (15 percent of the rangewide total) (Durst *et al.* 2005). A total of 149 territories were estimated in the three Management Units included in this designation (Santa Ynez: n = 8 territories, Santa Ana: n = 41 territories, San Diego: n = 100 territories). No critical habitat is being designated in the Santa Clara

Management Unit. In 2001, territories were distributed along 15 watersheds, mostly in the southern third of the Recovery Unit (USFWS 2002: 64). The largest number of territories are within the San Luis Rey (n = 67), Santa Margarita (n = 19), and Santa Ana (n = 40) watersheds (Durst *et al.* 2005). In 2001, all territories occurred in native or native-dominated habitats; over 60 percent were on government-managed lands (Federal, State, and/or local) (USFWS 2002: 64). This Recovery Unit contains designated segments within the Santa Ynez, Santa Ana, and San Diego Management Units. The stream segments designated as critical habitat are described below in their appropriate Management Units.

**Santa Ynez Management Unit**

We are designating a 32 km (20 mi) Santa Ynez River segment in Santa Barbara County, CA. This is the only stream in the Santa Ynez Management Unit to have nesting southwestern willow flycatchers and is northernmost along coastal CA. While a total of three sites are known along the length of the Santa Ynez River, our designated segment holds a single breeding site. A high of 28 territories were detected at this breeding site in 2000. In 2003, four territories were known at this site. Southwestern willow flycatchers have been detected nesting on the Santa Ynez River since 1994.

**Santa Ana Management Unit**

The Santa Ana River is the single largest river system in southern CA with flycatchers distributed throughout the stream from its headwaters/tributaries in the San Bernardino Mountains in San Bernardino County, CA, downstream to Riverside County. We are designating two segments (an upper 40.8 km/25.3 mi segment and a 13.6 km/ 8.5 mi lower segment) of the Santa Ana River in San Bernardino County (after removing a non-essential approximate 18 km/11 mi segment immediately below Seven Oaks Dam through the Santa Ana wash—see justification below) and other segments with high connectivity near its headwaters. In San Bernardino County we are designating 14.2 km (8.8 mi) of Bear Creek, 19.2 km (11.9 mi) of Mill Creek, 4.1 km (2.6 mi) of Waterman Creek, and 4.5 km (2.8 mi) of Oak Glen Creek.

The combination of these streams provides riparian habitat for breeding, migrating, dispersing, non-breeding and territorial southwestern willow flycatchers, metapopulation stability, gene flow, connectivity, population growth, and prevention against catastrophic loss. There are seven breeding sites known along the Santa Ana River, one breeding site on Bear Creek, three breeding sites on Mill Creek, one breeding site on Waterman Creek, one breeding site on Oak Glen Creek, one breeding site on San Timoteo Wash, and no breeding sites on Wilson or Yucaipa creeks (USGS 2004). Durst *et al.* (2005) estimated 40 territories were on the Santa Ana River drainage in 2003.

Portions of the Santa Ana Watershed in Riverside County identified as having features essential for the southwestern willow flycatcher (the lower Santa Ana River, Yucaipa Creek, Temecula Creek, and Vail Lake on Temecula Creek) that lie within the boundaries of the Western Riverside MSHCP are being excluded from this critical habitat designation (*see Relationship of Critical Habitat to Approved Habitat Conservation Plans—Exclusions Under Section 4(b)(2) of the Act).*

We have re-evaluated an approximate 18 km (11 mi) portion of the Santa Ana River immediately below Seven Oaks Dam, and portions of San Timoteo Wash, Yucaipa Creek, Wilson Creek, Oak Glen Creek, and Mill Creek. The portion of the Santa Ana Wash has little riparian habitat, is dry, and is not expected to develop riparian vegetation that can support nesting southwestern willow flycatchers due to the lack of surface water flow and the long-term establishment of Riversidean alluvial fan sage scrub vegetation in this area. Therefore, we have removed this approximate 18 km (11 mi) wash segment of the Santa Ana River to more accurately define the essential boundary of the critical habitat designation. To further more accurately define the essential boundaries of critical habitat, we reviewed and also removed segments of San Timoteo Wash, Yucaipa Creek, and Wilson Creek, and the lower portion of Mill Creek. Through further analysis of habitat, we have determined that these segments do not have areas with the appropriate topography, vegetation, or water that we would expect to support nesting southwestern willow flycatcher habitat, and therefore, we have removed them from this designation.

*San Diego Management Unit*

The longest two streams in the San Diego Management Unit, the San Luis Rey and Santa Margarita Rivers, contain the largest numbers of flycatcher territories within this Management Unit. In addition to these two streams, we are designating a collection of smaller streams within the Unit. Collectively, these segments contain essential features for breeding, non breeding, territorial, migrating, and dispersing southwestern willow flycatchers and help provide metapopulation stability, population growth, gene flow, connectivity, and protection against catastrophic losses. In 2003, Durst *et al.* (2005) estimated a total of 100 territories for the entire San Diego Management Unit, with 86 territories on these two river drainages.

We are designating an 9 km (5.6 mi) segment of the Santa Margarita River and a 1.6 km (1 mi) segment of De Luz Creek in San Diego County, CA, upstream of Camp Pendleton. Territories have been detected on the Santa Margarita River at Camp Pendleton since 1994. A high of 22 territories in 2002 and 19 in 2003 were detected at the two known breeding sites on the Santa Margarita River on Camp Pendleton. The segment upstream from Camp Pendleton maintains a diversity of riparian vegetation used by dispersing and migrating southwestern willow flycatchers and the ability to develop breeding habitat for population growth or discovery of undetected territories.

We are designating six segments of the San Luis Rey River and the lowest 5 km (3.1 mi) portion of Pilgrim Creek in San Diego County, CA. Five separate segments of the San Luis Rey River are located upstream (7.5 km/4.7 mi), adjacent to (0.75 km/0.5 mi, 1 km/0.6 mi), between (1.7 km/1 mi), and immediately (3 km/1.9 mi) below the La Jolla and Rincon and Indian Tribes. The lowest 51.3 km/32 mi segment of the San Luis Rey River is a contiguous segment extending to the ocean. A total of eight breeding sites (seven on San Luis Rey River and one on Pilgrim Creek) are spread along the length of these streams. Breeding sites have been detected since 1994. Durst *et al.* (2005) reported 67 territories from the San Luis Rey River drainage with a single site on the upper San Luis Rey River holding 44 territories. A single breeding site exists on Pilgrim Creek where one to two territories were detected in 1994, 1995, and 1999.

We are designating a short 3.2 km (2 mi) portion of Agua Hedionada Creek in San Diego County, CA. A single territory was detected from 1998 to 2000. No territories were detected from 2001 to 2003.

We are designating joining segments of Temescal Creek (7 km/4.4 mi) and Santa Ysabel River (6 km/3.7 mi) in San Diego County, CA. Both segments are found upstream of known breeding sites that are being excluded due to their inclusion in the San Diego County MSCP. As a result, these two segments currently provide habitat for dispersing

and migrating flycatchers and locations for population growth and/or discovery of undetected territories.

We are designating a 5.1 km (3.2 mi) segment of Temecula Creek in San Diego County, CA. Two breeding sites are known from Temecula Creek, with one occurring on the designated segment. Territories were first detected in 1997, and Durst *et al.* (2005) reported a single territory for 2003.

Habitat with features essential for the southwestern willow flycatcher identified within the boundaries of the San Diego MSCP on the San Dieguito River (including Lake Hodges), San Diego River, and a portion of Santa Ysabel River is being excluded from this critical habitat designation (*see Relationship of Critical Habitat to Approved Habitat Conservation Plans—Exclusions Under Section 4(b)(2) of the Act* section below).

Habitat with features essential for the southwestern willow flycatcher identified within the boundaries of Marine Corps Base, Camp Pendleton on Cristianitos, San Mateo, San Onofre, Los Flores/Las Pulgas, Pilgrim, and DeLuz Creeks, and the Santa Margarita River are being excluded from this critical habitat designation (*see Relationship of Critical Habitat to Military Lands—Application of Section 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act* section below).

Habitat with features essential for the southwestern willow flycatcher on portions of the Santa Margarita River located within the boundaries of the Seal Beach Naval Weapons Station, Fallbrook Detachment, is being excluded from this critical habitat designation (*see Relationship of Critical Habitat to Military Lands—Application of Section 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act* section below).

Habitat with features essential for the southwestern willow flycatcher identified within the boundaries of the City of Carlsbad's HMP at Agua Hedionda Lagoon and Agua Hedionda Creek is being excluded from this critical habitat designation (*see Relationship of Critical Habitat to Approved Habitat Conservation Plans—Exclusions Under Section 4(b)(2) of the Act* section below).

Habitat with features essential for the southwestern willow flycatcher was identified within the boundaries of Rincon and La Jolla Tribal Lands along the San Luis Rey River. These Tribes developed, completed, and are implementing actions described in their Southwestern Willow Flycatcher Management Plans. As result, we are excluding these tribal lands from the critical habitat designation (*see Relationship of Critical Habitat to American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act* section below).

We have re-evaluated our determination of the essential nature of the habitat features at Cuyamaca Lake. We determined that the small amount of habitat and disjunct nature from any other locations in the Santa Ana or Salton Management Units provided minimal habitat for metapopulation stability or prevention against catastrophic loss. As a result, this segment is no longer considered essential habitat and we have removed it from this designation.

We have re-evaluated our determination of the essential nature of the habitat features associated with a short segment of Cristiantos Creek upstream of Camp Pendleton. Further evaluation concluded that there was little riparian habitat due to the lack of flowing water. As a result, we no longer consider this segment as essential habitat and we have removed it from this designation.

We have re-evaluated our determination of the essential nature of the most upstream portions of the Santa Ysabel River, Temescal Creek, Temecula Creek, and San Diego River. The Cleveland National Forest provided comments describing specific portions that they believe do not provide the appropriate habitat for southwestern willow flycatchers because the vegetation is not dense, water is intermittent, understory (*i.e.* vegetation below the tree canopy) is absent, and could not improve for flycatchers as a result of Forest Service management. The Forest provided pictures and more accurate boundaries for these habitat segments. We agree with their assessment and have shortened these four segments to more accurately reflect in our designation the essential habitat on these river segments.

**Basin and Mohave Recovery Unit**

This unit is comprised of a broad geographic area including the arid interior lands of southern CA and a small portion of extreme southwestern NV. For 2003, Durst *et al.* (2005) estimated 61 flycatcher territories at 16 sites (5 percent of the rangewide total) were distributed among widely separated drainages. Almost all sites had less than five territories; the exception was the largest breeding sites on the Kern and Owens River drainages (USFWS 2002:64). In 2002, all territories were in native or native-dominated riparian habitats, and approximately 70 percent were on privately owned lands (USFWS 2002:64). The Recovery Unit contains the Owens, Kern, Mohave, Salton, and Amargosa Management Units. Stream segments designated in this proposal are found in the Kern, Mohave, and Salton Management Units.

*Owens Management Unit*

Habitat with features essential for the southwestern willow flycatcher identified along the Owens River are being managed by the Los Angeles Department of Water and Power (LADWP) and are being conserved through implementation of their Southwestern Willow Flycatcher Conservation Strategy. LADWP entered into a Memorandum of Understanding with the Service to implement these conservation actions. As a result, the entire 82.6 km (51.3 mi) Owens River, with 5 known breeding sites holding 28 territories as of 2003 (Durst *et al.* 2005) in Inyo and Mono Counties, CA, is being excluded from this critical habitat designation (*see Relationship of Critical Habitat to Partnerships and Conservation Plans/Easements on Private Lands—Exclusions Under Section 4(b)(2) of the Act* section below).

*Kern Management Unit*

We are designating a 15.5 km (9.6 mi) segment of the South Fork of the Kern River in Kern County, CA. This is the only stream segment in the Kern Management Unit known to have nesting southwestern willow flycatchers. Southwestern willow flycatchers have been detected nesting at two sites along this reach of the Kern River since 1993. In 1997, a high of 37 territories were detected at a single location. In 2003, 20 territories were reported from a single site (Durst *et al.* 2005).

Habitat with features essential for the southwestern willow flycatcher identified on the Haffenfeld Ranch along the South Fork of the Kern River is being excluded due to a conservation easement established with the National Resource Conservation Service (NRCS) specific to protecting habitat needs of the southwestern willow flycatcher. As a result of the protections provided through this easement, this property is being excluded from this critical habitat designation (*see Relationship of Critical Habitat to Partnerships and Conservation Plans/Easements on Private Lands—Exclusions Under Section 4(b)(2) of the Act* section below).

Two pieces of Federal land (Sprague Ranch and South Fork Kern Wildlife Area) with habitat features essential for the southwestern willow flycatcher within the Kern Management Unit are being excluded due to protections assured by their long-term commitments

to management programs specific to the riparian habitat and needs of the flycatcher. The Sprague Ranch was recently purchased specifically for the conservation needs of the southwestern willow flycatcher and is co-managed by the U.S. Army Corps of Engineers (Corps), the California Department of Fish and Game (CDFG), and the National Audubon Society (Audubon). The South Fork Kern River Wildlife Area, located at the upper end of Lake Isabella and Kern River immediately above the lake is co-managed by the Corps and the U.S. Forest Service to protect riparian habitat values. Both of these properties are managed in accordance with a long-term biological opinion and are being excluded from this critical habitat designation (*see Relationship of Critical Habitat to Federal Conservation Programs—Exclusions Under Section 4(b)(2) of the Act* section below).

*Mohave Management Unit*

We are designating a 16.1 km (10 mi) portion of the Mojave River, a 18.8 km (11.7 mi) section of Holcomb Creek, and a 20.3 km (12.6 mi) section of Deep Creek (including the uppermost portion of Mohave River Forks Reservoir) in San Bernardino County, CA, near the Town of Victorville. Since 1995, southwestern willow flycatchers have been detected nesting at three sites along this reach of the Mojave River, one site on Holcomb Creek, and zero sites on Deep Creek. Deep Creek connects Holcomb Creek with the Mohave Forks Reservoir and provides riparian habitat for dispersal and migration, and areas for population growth. In 2002, a high of 13 territories were detected at all 5 sites within these segments; however in 2003, 10 territories were recorded (Durst *et al.* 2005).

*Salton Management Unit*

We are designating an 11 km (6.8 mi) portion of San Felipe Creek in San Bernardino County, CA. This is the only stream in the Salton Management Unit known to have nesting southwestern willow flycatchers. Southwestern willow flycatchers have been detected nesting at a single site since 1998. In 1998 and 1999, a high of four territories were detected on this stream segment. In 2003, two territories were estimated from this site (Durst *et al.* 2005). This stream and the territories on it have high connectivity with other smaller populations in the adjacent San Diego Management Unit in the Coastal CA Recovery Unit raising the collective population above 10 territories.

*Lower Colorado Recovery Unit*

This is a geographically large and ecologically diverse Recovery Unit, encompassing the Colorado River and its major tributaries from the high elevation streams in the White Mountains of East/Central Arizona to the main stem Colorado River through the Grand Canyon and continuing downstream through the arid lands along the lower Colorado River to the Mexico border (USFWS 2002:64). In 2003, despite its size, the Unit was estimated to have only 150 known flycatcher territories (13 percent of the rangewide total) (Durst *et al.* 2005), most of which occur away from the main-stem Colorado River (Sogge *et al.* 2003). The largest populations are found on the Bill Williams, Virgin, and Pahranagat River drainages (USFWS 2002:64). In 2002, approximately 69 percent of territories are found on government-managed lands, and 8 percent are on Tribal lands (USFWS 2002:64). Habitat characteristics range from purely native (including high-elevation and low-elevation willow) to exotic (primarily tamarisk) dominated stands (USFWS 2002:64). This Recovery Unit contains the Little Colorado, Middle Colorado, Virgin, Pahranagat, Bill Williams, Hoover to Parker, and Parker to Southerly International Border Management Units. Stream segments are being designated within the Little Colorado, Virgin, and Bill Williams Management Units.

*Little Colorado Management Unit*

We are designating a portion of the Little Colorado River and portions of the East and West Forks of the Little Colorado River in Apache County, AZ. The 11.2 km (7 mi) segment of the East Fork of the Little Colorado River extends from Forest Service Road 113 downstream to its confluence with the West Fork of the Little Colorado River and Little Colorado River. The 8 km (5 mi) section of the West Fork of the Little Colorado goes from just upstream of Forest Service Road 113 downstream to its confluence with the East Fork Little Colorado River and Little Colorado River. The Little Colorado River segment extends for 15.8 km (9.8 mi) downstream from the confluence of the East and West Forks to the diversion ditch near the Town of Greer.

Southwestern willow flycatchers have been detected nesting at single sites on both the Little Colorado and West Fork of the Little Colorado since 1993. In 1996, a high of 11 territories were detected at both locations on the West Fork and Little Colorado Rivers. In 2003, two territories were detected on these segments. Due to its close proximity, the East Fork of the Little Colorado River is currently expected to be used for dispersing and migrating southwestern willow flycatchers and have the features to develop breeding habitat for southwestern willow flycatchers for population growth and stability.

We re-evaluated the 7 km (4 mi) segment of the South Fork of the Little Colorado River extending from Joe Baca Draw downstream to its confluence with the Little Colorado River and removed it from this designation. We visited the South Fork of the Little Colorado River on September 22, 2004, with Forest Service personnel and determined that the floodplain is not wide enough to support habitat currently known to be used by breeding southwestern willow flycatchers. While it is expected to be used by migrating southwestern willow flycatchers, our approach was to target stream segments that would serve a combination of purposes, including breeding habitat. Therefore, because it did not have nesting habitat, nor did we believe the topography allowed it to be able to develop nesting habitat, we no longer believe it is essential habitat and we have removed it from the designation.

*Middle Colorado Management Unit*

The upper most portion of the conservation space of Lake Mead, including the Colorado River to river mile 243, was identified as having features essential to the flycatcher in Mohave County, AZ. Southwestern willow flycatchers have been detected nesting at 14 sites along this reach of the Colorado River since 1993. In 1998, a high of 15 territories at 8 breeding sites were detected within this segment (USGS 2004). In 2003, no territories were detected on this stream segment, and in 2004, two territories were found (Munzer *et al.* 2005). The conservation space of Lake Mead and the Colorado River immediately upstream is covered under the Lower Colorado River Multi-Species Conservation Plan (LCR MSCP) up to full pool elevation of Lake Mead. The full pool elevation is defined by water surface elevation 1,229 feet National Geodetic Vertical Datum which extends up to near river mile 235 at Separation Canyon. As a result of upper portion of Lake Mead and Colorado River through river mile 235 being covered under the LCR MSCP, this entire segment is being excluded from this critical habitat designation (see *Relationship of Critical Habitat to Approved Habitat Conservation Plans—Exclusions Under Section 4(b)(2) of the Act* section below).

The Colorado River above Lake Mead on the Hualapai Nation was identified as having features essential to the southwestern willow flycatcher. The Nation developed, completed, and is implementing actions described in their Southwestern Willow Flycatcher Management Plan. As a result, and in conjunction with coverage under the LCR MSCP, the southern bank of the Colorado River on Hualapai Lands is being excluded from this designation (see *Relationship of Critical Habitat to American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act* section below).

*Virgin Management Unit*

We are designating a contiguous segment of the Virgin River in UT, AZ, and NV. The segment extends for 118.7 km (73.8 mi) from the Washington Field Diversion Impoundment in Washington County, UT, downstream through the Town of Littlefield, AZ, and ends in NV at the upstream boundary of the Overton State Wildlife Area in Clark County, NV. This segment exists for 36.7 km (22.8 mi) in UT, approximately 52 km (32.3 mi) through AZ, and 30 km (18.6 mi) in NV. The Virgin River is the only stream within this Management Unit and within UT known to have nesting southwestern willow flycatchers. Southwestern willow flycatchers have been detected nesting in 1995 at three sites in the NV segment, a single site in the AZ segment since 2001, and two sites in the UT segment since 1995. In 2001, a high of 40 territories were detected at 5 of the 6 sites within the proposed designation (36 in NV, 1 in AZ, and 3 in UT). In 2003, 37 territories were detected at 4 of the 6 sites (Durst *et al.* 2005).

The Overton State Wildlife Area encompasses a segment of the Virgin River where it enters into Lake Mead. This segment of the Virgin River was identified as having features essential to the southwestern willow flycatcher. As a result of the State of Nevada's management of this property for wildlife and riparian habitat for the flycatcher, this segment is being excluded from this designation (see *Relationship of Critical Habitat to State and Federal Wildlife Conservation Areas—Exclusions Under Section 4(b)(2) of the Act* section below).

A 1.2 km (2 mi) (approximately 158 ha/390 ac of riparian habitat) segment of the Virgin River exists between two excluded areas of the Overton State Wildlife Area. About 61ha (150 ac) of this area was purchased by the Bureau of Reclamation for conservation of wildlife and riparian habitat, with the possibility of turning management over to the State of Nevada. As a result of this remaining 1.2 km (2 mi) segment being surrounded by conservation lands, being detached from a considerably larger designated segment, being a very small piece of an overall larger segment that is being excluded from critical habitat, and because a significant portion was purchased for the conservation of wildlife, it is our determination that this segment is no longer essential habitat and we have removed it from the final designation.

*Pahranagat Management Unit*

The Pahranagat River, within the Pahranagat National Wildlife Refuge and Key Pittman State Wildlife Area in Lincoln County, NV, and the Muddy River within the boundaries of the Overton State Wildlife Area in Clark County, NV, were identified as having features essential to the southwestern willow flycatcher. Durst *et al.* (2005) reported 21 territories from these three locations in 2003. As a result of the Service's management of this National Wildlife Refuge and the State of Nevada's management of the Key Pittman and Overton Wildlife Areas for wildlife and riparian habitat for the flycatcher, all of the three segments proposed in this Management Unit are being excluded from this designation (see *Relationship of Critical Habitat to National Wildlife Refuge Lands—Exclusions Under Section 4(b)(2) of the Act and Relationship of Critical Habitat to State and Federal Wildlife Conservation Areas—Exclusions Under Section 4(b)(2) of the Act* sections below).

*Bill Williams Management Unit*

We are designating a 30.4 km (18.9 mi) segment of the Big Sandy River from the Town of Wikieup to Groom Peak Wash, in Mohave County, AZ. This segment contains a known breeding site (15 territories in 2003 and 28 in 2004), habitat for dispersing, migrating, and non-breeding southwestern willow flycatchers, as well as areas for population growth.

We re-evaluated the upper most portion of the Big Sandy River segment, examined habitat models (Dockens and Paradzick 2004), consulted local experts, and determined that due to the intermittent surface flow of this stream, there is a limited amount of riparian habitat that is able to support nesting habitat for southwestern willow flycatchers. Thus, we shortened this segment to more accurately reflect the essential nature of this segment for the flycatcher by removing the northern-most (12.9 km/20.8 mi) portion from the designation.

The Alamo Lake State Wildlife Area, which includes the Big Sandy, Santa Maria, and Bill Williams River confluence area (included within upper Alamo Lake), in Mohave and La Paz Counties, AZ, was identified as having features essential to the southwestern willow flycatcher. A total of 31 territories were detected in 2004. As a result of the State of AZ's management of this Area for wildlife and riparian habitat for the flycatcher, all of the river segments within this Wildlife Area are being excluded from this designation (see *Relationship of Critical Habitat to State and Federal Wildlife Conservation Areas—Exclusions Under Section 4(b)(2) of the Act* section below).

The Bill Williams River within the Bill Williams National Wildlife Refuge was identified as having features essential to the southwestern willow flycatcher. A total of two territories were detected on the refuge in 2004. As a result of the Service's management of the refuge for wildlife and riparian habitat for the flycatcher, the Bill Williams River within the refuge boundary is being excluded from this designation (see *Relationship of Critical Habitat to National Wildlife Refuge Lands—Exclusions Under Section 4(b)(2) of the Act* section below).

We re-evaluated the remaining approximately 1.6 km (1 mi) section of habitat along the Bill Williams River above the Bill Williams NWR (primarily occurring on Planet Ranch). This location is dominated by farm fields associated with the Ranch, and subsequently has little habitat for the southwestern willow flycatcher (U.S. Bureau of Reclamation 2005). There is potential for habitat improvement for the southwestern willow flycatcher but it would take a significant change in land operations, money, time, and effort, and may be more likely to develop habitat for yellow-billed cuckoos (U.S. Bureau of Reclamation 2005). We encourage continued management of the resources of this Ranch with respect to downstream riparian values, and toward developing future habitat for the southwestern willow flycatcher. But due to the present condition and the changes required to convert existing locations to flycatcher habitat, we have concluded it is not essential habitat, and have therefore removed it from the designation.

*Hoover to Parker Management Unit*

A 107 km (66.5 mi) segment of the Colorado River from Davis Dam to Parker Dam (including the Havasu National Wildlife Refuge, Fort Mohave Tribe, and Chemehuevi Tribe) in

Mohave and La Paz County, AZ, and San Bernardino County, CA, was identified as having features essential to the southwestern willow flycatcher and proposed as critical habitat. Six breeding sites are known from this segment, with the largest at Topock Marsh having 34 territories in 2004. As a result of the completion of the Lower Colorado River MSCP, Service management of Havasu National Wildlife Refuge for riparian habitat, and implementation of completed Southwestern Willow Flycatcher Management Plans by the Chemehuevi and Fort Mohave Tribes, this entire river segment is being excluded from this designation (see *Relationship of Critical Habitat to American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act, Relationship of Critical Habitat to National Wildlife Refuge Lands—Exclusions Under Section 4(b)(2) of the Act,* and *Relationship of Critical Habitat to Approved Habitat Conservation Plans—Exclusions Under Section 4(b)(2) of the Act* sections below).

*Parker to Southerly International Border Management Unit*

A 24.1 km (15 mi) Colorado River segment in La Paz and San Bernardino Counties, CA, and another 74.4 km (46.2 mi) Colorado River segment in La Paz and Yuma, Counties, AZ, and Imperial CA (including Cibola and Imperial National Wildlife Refuges, Colorado River and Fort Yuma (Quechan) Tribes) were identified as having features essential to the southwestern willow flycatcher and proposed as critical habitat. A high of 13 territories at 10 sites were detected on this segment in 1996, and 2 were detected in 2003. As a result of the Lower Colorado River MSCP, Service management of Cibola and Imperial National Wildlife Refuges, and implementation of completed Southwestern Willow Flycatcher Management Plans by the Colorado River and Fort Yuma (Quechan) Tribes these two river segments are being excluded from this designation (see *Relationship of Critical Habitat to American Indian Tribal Rights, Federal-Tribal Trust Responsibilities and the Endangered Species Act, Relationship of Critical Habitat to National Wildlife Refuge Lands—Exclusions Under Section 4(b)(2) of the Act,* and *Relationship of Critical Habitat to Approved Habitat Conservation Plans—Exclusions Under Section 4(b)(2) of the Act* sections below).

**Gila Recovery Unit**

This unit includes the Gila River watershed, from its headwaters in southwestern NM downstream to near the confluence with the Colorado River (USFWS 2002: 65). In 2002, the 588 known flycatcher territories (51 percent of the rangewide total) were distributed primarily on the Gila and lower San Pedro Rivers (Sogge *et al.* 2003). A total of 505 territories were detected in 2003 within the segments proposed in this Management Unit. Many sites are small (less than five territories), but sections of the upper Gila River, lower San Pedro River (including its confluence with the Gila River), and the Tonto Creek and Salt River inflows within the high water mark of Roosevelt Lake support the largest sites known within the subspecies' range. In 2001, private lands hosted 50 percent of the territories, including one of the largest known flycatcher populations in the Cliff-Gila Valley, NM (USFWS 2002: 65). Approximately 50 percent of the territories were on government-managed lands (USFWS 2002: 65). While 58 percent of territories were in native-dominated habitats, flycatchers in this Recovery Unit also make extensive use of exotic (77 territories) or exotic-dominated (108 territories) habitats (primarily tamarisk).

*Verde Management Unit*

We are designating two separate segments of the upper Verde River in Yavapai County, AZ. The first segment occurs in the Verde Valley and extends for 23.1 km (14.4 mi) from near the Town of Cottonwood (2 miles north of Highway 89A/260 intersection) downstream to the upstream end of Yavapai-Apache Tribal lands. The second segment extends for 29.2 km (18.1 mi) from the downstream boundary of Yavapai-Apache lands through the town of Camp Verde to Beasley Flat on the Prescott National Forest. A small (less than 1 km/0.6 mi) non-Tribal section of critical habitat separates two segments of excluded Yavapai—Apache Tribal lands.

Two segments occur in the middle Verde River in Yavapai and Maricopa Counties, AZ. A 37 km (23 mi) segment begins at the East Verde/Verde River confluence in Yavapai County on the Tonto National Forest and extends downstream to the conservation space boundary of Horseshoe Lake. The second segment begins immediately below Horseshoe Dam and extends for 6.5 km (4.1 mi) to the USGS gauging station in Maricopa County.

Since 1993, southwestern willow flycatchers have been confirmed at three breeding sites on the upper Verde River (Tuzigoot to Beasley Flat), with additional sightings in 2005 of about seven unsolicited singing flycatchers near the West Clear Creek confluence downstream to Beasley Flat (E. Paxton, USGS, e-mail). In 1997, 10 territories were the highest recorded on the upper Verde River segment. In 2003, 13 territories were detected at 2 sites within the Middle Verde River section (Smith *et al.* 2004, and in 2004, 17 territories were detected at Horseshoe Lake (Munzer *et al.* 2005).

The Verde River within the conservation space of Horseshoe Reservoir was identified as having features essential to the southwestern willow flycatcher. As a result of the partnership developed with Salt River Project, and their continued effort toward managing Horseshoe Lake to maintain flycatcher habitat for the long-term, and formalizing management and appropriate mitigation in a HCP, we are excluding the lake from this designation (see *Relationship of Critical Habitat to Partnerships and Conservation Plans/ Easements on Private Lands—Exclusions Under Section 4(b)(2) of the Act* section below).

Three separate areas in the Verde River within the boundary of Yavapai-Apache Tribal lands were identified as having features essential to the southwestern willow flycatcher. The Tribe developed, completed, and is implementing actions described in their Southwestern Willow Flycatcher Management Plan. As a result, the segments identified on Yavapai-Apache Tribal Lands are being excluded from this designation (see *Relationship of Critical Habitat to American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act* section below).

We re-evaluated the lowest 8 km (5 mi) segment of the Verde River located on the Tonto National Forest in Maricopa County, AZ, from Needle Rock to near the Fort McDowell Indian Tribal Boundary. While habitat here may be used in the future for breeding and migrating flycatchers, the results of recent surveys (Smith *et al.* 2004 and Munzer *et al.* 2005) did not detect flycatchers. We therefore concluded that due to the disconnected nature of this segment to upstream occupied areas, the short distance of the segment, and the lack of detections during surveys that it is not essential and we have removed from the designation. We encourage management of the Verde River below Bartlett Dam for flycatchers due to appropriate features to develop and maintain habitat.

*Roosevelt Management Unit*

We are designating a contiguous segment of lower Tonto Creek and the Salt River immediately upstream from the conservation space of Roosevelt Lake in Gila and Pinal Counties, AZ. A 31.7 km (19.7 mi) segment of Tonto Creek begins at the confluence of Tonto Creek and Rye Creek and extends to the high water mark of Roosevelt Lake in Gila County, AZ. The 28.3 km (17.6 mi) segment of the Salt River extends from the Cherry Creek confluence on the Tonto National Forest and travels downstream to the high water mark of Roosevelt Lake in Gila County, AZ. Outside of the conservation space of Roosevelt Lake, 10 territories were detected along Tonto Creek in 2004 (Munzer *et al.* 2005), and approximately 30 in 2005 (R. Ockenfels, AGFD, e-mail).

We re-evaluated the 34 km (21 mi) Pinto Creek segment and removed it from the designation because it does not have the essential habitat features identified for the flycatcher. The Arizona Game and Fish Department, U.S. Bureau of Reclamation, Tonto National Forest, and the Service identified Pinto Creek as habitat that could provide nesting locations for displaced flycatchers following inundation of habitat at Roosevelt Lake as a result of its proximity and habitat quality. Surveys in 2004 (Munzer *et al.* 2005), and particularly in 2005 (A. Smith, AGFD, e-mail) after flycatcher habitat was inundated at Roosevelt Lake, found no migrant or breeding flycatchers. While habitat may be used in the future for breeding and migrating flycatchers, the results of these surveys determined that it is not reasonably certain to be used by displaced Roosevelt flycatchers for nesting or migration, and therefore, we conclude that this segment is not essential habitat and we have removed it from the designation. We encourage continued management and monitoring of this segment for use by flycatchers.

The riparian habitat within the conservation space of Roosevelt Lake has features essential for the conservation of the southwestern willow flycatcher. In 2004, a total of 209 territories were found at Roosevelt Lake. The Roosevelt HCP covers the conservation space and as a result of protections provided from this HCP and management by the Tonto National Forest, this area is being excluded from this critical habitat designation (see *Relationship of Critical Habitat to Approved Habitat Conservation Plans—Exclusions Under Section 4(b)(2) of the Act* section below).

*Middle Gila/San Pedro Management Unit*

We are designating a segment of the middle and lower San Pedro River, and a segment of the Gila River near the San Pedro/Gila River confluence in Pinal, Pima, and Cochise Counties, AZ. The middle/lower San Pedro River segment extends for 97.4 km (60.5 mi) to the Gila River. The Gila River segment begins at Dripping Springs Wash and extends for 72.4 km (45 mi) downstream past the San Pedro/Gila confluence and the Towns of Winkleman and Kelvin to the Ashehurst Hayden Diversion Dam near the Town of Cochran in Gila and Pinal Counties, AZ. Flycatchers have been detected nesting along these segments since 1993. In 2003, a high of 167 territories from 19 sites (12 on San Pedro and 7 on the Gila) were detected on the stream segments proposed for critical habitat within this Management Unit. In 2004, a total of 157 territories were detected from these sites (Munzer *et al.* 2004). Dripping Springs Wash had one to two territories detected in 2005 (R. Ockenfels, AGFD, e-mail). Degradation of habitat quality due to an apparent reduction in river flow has dropped the number of territories on the Gila River segment from 68 in 1999, 26 in 2003, to 14 in 2004. This location, along with populations at Roosevelt Lake, AZ, and in the Cliff-Gila Valley, NM, have the most southwestern willow flycatcher territories throughout its range.

*Upper Gila Management Unit*

We are designating four distinct southwestern willow flycatcher critical habitat segments along the Upper Gila River from the Turkey Creek/Gila River confluence on the Gila National Forest, NM, downstream to San Carlos Apache Tribal Land, AZ. There are three full segments we are designating as southwestern willow flycatcher critical habitat on the upper Gila River in southwestern NM (Grant and Hildalgo Counties) and immediately across the AZ State line into Greenlee County. We are also designating four small parcels of land that are interspersed within an excluded portion of the U-Bar Ranch in the Cliff/Gila Valley, NM. A fourth full segment occurs in AZ through the Safford Valley in Gila, Graham, and Pinal Counties.

The first full segment extends for 15.5 km (9.7 mi) from the Turkey Creek/Gila River confluence on the Gila National Forest, NM, downstream to the upstream boundary of the U-Bar Ranch in the Cliff/Gila Valley, NM. We are excluding the U-Bar Ranch from this point downstream for approximately 6 km (3.7 mi) to near the Highway 180 Bridge. Along this approximate 6 km (3.7 mi) stretch of river are four small distinct parcels of land not owned by the U-Bar Ranch which are being designated as critical habitat. The second full segment extends from the downstream boundary of the U-Bar Ranch exclusion near where Highway 180 crosses the Gila River for 21.1 km (13.1 mi) through the Cliff/Gila Valley to the upstream entrance of the middle Gila Box on the Gila National Forest, NM (the middle Gila Box is being removed, see below). The third full segment begins at the gauging station above the Town of Red Rock in Grant County, NM, at the downstream end of the middle Gila Box and extends for 54.7 km (34 mi) into Hidalgo County, NM, and across the NM/AZ State line through the town of Duncan in Greenlee County, AZ.

A fourth full segment on the Gila River in AZ in Gila, Graham, and Pinal Counties extends for 69.2 km (43 mi) from the upper end of Earven Flat in AZ, above the Town of Safford, through the Safford Valley to the San Carlos Apache Tribal Boundary.

Southwestern willow flycatchers have been detected nesting along these stream segments in the Upper Gila Management Unit since 1993. A total of 16 breeding sites (7 in NM and 9 in AZ) are known in the Upper Gila Management Unit. In 1999, a high of 262 territories at 8 sites were detected. A single site, the U-Bar Ranch in the Cliff/Gila Valley, had 209 territories. In 2003, 191 territories at 8 sites were detected on the Gila River stream segments that we proposed as critical habitat within this Management Unit. The U-Bar Ranch had 123 of these territories in 2003, many nesting in the canopy of mature boxelder trees along maintained irrigated ditches.

The U-Bar Ranch, located in the Cliff/Gila Valley in Grant County, NM, was identified as having features essential to the conservation of the southwestern willow flycatcher. Since the mid-1990s, the U-Bar Ranch has been the focus of studies and research by the Forest Service's Rocky Mountain Research and Experiment Station in Albuquerque, NM. The number of territories detected has fluctuated between approximately 110 and 210 territories. The U-Bar exists at approximately 1372 m (4500 feet) above sea level. Dense stands of boxelder trees are found along irrigation canals. As a result, nearly 75 percent of the flycatcher territories are found nesting in the canopies of these boxelders, approximately 60 feet above the ground. No where else throughout this subspecies range are southwestern

willow flycatchers found nesting at this elevation, in this type of environment, in these types of trees, at this density. The combination of anthropogenic influence, elevation, and boxelder canopy structure has helped create a unique situation that is beneficial for nesting flycatchers. The result of these southwestern willow flycatcher studies has fostered the maintenance and management of one of the three largest known breeding populations. As a result of the stewardship demonstrated by the U-Bar Ranch and the commitment to future management of this population and its habitat, we are excluding the U-Bar Ranch from southwestern willow flycatcher critical habitat (see *Relationship of Critical Habitat to Partnerships and Conservation Plans/ Easements on Private Lands—Exclusions Under Section 4(b)(2) of the Act* section below).

We re-evaluated an 11.3 km (7 mi) segment of the Gila River downstream of the Gila Bird Area in NM, located primarily on the Gila National Forest in Grant County, known as the middle Gila Box. While flycatchers could use this location for migration and/or dispersal habitat, this section of river is bordered by canyon walls without the floodplain characteristics to develop the vegetation for nesting habitat. Therefore, we conclude that it is not essential habitat and we have removed it from the designation.

The Gila River immediately above San Carlos Lake and within the conservation space of the lake on San Carlos Apache Tribal Land was identified as having features essential to the southwestern willow flycatcher. The Tribe developed, completed, and is implementing actions described in their Southwestern Willow Flycatcher Management Plan. As a result, the segments identified as critical habitat on San Carlos Tribal Lands are being excluded from this designation (see *Relationship of Critical Habitat to American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act* section below).

**Rio Grande Recovery Unit**

This Recovery Unit encompasses the Rio Grande watershed from its headwaters in southwestern CO downstream to the Pecos River confluence in southwestern Texas, although no flycatcher breeding sites are currently known along the Rio Grande in Texas. Also included in the Recovery Unit is the Pecos River watershed in NM and Texas (where no breeding sites are known) and one site on Coyote Creek, in the upper Canadian River watershed. In 2003 (Durst *et al.* 2005), the Rio Grande Recovery Unit had grown to 229 territories (20 percent of the rangewide total). This is a large increase from the 128 territories detected in 2001 (USFWS 2002). Breeding sites along the Rio Grande in the San Luis Valley, CO, and at the upper end of Elephant Butte Reservoir, NM, accounted for the majority of this increase. In 2001, government-managed lands accounted for 63 percent of the territories in this unit; Tribal lands supported an additional 23 percent (USFWS 2002). This Recovery Unit contains the San Luis Valley, Upper Rio Grande, Middle Rio Grande, and Lower Rio Grande Management Units. Only river segments in the Middle and Upper Rio Grande are being designated as critical habitat.

*San Luis Valley Management Unit*

The upper Rio Grande in Costilla, Conejos, Alamosa, and Rio Grande Counties, CO, and a segment of the Conejos River in Conejos, County, CO, were identified as having features essential to the southwestern willow flycatcher. In 2003, Durst *et al.* (2005) estimated a total of 73 flycatcher territories known from this Management Unit. The five counties surrounding these streams in south-central Colorado along with the Rio Grande Water Conservation District has a developed partnership with the Service and other Federal agencies for conservation of riparian areas on private lands in combination with Federal partners including and extending beyond the river segments identified in our proposed designation. Additionally, the Service is implementing management on the Alamosa National Wildlife Refuge specific to protecting riparian habitat values for the southwestern willow flycatcher. As a result, the Rio Grande and Conejos River segments identified as proposed critical habitat in the San Luis Valley Management Unit are being excluded from this designation (see *Relationship of Critical Habitat to National Wildlife Refuge Lands—Exclusions Under Section 4(b)(2) of the Act,* and *Relationship of Critical Habitat to Partnerships and Conservation Plans/Easements on Private Lands—Exclusions Under Section 4(b)(2) of the Act* sections below).

*Upper Rio Grande Management Unit*

We are designating single segments of the upper Rio Grande in Taos and Rio Arriba Counties, NM; the Rio Grande del Rancho in Taos County, NM; and Coyote Creek in Mora County, NM. The upper Rio Grande segment extends for 45.9 km (28.5 mi) from the Taos Junction Bridge (State Route 520) downstream to the upstream boundary of the San Juan Pueblo. The 10.4 km (6.5 mi) of the Rio Grande del Rancho extends from Sarco Canyon downstream to the Arroyo Miranda confluence. The 9.3 km (5.8 mi) Coyote Creek segment travels from about 2 km/1 mi above Coyote Creek State Park downstream to the second bridge on State Route 518, upstream from Los Cocas.

Flycatchers have been detected nesting along these upper Rio Grande River segments since 1993. Eleven breeding sites are known to exist on these segments (seven on the Rio Grande, one on the Rio Grande del Rancho, and three on Coyote Creek). On the Rio Grande in 2002, 16 territories were detected at a single site. On the Rio Grande del Rancho in 2003, a high of six territories were detected at a single site. On Coyote Creek in 2000, a high of 17 territories at 3 sites were detected, however only 3 territories (from 2 sites) were detected in 2002, and no surveys occurred in 2003.

The Pueblos of San Juan, Santa Clara, and San Illdefonso were identified as having features essential to the southwestern willow flycatcher along the Rio Grande. These three Pueblos have established a history of habitat management conducive to fostering the development and maintenance of riparian vegetation for the southwestern willow flycatcher, including restoration of native vegetation in order to reduce catastrophic fire to the riparian area. All three Pueblos have developed partnerships with the Service toward management of flycatcher habitat, and through those partnerships will be finalizing riparian habitat management plans that specifically address the habitat needs of breeding, migrating, and dispersing flycatchers. As a result, the Rio Grande on the Pueblos of San Juan, Santa Clara, and San Illdefonso is being excluded from this designation (see *Relationship of Critical Habitat to American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act* section below).

Four extremely small sections of riparian vegetation exist between and adjacent to the San Juan, Santa Clara, and San Illdefonso Pueblos that we have determined are not essential and are removing from this designation. A small piece of non-Pueblo habitat less than 1 km (0.6 mi) long exists between the San Juan and Santa Clara Pueblos. Additionally, a piece of non-Pueblo habitat, less than 0.5 km/0.3 mi long exists to west, adjacent to the Santa Clara Pueblo. Another two small pieces (each less than 0.5 km/0.3 mi long) exist between the San Illdefonso and Santa Clara Pueblos. As a result of these segments being located adjacent to

appropriate management by the Pueblos for the southwestern willow flycatcher, and because of their disjunct location and small size, we have determined that these four pieces are not essential habitat and are being removed from this designation.

*Middle Rio Grande Management Unit*

We are proposing three separate segments of the middle Rio Grande in Valencia and Soccoro Counties, NM. These segments are separated by the Sevilleta and Bosque del Apache NWRs that are being excluded from this designation as explained below. The most northern Rio Grande segment extends from the southern boundary of the Isleta Pueblo for 71.1 km (44.2 mi) to the northern boundary of the Sevilleta NWR. The middle Rio Grande segment extends for 44 km (27.3 mi) from the southern boundary of the Sevilleta NWR to the northern boundary of the Bosque del Apache NWR. The most southern Rio Grande segment extends for 20.1 km (12.5 mi) from the southern boundary of the Bosque del Apache NWR to the overhead powerline near Milligan Gulch at the northern end of Elephant Butte State Park.

Southwestern willow flycatcher territories have been detected on the middle Rio Grande since 1993. In 2002, 98 territories at 7 sites were detected. In 2003, a high of 107 territories at 6 of 7 different breeding sites were detected. A total of 85 territories were detected at the San Marcial site in 2003.

Habitat with features essential for the southwestern willow flycatcher identified along the Middle Rio Grande within the Rio Grande Valley State Park (City of Albuquerque) is being conserved through implementation of their Bosque Action Plan. This plan describes preservation and conservation of vegetation and wildlife communities, including the flycatcher and the habitat upon which it depends. As a result of this management, the Rio Grande Valley State Park is being excluded from this critical habitat designation (see *Relationship of Critical Habitat to Partnerships and Conservation Plans/ Easements on Private Lands—Exclusions Under Section 4(b)(2) of the Act* section below).

The Rio Grande on Pueblo of Isleta land immediately downstream of Rio Grande Valley State Park (City of Albuquerque) was identified as having features essential to the southwestern willow flycatcher. The Pueblo developed, completed, and is implementing actions described in their Southwestern Willow Flycatcher Management Plan. As a result, the segment identified on Pueblo of Isleta land is being excluded from this designation (see *Relationship of Critical Habitat to American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act* section below).

Habitat with features essential for the southwestern willow flycatcher identified along the Middle Rio Grande within the Sevilleta and Bosque del Apache NWRs is being conserved by the Service. Goals and objectives of both refuges are the protection and restoration of riparian habitat for the southwestern willow flycatcher. A total of 11 territories as of 2003 were known from both NWRs (USGS 2004). As a result of the Service's management of the refuge for wildlife and riparian habitat for the flycatcher, the Rio Grande within the Sevilleta and Bosque del Apache NWRs boundaries is being excluded from this designation (see *Relationship of Critical Habitat to National Wildlife Refuge Lands—Exclusions Under Section 4(b)(2) of the Act* section below).

**Exclusions of Military Lands Under Section 4(a)(3)**

Section 318 of fiscal year 2004 the National Defense Authorization Act (Public Law No. 108–136) amended the Endangered Species Act to address the relationship of Integrated Natural Resources Management Plans (INRMPs) to critical habitat by adding a new section 4(a)(3). This provision prohibits the Service from designating as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an INRMP prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary of the Interior determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation.

The Sikes Act required each military installation that includes land and water suitable for the conservation and management of natural resources to complete an INRMP by November 17, 2001. An INRMP integrates implementation of the military mission of the installation with stewardship of the natural resources found on military lands. Each INRMP includes an assessment of the ecological needs on the installation, including the need to provide for the conservation of listed species; a statement of goals and priorities; a detailed description of management actions to be implemented to provide for the ecological needs of listed species; and a monitoring and adaptive management plan. We consult with the military on the development and implementation of INRMPs for installations with listed species.

An INRMP integrates implementation of the military mission of the installation with stewardship of the natural resources found there. Each INRMP includes an assessment of the ecological needs on the military installation, including conservation provisions for listed species; a statement of goals and priorities; a detailed description of management actions to be implemented to provide for these ecological needs; and a monitoring and adaptive management plan.

We identified in the proposed critical habitat rule for the southwestern willow flycatcher possible exclusion of Camp Pendleton and Fallbrook Naval Weapons Station from critical habitat under section 4(b)(2)of the Act. After re-evaluation, we have exempted lands owned by Camp Pendleton and Fallbrook Naval Weapons Station from the final critical habitat designation pursuant to section 4(a)(3) of the Act based on legally operative INRMPs that provide a benefit to the southwestern willow flycatcher. Detailed discussions of the exemptions and exclusion of military lands are discussed by installation below.

*Marine Corps Base, Camp Pendleton (MCBCP)*

Areas or habitat containing features essential to the conservation of the southwestern willow flycatcher within the boundaries of MCBCP occur along portions of Cristianitos (6 km/4 mi), San Mateo (5 km/3 mi), San Onofre (6 km/ 4 mi), Los Flores (8 km/5 mi), Las Pulgas (2 km/1 mi), and DeLuz Creeks (10 km/6 mi), and the Santa Margarita River (45 km/28 mi); however, as discussed below, these areas are being exempted from critical habitat for the flycatcher. The exemption includes lands leased to the California Department of Parks and Recreation. Southwestern willow flycatcher populations within these watersheds on Camp Pendleton contain features essential to the conservation of the species because these watersheds retain relatively natural hydrological processes and functions. The Santa Margarita watershed is one of the least altered major watersheds occupied by the species throughout its range.

Camp Pendleton's INRMP was completed and signed by the Commanding General on November 9, 2001. The INRMP provides conservation measures that will directly and indirectly benefit the southwestern willow flycatcher and other listed species found on the Base. According to Camp Pendleton's May 26, 2005,

comment letter, the Base annually reviews and updates its INRMP with cooperation of the Service and California Department of Fish and Game to verify that: (1) The Base has sufficient professionally trained natural resources management staff available to implement the INRMP; (2) there have not been significant changes to the installation's mission requirements or its natural resources; (3) planned actions are implemented in an adaptive manner, adjusting management priorities and methodologies to accommodate changing natural resource and mission requirements; and (4) the required Federal, State, and installation coordination has occurred.

Actions undertaken by Camp Pendleton that have directly or indirectly benefited the flycatcher include: (1) Removal of non-native plant and animal species from riparian habitats, including *Arunda donax*, a major invasive plant species, (2) control of brown-headed cowbirds (a nest parasite), for over the past ten years, (3) programmatic impact avoidance and minimization measures through the Riparian Biological Opinion (see below) and, (4) flycatcher surveys and monitoring. In addition to the above benefits, Camp Pendleton has hosted or funded the following research efforts in partnership with USGS-BRD: (1) Southwestern willow flycatcher demographic studies using banded flycatchers; (2) examination of vegetation characteristics at flycatcher nest sites; (3) riparian habitat use by birds (including southwestern willow flycatchers) with an emphasis on habitats dominated by exotic vegetation; (4) response of southwestern willow flycatchers to removal of exotic vegetation; (5) use of exotic riparian vegetation as nesting substrate; and, (6) use of non-listed birds as indicators of suitable southwestern willow flycatcher habitat.

Camp Pendleton manages listed species, including the southwestern willow flycatcher, in its riparian areas, such as Santa Margarita River, within the framework of programmatic management plans, approved in a biological opinion issued by the Service on October 30, 1995 (USFWS 1995a). The biological opinion discusses ongoing and planned training activities, infrastructure maintenance activities, several construction projects, and a Riparian and Estuarine Ecosystem Conservation Plan and assesses potential impacts to six federally-listed species, including the southwestern willow flycatcher. The Conservation Plan is designed to maintain and enhance the biological diversity of the riparian ecosystem on Camp Pendleton and includes promoting the growth of sensitive species, including the southwestern willow flycatcher. Actions to assist in promoting conservation of the southwestern willow flycatcher on MCBCP include maintaining connectivity of riparian habitats; eradicating exotic plant communities to further establishment of successional stages of riparian scrub and riparian woodland habitat; and continuing to implement brown-headed cowbird management. The terms and conditions of the biological opinion for the Conservation Plan form the basis for portions of MCBCP's INRMP that was completed in 2001. Therefore, since the Conservation Plan provides a benefit to the species as outlined above, and since the INRMP is based on this plan, we have determined that the INRMP does provide a benefit for the southwestern willow flycatcher.

Camp Pendleton has demonstrated ongoing funding of their INRMP and management of endangered and threatened species. According to their May 26, 2005, comment letter, in fiscal year 2003, Camp Pendleton spent approximately $5 million to fund INRMP-driven projects and to assure its implementation. During fiscal year 2004, they applied over $3.5 million toward projects, programs, and activities that provide direct and indirect benefit to the management and conservation of Base natural resources. Moreover, in partnership with the Service, Camp Pendleton is funding two Service biologists to assist in implementing their Sikes Act program and buffer lands acquisition initiative.

Based on Camp Pendleton's past history for listed species and their Sikes Act program, we believe that there is a high degree of certainty that the conservation efforts of their INRMP will be effective. Service biologists work closely with Camp Pendleton on a variety of endangered and threatened species issues, including the southwestern willow flycatcher. The management programs and Base directives to avoid and minimize impacts to the species are consistent with current and ongoing section 7 consultations with Camp Pendleton. Therefore, we find that the INRMP for Camp Pendleton provides a benefit for the southwestern willow flycatcher and are exempting from critical habitat all lands on Camp Pendleton, including lands leased to the State, pursuant to section 4(a)(3) of the Act.

*Fallbrook Naval Weapons Station*

Fallbrook Naval Weapons Station (NWS), located in northern San Diego County, is approximately 8,850 ac (3,581 ha). Fallbrook Naval Weapons Station contains high quality habitat for the southwestern willow flycatcher within the Santa Margarita watershed.

In 1996, Fallbrook NWS completed an INRMP to address conservation and management recommendations within the scope of the installation's military mission. The INRMP provides conservation measures that will directly and indirectly benefit the southwestern willow flycatcher and other listed species found on the Naval Station. The 1996 INRMP was prepared with input from the Service and incorporates conservation measures outlined in several previously completed consultations between the Service and Fallbrook NWS. Fallbrook NWS is currently working with the Service to revise and update their INRMP.

Additionally, Fallbrook NWS has completed a formal section 7 consultation with the Service to revise their Fire Management Plan (FMP) to provide more effective fuels management and wildfire control, while minimizing impacts to listed species on the installation, including the southwestern willow flycatcher. This plan is a primary component of the installation's effort to develop and implement an updated INRMP. The revised FMP incorporates fuels management and fire suppression activities with habitat management needs of the southwestern willow flycatcher and other listed species to promote conservation and recovery of these species on Fallbrook NWS. This has resulted in minimal affects to surrounding habitat, including portions of the Santa Margarita River. Based on information provided in the FMP, breeding and/or territorial flycatchers have not been detected on Fallbrook NWS since the listing of the flycatcher under the Act, with all recent sightings determined to be transient birds. Measures to offset, avoid or minimize affects to the least Bell's vireo—another riparian dependent species—as described in our biological opinion on the FMP are also adequate to avoid effects on transient southwestern willow flycatchers. Additionally, Fallbrook NWS has agreed to provide information to us regarding any future sightings of southwestern willow flycatchers and will conduct follow-up surveys to determine their breeding status. If breeding or territorial flycatchers are detected on the Fallbrook NWS, the U.S. Navy and we will cooperate to determine whether additional measures to avoid and minimize the effects of fire management activities on the

southwestern willow flycatcher are necessary.

The Fallbrook NWS has also provided private researchers and the general public with opportunities for scientific and educational pursuits on the installation while controlling access to sensitive habitat areas to avoid causing inadvertent harm to species, including the southwestern willow flycatcher.

Based on Fallbrook NWS's Sikes Act program, we believe there is a high degree of certainty that the conservation efforts of their INRMP will be effective. Service biologists work closely with Fallbrook Naval Weapons Station on a variety of endangered and threatened species issues, including the southwestern willow flycatcher. The management programs and Station's directives to avoid and minimize impacts to the species are consistent with current and ongoing section 7 consultations with Fallbrook NWS. Therefore, we find that the INRMP for Fallbrook NWS provides a benefit for the southwestern willow flycatcher and are exempting from critical habitat all lands on Fallbrook NWS pursuant to section 4(a)(3) of the Act.

*Exclusions Under Section 4(b)(2) of the Act*

Section 4(b)(2) of the Act states that critical habitat shall be designated, and revised, on the basis of the best available scientific data available after taking into consideration the economic impact, impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. An area may be excluded from critical habitat if it is determined that the benefits of such exclusion outweigh the benefits of specifying a particular area as critical habitat, unless the failure to designate such area as critical habitat will result in the extinction of the species. Consequently, we may exclude an area from critical habitat based on economic impacts, impacts on national security, or other relevant impacts such as preservation of conservation partnerships, if we determine the benefits of excluding an area from critical habitat outweigh the benefits of including the area in critical habitat, provided the action of excluding the area will not result in the extinction of the species.

In our critical habitat designation we use the provisions outlined in section 4(b)(2) of the Act to evaluate those specific areas on which are found physical and biological features essential to the conservation of the species to determine which areas to propose and subsequently finalize (*i.e.*, designate) as critical habitat. On the basis of our evaluation, we have determined that the benefits of excluding certain lands from the designation of critical habitat for the southwestern willow flycatcher outweighs the benefits of their inclusion, and have subsequently excluded those lands from this designation pursuant to section 4(b)(2) of the Act as discussed below.

Areas excluded pursuant to section 4(b)(2) included areas with: (1) Legally operative HCPs that cover the subspecies and provide assurances that the conservation measures for the subspecies will be implemented and effective; (2) draft HCPs that cover the subspecies, have undergone public review and comment, and provide assurances that the conservation measures for the subspecies will be implemented and effective (*i.e.*, pending HCPs); (4) Tribal conservation plans/programs that cover the subspecies and provide assurances that the conservation measures for the subspecies will be implemented and effective; (5) State and Federal conservation plans/programs that provide assurances that the conservation measures for the subspecies will be implemented and effective; (6) National Wildlife Refuges with Comprehensive Conservation Plans (CCPs) or programs that provide assurances that the conservation measures for the subspecies will be implemented and effective; and (7) Partnerships, conservation plans/easements, or other type of formalized relationship/agreement where a conservation plans/program provide assurances that the conservation measures for the subspecies will be implemented and effective. The relationship of critical habitat to these types of areas is discussed in detail in the following paragraphs.

Within the areas containing features essential to the conservation of the southwestern willow flycatcher across six states there are private lands with legally operative HCPs, State and Federal Wildlife Areas with conservation plans/programs, Tribal lands, National Wildlife Refuges, and other private lands with management plans, partnerships, and/or programs in place for the southwestern willow flycatcher.

We have considered, but are excluding from critical habitat for the southwestern willow flycatcher pursuant to section 4(b)(2) of the Act, lands containing essential features in the following areas. The following lands are covered by the completed HCPs: Western Riverside Multiple Species Habitat Conservation Plan, San Diego County Multiple Species Conservation Plan, City of Carlsbad Habitat Management Program, Lower Colorado River Multiple Species Conservation Plan, Roosevelt Habitat Conservation Plan (only Roosevelt Lake). The following Tribes and Pueblos have completed and are implementing Southwestern Willow Flycatcher Management Plans: Hualapai, Chemehuevi, Colorado River, Fort Mojave, Quechan (Fort Yuma), Yavapai-Apache, San Carlos, Isleta Pueblo, La Jolla, and Rincon. The following Northern New Mexico Pueblos have established southwestern willow flycatcher management partnerships with the Service: San Illdefonso, Santa Clara, and San Juan. The following NWRs have completed CCPs or have developed management programs and implementing management strategies specific to southwestern willow flycatcher habitat: Pahranagat, Havasu, Cibola, Imperial, Bill Williams, Alamosa, Bosque del Apache, and Sevilleta. The following State and Federal Wildlife Areas have completed management plans/programs that are being implemented for the protection of southwestern willow flycatcher habitat: Overton and Key Pittman State Wildlife Areas, NV; Alamo State Wildlife Area, AZ; South Fork Kern River Wildlife Area, CA, Sprague Ranch, Kern River, CA. Other lands excluded under section 4(b)(2) of the Act due to southwestern willow flycatcher/riparian habitat conservation plans/programs/easements and/or partnerships include: Los Angeles Department of Water and Power, Owens River, CA; San Luis Valley Partnership, Rio Grande and Conejos Rivers, CO; Hafenfeld Ranch, Kern River, CA; Salt River Project—Horseshoe Lake, Verde River, AZ, the City of Albuquerque/Rio Grande Valley State Park, Rio Grande, NM, and U-Bar Ranch, Gila River, NM. See below for a detailed discussion of our exclusion of these lands under section 4(b)(2) of the Act.

**General Principles of Section 7 Consultations Used in the 4(b)(2) Balancing Process**

The most direct, and potentially largest regulatory benefit of critical habitat is that federally authorized, funded, or carried out activities require consultation pursuant to section 7 of the Act to ensure that they are not likely to destroy or adversely modify critical habitat. There are two limitations to this regulatory effect. First, it only applies where there is a Federal nexus—if there is no Federal nexus, designation itself does not restrict actions that destroy or adversely modify critical habitat.

Second, it only limits destruction or adverse modification. By its nature, the prohibition on adverse modification is designed to ensure those areas that contain the physical and biological features essential to the conservation of the species or unoccupied areas that are essential to the conservation are not eroded. Critical habitat designation alone, however, does not require specific steps toward recovery.

Once consultation under section 7 of the Act is triggered, the process may conclude informally when the Service concurs in writing that the proposed Federal action is not likely to adversely affect the listed species or its critical habitat. However, if the Service determines through informal consultation that adverse impacts are likely to occur, then formal consultation should be initiated. Formal consultation concludes with a biological opinion issued by the Service on whether the proposed Federal action is likely to jeopardize the continued existence of a listed species or result in destruction or adverse modification of critical habitat, with separate analyses being made under both the jeopardy and the adverse modification standards. For critical habitat, a biological opinion that concludes in a determination of no destruction or adverse modification may contain discretionary conservation recommendations to minimize adverse effects to primary constituent elements, but it would not contain any mandatory reasonable and prudent measures or terms and conditions. Mandatory reasonable and prudent alternatives to the proposed Federal action would only be issued when the biological opinion results in a jeopardy or adverse modification conclusion.

We also note that for 30 years prior to the Ninth Circuit Court's decision in *Gifford Pinchot,* the Service equated the jeopardy standard with the standard for destruction or adverse modification of critical habitat. The Court ruled that the Service could no longer equate the two standards and that adverse modification evaluations require consideration of impacts on the recovery of species. Thus, under the *Gifford Pinchot* decision, critical habitat designations may provide greater benefits to the recovery of a species.

The information provided in this section applies to all the discussions below that discuss the benefits of inclusion and exclusion of critical habitat in that it provides the framework for the consultation process.

**Educational Benefits of Critical Habitat**

The benefit of including lands in critical habitat is that the designation of critical habitat serves to educate landowners, State and local governments, and the public regarding the potential conservation value of an area. This helps focus and contribute to conservation efforts by other parties by clearly delineating areas of high conservation value for the southwestern willow flycatcher. In general the educational benefit of a critical habitat designation always exists, although in some cases it may be redundant with other educational effects. For example, HCPs have significant public input and may largely duplicate the educational benefit of a critical habitat designation. This benefit is closely related to a second, more indirect benefit; in that designation of critical habitat would inform State agencies and local governments about areas that could be conserved under State laws or local ordinances.

However, we believe that there would be little additional informational benefit gained from the designation of critical habitat for the exclusions we are making in this rule because these areas were included in the proposed rule as having features essential to the conservation of the flycatcher. Consequently, we believe that the informational benefits are already provided even though these areas are not designated as critical habitat. Additionally, the purpose normally served by the designation of informing State agencies and local governments about areas which would benefit from protection and enhancement of essential features and habitat for the southwestern willow flycatcher is already well established among State and local governments, and Federal agencies in those areas which we are excluding in this rule on the basis of HCPs, and other existing habitat management protections.

As noted elsewhere in this rule, the southwestern willow flycatcher is migratory and thus may receive some additional benefit from a critical habitat designation in that it is not present year-round in the U.S. However, we believe that based on the educational benefits already being provided as to the importance of these areas, as described above, and the fact that effects to flycatchers as a result of impacts to habitat are consulted upon regardless of what time of year impacts may occur, minimal if any additional benefits would result.

The information provided in this section applies to all the discussions below that discuss the benefits of inclusion and exclusion of critical habitat.

*Habitat Conservation Plans—Exclusions Under Section 4(b)(2) of the Act*

Another process for long term habitat protection is available under section 10(a)(1)(B) of the Act, which authorizes us to issue permits allowing the take of listed wildlife species incidental to otherwise lawful activities to non-Federal entities such as private landowners and State and local governments. The incidental take permit can not be issued until the permittee establishes habitat protection pursuant to the terms of an HCP. The HCP must identify conservation measures that the permittee agrees to implement for the species to minimize and mitigate the impacts of the permitted incidental take, and must have funding for these conservation measures assured before the take permit is issued. Frequently, as is the case with the HCPs for the southwestern willow flycatcher discussed below, the habitat protections, inclusive of protections for essential features, are long term management actions which assist in providing significant conservation benefit to the essential features, the habitat mosaic, and the subpecies.

HCPs vary in size and may provide for incidental take coverage and conservation management for one or many federally-listed species. Additionally, more than one applicant may participate in the development and implementation of an HCP. Some areas occupied by the southwestern willow flycatcher involve several complex HCPs that address multiple species, cover large areas, and are important to many participating permittees. Large regional HCPs expand upon the basic requirements set forth in section 10(a)(1)(B) of the Act because they reflect a voluntary, cooperative approach to large-scale habitat and species conservation planning. Many of the large regional HCPs in southern California have been, or are being, developed to provide for the conservation of numerous federally-listed species and unlisted sensitive species and the habitat that provides for their biological needs. These HCPs are designed to proactively implement conservation actions to address future projects that are anticipated to occur within the planning area of the HCP. However, given the broad scope of these regional HCPs, not all projects envisioned to potentially occur may actually take place. The State of California also has a Natural Communities Conservation Program (NCCP) process that is very similar to the Federal HCP process and is often completed in conjunction with the HCP

process. We recognize that many of the projects with HCPs also have state issued NCCPs.

In the case of approved regional HCPs and accompanying Implementing Agreements (IAs) (*e.g.*, those sponsored by cities, counties, or other local jurisdictions) that provide for incidental take coverage for the southwestern willow flycatcher, a primary goal of these regional plans is to provide for the protection and management of features essential for the species' conservation and thus habitat necessary for conservation, while directing development to other areas. In the case of approved regional HCPs and accompanying Implementing Agreements (IAs) (*e.g.*, those sponsored by cities, counties, or other local jurisdictions) that provide for incidental take coverage for the southwestern willow flycatcher, a primary goal of these regional plans is to provide for the protection and management of habitat essential for the species' conservation, while directing development to other areas. The regional HCP development process provides an opportunity for more intensive data collection and analysis regarding the use of particular habitat areas by the southwestern willow flycatcher. The process also enables us to conduct detailed evaluations of the importance of such lands to the long-term survival of the species in the context of constructing a system of interlinked habitat blocks that provide for its biological needs.

We believe the conservation achieved through implementing HCPs is typically greater than would be achieved through multiple site-by-site, project-by-project, section 7 consultations involving consideration of critical habitat. HCPs cause permittees to consider, evaluate, and commit resources to implement long-term management to particular habitat for at least one and possibly other listed or sensitive species. HCPs undergo analysis under NEPA, involve public participation, and go through intra-Service section 7 consultation for issuance of the permit. In contrast, section 7 consultations for critical habitat only consider listed species in the project area evaluated and Federal agencies are only committed to prevent adverse modification to critical habitat caused by the particular project and are not committed to provide conservation or long-term benefits to areas not affected by the proposed project. Thus, any management plan or HCP which considers enhancement or recovery as the management standard will always provide as much or more benefit than a consultation for critical habitat designation conducted under the standards required by the Ninth Circuit in the *Gifford Pinchot* decision.

Below we provide our specific 4(b)(2) discussions for each of the HCPs that we are excluding from this final designation.

*Santa Ana Management Unit, CA*

Western Riverside County Multiple Species Habitat Conservation Plan (MSHCP)

The Western Riverside Multiple Species Habitat Conservation Plan (MSHCP) was finalized and approved on June 22, 2004. Participants in this HCP include 14 cities; the County of Riverside, including the Riverside County Flood Control and Water Conservation Agency, Riverside County Transportation Commission, Riverside County Parks and Open Space District, and Riverside County Waste Department; the California Department of Parks and Recreation; and the California Department of Transportation. The Western Riverside MSHCP is a subregional plan under the State's NCCP and was developed in cooperation with the California Department of Fish and Game. Within the 510,000 ha (1.26 million ac) planning area of the MSHCP, approximately 62,000 ha (153,000 ac) of diverse habitats are being conserved. The conservation of 62,000 ha (153,000 ac) complements other existing natural and open space areas that are already conserved through other means (*e.g.*, State parks, USFS, and County park lands). An important objective of the MSHCP is to implement measures, including monitoring and management, necessary to conserve important habitat for the southwestern willow flycatcher that occurs within the plan's boundaries.

The MSHCP Conservation Area will include at least 4,282 ha (10,580 ac) of flycatcher habitat (breeding and migration habitat) including six core areas of high quality habitat and interconnecting linkages, including the segments of the Santa Ana River, San Timoteo Canyon/Yucaipa Creek, and Temecula Creek (including Vail Lake). The plan aims to conserve 100 percent of breeding habitat for the southwestern willow flycatcher, including buffer areas 100 m (328 ft) adjacent to breeding areas. In addition, the MSHCP requires compliance with a Riparian/Riverine Areas and Vernal Pool policy that contains provisions requiring 100 percent avoidance and long-term management and protection of breeding habitat not included in the conservation areas, unless a Biologically Equivalent or Superior Preservation Determination can demonstrate that a proposed alternative will provide equal or greater conservation benefits than avoidance. We completed an internal consultation on the effects of the plan on the southwestern willow flycatcher and its essential habitat that is found within the plan boundaries, and determined that implementation of the plan provides for the conservation of the species because it provides for the conservation of breeding and migration flycatcher habitat, the conservation of dispersal habitat and adjacent upland areas, surveys for undiscovered populations, and the maintenance and potential restoration of suitable habitat areas within the conservation area.

We are excluding portions of the Santa Ana Watershed, including the Santa Ana River, San Timeteo Canyon/Yucaipa Creek, and Temecula Creek (including Vail Lake) containing features essential to the conservation of the flycatcher from the final designation of critical habitat for the southwestern willow flycatcher pursuant to section 4(b)(2) of the Act because it is within the planning area boundary for the Western Riverside MSHCP.

(1) Benefits of Inclusion

We believe that there is minimal benefit from designating critical habitat for the southwestern willow flycatcher within the MSHCP because, as explained above, these lands are already managed for the conservation of species covered by the MSHCP, including this subspecies.

As discussed above in the ''General Principles of Section 7 Consultations Used in the 4(b)(2) Balancing Process'' section, a benefit of including an area within a critical habitat designation is the protection provided by section 7(a)(2) of the Act that directs Federal agencies to ensure that their actions do not result in the destruction or adverse modification of critical habitat. We completed a section 7 consultation on the issuance of the section 10(a)(1)(B) permit for the MSHCP on June 22, 2004, and concluded that the southwestern willow flycatcher was adequately conserved and the issuance of the permit would not jeopardize the continued existence of this subspecies.

The areas excluded as critical habitat are currently occupied by the species. If these areas were designated as critical habitat, any actions with a Federal nexus which might adversely affect the critical habitat would require a consultation with us, as explained above. However, inasmuch as this area is currently occupied by the species, consultation for Federal activities which might adversely impact the species or

would result in take would be required even without the critical habitat designation. The requirement to conduct such consultation would occur regardless of whether the authorization for incidental take occurs under either section 7 or section 10 of the Act.

The inclusion of these areas of non-Federal land as critical habitat would provide some additional Federal regulatory benefits for the species consistent with the conservation standard based on the Ninth Circuit Court's decision in Gifford Pinchot. A benefit of inclusion would be the requirement of a Federal agency to ensure that their actions on these non-Federal lands do not likely result in the destruction or adverse modification of critical habitat. This additional analysis to determine destruction or adverse modification of critical habitat is likely to be small because the lands are not under Federal ownership and any Federal agency proposing a Federal action on these areas of non-Federal lands would likely consider the conservation value of these lands as identified in the Western Riverside County MSHCP and take the necessary steps to avoid jeopardy or the destruction or adverse modification of critical habitat.

We believe that designating any non-Federal lands within existing public/quasi public lands, proposed conceptual reserve design lands, and lands targeted for conservation within the Western Riverside County MSCHP Plan Area, would provide little additional educational and Federal regulatory benefits for the species. The additional educational benefits that might arise from critical habitat designation have been largely accomplished through the public review and comment of the environmental impact documents which accompanied the development of the Western Riverside County MSHCP and the recognition by some of the landowners of the presence of the endangered southwestern willow flycatcher and the value of their lands for the conservation and recovery of the species (e.g., County of Riverside Regional Parks and Open Space District). In addition, as discussed in the Educational Benefits of Critical Habitat section above, we believe the conservation achieved through implementing HCPs is typically greater than would be achieved through multiple site-by-site, project-by-project, section 7 consultations involving consideration of critical habitat.

We believe that there would be little additional informational benefit gained from including the MSHCP within the designation because this area was included in the proposed rule as having lands containing features essential to the flycatcher. Consequently, we believe that the informational benefits are already provided even though this area is not designated as critical habitat. Additionally, the purpose of the MSHCP to provide protection and enhancement of habitat for the southwestern willow flycatcher is already well established among State and local governments, and Federal agencies.

(2) Benefits of Exclusion

As mentioned above, the Western Riverside MSHCP provides for the conservation of breeding and migration flycatcher habitat, the conservation of dispersal habitat and adjacent upland areas, surveys for undiscovered populations, and the maintenance and potential restoration of suitable habitat areas within the conservation area. The Western Riverside MSHCP therefore provides for protection of the PCEs, and addresses special management needs such as surveys in suitable habitat and management of essential features and habitat. Designation of critical habitat would therefore be redundant on these lands, and would not provide additional protections.

The benefits of excluding lands within HCPs from critical habitat designation include relieving landowners, communities, and counties of any additional regulatory burden that might be imposed by critical habitat. Many HCPs, particularly large regional HCPs take many years to develop and, upon completion, become regional conservation plans that are consistent with the recovery objectives for listed species that are covered within the plan area. Additionally, many of these HCPs provide conservation benefits to unlisted, sensitive species. Imposing an additional regulatory review after an HCP is completed solely as a result of the designation of critical habitat may undermine conservation efforts and partnerships in many areas. In fact, it could result in the loss of benefits if participants abandon the voluntary HCP process because it may result in requiring additional regulations compared to other parties who have not voluntarily participated in species conservation. Designation of critical habitat within the boundaries of approved HCPs could be viewed as a disincentive to those entities currently developing HCPs or contemplating them in the future.

A related benefit of excluding lands within HCPs from critical habitat designation is the unhindered, continued ability to seek new partnerships with future HCP participants including States, Counties, local jurisdictions, conservation organizations, and private landowners, which together can implement conservation actions that we would be unable to accomplish otherwise. If lands within HCP plan areas are designated as critical habitat, it would likely have a negative effect on our ability to establish new partnerships to develop HCPs, particularly large, regional HCPs that involve numerous participants and address landscape-level conservation of species and habitats. By excluding these lands, we preserve our current partnerships and encourage additional conservation actions in the future.

Furthermore, an HCP or NCCP/HCP application must itself be consulted upon. While this consultation will not look specifically at the issue of adverse modification to critical habitat, unless critical habitat has already been designated within the proposed plan area, it will determine if the HCP jeopardizes the species in the plan area. The jeopardy analysis is similar to the analysis of adverse modification to critical habitat. In addition, Federal actions not covered by the HCP in areas occupied by listed species would still require consultation under section 7 of the Act due to the presence of the species. HCP and NCCP/HCPs typically provide for greater conservation benefits to a covered species than section 7 consultations because HCPs and NCCP/HCPs assure the long-term protection and management of a covered species and its habitat. In addition, funding for such management is assured through the standards found in the 5 Point Policy for HCPs (64 FR 35242) and the HCP ''No Surprises'' regulation (63 FR 8859). Such assurances are typically not provided by section 7 consultations that, in contrast to HCPs, often do not commit the project proponent to long-term special management or protections. Thus, a consultation typically does not accord the lands it covers the extensive benefits a HCP or NCCP/HCP provides. The development and implementation of HCPs or NCCP/HCPs provide other important conservation benefits, including the development of biological information to guide the conservation efforts and assist in species conservation, and the creation of innovative solutions to conserve species while allowing for development.

(3) Benefits of Exclusion Outweigh the Benefits of Inclusion

In summary, we believe that the benefits of excluding the Western Riverside MSHCP from the designation of critical habitat for the southwestern willow flycatcher outweigh the benefits

of including this area in critical habitat. We find that including the Western Riverside MSHCP would result in very minimal, if any, additional benefits to the southwestern willow flycatcher, as explained above.

We also find that the exclusion of these lands will not lead to the extinction of the subspecies, nor hinder its recovery because the management emphasis of the Western Riverside MSHCP is to protect and enhance habitat for the southwestern willow flycatcher.

We believe that exclusion of these lands from critical habitat will not result in extinction of the southwestern willow flycatcher since these lands will be conserved and managed for the benefit of this species pursuant to the Western Riverside County MSHCP. The Western Riverside MSHCP includes specific conservation objectives, survey requirements, avoidance and minimization measures, and management for the southwestern willow flycatcher that exceed any conservation value provided as a result of a critical habitat designation.

The jeopardy standard of section 7 and routine implementation of habitat conservation through the section 7 process also provide assurances that the species will not go extinct. In addition, the species is protected from take under section 9 of the Act. The exclusion leaves these protections unchanged from those that would exist if the excluded areas were designated as critical habitat.

Critical habitat is being designated for the southwestern willow flycatcher in other areas that will be accorded the protection from adverse modification by Federal actions using the conservation standard based on the Ninth Circuit Court's decision in *Gifford Pinchot.* Additionally, the species occurs on lands protected and managed either explicitly for the species, or indirectly through more general objectives to protect natural values, this factor acting in concert with the other protections provided under the Act for these lands absent designation of critical habitat on them, and acting in concert with protections afforded each species by the remaining critical habitat designation for the species, lead us to find that exclusion of these lands within the Western Riverside County MSHCP will not result in extinction of the southwestern willow flycatcher.

*San Diego Management Unit*

San Diego Multiple Species Conservation Program (MSCP)

Below we first provide some general background information on the San Diego Multiple Species Conservation Plan/Habitat Conservation Plan (MSCP/HCP), followed by an analysis pursuant to section 4(b)(2) of the Act of the benefits of including San Diego MSCP/HCP land within the critical habitat designation, an analysis of the benefits of excluding this area, and an analysis of why we believe the benefits of exclusion are greater than those of inclusion.

In southwestern San Diego County, the MSCP effort encompasses more than 236,000 ha (582,000 ac) and involves the participation of the County of San Diego and 11 cities, including the City of San Diego. This regional HCP is also a regional subarea plan under the NCCP program and has been developed in cooperation with California Department of Fish and Game. The MSCP provides for the establishment of approximately 69,573 ha (171,000 ac) of preserve areas to provide conservation benefits for 85 federally listed and sensitive species over the life of the permit (50 years), including the southwestern willow flycatcher. We have determined that portions of lands within the boundaries of the San Diego Multiple MSCP contain features essential to the conservation of the southwestern willow flycatcher, including areas along portions of the San Dieguito (including Lake Hodges), Santa Ysabel, and San Diego Rivers. These particular areas lie within the boundaries of approved subarea plans.

Conservation measures specific to the southwestern willow flycatcher within the San Diego MSCP/HCP include the preservation and management of 3,845 ha (9,500 ac) (81 percent) of the riparian habitat within the planning area, as well as eight of the nine known breeding locations at the time of the plan's development. Surveys are required for projects potentially affecting this species, and breeding habitat will be identified and avoided. Specific management directives include measures to provide appropriate flycatcher habitat, upland buffers for all known flycatcher populations, cowbird control, specific measures to protect against detrimental edge effects, and monitoring.

(1) Benefits of Inclusion

We believe that there is minimal benefit from designating critical habitat for the southwestern willow flycatcher within the San Diego MSCP/HCP because, as explained above, these lands are already managed for the conservation of covered species, including this subspecies.

As discussed above in the ''General Principles of Section 7 Consultations Used in the 4(b)(2) Balancing Process'' section, a benefit of including an area within a critical habitat designation is the protection provided by section 7(a)(2) of the Act that directs Federal agencies to ensure that their actions do not result in the destruction or adverse modification of critical habitat. We completed a section 7 consultation on the issuance of the section 10(a)(1)(B) permit for the County of San Diego subarea plan within the San Diego MSCP/HCP on May 12, 1998, and concluded that the southwestern willow flycatcher was adequately conserved and the issuance of the permit would not jeopardize the continued existence of this subspecies.

The areas excluded as critical habitat are currently occupied by the subspecies. If these areas were designated as critical habitat, any actions with a Federal nexus which might adversely affect the critical habitat would require a consultation with us, as explained above. However, inasmuch as this area is currently occupied by the subspecies, consultation for Federal activities which might adversely impact the subspecies or would result in take would be required even without the critical habitat designation. The requirement to conduct such consultation would occur regardless of whether the authorization for incidental take occurs under either section 7 or section 10 of the Act.

The inclusion of these areas of non-Federal land as critical habitat would provide some additional Federal regulatory benefits for the subspecies consistent with the conservation standard based on the Ninth Circuit Court's decision in Gifford Pinchot. A benefit of inclusion would be the requirement of a Federal agency to ensure that their actions on these non-Federal lands do not likely result in the destruction or adverse modification of critical habitat. This additional analysis to determine destruction or adverse modification of critical habitat is likely to be small because the lands are not under Federal ownership and any Federal agency proposing a Federal action on these areas of non-Federal lands would likely consider the conservation value of these lands as identified in the San Diego MSCP/HCP and take the necessary steps to avoid jeopardy or the destruction or adverse modification of critical habitat.

We believe that designating any lands within the San Diego MSCP/HCP Plan

Area would provide little additional educational and Federal regulatory benefits for the subspecies. The additional educational benefits that might arise from critical habitat designation have been largely accomplished through the public review and comment of the environmental impact documents which accompanied the development of the San Diego MSCP/HCP Plan Area and the recognition by some of the landowners of the presence of the endangered southwestern willow flycatcher and the value of their lands for the conservation and recovery of the species. In addition, as discussed in the Educational Benefits of Critical Habitat section above, we believe the conservation achieved through implementing HCPs is typically greater than would be achieved through multiple site-by-site, project-by-project, section 7 consultations involving consideration of critical habitat.

We believe that there would be little additional informational benefit gained from including the San Diego MSCP/HCP Plan Area within the designation because this area was included in the proposed rule as having lands that contain features essential to the conservation of the flycatcher. Consequently, we believe that the informational benefits are already provided even though this area is not designated as critical habitat. Additionally, the purpose of the San Diego MSCP/HCP to provide protection and enhancement of habitat for the southwestern willow flycatcher is already well established among State and local governments, and Federal agencies.

(2) Benefits of Exclusion

As mentioned above, the San Diego MSCP/HCP provides for the conservation of occupied and historic habitat, the removal of non-native predators, and the avoidance of impacts if a population were to be found. The San Diego MSCP/HCP therefore provides for protection of the PCEs, and addresses special management needs such as surveys in suitable habitat and management of habitat. Designation of critical habitat would therefore be redundant on these lands, and would not provide additional protections.

The benefits of excluding lands within HCPs from critical habitat designation include relieving landowners, communities, and counties of any additional regulatory burden that might be imposed by critical habitat. Many HCPs, particularly large regional HCPs take many years to develop and, upon completion, become regional conservation plans that are consistent with the recovery objectives for listed species that are covered within the plan area. Additionally, many of these HCPs provide conservation benefits to unlisted, sensitive species. Imposing an additional regulatory review after an HCP is completed solely as a result of the designation of critical habitat may undermine conservation efforts and partnerships in many areas. In fact, it could result in the loss of benefits to the subspecies if participants abandon the voluntary HCP process because it may result in additional regulations requiring more of them than other parties who have not voluntarily participated in conservation efforts for the subspecies. Designation of critical habitat within the boundaries of approved HCPs could be viewed as a disincentive to those entities currently developing HCPs or contemplating them in the future.

A related benefit of excluding lands within HCPs from critical habitat designation is the unhindered, continued ability to seek new partnerships with future HCP participants including States, counties, local jurisdictions, conservation organizations, and private landowners, which together can implement conservation actions that we would be unable to accomplish otherwise. If lands within HCP plan areas are designated as critical habitat, it would likely have a negative effect on our ability to establish new partnerships to develop HCPs, particularly large, regional HCPs that involve numerous participants and address landscape-level conservation of species and habitats. By excluding these lands we preserve our current partnerships and encourage additional conservation actions in the future.

Furthermore, an HCP or NCCP/HCP application must itself be consulted upon. While this consultation will not look specifically at the issue of adverse modification to critical habitat, unless critical habitat has already been designated within the proposed plan area, it will determine if the HCP jeopardizes the species in the plan area. The jeopardy analysis is similar to the analysis of adverse modification to critical habitat. In addition, Federal actions not covered by the HCP in areas occupied by listed species would still require consultation under section 7 of the Act due to the presence of the species. HCP and NCCP/HCPs typically provide for greater conservation benefits to a covered species than section 7 consultations because HCPs and NCCP/HCPs assure the long-term protection and management of a covered species, features essential to its conservation, and its habitat. In addition, funding for such management is assured through the standards found in the 5 Point Policy for HCPs (64 FR 35242) and the HCP ''No Surprises'' regulation (63 FR 8859). Such assurances are typically not provided by section 7 consultations that, in contrast to HCPs, often do not commit the project proponent to long-term special management or protections. Thus, a consultation typically does not accord the lands it covers the extensive benefits a HCP or NCCP/HCP provides. The development and implementation of HCPs or NCCP/HCPs provide other important conservation benefits, including the development of biological information to guide the conservation efforts and assist in species conservation, and the creation of innovative solutions to conserve species while allowing for development.

(3) Benefits of Exclusion Outweigh the Benefits of Inclusion

In summary, we believe that the benefits of excluding the San Diego MSCP/HCP from the designation of critical habitat for the southwestern willow flycatcher outweigh the benefits of including these lands in critical habitat. We find that including the San Diego MSCP/HCP would result in very minimal, if any, additional benefits to the southwestern willow flycatcher, as explained above.

We also find that the exclusion of these lands will not lead to the extinction of the subspecies, nor hinder its recovery because the management emphasis of the San Diego MSCP/HCP is to protect and enhance habitat for the southwestern willow flycatcher.

We believe that exclusion of these lands from critical habitat will not result in extinction of the southwestern willow flycatcher since these lands will be conserved and managed for the benefit of this subspecies pursuant to the San Diego MSCP/HCP. The San Diego MSCP/HCP includes specific conservation objectives, survey requirements, avoidance and minimization measures, and management for the southwestern willow flycatcher that exceed any conservation value provided as a result of a critical habitat designation, inclusive of that following a conservation standard based on the Ninth Circuit Court's decision in *Gifford Pinchot*.

The jeopardy standard of section 7 and routine implementation of habitat conservation through the section 7 process also provide assurances that the species will not go extinct. In addition, the species is protected from take under section 9 of the Act. The exclusion leaves these protections unchanged

from those that would exist if the excluded areas were designated as critical habitat, inclusive of that following a conservation standard based on the Ninth Circuit Court's decision in *Gifford Pinchot*.

Critical habitat is being designated for the southwestern willow flycatcher in other areas that will be accorded the protection from adverse modification by Federal actions using the conservation standard based on the Ninth Circuit Court's decision in *Gifford Pinchot*. Additionally, the species occurs on lands protected and managed either explicitly for the species, or indirectly through more general objectives to protect natural values, this factor acting in concert with the other protections provided under the Act for these lands absent designation of critical habitat on them, and acting in concert with protections afforded each species by the remaining critical habitat designation for the species, lead us to find that exclusion of these lands within the San Diego MSCP/HCP will not result in extinction of the southwestern willow flycatcher.

*San Diego Management Unit*

City of Carlsbad's Habitat Management Plan

The City of Carlsbad's Habitat Management Plan (HMP) was approved October 15, 2004. This plan is one of seven subarea plans being developed under the umbrella of the North County Multiple Habitat Conservation Plan (MHCP) in northern San Diego County. Participants in this regional conservation planning effort include the cities of Carlsbad, Encinitas, Escondido, Oceanside, San Marcos, Solana Beach, and Vista. The subarea plans in development are also proposed as subregional plans under the State's NCCP and are being developed in cooperation with the California Department of Fish and Game (CDFG). We have determined that portions of lands within the boundaries of the HMP contain lands with features essential to the conservation of the southwestern willow flycatcher, including all of Agua Hedionda Lagoon and a portion of Agua Hedionda Creek.

Approximately 9,943 ha (24,570 ac) of land are within the Carlsbad HMP planning area, with about 3,561 ha (8,800 ac) remaining as natural habitat for species covered under the plan. Of this remaining habitat, the Carlsbad HMP proposes to establish a preserve system for approximately 2,746 ha (6,786 ac). Conservation measures specific to the southwestern willow flycatcher within the Carlsbad HMP include the conservation of 200 ha (494 ac) (86 percent) of the riparian vegetation in the city and 10 ha (25 ac) (86 percent) of oak woodland. Preserved lands include the four highest quality habitat areas for flycatchers identified within the plan area, including lands along Agua Hedionda Creek. For proposed projects in or adjacent to suitable habitat outside of preserve areas, mandatory surveys will be conducted, with impacts to breeding flycatchers completely avoided or reduced, as described in the paragraph below. Flycatcher habitat will be managed to restrict activities that cause degradation, including livestock grazing, human disturbance clearing or alteration of riparian vegetation, brown-headed cowbird parasitism, and insufficient water levels leading to loss of riparian habitat and surface water. Area-specific management directives shall include measures to provide appropriate flycatcher habitat, cowbird control, and specific measures to protect against detrimental edge effects, and removal of invasive exotic species (*e.g., Arundo donax*). Human access to flycatcher-occupied breeding habitat will be restricted during the breeding season (May 1–September 15) except for qualified researchers or land managers performing essential preserve management, monitoring, or research functions. Projects that cannot be conducted without placing equipment or personnel in or adjacent to sensitive habitats shall be timed to ensure that habitat is removed prior to the initiation of the breeding season.

Projects having direct or indirect impacts to the southwestern willow flycatcher shall adhere to the following measures to avoid or reduce impacts: (1) The removal of native vegetation and habitat shall be avoided and minimized to the maximum extent practicable; (2) For temporary impacts, the work site shall be returned to pre-existing contours and revegetated with appropriate native species; (3) Revegetation specifications shall ensure creation and restoration of riparian woodland vegetation to a quality that eventually is expected to support nesting southwestern willow flycatchers, recognize that it may take many years (depending on type of activity and timing of flood events, etc.) to achieve this state; (4) Construction noise levels at the riparian canopy edge shall be kept below 60 dBA Leq (measured as Equivalent Sound Level) from 5 a.m. to 11 a.m. during the peak nesting period of March 15 to July 15. For the balance of the day/season, the noise levels shall not exceed 60 decibels, averaged over a 1-hour period on an A-weighted decibel (dBA) (*i.e.,* 1 hour Leq/dBA); (5) Brown-headed cowbirds and other exotic species which prey upon the flycatcher shall be removed from the site; (6) For new developments adjacent to preserve areas that create conditions attractive to brown-headed cowbirds, jurisdictions shall require monitoring and control of cowbirds; (7) Biological buffers of at least 30 m (100 ft) shall be maintained adjacent to breeding flycatcher habitat, measured from the outer edge of riparian vegetation. Within this 30 m (100 ft) buffer, no new development shall be allowed, and the area shall be managed for natural biological values as part of the preserve system; (8) Suitable unoccupied breeding habitat preserved within the FPA shall be managed to maintain or mimic effects of natural stream or river processes (*e.g.,* periodic substrate scouring and depositions); and (9) Natural riparian connections with upstream riparian habitat shall be maintained to ensure linkage to suitable occupied and unoccupied breeding habitat.

(1) Benefits of Inclusion

We believe that there is minimal benefit from designating critical habitat for the southwestern willow flycatcher within the Carlsbad HMP because, as explained above, these lands are already managed for the conservation of covered species, including this subspecies.

As discussed above in the ''General Principles of Section 7 Consultations Used in the 4(b)(2) Balancing Process'' section, a benefit of including an area within a critical habitat designation is the protection provided by section 7(a)(2) of the Act that directs Federal agencies to ensure that their actions do not result in the destruction or adverse modification of critical habitat. We completed a section 7 consultation on the issuance of the section 10(a)(1)(B) permit for the Carlsbad HMP on November 9, 2004, and concluded that the southwestern willow flycatcher was adequately conserved and the issuance of the permit would not jeopardize the continued existence of this subspecies.

The areas excluded as critical habitat are currently occupied by the species. If these areas were designated as critical habitat, any actions with a Federal nexus which might adversely affect the critical habitat would require a consultation with us, as explained above. However, inasmuch as this area is currently occupied by the species, consultation for Federal activities which might adversely impact the species or would result in take would be required even without the critical habitat

designation. The requirement to conduct such consultation would occur regardless of whether the authorization for incidental take occurs under either section 7 or section 10 of the Act.

The inclusion of these areas of non-Federal land as critical habitat would provide some additional Federal regulatory benefits for the species consistent with the conservation standard based on the Ninth Circuit Court's decision in Gifford Pinchot. A benefit of inclusion would be the requirement of a Federal agency to ensure that their actions on these non-Federal lands do not likely result in the destruction or adverse modification of critical habitat. This additional analysis to determine destruction or adverse modification of critical habitat is likely to be small because the lands are not under Federal ownership and any Federal agency proposing a Federal action on these areas of non-Federal lands would likely consider the conservation value of these lands as identified in the Carlsbad HMP and take the necessary steps to avoid jeopardy or the destruction or adverse modification of critical habitat.

We believe that designating any lands within the Carlsbad HMP would provide little additional educational and Federal regulatory benefits for the species. The additional educational benefits that might arise from critical habitat designation have been largely accomplished through the public review and comment of the environmental impact documents which accompanied the development of the Carlsbad HMP and the recognition by some of the landowners of the presence of the endangered southwestern willow flycatcher and the value of their lands for the conservation and recovery of the species. In addition, as discussed in the Educational Benefits of Critical Habitat section above, we believe the conservation achieved through implementing HCPs is typically greater than would be achieved through multiple site-by-site, project-by-project, section 7 consultations involving consideration of critical habitat.

We believe that there would be little additional informational benefit gained from including the Carlsbad HMP within the designation because this area was included in the proposed rule as having lands containing features essential to the conservation of the flycatcher. Consequently, we believe that the informational benefits are already provided even though this area is not designated as critical habitat. Additionally, the purpose of the Carlsbad HMP to provide protection and enhancement of habitat for the southwestern willow flycatcher is already well established among State and local governments, and Federal agencies.

(2) Benefits of Exclusion

As mentioned above, the Carlsbad HMP provides for the conservation of occupied and historic habitat, the removal of non-native predators, and the avoidance of impacts if a population were to be found. The Carlsbad HMP therefore provides for protection of the PCEs, and addresses special management needs such as surveys in suitable habitat and management of habitat. Designation of critical habitat would therefore be redundant on these lands, and would provide little, if any, additional protections.

The benefits of excluding lands within HCPs from critical habitat designation include relieving landowners, communities, and counties of any additional regulatory burden that might be imposed by critical habitat. Many HCPs, particularly large regional HCPs, take many years to develop and, upon completion, become regional conservation plans that are consistent with the recovery objectives for listed species that are covered within the plan area. Additionally, many of these HCPs provide conservation benefits to unlisted, sensitive species. Imposing an additional regulatory review after an HCP is completed solely as a result of the designation of critical habitat may undermine conservation efforts and partnerships in many areas. In fact, it could result in the loss of species benefits if participants abandon the voluntary HCP process because it may result in requiring additional regulations compared to other parties who have not voluntarily participated in species conservation. Designation of critical habitat within the boundaries of approved HCPs could be viewed as a disincentive to those entities currently developing HCPs or contemplating them in the future.

A related benefit of excluding lands within HCPs from critical habitat designation is the unhindered, continued ability to seek new partnerships with future HCP participants including States, Counties, local jurisdictions, conservation organizations, and private landowners, which together can implement conservation actions that we would be unable to accomplish otherwise. If lands within HCP plan areas are designated as critical habitat, it would likely have a negative effect on our ability to establish new partnerships to develop HCPs, particularly large, regional HCPs that involve numerous participants and address landscape-level conservation of species and habitats. By preemptively excluding these lands, we preserve our current partnerships and encourage additional conservation actions in the future.

Furthermore, an HCP or NCCP/HCP application must itself be consulted upon. While this consultation will not look specifically at the issue of adverse modification to critical habitat, unless critical habitat has already been designated within the proposed plan area, it will determine if the HCP jeopardizes the species in the plan area. The jeopardy analysis is similar to the analysis of adverse modification to critical habitat. In addition, Federal actions not covered by the HCP in areas occupied by listed species would still require consultation under section 7 of the Act. HCP and NCCP/HCPs typically provide for greater conservation benefits to a covered species than section 7 consultations because HCPs and NCCP/HCPs assure the long-term protection and management of a covered species and its habitat, and funding for such management is assured through the standards found in the 5 Point Policy for HCPs (64 FR 35242) and the HCP ''No Surprises'' regulation (63 FR 8859). Such assurances are typically not provided by section 7 consultations that, in contrast to HCPs, often do not commit the project proponent to long-term special management or protections. Thus, a consultation typically does not accord the lands it covers the extensive benefits a HCP or NCCP/HCP provides. The development and implementation of HCPs or NCCP/HCPs provide other important conservation benefits, including the development of biological information to guide the conservation efforts and assist in species conservation, and the creation of innovative solutions to conserve species while allowing for development.

(3) Benefits of Exclusion Outweigh the Benefits of Inclusion

In summary, we believe that the benefits of excluding the Carlsbad HMP from the designation of critical habitat for the southwestern willow flycatcher outweigh the benefits of including these lands in critical habitat. We find that including the Carlsbad HMP would result in very minimal, if any, additional benefits to the southwestern willow flycatcher, as explained above.

We also find that the exclusion of these lands will not lead to the extinction of the subspecies, nor hinder its recovery because the management emphasis of the Carlsbad HMP is to protect and enhance habitat for the southwestern willow flycatcher.

We believe that exclusion of these lands from critical habitat will not result in extinction of the southwestern willow flycatcher since these lands will be conserved and managed for the benefit of this species pursuant to the Carlsbad HMP. The Carlsbad HMP includes specific conservation objectives, survey requirements, avoidance and minimization measures, and management for the southwestern willow flycatcher that exceed any conservation value provided as a result of a critical habitat designation.

The jeopardy standard of section 7 and routine implementation of habitat conservation through the section 7 process also provide assurances that the species will not go extinct. In addition, the species is protected from take under section 9 of the Act. The exclusion leaves these protections unchanged from those that would exist if the excluded areas were designated as critical habitat.

Critical habitat is being designated for the southwestern willow flycatcher in other areas that will be accorded the protection from adverse modification by Federal actions using the conservation standard based on the Ninth Circuit Court's decision in Gifford Pinchot. Additionally, the species occurs on lands protected and managed either explicitly for the species, or indirectly through more general objectives to protect natural values, this factor acting in concert with the other protections provided under the Act for these lands absent designation of critical habitat on them, and acting in concert with protections afforded each species by the remaining critical habitat designation for the species, lead us to find that exclusion of these lands within the Carlsbad HMP will not result in extinction of the southwestern willow flycatcher.

*Roosevelt Management Unit, AZ*

Roosevelt Lake HCP

A HCP for Salt River Project (SRP) was completed for the operation of Roosevelt Dam in Gila and Maricopa Counties, which included as the action area the perimeter of Roosevelt Lake's high water mark (ERO 2002). The Record of Decision for the HCP was dated February 27, 2003. The land within the Roosevelt Lake perimeter is Federal land withdrawn by the U.S. Bureau of Reclamation and managed by the U.S. Forest Service. The flycatcher population at Roosevelt Lake, depending on the year, can be the largest population of nesting southwestern willow flycatchers across the subspecies range (approximately 150 territories, plus an unknown number of unmated floating/non-breeding flycatchers and fledglings). Operation of Roosevelt Dam during low water years can yield as much as 506 ha (1,250 ac) of occupied flycatcher habitat within the perimeter of the high water mark. Annually, the total available habitat varies as reservoir levels fluctuate depending on annual precipitation with dry years yielding proportionally more habitat. We anticipated that creation and loss of habitat would occur over the 50 year life of the HCP. Flycatcher habitat at Roosevelt Lake varies depending on how and when the lake recedes as a result of water in-flow and subsequent storage capacity and delivery needs. As the lake recedes, flat-gradient, fine moist soils are exposed which provide seed beds for riparian vegetation. The size of Roosevelt Lake, and therefore the amount and location of flycatcher habitat, can vary greatly due to dam operations, floods, and drought. However, even in the expected high-water years, we determined that some flycatcher habitat would persist at Roosevelt Lake providing a net benefit to the bird. Species covered in this HCP were the southwestern willow flycatcher, bald eagle (*Haliaeetus leucocephalus*), and yellow-billed cuckoo (*Coccyzus americanus*).

The HCP covers Roosevelt Dam operations for 50 years and involves the conservation of a minimum of 607 ha (1,500 ac) of flycatcher habitat off-site, outside of the Roosevelt Management Unit, on the San Pedro, Verde, and/or Gila rivers, and possibly other streams in AZ, and implementation of conservation measures to protect up to an additional 304 ha (750 ac) of flycatcher habitat. Measures in the HCP to protect habitat at Roosevelt Lake include having the Forest Service hire a Forest Service employee (USFS) to patrol and improve protection of flycatcher habitat in the Roosevelt lakebed from adverse activities such as fire ignition from human neglect, improper vehicle use, etc., and to develop habitat at the Rock House Farm Site.

The conclusion provided in our biological opinion, required in order to issue the HCP permit, was based upon the persistence of varying degrees of occupied southwestern willow flycatcher habitat that, at a minimum, could possibly reach the numerical (50 territories) and distribution goals (within Roosevelt Management Unit) established in the Recovery Plan, under full operation of Roosevelt Dam with an HCP. The permittee (ERO 2002) estimated that an average of 121 to 162 ha (300 to 400 ac) of suitable habitat (thus about 60 to 81 ha/150 to 200 ac of occupied habitat) would be present during the life of the permit, which could support 45 to 90 territories. Even in a worse case flood event, 15 to 30 territories are expected to persist. Under more favorable habitat conditions, the area between the existing pool and the high water mark has supported the largest local population of flycatchers throughout the subspecies range (approximately 150 pairs). The basis for the full-time USFS employee is to minimize the effects of on-the-ground actions (trespass livestock, recreation, fire, habitat clearing, development, roads, fencing, boating, gravel collection, off-highway vehicles, etc.), not at the discretion or under the control of SRP. While it is not possible to fully protect these areas with an on-the-ground officer, the HCP provides an additional level of protection that would not otherwise be available to the habitat absent the HCP.

Currently, a collection of properties have been acquired as required by the HCP along the lower San Pedro and Gila River (Middle Gila/San Pedro Management Unit), and a single property along the Verde River (Verde Management Unit). Some of these properties were identified as essential habitat in the critical habitat proposal, but were proposed for exclusion under section 4(b)(2). In their comments on the proposed rule, SRP specifically requested that the mitigation properties identified in the proposal and others they acquired since publication of the proposal, that were part of the proposal, be included in the critical habitat designation. Therefore, due to the discretion of the Secretary under section 4(b)(2) of the Act, and based upon the comments received from SRP, the mitigation properties acquired by SRP are included in the final designation as critical habitat.

(1) Benefits of Inclusion

We believe that there is minimal benefit from designating critical habitat for the southwestern willow flycatcher within the conservation space of Roosevelt Lake, because, as described below, the location is occupied by many southwestern willow flycatchers and therefore, its habitat is already under evaluation under section 7 of the Act, and operations of Roosevelt Dam (resulting in the periodic rise and fall of water across the land at the edges of the lake) is integral to the long-term persistence of flycatcher habitat at Roosevelt Lake. Therefore, while flycatcher habitat will vary in quality and quantity over time due to the different lake levels within the

conservation space of Roosevelt Lake, it will persist.

With respect to operations of Roosevelt Dam, we determined in our jeopardy analysis for our intra-Service section 7 consultation for issuance of the Roosevelt HCP permit that dam operations would not result in jeopardy to the southwestern willow flycatcher. As stated in our proposal, one of the primary conservation values of proposed critical habitat is to sustain existing populations. The threshold for reaching destruction or adverse modification at Roosevelt Lake would likely require a reduction in the capability of the habitat to sustain existing populations. It is likely that actions that would reduce the capability of the habitat to sustain a population would also jeopardize the continued existence of the species. Because of the importance of the conservation space at Roosevelt Lake plays for water storage, there is no reasonable reason to believe that there would be any development or change that would result in this piece of land being unavailable for riparian vegetation. This is because the dam operates in a way that continues moves water out of the reservoir to downstream lakes and canals. Thus, dam operators are continuously in the process of creating conservation space at Roosevelt Lake, and therefore, places for riparian vegetation (*i.e.*, flycatcher habitat) to grow. Constant lake levels, which are not the desired condition at Roosevelt Lake, will not result in the creation of the hundreds of acres of flycatcher habitat that occurred between 1995 and 2004. On the contrary, dynamic lake levels (like Roosevelt Dam is operated), similar to river systems, are important for the creation and maintenance of abundant southwestern willow flycatcher habitat at this location.

The threshold for reaching destruction or adverse modification of critical habitat at Roosevelt Lake would likely require a reduction in the capability of the habitat to sustain existing populations. It is likely that actions that would reduce the capability of the habitat to sustain a population would also jeopardize the continued existence of the species. We concluded in our intra-Service opinion for issuance of Roosevelt Dam HCP permit, that dam operations would sustain populations over time (and similar to all flycatcher locations are subject to disturbances such as flooding and drought and an increase and decrease in populations), and therefore, would not jeopardize the flycatcher. Therefore, the outcome of consultation under section 7 of the Act on Roosevelt Lake Dam operations with critical habitat designated would not likely be materially different compared to the listing of the species alone. Similarly, we concluded in our 4(b)(8) determination in the proposed and final rules that dam operations, like those of Roosevelt Lake, would not result in adverse modification of critical habitat, because normal operations resulted in conditions that allows flycatcher habitat to persist over time.

However, dam operations are not the only possible impact to flycatcher habitat at Roosevelt Lake, once water recedes and uncovers the ground where flycatcher habitat can grow; the Forest Service is the land manager. Livestock grazing and recreation, two activities that occur in and around Roosevelt Lake, have the ability to adversely affect critical habitat. These activities have previously occurred in the dry conservation space of the lake. But since the mid-1990s, the Tonto National Forest has prevented grazing from the lake bottom and fenced habitat to limit the effects of recreation and adjacent trespass cattle. Through the Roosevelt HCP, a Forest Protection Officer has been hired in order to help monitor and regulate unauthorized activities that could affect flycatcher habitat. Therefore, there is existing management by the Forest Service and additional protections through the HCP to protect the development, growth, and maintenance of flycatcher habitat from unauthorized activities.

The draft environmental assessment found that minor changes in livestock grazing or recreation through section 7 consultations, due to a critical habitat designation, may occur in the form of additional discretionary conservation recommendations to reduce impacts to the primary constituent elements. If Roosevelt Lake was designated as critical habitat, there may be some benefit through consultation under the adverse modification standard for actions under the discretion of the Forest Service. But, since the location is currently occupied by breeding flycatchers, dispersing young-of-the year flycatchers, migrating, foraging, and non-breeding flycatchers; habitat is already considered in consultations under section 7 of the Act and current management emphasizes habitat growth and persistence. For these reasons and because formal consultations will likely result in only discretionary conservation recommendations due to existing appropriate management, we believe there is an extremely low probability of mandatory elements (*i.e.*, reasonable and prudent alternatives) arising from formal section 7 consultations that include consideration of designated critical habitat for the southwestern willow flycatcher at Roosevelt Lake.

We believe that there would be little educational and informational benefit gained from including Roosevelt Lake within the designation, because this area was included in the proposed rule as essential habitat, is discussed in this final rule, and has been the focus of flycatcher research and water storage issues since the mid-1990s. Consequently, we believe that the informational benefits are already provided even though this area is not designated as critical habitat. Additionally, the importance of Roosevelt Lake for conservation of the flycatcher, its importance to the Roosevelt Management Unit, and to the population of flycatchers in the state of Arizona has already been realized by managing agencies, including the public, State and local governments, and Federal agencies.

(2) Benefits of Exclusion

A benefit of excluding Roosevelt Lake from critical habitat includes some reduction in administrative costs associated with engaging in the critical habitat portion of section 7 consultations. Administrative costs include time spent in meetings, preparing letters and biological assessments, and in the case of formal consultations, the development of the critical habitat component of a biological opinion. However, because the flycatcher occupies the margins of Roosevelt Lake, consultations are expected to occur regardless of a critical habitat designation, and those costs to perform the additional analysis are not expected to be significant.

The Roosevelt HCP and exclusion from critical habitat can also facilitate other cooperative conservation activities with other similarly situated dam operators or landowners. Continued cooperative relations with SRP and its stakeholders is expected to influence other future partners and lead to greater conservation than would be achieved through multiple site-by-site, project-by-project, section 7 consultations. The benefits of excluding lands within the Roosevelt Lake HCP area from critical habitat designation include recognizing the value of conservation benefits associated with HCP actions; encouraging actions that benefit multiple species; encouraging local participation in development of new HCPs; and facilitating the cooperative activities provided by the Service to landowners, communities, and counties in return for their voluntary adoption of the HCP.

The Roosevelt HCP has and will continue to help generate important status and trend information for flycatcher recovery. In addition to specific flycatcher conservation actions, the development and implementation of this HCP provides regular monitoring of flycatcher habitat, distribution, and abundance over the 50 year permit.

Failure to exclude Roosevelt Lake could be a disincentive for other entities contemplating partnerships as it would be perceived as a way for the Service to impose additional regulatory burdens once conservation strategies have already been agreed to. Private entities are motivated to work with the Service collaboratively to develop voluntary HCPs because of the regulatory certainty provided by an incidental take permit under section 10(a)(1)(B) of the Act with the ''No Surprises'' assurances. This collaboration often provides greater conservation benefits than could be achieved through strictly regulatory approaches, such as critical habitat designation. The conservation benefits resulting from this collaborative approach are built upon a foundation of mutual trust and understanding. It takes considerable time and effort to establish this foundation of mutual trust and understanding which is one reason it often takes several years to develop a successful HCP. Excluding this area from critical habitat would help promote and honor that trust by providing greater certainty for permittees that once appropriate conservation measures have been agreed to and consulted on for the southwestern willow flycatcher that additional consultation will not be necessary.

HCP permittees and stakeholders have submitted comments and spoke during public hearings discussing that they view critical habitat designation at Roosevelt Lake as unwarranted and an unwelcome intrusion to the operation of Roosevelt Dam, and an erosion of the regulatory certainty that is provided by their incidental take permit and the ''No Surprises'' assurances. We received other public comments disapproving of our identification of the conservation space of Roosevelt Lake as essential habitat, believing designation of critical habitat at Roosevelt Lake would limit fishing, camping, water storage, etc. There is a concern by SRP and stakeholders that designation of critical habitat at Roosevelt Lake has the potential to threaten the storage and delivery of water to the greater Phoenix metropolitan area (as described in the Economic Analysis). Should this ever come to pass, the results could be significant, however we do not believe that scenario is reasonably foreseeable (see discussion above). Having applicant's understand the Service's commitment will encourage continued partnerships with these permittees that could result in additional conservation plans or additional lands enrolled in HCPs.

A related benefit of excluding lands within this HCP is the continued ability by the Service to seek new partnerships. Permittees who trust and benefit from the HCP process discuss the benefits with others who may become future HCP participants, such as States, counties, local jurisdictions, conservation organizations, and private landowners. New HCPs would result in implementation of conservation actions that we would be unable to accomplish otherwise. By excluding areas covered by HCPs from critical habitat designation, we preserve these partnerships and promote more effective conservation actions in the future.

Our collaborative relationships with the Roosevelt Lake HCP permittees clearly make a difference in our partnership with the numerous stakeholders involved and influence our ability to form partnerships with others. Concerns over perceived added regulation potentially imposed by critical habitat harms this collaborative relationship by leading to distrust. Our experience has demonstrated that successful completion of one HCP has resulted in the development of other conservation efforts and HCPs with other landowners.

(3) Benefits of Exclusion Outweigh the Benefits of Inclusion

In summary, we find that the benefits of designating critical habitat for the southwestern willow flycatcher at Roosevelt Lake are relatively small in comparison to the benefits of exclusion. We find that including Roosevelt Lake would result in very minimal, if any additional benefits to the southwestern willow flycatcher, as explained above. In making this finding, we have weighed the benefits of including these lands as critical habitat with an operative HCP and management by the Forest Service, and without critical habitat. Excluding Roosevelt Lake would eliminate some additional administrative effort and cost during the consultation process pursuant to section 7 of the Act. Excluding Roosevelt Lake would continue to help foster development of future HCPs and strengthen our relationship with Roosevelt HCP permittees and stakeholders. Roosevelt Dam operations will continue to foster the maintenance, development, and necessary recycling of habitat for the flycatcher in the long-term due to the dynamic nature of water storage and delivery. Forest Service management fosters the presence of flycatcher habitat, and there is virtually no risk of development within the conservation space of Roosevelt Lake. Excluding Roosevelt Lake eliminates regulatory uncertainty associated with the permittees HCP, and any possible risk to water storage and delivery to the greater Phoenix metropolitan area. We have concluded that the benefits of the Roosevelt Dam operations underneath the coverage of the Roosevelt HCP and Forest Service management outweigh those that would result from the designation. We have therefore excluded these lands from the final critical habitat designation pursuant to section 4(b)(2) of the Act.

We also find that the exclusion of these lands will not lead to the extinction of the species, nor hinder its recovery because the operation of Roosevelt Dam, maintenance of the conservation space of the lake, and Forest Service management will ensure the long-term persistence and protection of flycatcher habitat at Roosevelt Lake. We determined in our intra-Service section 7 biological opinion for the issuance of the Roosevelt HCP permit that operations would not result in jeopardy. Our 4(b)(8) determination in this proposal indicated that we did not believe dam operations, like Roosevelt Dam, would result in adverse modification. We determined that while incidental take will occur, and habitat will fluctuate in its abundance and quality, reservoir operations resulting in a dynamic environment were necessary for the long-term persistence of habitat. It was estimated that an average of 121 to 162 ha (300 to 400 ac) of suitable habitat (thus about 60 to 81 ha/150 to 200 ac of occupied habitat) would be present during the life of the permit, which could support 45 to 90 territories. Even in a worse case flood event, 15 to 30 territories are expected to persist. Under more favorable habitat conditions, the area between the existing pool and the high water mark has supported the largest local population of flycatchers throughout the subspecies range (approximately 150 pairs). The best case scenario and average estimated amount of available habitat can far surpasses the amount needed to support the 50 territory numerical goal recommended in the Recovery Plan (USFWS 2002).

*Hoover to Parker, Parker to Southerly International Border, and Middle Colorado Management Units, CA/AZ/NV*

Lower Colorado River Multi-Species Conservation Plan (LCR MSCP)

The LCR MSCP was developed for areas along the lower Colorado River along the borders of AZ, CA, and NV from the conservation space of Lake Mead to Mexico, in the Counties of La Paz, Mohave, and Yuma in AZ; Imperial, Riverside, and San Bernardino Counties in CA, and Clark County in NV. The LCR MSCP primarily covers activities associated with water storage, delivery, diversion, and hydroelectric production. The Record of Decision was signed by the Secretary of Interior on April 2, 2005. Discussions began on the development of this HCP in 1994, but an important catalyst was a 1997 jeopardy biological opinion for the southwestern willow flycatcher issued to the Bureau of Reclamation for lower Colorado River operations (USFWS 1997).

The Federal agencies involved in the LCR MSCP include the Bureau of Reclamation, Bureau of Indian Affairs, National Park Service, Bureau of Land Management, Western Area Power Administration, and U.S. Fish and Wildlife Service. The permittees covered in AZ are: The Arizona Department of Water Resources; Arizona Electric Power Cooperative Inc.; Arizona Game and Fish Department; Arizona Power Authority; Central Arizona Water Conservation District; Cibola Valley Irrigation and Drainage District; City of Bullhead City; City of Lake Havasu City; City of Mesa; City of Somerton; City of Yuma; Electrical District No. 3, Pinal County, Arizona; Golden Shores Water Conservation District; Mohave County Water Authority; Mohave Valley Irrigation and Drainage District; Mohave Water Conservation District, North Gila Valley Irrigation and Drainage District; Salt River Project Agricultural Improvement and Power District; Town of Fredonia; Town of Thatcher; Town of Wickenburg; Unit ''B'' Irrigation and Drainage District; Wellton-Mohawk Irrigation and Drainage District; Yuma County Water Users' Association; Yuma Irrigation District; and Yuma Mesa Irrigation and Drainage District. The permittees covered in CA are: The City of Needles, the Coachella Valley Water District, the Colorado River Board of California, the Imperial Irrigation District, the Los Angeles Department of Water and Power, the Palo Verde Irrigation District, the San Diego County Water Authority, the Southern California Edison Company, the Southern California Public Power Authority, Bard Water District, and The Metropolitan Water District of Southern California. The permittees covered in NV are: The Colorado River Commission of Nevada, the Nevada Department of Wildlife, Basic Water Company, and the Southern Nevada Water Authority.

The Southwestern Willow Flycatcher Management Units primarily encompassed in the LCR MSCP are the Hoover to Parker and Parker to Southerly International Border Management units. Streams in the Middle Colorado (Colorado River/Lake Mead), Virgin (Virgin River), and Pahranagat (Muddy River) Management units in AZ, UT, and NV, are briefly represented where they surround Lake Mead (including the conservation space of Lake Mead which extends up the Colorado River to Separation Canyon). The southwestern willow flycatcher is a key species in the LCR MSCP where the permittees will create and maintain 1,639 ha (4,050 ac) of flycatcher habitat over the 50-year life of the permit (2005 to 2055). Additional research, management, monitoring, and protection of flycatchers and flycatcher habitat will occur from fire, nest predators, and brood parasites. The development of flycatcher habitat will occur specifically throughout the Hoover to Parker and Parker to Southerly International Border Management units, and is expected to meet conservation goals of the flycatcher identified in the Recovery Plan by increasing numbers of territories in appropriate Management Units. Management and tasks associated with the HCP will result in improving and maintaining essential migration stopover habitat, improving meta-population stability, and reducing the risk of catastrophic losses due to fire. In addition to creation and subsequent management of flycatcher habitats, provision is made in the LCR MSCP to provide funds to ensure the maintenance of existing flycatcher habitats within the Management Units. The LCR MSCP will also cover 26 species, including 5 more federally listed animals: Yuma clapper rail (*Rallus longirostris yumanensis*), Desert Tortoise (*Gopherus agassizii*), razorback sucker (*Xyrauchen texanus*), bonytail (*Gila elegans*), humpback chub (*Gila cypha*).

As a result of the development of the LCR MSCP, and in conjunction with (see *Relationship of Critical Habitat to National Wildlife Refuge Management Plans—Exclusions Under Section 4(b)(2) of the Act*, and *Relationship of Critical Habitat to Tribal Management Plans—Exclusions Under Section 4(b)(2) of the Act* sections below) Southwestern Willow Flycatcher Tribal Management Plans and conservation of southwestern willow flycatcher habitat on National Wildlife Refuges (NWR) along the Lower Colorado River, there is significant conservation of existing flycatcher habitat and development of new flycatcher habitat throughout the length of the LCR MSCP planning area (Lake Mead to Mexico). The LCR MSCP and management of NWR and Tribal Lands will result in thousands of acres of restored, protected, and managed flycatcher habitat for nesting, migrating, foraging, territorial, non-breeding, and dispersing birds capable of reaching conservation goals established in the Recovery Plan. As a result of the assurances and protections provided the southwestern willow flycatcher and its habitat, we are excluding the length of the Lower Colorado River from the conservation space of Lake Mead (which extends up to Separation Canyon) downstream to the Southerly International Border from designation as flycatcher critical habitat.

(1) Benefits of Inclusion

We believe that there is minimal benefit from designating critical habitat for the southwestern willow flycatcher along the length of the lower Colorado River from Lake Mead to Mexico, because as described above, the LCR MSCP commits to developing, managing, and protecting thousands of acres of flycatcher habitat. Additionally, over a thousand acres of riparian habitat that can be used by flycatchers will collectively be restored, managed, and maintained on NWRs (Havasu, Cibola, and Imperial) and Tribal Lands (Hualapai, Colorado River, Chemehuevi, Fort Mohave, and Quechan—Fort Yuma) along the lower Colorado River within the area covered by the LCR MSCP. The culmination of these efforts is anticipated to surpass recovery goals recommended in the Recovery Plan; maintain, develop and improve migration, dispersal, sheltering, and foraging habitat; develop metapopulation stability; and protect against catastrophic losses.

Under section 7, critical habitat designation will provide little additional benefit to the southwestern willow flycatcher within the boundaries of the LCR MSCP. The catalyst for the LCR MSCP was largely a result of a jeopardy biological opinion (USFWS 1997) for the southwestern willow flycatcher to the Bureau of Reclamation for its lower Colorado River operations. As a result, the LCR MSCP and its Implementing Agreement are designed to ensure the conservation of the flycatcher within the plan area and

include management measures to protect, restore, enhance, manage, and monitor habitat to benefit the conservation of flycatcher. The adequacy of plan measures to protect the flycatcher and its habitat has undergone thorough evaluation in the section 7 consultations completed prior to approval of the plans, and therefore, the benefit of including these areas to require section 7 consultation for critical habitat is negated.

This HCP involved public participation through public notices and comment periods associated with the NEPA process prior to being approved. Additionally, this HCP is one of the largest HCPs in the country, with an immense list of stakeholders and permittees from CA, AZ, and NV that took about a decade to complete. Therefore, managing agencies, States, counties, cities, and other stakeholders are aware of the importance of the lower Colorado River for the southwestern willow flycatcher. For these reasons, we believe that designation of critical habitat would provide little additional educational benefit the area covered by this approved HCP. Federal actions that may affect the flycatcher will still require consultation under section 7 of the Act.

With respect to lower Colorado River operations covered under the LCR MSCP, we determined in our jeopardy analysis for our intra-Service section 7 consultation for issuance of the HCP permit that operations with the included protections, mitigation and management would not result in jeopardy to the southwestern willow flycatcher. As stated in our proposal, one of the primary conservation values of proposed critical habitat is to sustain existing populations. The threshold for reaching destruction or adverse modification along the Lower Colorado River would likely require a reduction in the capability of the habitat to sustain existing populations. It is likely that actions that would reduce the capability of the habitat to sustain a population would also jeopardize the continued existence of the species. Because of the development, restoration, and protection of riparian habitat attributed to the LCR MSCP, NWRs, and Tribes, flycatcher habitat will be more abundant, more widespread, and of higher quality than conditions today and the recent past.

Covered activities under the LCR MSCP are not the only possible impacts to flycatcher habitat along the Lower Colorado River. There are continued projects developed, carried out, funded, and permitted by Federal agencies such as Bureau of Reclamation and Bureau of Land Management that are not covered by the LCR MSCP. Fire management, restoration, recreation, and other activities have the ability to adversely affect the flycatcher and critical habitat. The draft environmental assessment for this proposed rule found that minor changes in restoration, fire management, and recreation could occur as result of a critical habitat designation in the form of additional discretionary conservation recommendations to reduce impacts to the primary constituent elements. Therefore, if the lower Colorado River was designated as critical habitat, there may be some benefit through consultation under the adverse modification standard for actions not covered by the LCR MSCP. But, since the proposed river segments are occupied by breeding flycatchers, dispersing young-of-the year flycatchers, migrating, foraging, and non-breeding flycatchers; habitat is already considered in consultations under section 7 of the Act. For these reasons and because formal consultations will likely result in only discretionary conservation recommendations due to existing restoration and management efforts along the length of the Lower Colorado River due to the LCR MSCP and restoration and management occurring on NWRs and Tribal Lands, we believe there is a low probability of mandatory elements (*i.e.*, reasonable and prudent alternatives) arising from formal section 7 consultations that include consideration of designated critical habitat for the southwestern willow flycatcher along the Lower Colorado River from Lake Mead to Mexico.

(2) Benefits of Exclusion

A benefit of excluding the lower Colorado River from critical habitat includes some reduction in administrative costs associated with engaging in the critical habitat portion of section 7 consultations. Administrative costs include time spent in meetings, preparing letters and biological assessments, and in the case of formal consultations, the development of the critical habitat component of a biological opinion. However, because the flycatcher occupies the lower Colorado River for a variety of life history needs, consultations are expected to occur regardless of a critical habitat designation, and those costs to perform the additional analysis are not expected to be significant.

The exclusion of the lower Colorado River from critical habitat as a result of the LCR MSCP can help facilitate other cooperative conservation activities with other similarly situated dam operators or landowners. Continued cooperative relations with the three states and myriad of stakeholders is expected to influence other future partners and lead to greater conservation than would be achieved through multiple site-by-site, project-by-project efforts, and associated section 7 consultations. The benefits of excluding lands within the LCR MSCP plan area from critical habitat designation include recognizing the value of conservation benefits associated with HCP actions; encouraging actions that benefit multiple species; encouraging local participation in development of new HCPs; and facilitating the cooperative activities provided by the Service to landowners, communities, and counties in return for their voluntary adoption of the HCP.

The LCR MSCP will also help generate important status and trend information for flycatcher recovery. In addition to specific flycatcher conservation actions, the development and implementation of this HCP provides regular monitoring of flycatcher habitat, distribution, and abundance over the 50-year permit.

Failure to exclude the lower Colorado River covered under the LCR MSCP could be a disincentive for other entities contemplating partnerships as it would be perceived as a way for the Service to impose additional regulatory burdens once conservation strategies have already been agreed to. Private entities are motivated to work with the Service collaboratively to develop voluntary HCPs because of the regulatory certainty provided by an incidental take permit under section 10(a)(1)(B) of the Act with the No Surprises Assurances. This collaboration often provides greater conservation benefits than could be achieved through strictly regulatory approaches, such as critical habitat designation. The conservation benefits resulting from this collaborative approach are built upon a foundation of mutual trust and understanding. It has taken considerable time and effort to establish this foundation of mutual trust and understanding which is one reason it often takes several years to develop a successful HCP. Excluding this area from critical habitat would help promote and honor that trust by providing greater certainty for permittees that once appropriate conservation measures have been agreed to and consulted on for listed and sensitive species additional consultation will not be necessary.

HCP permittees and stakeholders submitted comments and spoke during public hearings discussing that they

view critical habitat designation along the lower Colorado River as unwarranted and an unwelcome intrusion to river operations, and an erosion of the regulatory certainty that is provided by their incidental take permit and the No Surprises assurances. There is a concern by agencies and stakeholders that designation of critical habitat along the lower Colorado River has the potential to threaten the storage, delivery, and diversion of water and hydroelectric production for AZ, CA, and NV. Should this ever come to pass, the economic results would be the most significant throughout the bird's range (see Economic Analysis), however we do not believe this scenario is reasonably foreseeable (see discussion above). Having applicants understand the Service's commitment will encourage continued partnerships with these permittees that could result in additional conservation plans or additional lands enrolled in HCPs.

Our collaborative relationships with the LCR MSCP permittees clearly make a difference in our partnership with the numerous stakeholders involved and influence our ability to form partnerships with others. Concerns over perceived added regulation potentially imposed by critical habitat harms this collaborative relationship by leading to distrust. Our experience has demonstrated that successful completion of one HCP has resulted in the development of other conservation efforts and HCPs with other landowners.

The benefits of excluding this HCP from critical habitat designation include relieving Federal agencies, State agencies, landowners, communities, and counties of any additional regulatory burden that might be imposed by critical habitat. This HCP took many years to develop and, upon completion, became a river long conservation plan that is consistent with the recovery objectives for the flycatcher within the plan area. Additionally, this HCP provides conservation benefits to 20 unlisted sensitive species. Imposing an additional regulatory review after the HCP is completed solely as a result of the designation of critical habitat may undermine conservation efforts and partnerships in many areas. In fact, it could result in the loss of species' benefits if future participants abandon the voluntary HCP process. Designation of critical habitat along the lower Colorado River could be viewed as a disincentive to those entities currently developing HCPs or contemplating them in the future. The benefit of excluding the lower Colorado River within the approved LCR MSCP from critical habitat outweighs the benefits of its inclusion.

(3) Benefits of Exclusion Outweigh the Benefits of Inclusion

In summary, we find that the benefits of designating critical habitat for the southwestern willow flycatcher along the Lower Colorado River (Lake Mead to Mexico) are relatively small in comparison to the benefits of exclusion. We find that including the Lower Colorado River would result in very minimal, if any additional benefits to the southwestern willow flycatcher, as explained above. In making this finding, we have weighed the benefits of including these lands as critical habitat with an operative HCP and management by NWRs and Tribal Lands, and without critical habitat. Excluding the Lower Colorado River would eliminate some additional administrative effort and cost during the consultation process pursuant to section 7 of the Act. Excluding the Lower Colorado River would continue to help foster development of future HCPs and strengthen our relationship with AZ, CA, and NV permittees and stakeholders. Excluding the Lower Colorado River eliminates regulatory uncertainty associated with permittees and stakeholders. Excluding the lower Colorado River eliminates any possible risk to water storage, delivery, diversion and hydroelectric production to AZ, NV, and CA, and therefore significant potential economic costs due to a critical habitat designation. We have therefore concluded that the benefits to the flycatcher and its habitat as a result of the restoration, maintenance, and management activities attributed to the LCR MSCP, NWR and Tribes outweigh those that would result from the addition of a critical habitat designation. We have therefore excluded these lands from the final critical habitat designation pursuant to section 4(b)(2) of the Act.

We also find that the exclusion of the lower Colorado River from Lake Mead to Mexico (Southerly International Border) will not lead to the extinction of the subspecies, nor hinder its recovery, because restoration, maintenance, and management of southwestern willow flycatcher habitat due to the LCR MSCP, and by NWRs and Tribes will ensure the long-term persistence and protection of flycatcher habitat along the lower Colorado River. The LCR MSCP provides for a greater conservation benefit to the flycatcher than consultations pursuant to section 7 of the Act because this HCP assures the long-term protection and management of a flycatcher habitat, and funding for this management. Such assurances are typically not provided by consultations under section 7 of the Act that, in contrast to HCPs, often do not commit the project proponent to long-term special management or protections. Thus, a consultation typically does not accord the lands it covers the extensive benefits an HCP provides. We determined in our intra-Service section 7 biological opinion for the issuance of the LCR MSCP permit that the lower Colorado River operations would not result in jeopardy. The southwestern willow flycatcher is a key species in the LCR MSCP where the permittees will create and maintain 1,639 ha (4,050 ac) of flycatcher habitat over the 50-year life of the permit (2005 to 2055). As a result of appropriate placement of flycatcher habitat developed through the LCR MSCP along with the restoration, management and maintenance of flycatcher habitat on NWRs and Tribes, we expect to meet and possibly surpass the 50 territory goal for the Hoover to Parker Management Unit, and 150 territory goal for the Parker to Southerly International Boundary Management Unit. We are therefore excluding the area covered under the LCR MSCP (Lake Mead to Southerly International Border) from critical habitat designation, because under section 4(b)(2) of the Act, we find that the benefits of exclusion exceed the benefits of inclusion, and exclusion would not result in extinction of the subspecies.

**Relationship of Critical Habitat to State and Federal Wildlife Conservation Areas—Exclusions Under Section 4(b)(2) of the Act)**

*State Wildlife Areas (SWA)*

*Pahranagat Management Unit, NV*

Key Pittman State Wildlife Area

The Key Pittman Wildlife Area is located in Lincoln County, NV, and contains a wide diversity of habitats within its 539 ha (1,332 ac). The Pahranagat River travels through portion of the Key Pittman Wildlife Area, including Nesbitt Lake, an impounded area along the river. The State of Nevada's Department of Wildlife owns and manages this property. The Nevada Fish and Game Commission purchased portions of the area in 1962 and 1966, primarily for waterfowl hunting, and as a secondary goal, habitat for other wetland species. A draft management plan was completed in November 2003 and provides the framework for the next 10 years. The plan went through stakeholder meetings and public review.

We determined that the entire stretch of the Pahranagat River, through this

Wildlife Area, is essential to the conservation of the southwestern willow flycatcher. A total of 4 to 10 southwestern willow flycatcher territories have been detected from 1999 to 2002, 9 were detected in 2002. The State of Nevada fences the known flycatcher habitat in order to protect it from livestock grazing, manages water to maintain habitat, monitors the status of flycatchers, and is actively planting riparian plants to improve the distribution of riparian habitat. While the plan has not been finalized it is being implemented. In addition, the area has been under management for wildlife since the 1960s with conservation efforts targeted towards waterfowl, wetland species, and specifically the southwestern willow flycatcher. As a result of the assurances and protections provided the southwestern willow flycatcher and its habitat on the Key Pittman State Wildlife Area, we are excluding this area from critical habitat. Our 4(b)(2) analysis is provided below.

*Pahranagat and Virgin Management Units, NV*

Overton State Wildlife Area

The Overton Wildlife Area is located in Clark County, NV, and contains a wide diversity of habitats within its 7,146 ha (17,657 ac). The Muddy River and Virgin River travel through a small portion of the State Wildlife Management Area near Lake Mead. The State of Nevada's Department of Wildlife owns and manages this property. A management plan was completed in December 2000 and provides the framework for the next 10 years. The plan went through stakeholder meetings and public review.

We determined that the stretches of the Muddy and Virgin rivers through the boundaries of the Overton Wildlife Area are essential to the conservation of the southwestern willow flycatcher. A total of one to two southwestern willow flycatcher territories have been detected within the Overton Wildlife Area from 1997 to 2002. Riparian habitat is being enhanced and protected for neotropical migratory birds including southwestern willow flycatchers. A minimum of a quarter-acre willow patch and varying amount of cottonwood, mesquite, and hackberry will be planted annually in locations able to support native riparian trees, and water is being managed to improve and maintain riparian habitat. Riparian habitat is protected from livestock grazing, because no grazing occurs in the Wildlife Area. This Wildlife Area was developed for wetland habitat and waterfowl activities (including hunting). As a result, flycatcher-related riparian habitat maintenance activities described in the management plan are consistent with the management goals of the Wildlife Area. As a result of the assurances and protections provided the southwestern willow flycatcher and its habitat on the Overton Wildlife Area, we are excluding this area from critical habitat. Our 4(b)(2) analysis is provided below.

*Bill Williams Management Unit, AZ*

Alamo Lake State Wildlife Area

The Alamo State Wildlife Area (AWA) in La Paz and Mohave counties was created under provisions of the Fish and Wildlife Coordination Act (16 U.S.C. 661–66c), Public Land Order 492 (PLO 492), and the General Plan agreement between the Secretary of the Army, Secretary of the Interior, and Director of AZ Game and Fish, signed January 19, 1968 (Arizona Game and Fish Department-Arizona State Parks 1997). A lease agreement between the Arizona Game and Fish Department Commission and the U.S. Army Corps of Engineers was signed in 1970 establishing the AWA for fish and wildlife conservation and management purposes (Arizona Game and Fish Department—Arizona State Parks 1997). The present lease area encompasses approximately 9,140 ha (22,586 ac). Public input was solicited and addressed in development of the AWA Management Plan through scoping and the NEPA (Arizona Game and Fish Department—Arizona State Parks 1997).

The AWA Management Plan describes the unique riparian, wetland, and aquatic aspects of the area for a variety of species, specifically identifying the southwestern willow flycatcher. As a result, two of the specific resources that management emphasizes are directed toward the habitat needs of the flycatcher: (1) Maintain and enhance aquatic and riparian habitats to benefit wildlife; and (2) restore, manage, and enhance habitats for wildlife of special concern. In order to accomplish this goal, no cattle grazing is allowed in the riparian areas on the upper end of Alamo Lake and the lower portions of the Santa Maria and Big Sandy Rivers. Also, recreation (i.e. off-road vehicles) is identified as important management objective. The number of territories at Alamo Lake within the AWA has varied annually between 4 and 32 territories from 1994 to 2003 (USGS 2004).

We determined that the segments of the Big Sandy, Santa Maria, and Bill Williams Rivers at the upper end of Alamo Lake within the AWA are essential to the conservation of the southwestern willow flycatcher. The AWA has been in existence for over 30 years under the management of Arizona Game and Fish Department. The AWA was developed for wildlife conservation. The current AWA Management Plan specifically emphasizes the importance of riparian habitat management for southwestern willow flycatchers. Management has fostered an increasing population, with the number of territories exceeding 20 in all but one season since 1999. The AWAs goals are consistent with the habitat needs of the flycatcher. As a result of the assurances and protections provided the southwestern willow flycatcher and its habitat on the Alamo Wildlife Area, we are excluding this area from critical habitat.

(1) Benefits of Inclusion

We believe that there is minimal benefit from designating critical habitat for the southwestern willow flycatcher on these State Wildlife Areas because, as explained in detail above, these lands are already managed for the conservation of wildlife, including the southwestern willow flycatcher.

Inclusion of lands as critical habitat can provide a benefit due to the improved educational aspect it provides land managers/owners. However, in this case, due to the conservation aspect of these lands specifically for wildlife and management there is an educational focus already being provided for southwestern willow flycatchers. In addition, these areas were identified as essential habitat for the southwestern willow flycatcher in our proposed rule. A critical habitat designation would not likely result in improved educational benefits beyond what is being provided.

As stated in the draft environmental assessment, the primary conservation value of the proposed critical habitat segments is to sustain existing populations. The threshold for reaching destruction or adverse modification on SWAs would likely require a reduction in the capability of the habitat to sustain existing populations. It is likely that actions that would reduce the capability of the habitat to sustain a population would also jeopardize the continued existence of the species. Consequently, the outcome of the section 7 consultations on SWAs may not be materially different with designation of critical habitat compared to the listing of the species alone. In addition, given that these lands are managed for the conservation of wildlife, and specifically have established measures for southwestern willow flycatchers, it is highly unlikely that the SWAs would consider undertaking any projects that

would result in a long-term reduction of the capability of the habitat to sustain existing populations. To the contrary, activities occurring within SWAs are specifically for the benefit of wildlife, with management being conducted for the restoration, improvement, and protection of flycatcher habitat.

As described above, all of SWA lands proposed for critical habitat may have additional conservation value above sustaining existing populations, because they are managing these lands to improve, protect, and expand upon the amount of nesting habitat that would provide for growth of existing populations. Expansion of existing populations in these areas would be an element of recovering the southwestern willow flycatcher. Accordingly, through section 7 consultations that may occur, some benefit may incur through the adverse modification standard and whether or not the activity results in a reduction in the suitability of the habitat to support expansion of existing populations. Therefore, because formal consultations will likely result in only discretionary conservation recommendations on these SWA lands, we believe there is an extremely low probability of mandatory elements (*i.e.*, reasonable and prudent alternatives) arising from formal section 7 consultations that include consideration of designated southwestern willow flycatcher critical habitat.

The environmental assessment found that minor changes through section 7 consultation may occur in the form of additional discretionary conservation recommendations to reduce impacts to the primary constituent elements. For activities that SWAs are anticipated to engage in, those are expected to primarily be projects focused on habitat restoration, protection, and fire management. No formal consultation for habitat restoration has occurred on SWAs. Both restoration and fire management activities were anticipated in the environmental assessment to possibly have short-term adverse impacts to PCEs, but long-term beneficial effects from protections and improvement of habitat quality, quantity, and persistence. However, as discussed above, consultations on these activities would be similar to existing conditions, where consultations already address potential affects to the southwestern willow flycatcher because these river segments are occupied by nesting and migrating southwestern willow flycatchers. The outcome of the section 7 consultations on these SWAs may not be materially different with designation of critical habitat compared to the listing of the species alone due to the threshold for reaching destruction or adverse modification on proposed critical habitat. Moreover, we note that while additional conservation recommendations may result for projects of this nature, they would be discretionary on the part of the Federal agency.

(2) Benefits of Exclusion

The benefits of excluding SWAs include a reduction in administrative costs associated with engaging in section 7 consultations for critical habitat. Administrative costs include additional time spent in meetings and preparing letters, and in the case of biological assessments and informal and formal consultations, the development of those portions of these documents that specifically address the critical habitat designation. SWA and FWS staff can, more appropriately, use these limited funds toward continuing to manage and improve SWA lands for their stated purpose, wildlife conservation (and southwestern willow flycatcher conservation). In the future, SWAs will likely engage in low effort informal section 7 consultations periodically, and less frequently formal consultations, to address impacts of activities on the southwestern willow flycatcher (primarily those associated with habitat restoration, protection, and fire management). Potential project modifications are likely to be minimal, given the beneficial nature of the SWA activities and projects.

(3) Benefits of Exclusion Outweigh Benefits of Inclusion

In summary, we believe that the benefits of excluding these SWAs from the designation of critical habitat for the southwestern willow flycatcher outweigh the benefits of including them in critical habitat. We find that including these SWAs would result in very minimal, if any additional benefits to the southwestern willow flycatcher, as explained above. Because these areas are being managed by SWA staff familiar with wildlife-related issues, there is no reason to believe that the designation would result in an increased education benefit to land managers. Including SWAs in the designation could require some additional administrative effort and cost during the section 7 consultation process. Although the additional effort to consider and analyze the affects of various projects on critical habitat may not be substantial, however, it would require the SWA to use limited additional resources that may otherwise be used towards beneficial projects for wildlife (and the southwestern willow flycatcher).

We also find that the exclusion of these SWAs will not lead to the extinction of the southwestern willow flycatcher, nor hinder its recovery because these lands are specifically managed for the protection of wildlife and there is an emphasis at each SWA to protect and enhance habitat specifically for the southwestern willow flycatcher.

**Federal Wildlife Conservation Areas**

*Kern Management Unit, CA*

Sprague Ranch

Section 4(b)(2) of the Act requires us to consider other relevant impacts, in addition to economic impacts, of designating critical habitat. The Sprague Ranch included in the Kern Management Unit warrants exclusion from the final designation of critical habitat under section 4(b)(2) of the Act because we have determined that the benefits of excluding Sprague Ranch from southwestern willow flycatcher critical habitat designation will outweigh the benefits of including it in the final designation based on the long-term protections afforded for southwestern willow flycatcher habitat. The following represents our rationale for excluding the Sprague Ranch from the final designated critical habitat for the southwestern willow flycatcher in the Kern Management Unit.

The Sprague Ranch is an approximately 1,003 ha (2,479 ac) parcel which includes approximately 395 ha (975 ac) of floodplain located along the south fork of the Kern River. The Sprague Ranch was purchased by the U.S. Army Corps of Engineers (Corps) as a result of biological opinions for the long-term operation of Lake Isabella Dam and Reservoir (Service File Nos. 1–1–96–F–27; 1–1–99–F–216; and 1–1–05–F–0067) specifically to provide habitat and conservation for the southwestern willow flycatcher. During the periods of time flycatcher habitat is not available as a result of short-term inundation from Isabella Dam operations, habitat at the Sprague Ranch is expected to provide habitat for the flycatcher. The dominant vegetation in the Kern Management Unit is mature willows (*Salix* sp.) and Fremont cottonwood. Other plant communities of the Kern Management Unit include open water, wet meadow, and riparian uplands.

As a result of the expertise of the National Audubon Society (Audubon) and the California Department of Fish and Game (CDFG) in management of flycatcher habitat on adjacent and

nearby properties along the Kern River, management of the Sprague Ranch is a joint venture between these two parties and the Corps. The Sprague Ranch is located immediately north and adjacent to the Kern River Preserve (KRP), which is owned and operated by Audubon, and shares a common border with the KRP of over 4.8 km (3 mi). The CDFG manages the Canebrake Preserve located upstream of the critical habitat designation.

The southwestern willow flycatcher occurs throughout the Kern Management Unit, which includes portions of the Sprague Ranch. The Sprague Ranch contains existing riparian forest that can support and maintain nesting territories and migrating and dispersing southwestern willow flycatcher. But other portions of the Ranch are believed to require restoration and management in order become nesting flycatcher habitat. Activities such as cowbird trapping, exotic vegetation control, and native tree plantings are other management activities expected to occur. The Ranch is currently being managed in accordance with the terms and conditions of the biological opinions (cited above) specifically for the benefit of the southwestern willow flycatcher.

(1) Benefits of Inclusion

We believe that there is minimal benefit from designating critical habitat for the southwestern willow flycatcher within the Sprague Ranch because, as explained above, these lands are already managed for the conservation of flycatcher.

As stated in the environmental assessment, the primary conservation value of the proposed critical habitat segments is to sustain existing populations. The threshold for reaching destruction or adverse modification on the Sprague Ranch property would likely require a reduction in the capability of the habitat to sustain existing populations. Given that these lands are managed specifically for the benefit of the flycatcher, it is highly unlikely that projects would be considered that would result in a depreciable diminishment or long-term reduction of the capability of the habitat to sustain existing populations. To the contrary, activities occurring on these lands will provide benefits to the flycatcher by restoring, improving, and protecting its habitat.

As described above, the Sprague Ranch may have additional conservation value above sustaining existing populations, because it is being managed to not only maintain existing habitat, but also to improve, protect, and possibly expand upon the amount of nesting habitat that would provide for growth of existing populations. Expansion of existing populations in these areas would be an element of recovering the southwestern willow flycatcher. Accordingly, and as further discussed above in the ''General Principles of Section 7 Consultations Used in the 4(b)(2) Balancing Process'' section, through section 7 consultations that may occur, some benefit may incur through the adverse modification standard and whether or not a proposed activity results in a reduction in the suitability of the habitat to support expansion of existing populations. However, because formal consultations will likely result in only discretionary conservation recommendations (*i.e.*, adverse modification threshold is not likely to be reached), we believe there is an extremely low probability of mandatory elements (*i.e.*, reasonable and prudent alternatives) arising from formal section 7 consultations that include consideration of designated southwestern willow flycatcher critical habitat. As mentioned above, this property was purchased specifically for the southwestern willow flycatcher, therefore, we do not believe it is likely that actions will be proposed that would be counter to the purpose of this habitat and result in adverse modification, using a conservation standard based on the Ninth Circuit Court's decision in *Gifford Pinchot.*

We believe the conservation measures for the flycatcher that are occurring or will be used in the future on the Sprague Ranch (*i.e.*, demographic surveys, cowbird trapping, non-native vegetation removal, livestock exclusion, hydrologic restoration, planting of native vegetation, monitoring, and reporting) provide as much, and possibly more benefit than would be achieved through section 7 consultations involving consideration of critical habitat. This is because management that is occurring or that is planning to occur will be the same activities which would be implemented in order to maintain or restore flycatcher habitat.

As discussed in the ''Educational Benefits of Critical Habitat'' section above, we believe that there would be little additional informational benefit gained from including these portions of the Sprague Ranch within the designation because this area was included in the proposed rule as having essential flycatcher habitat. Further, the Kern River in this area was previously designated as critical habitat, numerous public meetings and hearings have occurred in Lake Isabella concerning the flycatcher and the designation of its critical habitat, and the population of flycatchers along the Kern River is one of the most studied throughout the subspecies range due to its proximity to the Kern River Reserve and an on-going research and monitoring project for the flycatcher. Consequently, we believe that the informational benefits that could be provided through a designation of critical habitat in this area are already provided because of the rationale mentioned above and the fact that this property was purchased specifically for the conservation of the southwestern willow flycatcher. Additionally, since this area is already being jointly managed by Federal, State, and private entities for the benefit of the flycatcher, its importance to flycatcher conservation is already well established.

(2) Benefits of Exclusion

The southwestern willow flycatcher occurs on public and private lands throughout the Kern Management Unit. Proactive voluntary conservation efforts by private or non-Federal entities are necessary to prevent the extinction and promote the recovery of the southwestern willow flycatcher in the Kern Management Unit.

We have determined that the southwestern willow flycatcher using habitat located within properties covered by management plans or conservation strategies that protect or enhance the conservation of the subspecies will benefit substantially from voluntary landowner management actions due to an enhancement and creation of riparian and wetland habitat and a reduction in risk of loss of riparian habitat. The conservation benefits of critical habitat are primarily regulatory or prohibitive in nature. Where consistent with the discretion provided by the Act, the Service believes it is necessary to implement policies that provide positive incentives to private landowners to voluntarily conserve natural resources and that remove or reduce disincentives to conservation (Wilcove *et al.* 1996). Thus, we believe it is essential for the recovery of the southwestern willow flycatcher to build on continued conservation activities such as these with proven partners, and to provide positive incentives for other private landowners who might be considering implementing voluntary conservation activities but have concerns about incurring incidental regulatory or economic impacts.

The Sprague Ranch is jointly managed by the Corps, CDFG, and Audubon in accordance with the terms and conditions of the Biological Opinions

which require actions for the conservation of flycatchers, including: demographic surveys, cowbird trapping, non-native vegetation removal, livestock exclusion, hydrologic restoration, planting of native vegetation, noxious weed control activities, flood irrigating low lying areas, upgrading of fencing, upgrading irrigation systems, monitoring, and reporting. These measures will assist in restoration and conservation of southwestern willow flycatcher habitat. Two habitat assessments have been performed on the property which concluded that approximately 168 ha (414 ac) of land are currently available as potential breeding habitat through restoration and management, and another approximately 227 ha (561 ac) were identified as potentially restorable to support a mosaic of habitat that could be used by southwestern willow flycatchers during post-breeding dispersal and migration. By using the available water supply and distribution system, modifying or eliminating current grazing practices, removing invasive non-native plant species, and planting riparian vegetation, the Sprague Ranch has the potential for restoration of approximately 395 ha (975 ac) into a mosaic of habitat similar to the KRP and the South Fork Wildlife Area (SFWA). In addition, the water supply and distribution system of the Sprague Ranch has a beneficial effect on the hydrology that supports the riparian habitats within the KRP and the SFWA.

Therefore, while the Sprague Ranch possesses habitat for the flycatcher, future management of flycatcher habitat is needed in order to restore this property to its full potential for the bird. The implementation of these actions or others for the flycatcher may require further section 7 consultation between the Corps and the Service. As a result, there would be an additional use of time and money by the Corps and the Service, or possibly our non-Federal partners (Audubon and CDFG for the Corps) to develop sections of biological assessments and analyses in biological opinions specific to a critical habitat designation. These costs, added to already limited funds for the Corps for wildlife habitat restoration and maintenance, would be an additional time and cost burden above that which would be required for section 7 consultations without critical habitat. It could also cause delays to implementing beneficial actions for the flycatcher. If due to those limited budgets, the cost of developing these assessments are passed to our non-Federal partners, then this could be an even greater burden due to the more limited funding and personnel of Audubon and the State. The result could, in the most extreme cases, prevent or severely delay implementation of needed management actions. The use of time and effort on evaluation of projects on critical habitat could take away time, money, and effort by our non-Federal partners that could not only be used for implementing beneficial flycatcher management on the Sprague Ranch, but it could extend to other properties they own along the Kern River important to the flycatcher. Therefore, we believe there would be a benefit to exclusion of Sprague Ranch which could be of greater significance if passed on to our non-Federal partners if consultation was needed in order to implement beneficial projects for the flycatcher.

(3) The Benefits of Exclusion Outweigh the Benefits of Inclusion

Based on the above considerations we have determined that the benefits of excluding the Sprague Ranch from critical habitat in the Kern Management Unit outweigh the benefits of including it as critical habitat for the southwestern willow flycatcher.

The Sprague Ranch was purchased specifically for the southwestern willow flycatcher and is jointly managed by the Corps, CDFG, and Audubon in accordance with the terms and conditions of the Biological Opinions. Therefore, the strategy of the managing partners is to implement conservation and management measures to achieve conservation goals for the southwestern willow flycatcher. There are little to no additional educational or regulatory benefits of including these lands as critical habitat. The Kern River is well known by the public and managing agencies for its value and importance to the southwestern willow flycatcher. Likewise, there will be little additional Federal regulatory benefit to the species because (a) there is a low likelihood that the Sprague Ranch will be negatively affected to any significant degree by Federal activities that were not consulted on in the existing Biological Opinions pursuant to section 7 consultation requirements, and (b) the Sprague Ranch is being managed in accordance with the terms and conditions of the Biological Opinions and we believe that based on ongoing management activities there would be no additional requirements pursuant to a consultation that addresses critical habitat. We believe there could be a small additional administrative cost as a result of designation of critical habitat to the Service, and a cost that could be more significant to the Corps and potentially non-Federal partners. If the Corps administrative costs are passed on to our non-Federal partners to conduct assessments and analyses, this could delay, or in worse case scenario prevent important management from being implemented on the Sprague Ranch or other properties managed for riparian values along the Kern River.

We believe that exclusion of these lands will not result in the extinction of the subspecies because the flycatcher already occupies this segment of the Kern River, including the Sprague Ranch. Actions which might adversely affect the subspecies are expected to have a Federal nexus, and would thus undergo a section 7 consultation with the Service. The jeopardy standard of section 7 and routine implementation of habitat preservation through the section 7 process provide assurance that the species will not go extinct. In addition, the species is protected from take under section 9 of the Act. The exclusion leaves these protections unchanged from those that would exist if the excluded areas were designated as critical habitat.

Critical habitat is being designated for the subspecies in other areas that will be accorded the protection from adverse modification by Federal actions using the conservation standard based on the Ninth Circuit decision in *Gifford Pinchot.* Additionally, the subspecies occurs on lands protected and managed either explicitly for the subspecies, or indirectly through more general objectives to protect natural habitat values. This provides protection from extinction while conservation measures are being implemented. The subspecies also occurs on lands managed to protect and enhance wetland values under the Wetlands Reserve Program of the NRCS.

In conclusion, we find that the exclusion of critical habitat on the Sprague Ranch would most likely have a net positive conservation effect on the recovery and conservation of the southwestern willow flycatcher when compared to the positive conservation effects of a critical habitat designation. As described above, the overall benefits to these species of a critical habitat designation for these properties are relatively small. In contrast, we believe that this exclusion will enhance our existing partnership with the Corps, CDFG, and Audubon, and it will set a positive example and could provide positive incentives to other non-Federal landowners who may be considering implementing voluntary conservation activities on their lands. We conclude there is a higher likelihood of beneficial conservation activities occurring in these and other areas for the flycatcher

without designated critical habitat than there would be with designated critical habitat on the Sprague Ranch.

South Fork Kern River Wildlife Area

Section 4(b)(2) of the Act requires us to consider other relevant impacts, in addition to economic impacts, of designating critical habitat. The South Fork Wildlife Area (SFWA) in the Kern Management Unit warrants exclusion from the final designation of critical habitat under Section 4(b)(2) of the Act because we have determined that the benefits of excluding the SFWA from southwestern willow flycatcher critical habitat designation will outweigh the benefits of including it in the final designation based on the special management considerations and protections afforded for southwestern willow flycatcher habitat. The SFWA is an approximately 514 ha (1,270 ac) parcel of mature willow-cottonwood riparian forest located along the south fork of the Kern River, west of historic Patterson Lane, including a portion of upper Lake Isabella. The SFWA is jointly managed by the Corps and the U.S. Forest Service (Forest Service). Isabella Dam and southwestern willow flycatcher habitat in the SFWA is managed as a result of long-term biological opinions for Corps operation of Lake Isabella Dam and Reservoir (Service File Nos. 1–1–96–F–27; 1–1–96–F–150; 1–1–99–F–216; and 1–1–05–F–0067) and on-the-ground management by the Forest Service. These opinions resulted in the long-term management of Lake Isabella Dam that maintains the dynamic processes to establish flycatcher habitat over the long-term and resulted in the acquisition of the Sprague Ranch (immediately upstream of the SFWA) to compensate for short-term losses in habitat, and management of SFWA for southwestern willow flycatchers. The following represents our rationale for excluding the SFWA from the final designated critical habitat for the southwestern willow flycatcher in the Kern Management Unit.

The management of Lake Isabella Dam is similar to other reservoirs (*i.e.*, Roosevelt, Horseshoe, Mead) that develop nesting southwestern willow flycatcher habitat. As a result of fluctuating lake elevations, the broad floodplain of the upper portion of the lake bottom is periodically covered in water, which once the water recedes, provides conditions for the germination and development of large patches of riparian habitat for the flycatcher. Periodic inundation is subsequently needed in order to prevent the drying and loss of habitat so that habitat required by nesting flycatcher can regenerate and persist over the long-term.

Lake Isabella Dam and Reservoir operations that periodically inundate the SFWA are managed by the Corps in accordance with the terms and conditions of the Biological Opinions which require actions for the conservation of flycatchers, including: Long-term studies of flycatcher habitat and demographics; implementation and monitoring of a cowbird trapping program; a nest moving protocol to prevent inundation of nests during high water events; measures to control water craft in coordination with the Forest Service; and the acquisition of 465 ha (1,150 ac) of land to compensate for incidental take resulting from the periodic inundation of the SFWA. To date, the Corps has acquired 415 ha (1,025 ac) of land to satisfy the conditions of the Biological Opinions. In the most recent amendment to the Biological Opinions, the Corps and the Service have committed to work together on acquiring the last 51 ha (125 ac) within five years of the date of the amendment (Service File No. 1–1–05–F–0067). Funding for the implementation of these measures is provided by the Corps in accordance with terms and conditions of the Biological Opinions.

The SFWA is managed by the Forest Service within Lake Isabella (after the water recedes) and along the Kern River immediately upstream. Through informal consultation with the Forest Service, measures for the conservation of flycatchers have been implemented, including: restricting the speed of water craft to 8 km per hour (5 mi per hour) within 30.5 m (100 ft) of the SFWA; prohibition of overnight camping, motorized vehicles, and campfires in the South Fork Wildlife Area. The SFWA is fenced, and the fencing is maintained to enforce the exclusion of unauthorized uses. Grazing is also excluded from the SFWA.

(1) Benefits of Inclusion

We believe that there is minimal benefit from designating critical habitat for the southwestern willow flycatcher within portions of the SFWA within the Kern Management Unit because, as explained above, these lands are already managed for the conservation of flycatcher.

As stated in the environmental assessment, the primary conservation value of the proposed critical habitat segments is to sustain existing populations. The threshold for reaching destruction or adverse modification on the SFWA would likely require a reduction in the capability of the habitat to sustain existing populations. Because Isabella Dam operations provide the dynamics needed to sustain habitat over the long-term and the Forest manages the land for the benefit of wildlife and the flycatcher, it is highly unlikely that projects would be considered for this area that would result in a depreciable diminishment or long-term reduction of the capability of the habitat to sustain existing flycatcher populations. Similar to other lakes, one of the primary purposes of the conservation space of the lake bottom is to store water for delivery downstream. As a result of the importance of this space for temporary water storage, there is little to no reason to believe that within the lake bottom there would be any permanent development or alteration that would eliminate or significantly reduce the amount of open space where flycatcher habitat develops and persists. Concurrently, Forest Service management of cattle grazing activities and recreation through fencing and other restrictions has helped foster the development and maintenance of flycatcher habitat within the SFWA. As a result, dam operations and land management and long-term commitments through section 7 consultations have and will provide benefits to the flycatcher within the SFWA.

As described above, the SFWA lands proposed for critical habitat may have additional conservation value above sustaining existing populations, because they are managing these lands to improve, protect, and possibly expand upon the amount of nesting habitat that would provide for growth of existing populations. Expansion of existing populations in these areas would be an element of recovering the southwestern willow flycatcher. Accordingly, and as further discussed above in the ''General Principles of Section 7 Consultations Used in the 4(b)(2) Balancing Process'' section, through section 7 consultations that may occur, some benefit may incur through the adverse modification standard and whether or not the activity results in a reduction in the suitability of the habitat to support expansion of existing populations. However, because formal consultations will likely result in only discretionary conservation recommendations (*i.e.*, adverse modification threshold is not likely to be reached), we believe there is an extremely low probability of mandatory elements (*i.e.*, reasonable and prudent alternatives) arising from formal section 7 consultations that include consideration of designated

southwestern willow flycatcher critical habitat.

We believe the operation of Isabella Dam and current on-the-ground conservation measures being conducted for the flycatcher on the SWFA that include field studies, management of recreational uses, grazing exclusion, acquisition of upstream areas, fluctuating dam operations, and efforts to reduce predation and protection of nestlings from inundation provides as much as would be achieved through section 7 consultations involving consideration of critical habitat, using a conservation standard based on the Ninth Circuit Court's decision in *Gifford Pinchot*.

As discussed in the ''Educational Benefits of Critical Habitat'' section above, we believe that there would be little additional informational benefit gained from including these portions of the SFWA within the designation because this area is well known for its value to southwestern willow flycatcher by managing agencies and the public. Additionally, since this area is already being federally managed for the benefit of the flycatcher its importance to flycatcher conservation is already well established.

(2) Benefits of Exclusion

The implementation of management actions for the southwestern willow flycatcher and its habitat within the SFWA may require further section 7 consultation between the Corps, the Forest Service, and the Service. As a result, there would be an additional use of time and money by each agency to develop sections of biological assessments and analyses in biological opinions to address a critical habitat designation. These costs would be an additional time and cost burden above that which would be required for section 7 consultations without critical habitat. It could cause delays to implementing beneficial management actions for the flycatcher. The use of time and effort on evaluation of projects on critical habitat could take away time, money, and effort by these agencies to implement beneficial flycatcher management on the SFWA or other areas where management is needed for the flycatcher such as the Sprague Ranch or other nearby Forest Service lands. Therefore, a benefit of excluding the SFWA from critical habitat includes some reduction in administrative costs associated with engaging in the critical habitat portion of section 7 consultations. Administrative costs include time spent in meetings, preparing letters and biological assessments, and in the case of formal consultations, the development of the critical habitat component of a biological opinion. The implementation of long-term management activities by Corps and Forest Service at SFWA has and will continue to help generate important status and trend information for flycatcher recovery within the Kern Management Unit.

The exclusion of Lake Isabella from critical habitat may facilitate other cooperative conservation activities with other similarly situated dam operators or landowners. Throughout the comment period and during public hearings, we heard from many local residents who were very concerned with any possible restrictions to Lake Isabella lake levels as a result of a critical habitat designation. While Isabella is operated by the Corps and the land is managed by the Forest Service, the recreation associated with the lake was a significant concern for the community. Continued cooperative relations with Corps, Forest Service, and non-Federal stakeholders associated with recreation at Lake Isabella and local governments can be expected to influence other future partners and lead to greater conservation than might be achieved through multiple site-by-site, project-by-project, section 7 consultations. The benefits of excluding lands within the SFWA from critical habitat designation include recognizing the value of conservation benefits associated with long-term management actions being implemented for the flycatcher and demonstrating to the Corps, Forest Service, Lake Isabella community, local governments, stakeholders, and landowners along the Kern River the benefits associated with implementing conservation activities.

In contrast, failure to exclude the SFWA could be a disincentive for other entities contemplating partnerships with the Service, as it would be perceived as a way for the Service to impose additional regulatory burdens once conservation strategies have already been agreed to. As noted above, while long-term management of the SFWA management is conducted by the Corps and the Forest Service, Lake Isabella was of extreme importance and interest to local non-Federal stakeholders. The scoping meetings held at Lake Isabella, arguably the smallest community visited across six states, generated the largest attendance (hundreds of private citizens concerned over the possible designation of the area as critical habitat). Excluding this area from critical habitat would help foster a collaborative relationship with the Corps, Forest Service, stakeholders, landowners, and local governments associated with Lake Isabella and the Kern River. We believe this collaboration makes a difference in our ability to form partnerships with others. Concerns over perceived additional regulation imposed by critical habitat when long-term conservation strategies are being implemented harms collaborative relationships and can lead to distrust. Our experience has demonstrated that successful completion of conservation efforts such as HCPs, conservation easements, or the unique long-term section 7 consultation on Lake Isabella dam operations can result in the development of other conservation efforts and HCPs with other landowners.

(3) The Benefits of Exclusion Outweigh the Benefits of Inclusion

Based on the above considerations, we have determined that the benefits of excluding the SFWA from critical habitat for the southwestern willow flycatcher in the Kern Management Unit outweigh the benefits of inclusion.

The SFWA is currently operating under the terms and conditions of the Biological Opinions issued to the Corps and management agreed upon through informal consultation with the Forest Service. These long-term management commitments implement conservation measures and achieve important conservation goals through information obtained by field studies, management of recreational uses, grazing exclusion, acquisition and management of upstream acreage, and efforts to reduce predation and inundation of nests for the benefit of the southwestern willow flycatcher.

The Service believes the additional educational and regulatory benefits of including the SFWA as critical habitat is relatively small to non-existent. The local community and managing agencies are well aware of the importance of Lake Isabella and the SFWA for southwestern willow flycatchers due to the notoriety consultation for Isabella Dam operation elicited in the community, concern by managing agencies, and awareness raised during the NEPA scoping process for this designation. The Service anticipates that the conservation strategies for SFWA will continue to be implemented in the future, and that the funding for these activities will be provided in accordance with the terms and conditions associated with the Biological Opinions under section 7 of the Act. We anticipate there will be little additional Federal regulatory benefit to the species because (a) there is a low likelihood that the SFWA will be negatively affected to any significant degree by Federal activities that were

not consulted on in the existing Biological Opinions pursuant to section 7 consultation requirements, and (b) we believe that based on past and ongoing Forest Service management activities there would be no additional requirements pursuant to a consultation that addresses critical habitat. We also believe that due to the purpose of the conservation space of Lake Isabella for water storage and delivery, there is no reason to expect that this area will be developed or altered in a way that would prevent the SFWA within Lake Isabella from being capable of supporting southwestern willow flycatcher habitat. While management of Isabella is accomplished through Federal agencies, the benefits of excluding lands within the SFWA from critical habitat designation include demonstrating to the concerned Lake Isabella community, local governments, stakeholders, and landowners along the Kern River the benefits associated with implementing conservation activities.

We believe that exclusion of these lands will not result in the extinction of the southwestern willow flycatcher as the SFWA is occupied by the southwestern willow flycatcher. Actions which might adversely affect the species are expected to have a Federal nexus, and regardless of a critical habitat designation, would undergo a section 7 consultation with the Service. The jeopardy standard of section 7 and routine implementation of habitat preservation through the section 7 process provides assurance that the species will not go extinct. In addition, the species is protected from incidental take under section 9 of the Act. The exclusion leaves these protections unchanged from those that would exist if the SFWA was designated as critical habitat.

Critical habitat is being designated for the subspecies in other areas, including the Kern River adjacent to the SFWA that will be accorded protection from adverse modification by Federal actions using the conservation standard based on the Ninth Circuit decision in *Gifford Pinchot*. Additionally, the subspecies occurs on lands protected and managed either explicitly for the species, or indirectly through more general objectives to protect natural habitat values. This provides protection from extinction while conservation measures are being implemented. The subspecies also occurs on lands managed to protect and enhance wetland values under the Wetlands Reserve Program of the NRCS.

In conclusion, we find that the benefits of excluding the SFWA outweigh the benefits of inclusion, and this exclusion will not result in extinction of the southwestern willow flycatcher. We believe the exclusion of critical habitat on the SFWA would most likely have a net positive conservation effect on the recovery and conservation of the southwestern willow flycatcher when compared to the positive conservation effects of a critical habitat designation. As described above, the overall benefits to the flycatcher of a critical habitat designation for these properties are relatively small. In contrast, we believe that this exclusion will enhance our existing partnership with the Corps, Forest Service, and local community, and due to the attention this generated within the local community, set a positive example that could provide positive incentives to other non-Federal landowners who may be considering implementing voluntary conservation activities on their lands. We conclude there is a higher likelihood of beneficial conservation activities occurring in these and other areas for the southwestern willow flycatcher without designated critical habitat than there would be with designated critical habitat on the SFWA.

*Relationship of Critical Habitat to National Wildlife Refuge Lands—Exclusions Under Section 4(b)(2) of the Act*

We have determined that areas essential to the conservation of the southwestern willow flycatcher include the following National Wildlife Refuges (NWR): Bill Williams NWR, Parker, AZ; Cibola NWR, Blythe, AZ; Imperial NWR, Yuma, AZ; Havasu NWR, Needles, CA; Alamosa/Monte Vista NWR, Alamosa, CO; Bosque del Apache and Sevilleta NWRs, Socorro, NM; and Pahranagat NWR, Alamo, NV. All of these refuges will be developing or in some cases (Sevilleta and Alamosa NWRs) have developed and completed Comprehensive Conservation Plans (CCPs) that provide the framework for protection and management of all trust resources, including federally listed species and sensitive natural habitats. These plans, and the management actions undertaken to implement them, will have to undergo (or have undergone) review and consultation under section 7 of the Act and evaluation for their consistency with the conservation needs of listed species. Those NWRs without approved CCPs currently have management plans and/or programs in place that provide conservation benefits for the southwestern willow flycatcher. Their annual work plans provide the specific tasks associated with accomplishing the broader Refuge objectives of wildlife habitat management. Some of these management plans have also been reviewed by the public under NEPA and consulted upon under section 7 of the Act. For example, the Lower Colorado River National Wildlife Refuges (Bill Williams, Havasu, Cibola, and Imperial NWRs) currently operate under a Comprehensive Management Plan (USFWS 1994) that has been evaluated under NEPA and section 7 of the Act. We believe that there is minimal benefit from designating critical habitat for the southwestern willow flycatcher within NWR lands because these lands are protected areas for wildlife, and are currently managed for the conservation of wildlife, including threatened and endangered species, specifically the southwestern willow flycatcher. Below we first provide a description of the special management being provided by the NWR lands within the proposed designation, followed by a 4(b)(2) analysis that weighs the benefits of excluding versus those of including these lands within the final designation.

*Bill Williams Management Unit, AZ*

Bill Williams NWR

The Bill Williams NWR consists of 2,471 ha (6,105 ac) (USFWS 1994), and was originally established on January 22, 1941, concurrently with the Havasu NWR by Executive Order 8647. Some of the goals included in the lower Colorado River refuges (Havasu, Bill Williams, Cibola, and Imperial NWRs) Comprehensive Management Plan (1994–2014) (USFWS 1994) are to: ''* * * restore and maintain the natural diversity * * *''; ''* * * achieve threatened and endangered species recovery * * *''; ''* * * revegetate substantial amounts of habitat with native mixes of vegetation leading to biological diversity''; ''* * * enhance use of Colorado River water and protect existing water rights holdings * * *''; ''* * * ensure only compatible and appropriate activities occur * * * and * * * regulate all activities * * * that are potentially harmful to refuge resources''; and to ''* * * effect improvements to funding and staffing that will result in long lasting enhancements to habitat and wildlife resources * * * leading to achievement of the goals of this plan and the goals of the National Wildlife Refuge System.''

The Bill Williams NWR Annual Habitat Work Plan for 2004–2005 described the Executive Order establishing the area ''* * * as a refuge and breeding ground for migratory birds and other wildlife.'' This refuge includes the largest flood regenerated riparian forest on the Lower Colorado

River of approximately 931 ha (2300 ac) of cottonwood, willow, mesquite, and salt cedar woodlands and terrace shrublands. From 1994 to 2003, 1 to 15 flycatcher territories were detected on the refuge, with the largest number of territories detected in 2002 (USGS 2004). Migrant willow flycatchers have also been detected (Koronkiewicz *et al.* 2004). Their habitat goals are to protect, maintain, and if possible, enhance habitats, particularly those for neotropical migrants, endangered species, and other species of concern. This is being done by monitoring the location of flycatchers and other sensitive species, and protecting habitat from: wildfire, impacts of recreation, and exotic weeds such as Fountain Grass and Arundo spp.

The effort by the refuge to maintain and improve the abundance and quality of riparian vegetation provides a conservation benefit to the flycatcher. As a result of the refuge's effort and long-term commitment to provide a conservation benefit to the southwestern willow flycatcher, we believe these protections and assurances warrant exclusion from flycatcher critical habitat.

*Hoover to Parker Management Unit, AZ/CA*

Havasu NWR

The Havasu NWR was established by Executive Order 8647 on January 22, 1941, ''* * * as a refuge and breeding ground for migratory birds and other wildlife.'' It consists of 15,551 ha (38,427 ac) (USFWS 1994). Some of the goals included in the lower Colorado River refuges (Havasu, Bill Williams, Cibola, and Imperial NWRs) Comprehensive Management Plan (1994–2014) (USFWS 1994) are to: ''* * * restore and maintain the natural diversity * * *''; ''* * * achieve threatened and endangered species recovery * * *''; ''* * * revegetate substantial amounts of habitat with native mixes of vegetation leading to biological diversity*rdquo;; ''* * * enhance use of Colorado River water and protect existing water rights holdings * * *''; ''* * * ensure only compatible and appropriate activities occur * * * and * * * regulate all activities * * * that are potentially harmful to refuge resources''; and to ''* * * effect improvements to funding and staffing that will result in long lasting enhancements to habitat and wildlife resources * * * leading to achievement of the goals of this plan and the goals of the National Wildlife Refuge System.'' In addition, flycatcher management on this refuge will work in conjunction with additional flycatcher management throughout the LCR MSCP (see section describing *Relationship of Critical Habitat to Approved Habitat Conservation Plans—Exclusions Under Section 4(b)(2) of the Act*).

The Havasu NWR Annual Habitat Work Plan for 2004–2005 identifies specific areas where habitat for the southwestern willow flycatcher will be maintained, improved, protected, and managed. Overall, the refuge manages for a variety of habitat types that provide locations for waterfowl, wading birds, passerines, etc. Because southwestern willow flycatchers are a keystone woody riparian species, management and improvement of habitat for the flycatcher (and all riparian passerine species) is a specific goal of the refuge. Between 2 and 20 flycatcher territories have been detected on the refuge between 1995 and 2003 (USGS 2004), as well as migrating southwestern willow flycatchers (Koronkiewicz *et al.* 2004). A high of 20 territories were detected in 2002.

Riparian habitat restoration and maintenance projects are underway and will continue in order to provide a conservation benefit for the flycatcher. For example, approximately 40 ha (100 ac) in the Beal Unit and 20 ha (50 ac) in the Pintail Unit are being restored and managed for woody riparian vegetation that can be used by migrant and possibly nesting flycatchers. During the 2004 fiscal year, a total of 8,765 cottonwoods, 4,800 Goodding's willows, 4,065 Coyote willow, and 940 mesquites were planted in the Beal Unit. In the Pintail Unit, during the 2004 fiscal year, 1,650 cottonwoods and 1,175 willows were planted. In the 1,619 ha (4,000 ac) Topock Unit, habitat exists and is being managed for nesting flycatchers and wading birds, and the 202 ha (500 ac) Whiskey Slough Unit is also targeted for management for southwestern willow flycatchers.

In addition to the riparian restoration efforts occurring on the refuge, additional management occurs in order to improve habitat quality and persistence. Specific water management to mimic the natural hydrology is needed for woody vegetation and to maintain conditions and prey for nesting flycatchers. Management of feral pigs that can harm and destroy vegetation is needed to protect habitat. Additionally, management of exotic woody and weed species such as salt cedar and Johnson grass occurs to reduce risks of fire in riparian areas.

The effort by the refuge to maintain and improve the abundance, distribution, and quality of riparian vegetation provides a conservation benefit to the flycatcher. Additional water management is an essential component to the success of plantings and existing habitat conditions favored by the flycatcher. Protecting habitat by reducing the reducing the risk of fire and destruction by feral pigs also provides a conservation benefit. As a result of the refuge's effort and long-term commitment to provide a conservation benefit to the southwestern willow flycatcher, we believe these protections and assurances warrant exclusion from flycatcher critical habitat.

*Parker to Southerly International Border Management Unit, AZ/CA*

Cibola NWR

The Cibola NWR consists of approximately 6,745 ha (16,667 ac) (USFWS 1994). Some of the goals included in the lower Colorado River refuges (Havasu, Bill Williams, Cibola, and Imperial NWRs) Comprehensive Management Plan (1994–2014) (USFWS 1994) are to: ''* * * restore and maintain the natural diversity * * *''; ''* * * achieve threatened and endangered species recovery * * *''; ''* * * revegetate substantial amounts of habitat with native mixes of vegetation leading to biological diversity''; ''* * * enhance use of Colorado River water and protect existing water rights holdings * * *''; ''* * * ensure only compatible and appropriate activities occur * * * and * * * regulate all activities * * * that are potentially harmful to refuge resources''; and to ''* * * effect improvements to funding and staffing that will result in long lasting enhancements to habitat and wildlife resources * * * leading to achievement of the goals of this plan and the goals of the National Wildlife Refuge System.'' In addition, flycatcher management on this refuge will work in conjunction with additional flycatcher management throughout the LCR MSCP (see section describing *Relationship of Critical Habitat to Approved Habitat Conservation Plans—Exclusions Under Section 4(b)(2) of the Act*).

The Cibola NWR 2004–2005 Annual Habitat Work Plan identifies as its main objective, the restoration of wetland, riverine, riparian, moist soil and agricultural habitat in order to maintain the natural abundance and diversity of native species, habitats and communities which are found in the Lower Colorado River floodplain (with emphasis on trust resources, endangered and threatened species, and other species of concern). As a result, the migratory and nesting habitat of the

southwestern willow flycatcher, as well as habitat for other passerine species is specifically identified as the important habitat to maintain, preserve, and restore. A single southwestern willow flycatcher territory has been detected on the refuge (USGS 2004) as well as migrating willow flycatchers (Koronkiewicz *et al.* 2004).

The Cibola NWR has specifically identified as a goal, maintaining existing native riparian woodland and restoring an average of 20 ha (50 ac) annually through seeding and planting native mesquite, cottonwood, and willow trees, and associated understory plants. Three different Refuge Management Units that contain approximately 323 ha (800 ac), 6 ha (15 ac), and 40 ha (100 ac) of habitat, are designated for restoration to native mesquite, cottonwood, and willows.

Previous plantings and habitat maintenance has occurred, which has resulted in improved habitat conditions for the flycatcher. At one 7 ha (17.8 ac) field where about 7,100 one gallon cottonwood and willow trees were planted in 2003, the area has shown extensive use by birds, including detections of migrant willow flycatchers and yellow-billed cuckoos.

Protection of existing sites through fire management and replacement of poor quality salt cedar to less flammable and higher quality native plant species is occurring as part of the refuge's restoration efforts. Reducing the amount of unsuitable salt cedar and replacing it with native mesquite, cottonwoods, and willows, provides improved habitat value for flycatchers and other passerines and reduces the risk of wildfire.

The refuge-wide effort to maintain and improve the abundance, distribution, and quality of riparian vegetation provides a conservation benefit to the flycatcher. The protection of this habitat by reducing the risk of fire through management of flammable salt cedar, also provides a conservation benefit. As a result of Cibola's refuge-wide effort and long-term commitment to provide a conservation benefit to the southwestern willow flycatcher by improving the abundance, distribution, quality, and persistence of native riparian vegetation for nesting and migrating flycatchers, we believe these protections and assurances warrant exclusion from flycatcher critical habitat.

Imperial NWR

The Imperial NWR consists of 10,428 ha (25,768 ac). Some of the goals included in the lower Colorado River refuges (Havasu, Bill Williams, Cibola, and Imperial NWRs) Comprehensive Management Plan (1994–2014) (USFWS 1994) are to: ''* * * restore and maintain the natural diversity * * *''; ''* * * achieve threatened and endangered species recovery * * *''; ''* * * revegetate substantial amounts of habitat with native mixes of vegetation leading to biological diversity''; ''* * * enhance use of Colorado River water and protect existing water rights holdings * * *''; ''* * * ensure only compatible and appropriate activities occur * * * and * * * regulate all activities * * * that are potentially harmful to refuge resources''; and to ''* * * effect improvements to funding and staffing that will result in long lasting enhancements to habitat and wildlife resources * * * leading to achievement of the goals of this plan and the goals of the National Wildlife Refuge System.'' In addition, flycatcher management on this refuge will work in conjunction with additional flycatcher management throughout the LCR MSCP (see section describing *Relationship of Critical Habitat to Approved Habitat Conservation Plans—Exclusions Under Section 4(b)(2) of the Act*).

The Imperial NWR Annual Habitat Work Plan for 2004–2005 identifies specific areas where riparian habitat will be maintained, improved, protected, and managed. Overall, the refuge manages for a variety of habitat types that provide locations for waterfowl, wading birds, passerines, etc. Their Work Plan specifically identifies 15 Management Units (totaling about 648 ha/1600 ac) where habitat for riparian obligate passerines is a target. Not every hectare/acre of these Units is dedicated specifically to woody riparian habitat. Restoration and management of flycatcher habitat include maintenance of areas with woody riparian vegetation, and restoration and protection through methods such as planting, salt cedar control, and prescribed burns. The Backwater Riversedge Management Unit has an additional 2,270 ha (5,609 ac) of salt cedar, willow, remnant cottonwoods, and scattered marshes for southwestern willow flycatchers. One to five flycatcher territories were detected for 3 years on the refuge between 1996 and 2003 (USGS 2004), as well as migrating southwestern willow flycatchers (Koronkiewicz *et al.* 2004).

The refuge-wide effort to maintain and improve the abundance, distribution, and quality of riparian vegetation provides a conservation benefit to the flycatcher. The protection of this habitat by reducing the risk of wildfire through management of flammable salt cedar, also provides a conservation benefit. As a result of Imperial's refuge-wide effort and long-term commitment to provide a conservation benefit to habitat for nesting and migrating southwestern willow flycatchers, we believe these protections and assurances warrant exclusion from flycatcher critical habitat.

*Middle Rio Grande Management Unit, NM*

Bosque del Apache NWR

The Bosque del Apache NWR consists of 23,117 ha (57,121 ac), of which approximately 4,856 ha (12,000 ac) occur within the Rio Grande floodplain. Since 1986, the refuge has been actively restoring riparian forests and grasslands. In 1999, the refuge expanded its ''place of use'' increasing the potential for additional riparian habitat to be restored. Since 1993, migratory and nesting southwestern willow flycatchers have been annually detected at the refuge with 1 to 5 territories detected (USGS 2004).

The refuge currently manages eight sites for southwestern willow flycatcher habitat. Within the historic floodplain there is currently an estimated 32 ha (78 ac) of native-dominated flycatcher habitat, and within the active floodplain, 23 ha (58 ac) of native-dominated habitat is estimated to exist. More suitable habitat in non-native and native vegetation exists.

The refuge is planning to manage seven areas specifically for southwestern willow flycatcher breeding habitat in the active floodplain and four areas in the historic floodplain. Combined, these 11 areas total 271 ha (669 ac).

The refuge currently uses a variety of restoration and management techniques to create, maintain, and protect southwestern willow flycatcher habitat. Flammable salt cedar is being selectively removed and replaced with native vegetation and grasslands in order to improve the quality and abundance of flycatcher habitat. The reduction of exotic vegetation, increase in native vegetation, and creation of grassland fire breaks reduces the occurrence and impact of wildfire. In order to achieve restoration success with native woody riparian vegetation, water is being applied to restoration sites in order to mimic the timing of natural hydrograph (the refuge has a license for 12,417 acre feet of water per year). Also, within the active floodplain, in order to restore/improve channel floodplain connection, water distribution, channel movement, and sediment transport, banks are planned

for de-stabilization as are limited topographic changes to the floodplain are needed.

The refuge-wide effort to maintain and improve the abundance, distribution, and quality of riparian vegetation provides a conservation benefit to the flycatcher. The protection of this habitat by reducing the risk of fire through management of flammable salt cedar, also provides a conservation benefit. As a result of Bosque del Apache's refuge-wide effort and long-term commitment to provide a conservation benefit to the southwestern willow flycatcher habitat for nesting and migrating flycatchers, we believe these protections and assurances warrant exclusion from flycatcher critical habitat.

Sevilleta NWR

The Sevilleta NWR's CCP describes 10 goals that promote the diversity, protection, management, enhancement, and maintenance of wildlife habitat. A few of those goals are specific to the management of southwestern willow flycatcher habitat. A specific goal is to ''provide for the enhancement, preservation, and protection of threatened and endangered species as they occur naturally or were historically present on the Sevilleta NWR so that viable, self-sustaining populations can be restored to their natural habitats.'' Additional goals describe, restoring and maintaining ''* * * the natural diversity of plants and wildlife * * *,'' and protecting existing, and securing ''* * * additional water rights and/or in-stream flow rights as necessary to protect the integrity of the riparian and aquatic habitats on the refuge.'' A total of 4 to 10 flycatcher territories have been detected on the refuge between 1999 and 2003 (USGS 2004).

The CCP more specifically describes the refuge's objectives to meet the goal of enhancing riparian habitat on the Rio Grande. At Sevilleta NWR, one objective is to ''* * * preserve refuge habitat diversity and threatened and endangered species habitats by preserving and enhancing habitats to their natural condition.'' Another is to ''reverse declining trends in quality and quantity of riparian wetland habitats; restore, maintain, and enhance the species composition, aerial extent, and spatial distribution of riparian/wetland habitats.'' The CCP also describes that a key objective is to ''* * * preserve, enhance, and restore hydrological regimes in order to perpetuate a healthy river ecosystem.''

The CCP describes the goal of providing, ''* * * 100 acres (40 ha) of cottonwood/willow habitat specifically for southwestern willow flycatchers.'' In addition to the main goals and objectives specific to river function and riparian habitat, the CCP describes strategies in order to reach this flycatcher objective such as controlling non-native vegetation, implementing management practices that ensure survival of and eliminate impacts to naturally occurring threatened and endangered species, and restoring native plants.

The effort to maintain and improve the abundance, distribution, and quality of riparian vegetation provides a conservation benefit to the flycatcher. As a result of the Sevilleta NWR's effort and long-term commitment to provide a conservation benefit to the southwestern willow flycatcher by improving the abundance, distribution, quality, and persistence of native riparian vegetation for nesting and migrating flycatchers, we believe these protections and assurances warrant exclusion from flycatcher critical habitat.

*San Luis Valley Management Unit, CO*

Alamosa NWR

The Alamosa NWR's CCP describes 13 goals that promote the diversity, protection, management, enhancement, and maintenance of wildlife habitat. One of those goals is specific to the management of habitat used by the southwestern willow flycatcher. This goal is to ''enhance the Rio Grande corridor and its tributaries on refuge lands to provide habitat for river, riparian dependent, and other wetland species.'' A total of 19 to 29 southwestern willow flycatcher territories have been detected on the refuge between 1997 and 2003 (USGS 2004). In addition, flycatcher management on this refuge will work in conjunction with additional flycatcher management throughout the San Luis Valley Management Unit (see section describing *Relationship of Critical Habitat to Partnerships*).

The CCP more specifically describes the refuge's objectives to meet the goal of enhancing riparian habitat on the Rio Grande. At Alamosa NWR, the objective is to ''* * * dense multi-layered native riparian vegetation such as willows and cottonwoods for breeding and migrating riparian obligate species, notably the southwestern willow flycatcher * * *'' Additionally, an objective is to protect the aquatic resources and provide for a disturbance free breeding environment for migratory species. The refuge intends to perpetuate the natural aspect of the physical and biological characteristics of the Rio Grande floodplain. Additionally, the refuge intends to protect sufficient habitat for the southwestern willow flycatcher through easement and fee-title acquisition, habitat improvements on the refuge, and protections of habitat on private lands through Partners for Fish and Wildlife Programs.

The refuge-wide effort to maintain and improve the abundance, distribution, and quality of riparian vegetation provides a conservation benefit to the flycatcher. As a result of Alamosa's refuge-wide effort and long-term commitment to provide a conservation benefit to the southwestern willow flycatcher by improving the abundance, distribution, quality, and persistence of native riparian vegetation for nesting and migrating southwestern willow flycatchers, we believe these protections and assurances warrant exclusion from southwestern willow flycatcher critical habitat.

*Pahranagat Management Unit, NV*

Pahranagat NWR

The Pahranagat NWR was established for the conservation of wildlife, including migratory birds like the southwestern willow flycatcher. The Refuge's draft CCP specifies as one of its goals the enhancement of wildlife diversity and contribution to the recovery of endangered, threatened, and special status species through habitat improvements and restoration.

In order to accomplish this goal for the southwestern willow flycatcher, the refuge is currently engaged in a variety of management actions. They are maintaining 41 ha (100 acs) of cottonwood/willow riparian habitat specifically for breeding southwestern willow flycatchers and other migratory birds. Additionally, over the last three years the refuge has planted over 6,000 willows and cottonwood trees on 81 ha (200 ac) to provide more breeding habitat for the flycatcher. The refuge continues to help coordinate with other agencies in their surveys and research of southwestern willow flycatchers and to seek funding to develop more acreage into cottonwood/willow through restoration efforts.

As a result of the refuge's management, the population of breeding southwestern willow flycatchers has increased from 5 to 14 territories between 1997 and 2003 (USGS 2004). The refuge-wide effort to maintain and improve the abundance, distribution, and quality of riparian vegetation provides a conservation benefit to the flycatcher. As a result of the refuge's goals for conserving wildlife, and their commitment to improving the abundance, distribution, quality, and

persistence of native riparian vegetation for nesting and migrating southwestern willow flycatchers, we believe these protections and assurances warrant exclusion from southwestern willow flycatcher critical habitat.

(1) Benefits of Inclusion for NWR lands

We believe that there is minimal benefit from designating critical habitat for the southwestern willow flycatcher on NWR lands because, as explained in detail above, these lands are already managed for the conservation of wildlife.

As stated in the environmental assessment, the primary conservation value of the proposed critical habitat segments is to sustain existing populations. The threshold for reaching destruction or adverse modification on NWR lands would likely require a reduction in the capability of the habitat to sustain existing populations. It is likely that actions that would reduce the capability of the habitat to sustain a population would also jeopardize the continued existence of the species. Consequently, the outcome of the section 7 consultations on NWR lands may not be materially different with designation of critical habitat compared to the listing of the species alone. In addition, given that these lands are managed for the conservation of wildlife, in particular endangered and threatened species, and specifically riparian habitat for migratory and nesting southwestern willow flycatchers, it is highly unlikely that the NWR lands would consider undertaking any projects that would result in a long-term reduction of the capability of the habitat to sustain existing populations. To the contrary, activities occurring within NWR lands are specifically for the benefit of the flycatcher, by restoring, improving, and protecting its habitat.

As described above, all of NWR lands proposed for critical habitat may have additional conservation value above sustaining existing populations, because they are managing these lands to improve, protect, and expand upon the amount of nesting habitat that would provide for growth of existing populations. Expansion of existing populations in these areas would be an element of recovering the southwestern willow flycatcher. Accordingly, through section 7 consultations that may occur, some benefit may incur through the adverse modification standard and whether or not the activity results in a reduction in the suitability of the habitat to support expansion of existing populations. However, because formal consultations will likely result in only discretionary conservation recommendations (*i.e.,* adverse modification threshold is not likely to be reached), we believe there is an extremely low probability of mandatory elements (*i.e.,* reasonable and prudent alternatives) arising from formal section 7 consultations that include consideration of designated southwestern willow flycatcher critical habitat.

The draft environmental assessment found that minor changes through section 7 consultation may occur in the form of additional discretionary conservation recommendations to reduce impacts to the primary constituent elements. For activities that NWR's are anticipated to engage in, those are expected to primarily be projects focused on habitat restoration and fire management. One formal consultation for habitat restoration has occurred on NWR lands (Parahnagat NWR, NV) that resulted in incidental take of one flycatcher territory. Both restoration and fire management activities were anticipated in the draft environmental assessment to possibly have short-term adverse impacts to PCEs, but long-term beneficial effects from protections and improvement of habitat quality, quantity, and persistence. However, as discussed above, consultations on these activities would be similar to existing conditions, where consultations already address potential affects to the southwestern willow flycatcher because these river segments are occupied by nesting and migrating southwestern willow flycatchers. The outcome of the section 7 consultations on these NWRs may not be materially different with designation of critical habitat compared to the listing of the species alone due to the threshold for reaching destruction or adverse modification on proposed critical habitat. Moreover, we note that while additional conservation recommendations may result for projects of this nature, they would be discretionary on the part of the Federal agency.

(2) Benefits of Exclusion for NWR lands

The benefits of excluding NWR lands include a reduction in administrative costs associated with engaging in section 7 consultations for critical habitat Administrative costs include additional time spent in meetings and preparing letters, and in the case of biological assessments and informal and formal consultations, the development of those portions of these documents that specifically address the critical habitat designation. NWR staff can, more appropriately, use these funds toward continuing to manage and improve NWR lands for their stated purpose, wildlife conservation (and southwestern willow flycatcher conservation). In the future, these refuges will likely engage in low effort informal intra-Service section 7 consultations annually, and less frequently formal consultations, to address impacts of activities on the southwestern willow flycatcher (primarily those associated with habitat restoration and fire management). Potential project modifications are likely to be minimal, given the beneficial nature of the NWR activities and projects.

(3) Benefits of Exclusion Outweigh Benefits of Inclusion

In summary, we believe that the benefits of excluding NWR's from the designation of critical habitat for the southwestern willow flycatcher outweigh the benefits of including the NWR's in critical habitat. We find that including the NWR's would result in very minimal, if any additional benefits to the southwestern willow flycatcher, as explained above. However, including the NWRs in the designation would require some additional administrative effort and cost during the section 7 consultation process. Although the additional effort to consider and analyze the affects of various projects on critical habitat may not be substantial, it would require the NWR's to use additional resources that may be otherwise used towards beneficial projects for wildlife (and the southwestern willow flycatcher).

We also find that the exclusion of these NWRs will not lead to the extinction of the southwestern willow flycatcher, nor hinder its recovery because there is the emphasis at each NWR to protect and enhance habitat specifically for the southwestern willow flycatcher.

*Relationship of Critical Habitat to American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act*

In accordance with the Secretarial Order 3206, ''American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act'' (June 5, 1997); the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments'' (59 FR 22951); Executive Order 13175; and the relevant provision of the Departmental Manual of the Department of the Interior (512 DM 2), we believe that fish, wildlife, and other natural resources on tribal lands are

better managed under tribal authorities, policies, and programs than through Federal regulation wherever possible and practicable. Based on this philosophy, we believe that, in many cases, designation of tribal lands as critical habitat provides very little additional benefit to threatened and endangered species. Conversely, such designation is often viewed by tribes as an unwanted intrusion into tribal self governance, thus compromising the government-to-government relationship essential to achieving our mutual goals of managing for healthy ecosystems upon which the viability of threatened and endangered species populations depend.

We have determined that the following Tribes and Pueblos have lands essential to the conservation of the southwestern willow flycatcher: Chemehuevi, Colorado River, Fort Mojave, Quechan (Fort Yuma), Hualapai, Isleta, La Jolla, Pala, Rincon, San Carlos, San Illdefonso, San Juan, Santa Clara, Santa Ysabel, and Yavapai-Apache. In making our final decision with regard to tribal lands, we considered several factors including our relationship with the Tribe or Pueblo and whether a management plan has been developed for the conservation of the southwestern willow flycatcher on their lands.

Tribal governments protect and manage their resources in the manner that is most beneficial to them. Each of the affected Tribes exercises legislative, administrative, and judicial control over activities within the boundaries of their respective lands. Additionally, they have natural resource programs and staff, and some have generated Southwestern Willow Flycatcher Management Plans (SWFMP). In addition, as trustee for land held in trust by the United States for Indian Tribes, the BIA provides technical assistance to the Tribes on management planning and oversees a variety of programs on Tribal lands. Flycatcher conservation activities have been ongoing on many Tribal lands included in the proposed critical habitat designation. On other Tribal lands, their natural resource management, while not specific to the flycatcher, has been consistent with management of habitat for the flycatcher. The development and implementation of these efforts formalized in these Management Plans will continue with or without critical habitat designation.

Tribal Conservation/Management Plans/ Partnerships

In this section, we first provide the specifics of the SWFMPs that were developed by the Tribes/Pueblos (Chemehuevi, Colorado River, Fort Mojave, Quechan—Fort Yuma, Hualapai, Isleta, La Jolla, Rincon, San Carlos, and Yavapai-Apache). These plans were all admitted to the supporting record during the open comment period for the proposed rule. After this introduction, we analyze the benefits of including these lands within the critical habitat designation and the benefits of excluding these areas. We have also developed partnerships specifically for the management of southwestern willow flycatcher habitat on the San Illdefonso, Santa Clara, and San Juan Pueblos in northern New Mexico. We provide a description of those partnerships and a benefits analysis for each of these Pueblos at the end of the tribal section below.

Tribal Conservation/Management Plans

In this section, we first provide the specifics of the SWFMP that were developed by the Tribes/Pueblos. These plans were all admitted to the supporting record during the open comment period for the proposed rule. After this introduction, we analyze the benefits of including the Tribes' lands within the critical habitat designation and the benefits of excluding these areas.

*Middle Colorado Management Unit, AZ*

Hualapai Tribe

The Hualapai Tribe sits alongside a segment of essential southwestern willow flycatcher habitat along the Colorado River on the south side of the channel in the Middle Colorado Management Unit above Lake Mead. The Hualapai Tribe had no known southwestern willow flycatcher territories in 2003, but has eight sites where territories have previously been detected. The Hualapai Tribe has finalized a SWFMP and the plan has been adopted by the Hualapai Tribal Council.

The SWFMP's objectives are to: manage riparian vegetation to maximize continued presence of native plant species suitable for use by southwestern willow flycatchers; ensure that existing land uses (which presently include recreational activities) will not result in net loss or reduction in quality of southwestern willow flycatcher habitat; and continue their Department of Natural Resources partnership in the management of the lower Colorado River (see section describing *Relationship of Critical Habitat to Approved Habitat Conservation Plans—Exclusions Under Section 4(b)(2) of the Act*).

This SWFMP specifically addresses and presents assurances for southwestern willow flycatcher conservation measures. There would be no net loss or permanent modification from management of suitable native riparian habitat to the bird. Any restoration activities that are directed at reducing nonnative tamarisk, controlling fire, construction of roads, or recreational management within occupied willow flycatcher habitat, will be coordinated with the Service to ensure that detrimental impacts are minimized. Helicopter flights will not approach closer than 91 m (300 feet) of occupied habitat to avoid any possible physical damage to birds or habitat from over-flights. Campsite management will continue to ensure that no detrimental impacts to overall willow flycatcher habitat quality. The Tribe will continue to ensure documentation of breeding and migratory use by willow flycatchers, pending availability funds. In this regard, the Hualapai Nation will continue to seek funding through Tribal sources, partners associated with the LCR MSCP, and outside grant sources. The Tribe will encourage recreational use awareness of the conservation needs of the willow flycatcher wherever possible. The Tribe will implement a cowbird-trapping program if parasitism becomes a problem in the future, dependent on available funds.

As a result of the assurances, protections, and conservation benefit provided the southwestern willow flycatcher and its habitat on Hualapai Tribal lands described above, we are excluding this area from flycatcher critical habitat.

*Hoover to Parker Management Unit, AZ/ CA*

Fort Mojave Tribe

The Fort Mojave Tribe sits alongside a segment of essential southwestern willow flycatcher habitat along the Colorado River in the Hoover to Parker Management Unit above Lake Havasu. The Fort Mojave Tribe currently has no known southwestern willow flycatcher territories, but these lands are within the geographic area occupied by the species due to the proximity of known southwestern willow flycatcher territories upstream and downstream, dispersal behavior, movements, and migratory habitats. Southwestern willow flycatchers are currently expected to use Fort Mojave lands along the Lower Colorado River for foraging and shelter during migration. In addition, flycatcher management on Tribal Land will work in conjunction with additional flycatcher management

throughout the LCR MSCP (see section describing *Relationship of Critical Habitat to Approved Habitat Conservation Plans—Exclusions Under Section 4(b)(2) of the Act*).

The Fort Mojave Tribe has completed a SWFMP. Within the budgetary constrains of the Fort Mojave Indian Tribe and the Service, the Tribe has committed to continue management to sustain the current value of saltcedar and willow and cottonwood stands that meet moist soil conditions necessary to maintain the species; to continue to utilize lands that do not have moist soil characteristics for territory and associated nesting purposes for agricultural and other cultural, economic and social needs; to carry out monitoring to determine species presence and vegetation status in cooperation with the Service; and to continue to provide wildfire response and law enforcement to protect habitats having moist soil conditions of value for feeding within a nesting area and similarly protect native cottonwood, willow, and mesquite habitats to benefit the southwestern willow flycatcher.

As a result of the assurances, protections, and conservation benefit provided the southwestern willow flycatcher and its habitat on Fort Mojave Tribal lands described above, we are excluding this area from flycatcher critical habitat.

Chemehuevi Tribe

The Chemehuevi Tribe sits alongside a segment of essential southwestern willow flycatcher habitat along the Colorado River on the west side of the channel in the Hoover to Parker Management Unit adjacent to the Colorado River and Lake Havasu. The Chemehuevi Tribe currently has no known southwestern willow flycatcher territories, but these lands are within the geographic area occupied by the species due to the proximity of known southwestern willow flycatcher territories upstream and downstream, dispersal behavior, movements, and migratory habitats. Southwestern willow flycatchers are currently expected to use Chemhuevi lands along the Lower Colorado River for foraging and shelter during migration. In addition, flycatcher management on Tribal Land will work in conjunction with additional flycatcher management throughout the LCR MSCP (see section describing *Relationship of Critical Habitat to Approved Habitat Conservation Plans—Exclusions Under Section 4(b)(2) of the Act*).

The Chemehuevi Tribe has finalized a SWFMP, that within funding limits, commits the Tribe to continue to control wild fire, improve native plant presence through restoration projects, minimize impacts associated with recreational or other use along the river and lake shorelines, and collaborate with the Service to improve conditions for the flycatcher by discussing and implementing projects to reduce burro damage. The SWFMP identifies the management of riparian saltcedar and native willow, cottonwood, and mesquite to maximize native plant presence. Management will be done in cooperative work effort with the Service to identify restoration sites and provide early control response to wild fires that would result in no net loss or permanent modification that is detrimental to flycatcher or its habitat as specified by the Recovery Plan (USFWS 2002). Any permanent river or lakeshore land use changes, such as recreational or other developments, will take habitat needs of the flycatcher into account and will be done in mutual consultation with the Service so as to design plans that minimize detrimental impacts to habitat requirements. The SWFMP identifies continued cooperation between the Tribe and Service to ensure continued management of or improve to habitat conditions. Continued monitoring of habitat and flycatchers and long-term restoration of native plants (*e.g.* cottonwood, mesquite, and willow), within funding constraints, will result in no net habitat loss or permanent habitat modification to avoid detrimental impacts to the flycatcher as specified in the Recovery Plan.

As a result of the assurances, protections, and conservation benefit provided the southwestern willow flycatcher and its habitat on Chemehuevi Tribal lands described above, we are excluding this area from flycatcher critical habitat.

*Parker to Southerly International Border Management Unit, AZ/CA*

Colorado Indian Tribes (CRIT)

We determined that the CRIT have areas that are essential to the conservation of the southwestern willow flycatcher along the Colorado River. The CRIT currently has no known southwestern willow flycatcher territories, but these lands are within the geographic area occupied by the species due to the proximity of known southwestern willow flycatcher territories upstream and downstream, dispersal behavior, movements, and migratory habitats. Southwestern willow flycatchers are currently expected to use CRIT lands along the Lower Colorado River for foraging and shelter during migration. The CRIT have been active in riparian restoration within tribal boundaries, where territories may become established. In addition, flycatcher management on Tribal Land will work in conjunction with additional flycatcher management throughout the LCR MSCP (see section describing *Relationship of Critical Habitat to Approved Habitat Conservation Plans—Exclusions Under Section 4(b)(2) of the Act*).

The Colorado River Indian Tribes have submitted a final SWFMP, which describes the protections and assurances for the flycatcher. The SWFMP identifies schedules for breeding habitat surveys and monitoring flycatcher nesting activity. The SWFMP also identifies the assessment, identification, and protection of flycatcher migration habitat. The SWFMP identifies protecting breeding habitat with the Ahakhav Tribal Preserve and in any areas established for flycatchers with the LCR MSCP. Seasonal closures of occupied habitat during the breeding season may be necessary and established by the CRIT. Protection of flycatcher habitat from fire is established in the SWFMP, as well as protections from other possible stressors such as overgrazing, recreation, and development.

As a result of the assurances, protections, and conservation benefit provided the southwestern willow flycatcher and its habitat on CRIT lands described above, we are excluding this area from flycatcher critical habitat.

Quechan (Fort Yuma) Indian Tribe

We determined that the Quechan Tribe has areas that are essential to the conservation of the southwestern willow flycatcher along the Colorado River near the City of Yuma. The Quechan Tribe currently has no known southwestern willow flycatcher territories, but these lands are within the geographic area occupied by the species due to the proximity of known southwestern willow flycatcher territories upstream and downstream, dispersal behavior, movements, and migratory habitats. Southwestern willow flycatchers are currently expected to use Quechan lands along the Lower Colorado River for foraging and shelter during migration. In addition, flycatcher management on Tribal Land will work in conjunction with additional flycatcher management throughout the LCR MSCP (see section describing *Relationship of Critical Habitat to Approved Habitat Conservation Plans—Exclusions Under Section 4(b)(2) of the Act*).

The Quechan Tribe has completed a SWFMP. The objectives of the SWFMP

specifically address and present assurances for southwestern willow flycatcher habitat conservation measures. The Tribe will manage riparian saltcedar that is intermixed with cottonwood, willow, mesquite, and arrowweed to maximize potential value for use by flycatchers for nesting. Any permanent land use changes for recreation or other reasons will consider the biological needs of the flycatcher and support flycatcher conservation needs as long as consistent with Tribal cultural and economic needs. The Tribe will consult with the FWS to develop/design plans that minimize impacts to habitat requirements for the flycatcher. The Tribe will establish collaborative relationships with the FWS to benefit the flycatcher including monitoring for flycatcher presence and habitat condition, all within the constraints of available funds to the Tribe. These goals and objectives will result in no net habitat loss or permanent modification to habitat values as specified within the Recovery Plan (USFWS 2002).

As a result of the assurances, protections, and conservation benefit provided the southwestern willow flycatcher and its habitat on Quechan Tribal lands described above, we are excluding this area from flycatcher critical habitat.

*Upper Gila Management Unit, AZ*

San Carlos Apache Tribe

The San Carlos Apache Tribe has completed a SWFMP. The Tribe highly values its wildlife and natural resources which it is charged to preserve and protect under the Tribal Constitution. Consequently, the Tribe has long worked to manage the habitat of wildlife on its tribal lands, including the habitat of endangered and threatened species. We understand that it is the Tribe's position that a designation of critical habitat on its lands improperly infringes upon their tribal sovereignty and the right to self-government.

The San Carlos Apache Tribes' SWFMP provides assurances and a conservation benefit to the southwestern willow flycatcher. Implementation of the SWFMP will result in protecting all known flycatcher habitat on San Carlos Tribal Land and assure no net habitat loss or permanent modification will result. All habitat restoration activities (whether it is to rehabilitate or restore native plants) will be conducted under reasonable coordination with the Service. All reasonable measures will be taken to ensure that recreational activities do not result in a net habitat loss or permanent modification. All reasonable measures will be taken to conduct livestock grazing activities under the guidelines established in the Recovery Plan (USFWS 2002). Within funding limitations and under confidentiality guidelines established by the Tribe, the Tribe will cooperate with the Service to monitor and survey habitat for breeding and migrating flycatchers, conduct research, and perform habitat restoration, cowbird trapping, or other beneficial flycatcher management activities.

As a result of the assurances, protections, and conservation benefit provided to the southwestern willow flycatcher and its habitat on San Carlos Apache Tribal lands described above, we are excluding this area from flycatcher critical habitat.

*Verde Management Unit, AZ*

Yavapai-Apache Nation

We determined that the Yavapai-Apache Nation has areas that are essential to the conservation of the southwestern willow flycatcher along the Verde River in AZ. The Yavapai-Apache Nation currently has no known southwestern willow flycatcher territories, but these lands are within the geographic area occupied by the species due to the proximity of known southwestern willow flycatcher territories upstream and downstream, dispersal behavior, movements, and migratory habitats. Southwestern willow flycatchers are currently expected to use Yavapai-Apache lands along the Verde River for foraging and shelter during migration.

The Yavapai-Apache Nation has completed a SWFMP. The objectives of the SWFMP specifically address and present assurances for southwestern willow flycatcher habitat conservation measures. The Nation will, through zoning, Tribal ordinances and code requirements, and measures identified in the Recovery Plan, take all practicable steps to protect known southwestern willow flycatcher habitat located in the riparian areas located along the Verde River. The Nation will take all reasonable measures to assure that no net habitat loss or permanent modification of flycatcher habitat will result from recreational and road construction activities, or habitat restoration activities, and will take all reasonable steps to coordinate with the Service so that flycatcher habitat is protected. Within funding limitations and under confidentiality guidelines established by the Tribe, the Tribe will cooperate with the Service to monitor and survey habitat for breeding and migrating flycatchers, conduct research, and perform habitat restoration, cowbird trapping, or other beneficial flycatcher management activities.

As a result of the assurances, protections, and conservation benefit provided the southwestern willow flycatcher and its habitat on Yavapai-Apache Tribal lands described above, we are excluding this area from flycatcher critical habitat.

*Middle Rio Grande Management Unit, NM*

Pueblo of Isleta

The Pueblo of Isleta has amended its riverine management plan to include the southwestern willow flycatcher. The main objective of the flycatcher portion of this plan is to protect, conserve, and promote the management of the southwestern willow flycatcher and its associated habitat within the Pueblo's boundaries.

The Pueblo of Isleta's Management Plan focuses on identifying the distribution and abundance of breeding flycatchers, their reproductive success, and reducing stressors. Cattle grazing is not allowed in the riparian area. Fire management will be conducted to protect flycatcher habitat. Management of flycatcher habitat includes protecting occupied habitat, maintaining native vegetation, and preventing habitat fragmentation.

As a result of the assurances, protections, and conservation benefit provided the southwestern willow flycatcher and its habitat on Pueblo lands described above, we are excluding this area from flycatcher critical habitat.

*San Diego Management Unit, CA*

La Jolla Band of Luiseño Indians

The San Luis Rey (approximately 5 km/8 mi) flows through the Lo Jolla Band of Indian Tribal Lands in northern San Diego County, CA. The Tribe has identified that river flow is controlled by Lake Henshaw Dam that can sometimes, due to drought, cause interruptions in flow and possibly limit the development of riparian habitat and success for species such as the southwestern willow flycatcher. This section of stream was proposed as critical habitat. The La Jolla Tribe currently has no known southwestern willow flycatcher territories, but these lands are within the geographic area occupied by the species due to the proximity of known southwestern willow flycatcher territories, upstream and downstream, dispersal behavior, movements, and migratory habitats. Southwestern willow flycatchers are currently expected to use La Jolla lands along the San Luis Rey for foraging and shelter during migration.

The Tribe has described a collection of measures, protections, and efforts they are and will be undertaking to protect riparian habitat for the southwestern willow flycatcher. The Tribe maintains permanent staff to address environmental issues, of which a Master's level biologist is employed. The Tribe will work to maintain open space along the river, with a particular emphasis on the western 2 km/3.5 mi stretch of stream. The Tribe is working to establish this piece of river as a reserve for environmental and cultural purposes. Management of native vegetation and removal of exotic vegetation is occurring that could improve the quality and abundance of native species, and/or decrease the risk of wildfire in the riparian area. They are also actively reducing the impact of recreation in riparian areas by continuing to educate Tribal Members through outreach programs and newsletters. Tribal staff are also developing brochures to provide to campground visitors to encourage good stewardship and to educate them on how to reduce impacts to the land. Additionally they are working to discourage use of off-road vehicles in riparian areas through education, movement of roads, closures, and development of Tribal ordinances. The Tribe will explore future opportunities for research to determine how to best manage for flycatchers. For example, they indicated that it may be necessary to initiate a cowbird trapping program if appropriate.

As a result of the assurances, protections, and conservation benefit provided the southwestern willow flycatcher and its habitat on La Jolla Tribal Lands through maintenance of open space, management, and protections, we are excluding this area from flycatcher critical habitat.

Rincon Tribe

The San Luis Rey River (roughly 3 km/1.8 mi) flows through Rincon Tribal Lands in northern San Diego County, CA, just downstream from La Jolla Tribal Land. The entire section of stream was proposed as critical habitat. The Rincon Tribe currently has no known southwestern willow flycatcher territories, but these lands are within the geographic area occupied by the species due to the proximity of known southwestern willow flycatcher territories, upstream and downstream, dispersal behavior, movements, and migratory habitats. Southwestern willow flycatchers are currently expected to use Rincon lands along the San Luis Rey River for foraging and shelter during migration.

The Tribe has completed a plan that addresses potential threats to flycatcher habitat through implementation of a variety of protective measures. The Tribe will monitor and remove introduced exotic plants that could reduce the quality and abundance of native species, and/or increase the risk of wildfire in the riparian. They will exclude activities in the floodplain which could remove or reduce the quality of riparian habitat such as mining and livestock grazing. The Tribe will exclude unauthorized recreational uses and off-road vehicle use. Signs, boundaries, and/or other measures will be taken to educate the public and prevent unauthorized recreational use.

The Tribe will dedicate funding to this effort and report to the Service its annual progress. The Tribe will coordinate with the Service on whether the Plan requires updating. The Tribe hopes to incorporate these activities into a formalized HCP that is targeted for completion in 2006. In the event that a decision is made to not complete the HCP, this Plan will be revised and adopted for another 30 years.

As a result of the assurances, protections, and conservation benefit provided the southwestern willow flycatcher and its habitat on Rincon Tribal Lands through implementation of their management plan, we are excluding this area from flycatcher critical habitat.

(1) Benefits of Inclusion for Tribal Lands

Few additional benefits would be derived from including these Tribal lands in a flycatcher critical habitat designation beyond what will be achieved through the implementation of their management plans. The principal benefit of any designated critical habitat is that activities in and affecting such habitat require consultation under section 7 of the Act. Such consultation would ensure that adequate protection is provided to avoid destruction or adverse modification of critical habitat. However, we conclude that few regulatory benefits to the flycatcher would be gained from a designation of critical habitat on these Tribal lands because, as described above, these Tribes are already managing their lands consistent with the Recovery Plan. When we review projects pursuant to section 7 for the flycatcher we review them for their consistency with the Recovery Plan. Therefore, consultations would not be materially different without a designation of critical habitat since we would use a similar approach in this case for both the jeopardy and adverse modification analyses. Also, where there is consistency with the Recovery Plan, it would be highly unlikely that the consultation would result in a determination of adverse modification. Thus, as noted above, when the threshold for adverse modification is not reached, as noted above, additional conservation recommendations could result out of a consultation, but such measures would be discretionary on the part of the Federal agency. These Tribes have already agreed under the terms of their flycatcher management plans to protect flycatcher habitat, to ensure no net loss, to coordinate with the Service, and to conduct activities consistent with the Recovery Plan. Accordingly, we find the consultation process for a designation of critical habitat is unlikely to result in additional protections for the flycatcher on Tribal lands.

Another possible benefit is that the designation of critical habitat can help to inform the Tribes/Pueblos regarding potential conservation value of an area, and may focus efforts by clearly delineating areas of high conservation value for the flycatcher. Any information about the flycatcher and its habitat that reaches a wide audience, including other parties engaged in conservation activities, would be considered valuable. These Tribes/Pueblos are currently working with the Service to address habitat and conservation needs for the flycatcher. Additionally, we anticipate that these Tribes/Pueblos will continue to actively participate in working groups, and provide for the timely exchange of management information. The educational benefits important for the long-term survival and conservation of the flycatcher are being realized. Educational benefits will continue on these lands if they are excluded from the designation, because the management/conservation plans already recognize the importance of those habitat areas to the flycatcher. Additionally, we included these lands in the proposed and final rules as areas essential to the conservation of the southwestern willow flycatcher so information about their essential nature has been published through this rulemaking process.

Another possible benefit is the additional funding that may be generated for habitat restoration or improvement by having an area designated as critical habitat. In some instances, having an area designated as critical habitat may improve the ranking a project receives during evaluation for funding. Tribes/Pueblos often require additional sources of funding in order to conduct wildlife-related activities. Therefore, having an area designated as

critical habitat could improve the chances of Tribes receiving funding for flycatcher-related projects. However, the perceived restrictions of a critical habitat designation would likely have a more damaging effect to coordination efforts, possibly preventing actions that might maintain, improve, or restore habitat. Additionally, areas occupied by nesting, migrating, dispersing, or foraging flycatchers, as is the case here, also provide benefits when projects are evaluated for receipt of funding.

For these reasons, then, we believe that designation of critical habitat would have few additional benefits beyond those that will result from continued consultation under the jeopardy standard.

(2) Benefits of Exclusion

The benefits of excluding these Tribal Lands from designated critical habitat are more significant. They include: (1) The advancement of our Federal Indian Trust obligations and our deference to tribes to develop and implement tribal conservation and natural resource management plans for their lands and resources, which includes the flycatcher; (2) the maintenance of effective working relationships to promote the conservation of the flycatcher and its habitat; (3) the allowance for continued meaningful collaboration and cooperation; (4) the provision of conservation benefits to riparian ecosystems and the flycatcher and its habitat that might not otherwise occur; and (5) the reduction or elimination of administrative and/or project modification costs as analyzed in the economic analysis.

During the development of the flycatcher critical habitat proposal (and coordination for other critical habitat proposals), and other efforts such as development of the Southwestern Willow Flycatcher Recovery Plan, we have met and/or communicated with various Tribes/Pueblos to discuss how they might be affected by the regulations associated with flycatcher management, flycatcher recovery, and the designation of critical habitat. As such, we established relationships with Tribes/Pueblos specific to flycatcher conservation. As part of our relationship, we provided technical assistance to each of these Tribes/Pueblos to develop measures to conserve the flycatcher and its habitat on their lands. These measures are contained within the management/conservation plans that we have in our supporting record for this decision (see discussion above). These proactive actions were conducted in accordance with Secretarial Order 3206, ''American Indian Tribal Rights, Federal—Tribal Trust Responsibilities, and the Endangered Species Act'' (June 5, 1997); the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments'' (59 FR 22951); Executive Order 13175; and the relevant provision of the Departmental Manual of the Department of the Interior (512 DM 2). We believe that these Tribes/Pueblos should be the governmental entities to manage and promote the conservation of the flycatcher on their lands. During our communication with these Tribes/Pueblos, we recognized and endorsed their fundamental right to provide for tribal resource management activities, including those relating to riparian ecosystems.

The designation of critical habitat on these Tribal or Pueblo lands would be expected to adversely impact our working relationship with these Tribes. In fact, during our discussions with these Tribes and from comments received, many informed us that critical habitat would be viewed as an intrusion on their sovereign abilities to manage natural resources in accordance with their own policies, customs, and laws. To this end, we found that each Tribe would prefer to work with us on a government-to-government basis. For these reasons, we believe that our working relationships with these Tribes would be better maintained if they are excluded from the designation of critical for the flycatcher. We view this as a substantial benefit since we have developed a cooperative working relationship with the Tribes and Pueblos for the mutual benefit of the conservation of the southwestern willow flycatcher and other threatened and endangered species.

We indicated in the proposed rule (October 12, 2004; 69 FR 60706) that our final decision regarding the designation of critical habitat on Tribal Lands, would consider our relationship with Tribes and/or Pueblos and whether they developed a flycatcher specific management plan. We identified that the Colorado River Indian Tribes and Hualapai Tribe had draft plans and the Santa Ana Pueblo had developed a Safe Harbor Agreement with us for flycatchers. Santa Ana Pueblo lands were not included in the proposal. We also discussed our continued cooperation with Tribes and Pueblos during the comment period on the development of Management Plans. During the comment period, we received input from many Tribes and BIA offices expressing the view that designating critical habitat for the flycatcher on Tribal land would adversely affect the Service's working relationship with all Tribes. Many noted the beneficial cooperative working relationships between the Service and Tribes have assisted in the conservation and recovery of listed species and other natural resources. They indicated that critical habitat designation on these Tribes or Pueblos would amount to additional Federal regulation of sovereign Nations' lands, and would be viewed as an unwarranted and unwanted intrusion into Tribal natural resource programs. We conclude that our working relationships with these Tribes on a government-to-government basis have been extremely beneficial in implementing natural resource programs of mutual interest, and that these productive relationships would be compromised by critical habitat designation of these Tribal lands.

In addition to management/conservation actions described for the conservation of the flycatcher, we anticipate future management/conservation plans to include conservation efforts for other listed species and their habitat. We believe that many Tribes and Pueblos are willing to work cooperatively with us to benefit other listed species, but only if they view the relationship as mutually beneficial. Consequently, the development of future voluntarily management actions for other listed species will likely be contingent upon whether these Tribal lands are designated as critical habitat for the flycatcher. Thus, a benefit of excluding these lands would be future conservation efforts that would benefit other listed species.

(3) Benefits of Exclusion Outweigh the Benefits of Inclusion

In summary, the benefits of including these Tribes and Pueblos in the critical habitat designation are limited to a potential benefit gained through the requirement to consult under section 7 and consideration of the need to avoid adverse modification of critical habitat and potential educational benefits. However, as discussed in detail above, we believe these benefits are provided for through other mechanisms. The benefits of excluding these areas from being designated as critical habitat for the flycatcher are more significant, and include encouraging the continued implementation of the tribal management/conservation measures such as monitoring, survey, restoration, protection, and fire-risk reduction activities that are planned for the future or are currently being implemented. These programs will allow the Tribes to manage their natural resources to

benefit riparian ecosystems for the flycatcher, without the perception of Federal Government intrusion. This philosophy is also consistent with our published policies on Native American natural resource management. The exclusion of these areas will likely also provide additional benefits to the flycatcher and other listed species that would not otherwise be available due to the Service's ability to encourage and maintain cooperative working relationships with other Tribes and Pueblos. We find that the benefits of excluding these areas from critical habitat designation outweigh the benefits of including these areas.

As noted above, the Service may exclude areas from the critical habitat designation only if it is determined, ''based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.'' Here, we have determined that exclusion of these Tribes and Pueblos from the critical habitat designation will not result in the extinction of the flycatcher. First, activities on these areas that may affect the flycatcher will still require consultation under section 7 of the Act. Section 7(a)(2) of the Act requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of listed species. Therefore, even without critical habitat designation on these lands, activities that occur on these lands cannot jeopardize the continued existence of the flycatcher. Second, each of the Tribes have committed to protecting and managing according to their management/conservation plans and natural resource management objectives. In short, the Tribes have committed to greater conservation measures on these areas than would be available through the designation of critical habitat. With these natural resource measures, we have concluded that this exclusion from critical habitat will not result in the extinction of the flycatcher, chiefly because the management/conservation plans are generally based on the management tenets of the Recovery Plan. Accordingly, we have determined that these Tribes and Pueblos should be excluded under subsection 4(b)(2) of the Act because the benefits of excluding these lands from critical habitat for the flycatcher outweigh the benefits of their inclusion and the exclusion of these lands from the designation will not result in the extinction of the species.

*Upper Rio Grande Management Unit*

San Ildefonso Pueblo

We have worked with San Ildefonso Pueblo (Pueblo) to consolidate information on their past, present, and future voluntary measures, restoration projects, and management to conserve the southwestern willow flycatcher and its habitat on their lands. We have determined, pursuant to section 4(b)(2) of the Act, that we will exclude the lands of this Pueblo, in the Upper Rio Grande Management Unit, from the final designation of critical habitat. As described in our 4(b)(2) analysis below, we have reached this determination because of our effective working relationship with the Pueblo and the benefits of excluding their lands from the final critical habitat designation outweigh the benefits of designating their lands.

San Ildefonso Pueblo is in Santa Fe County, approximately 37 km (23 mi) north of the city of Santa Fe. It encompasses approximately 10,602 ha (26,198 ac) in the Rio Grande valley, including approximately 434 ha (1,073 ac) of the Rio Grande floodplain. On the Pueblo, water is diverted from the Rio Grande for an irrigation system that supports Tribal agricultural practices. Multiple-use practices of the river and riparian habitat resources are an essential component of Tribal activities and culture, and as a result, the Pueblo has taken steps to manage all the components of the riparian habitat (bosque) to ensure that it is intact for future generations. The need for bosque restoration on the Pueblo includes the fact that it is an area of wildland urban interface and current fuel levels in the riparian area pose a fire threat. Over the years, the bosque area has been overtaken by non-native plant species that have created a hazardous potential for wildland fire within the urban interface. The removal of non-native vegetation with the planting of native vegetation and floodplain rehabilitation are being conducted by the Pueblo. Flycatcher surveys are conducted by the Bureau of Indian Affairs (BIA) before the implementation of projects and they have not detected any flycatchers in the project areas (Norman Jojola, BIA Northern Pueblos Agency, pers. comm., August 24, 2005). The Pueblo's long-term management objectives include efforts to reestablish and maintain sustainable native plant communities in the Rio Grande floodplain and improve habitat, including wetland restoration, for culturally important plant and wildlife species, including the southwestern willow flycatcher.

Since 1995, we have been working with the Pueblo and the BIA on wildlife-related projects. We established and maintain a cooperative working relationship with the BIA and their consultants when they requested our involvement and review of environmental assessments for Pueblo projects that included evaluations of habitat for flycatchers. We reviewed the project proposals, environmental assessments, and resulting determinations, and all but one of the proposed projects were determined to have ''no effect'' or to have an insignificant and discountable effect. The one project that was a ''may effect'' is described below.

The project that had the determination of ''may affect, not likely to adversely affect'' the flycatcher (Service Cons. #2–22–99–I–187, 1999), involved the installation of exploratory wells in the bosque, and resulted in an informal consultation for the flycatcher and its habitat. Surveys in the project area did not detect any flycatchers and a 10 by 15 m (32 by 50 ft) patch of potential flycatcher habitat was not affected by the project. In 2001, we also provided technical advice to the BIA and the Pueblo for upcoming bosque restoration projects (Norman Jojola, BIA, August 24, 2005). It was determined that nesting habitat did not exist at the proposed project sites. Surveys conducted by BIA did not detect any flycatchers at the sites.

A 2003–2005 project that we consulted on involves approximately 749 acres along the east side of the Rio Grande within the bosque corridor of San Ildefonso Pueblo (Service 2003, 2004). The project will restore native riparian vegetation and the floodplain by removal of non-native plants and the enhancement of native vegetation and wetlands. The BIA and the Pueblo consulted with us to address concerns about the flycatcher and its habitat at this project site. Flycatcher surveys were conducted and no flycatchers were detected. It was determined that the flycatcher nesting habitat did not exist at the project site and the effect to migration habitat would be insignificant and discountable.

The bosque is important to the traditional life of the people of the Pueblo of San Ildefonso. The Pueblo is managing the vegetation and water components of the bosque to ensure its integrity for the future. They were awarded a Pub. Law 93–638 contract in 2003 to implement the development of a reservation-wide Integrated Resource Management Plan. This process provides the opportunity for the Pueblo to address its resources as a whole and

provide a holistic management approach which would include threatened and endangered species and their habitat. As a sovereign entity they seek to continue to protect and manage their resources according to their traditional and cultural practices, with consideration given to the prevention of wildfires given that it is an area of wildland urban interface (San Ildefonso, August 22, 2005).

The Pueblo request that their land be excluded from the designation of critical habitat in that they want the Service to recognize their sovereign status and their right to manage their own resources. They consider the designation of critical habitat on their land as a total disregard of the Service's trust responsibility to the Tribe and their sovereign status (BIA Northern Pueblos Agency, July 11, 2005). They recognize the importance of their land as a migration area for the flycatcher and they understand that due to their proximity to known territories that their lands were included in the proposal as essential habitat, which includes the potential for dispersal of flycatchers and future development of nesting habitat. However, their traditions and culture have a holistic approach to resource management and they want the Service to recognize this and exclude the Pueblo from the designation of critical habitat.

(1) Benefits of Inclusion

The principal benefit of any designated critical habitat is that activities in and affecting such habitat require consultation under section 7 of the Act if a Federal action is involved. Such consultations ensure that adequate protection is provided to avoid destruction or adverse modification of critical habitat. The section 7 conferencing and consultations involving projects on lands of the San Ildefonso Pueblo for the flycatcher have all been informal. Effects to the flycatcher from Pueblo projects have been insignificant and discountable with determinations of ''no effect'' or ''may affect, not likely to adversely affect'' the flycatcher and its habitat. These determinations resulted from the beneficial nature of the projects proposed to the flycatcher (*e.g.*, restoration and fuels reduction projects). Given that lands of the San Ildefonso Pueblo are managed in a way that provide benefits to the flycatcher, it is highly unlikely that projects would be considered that would result in a depreciable diminishment or long-term reduction of the capability of the habitat to provide for areas of migration and dispersal. To the contrary, activities occurring on these lands will provide benefits to the flycatcher by restoring, improving, and protecting its habitat. Thus we conclude that few regulatory benefits to the flycatcher would be gained from a designation of critical habitat on the Pueblo lands because, as described above, and as evidence by the consultation history, the Pueblo is already managing their lands for the benefit of the flycatcher and its habitat. Furthermore, based on the consultation history and the beneficial nature of the projects undertaken by the Pueblo, it would be highly unlikely that the consultation would result in a determination of adverse modification. Thus, as described in the ''General Principles of Section 7 Consultations Used in the 4(b)(2) Balancing Process'' section above, when the threshold for adverse modification is not reached, additional conservation recommendations could result out of a consultation, but such measures would be discretionary on the part of the Federal agency.

Another possible benefit is that the designation of critical habitat can serve to educate the public regarding the potential conservation value of an area, and this may focus and contribute to conservation efforts by other parties by clearly delineating areas of high conservation value for certain species. Any information about the flycatcher and its habitat that reaches a wide audience, including other parties engaged in conservation activities, would be considered valuable. However, the Pueblo is already working with the Service to understand the habitat needs of the species. Further, the Pueblo lands were included in the proposed designation, which itself has reached a wide audience, and has thus provided information to the broader public about the conservation value of this area. Thus, the educational benefits that might follow critical habitat designation, such as providing information to the BIA or the Pueblo on areas that are important for the long-term survival and conservation of the species, have already been provided by proposing the area as critical habitat. For these reasons, then, we believe that designation of critical habitat would have few, if any, additional benefits beyond those that will result from continued consultation for the presence of the species.

(2) Benefits of Exclusion

The benefits of excluding San Ildefonso Pueblo from designated critical habitat are significant. The proposed critical habitat designation included approximately 434 ha (1,073 ac) of Rio Grande floodplain within the Pueblo boundaries. We believe that the significant benefits that would be realized by forgoing the designation of critical habitat on this area include: (1) The furtherance of our Federal Trust obligations and our deference to the Pueblo to develop and implement Tribal conservation and natural resource management plans for their lands and resources within the Rio Grande ecosystem, which includes the flycatcher and its habitat; (2) the continuance and strengthening of our effective working relationships with the Pueblo to promote the conservation of the flycatcher and its habitat; (3) the allowance for continued meaningful collaboration and cooperation in surveying as we work towards recovery of the species; and (4) the provision of conservation benefits to the Rio Grande ecosystem and the flycatcher and its habitat that might not otherwise occur.

As discussed above, we met with San Ildefonso Pueblo to discuss how they might be affected by the designation of critical habitat. The meetings with the Pueblo were conducted in accordance with Secretarial Order 3206; the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments'' (59 FR 22951); Executive Order 13175; and the relevant provision of the Departmental Manual of the Department of the Interior (512 DM 2). We believe that the Pueblos should be the governmental entities that manage and promote the conservation of the flycatcher on their lands and this was stated during meetings. We also recognized and endorsed their resource management activities, including those relating to the Rio Grande ecosystem. Much of our discussions centered on providing technical advice/assistance to the Pueblo to continue their natural resource management activities that provide benefits to the flycatcher.

Our meetings with the Pueblo are a component of our effective working relationship with them. We established a working relationship in respect to the flycatcher with the earlier informal consultations discussed above. We are maintaining the relationship by means of informal meetings that offer information sharing and technical advice/assistance about project effects to flycatchers and recommended conservation measures.

We find that conservation benefits (*e.g.*, flycatcher surveys and habitat restoration enhancement) are being provided to the flycatcher and its habitat through our cooperative working relationship with the San Ildefonso Pueblo. During our discussions with the Pueblo we were informed that critical

habitat would be viewed as an intrusion on their sovereign abilities to manage natural resources in accordance with their own policies, customs, and laws. To this end, we found that the Pueblo would prefer to work with us on a Government-to-Government basis. For these reasons, we believe that our working relationship with the Pueblo would be maintained if they are excluded from the designation of critical habitat for the flycatcher.

The consultation history, conservation, restoration, and management information submitted to us by the Pueblo documents that meaningful collaborative and cooperative work for the flycatcher and its habitat will continue within their lands. These commitments demonstrate the willingness of the Pueblo to work cooperatively with us toward conservation efforts that will benefit the flycatcher. The Pueblo has committed to several ongoing and future management, restoration, enhancement, and survey activities and we believe that the results of these activities will promote long-term protection and conserve the flycatcher and its habitat within the Pueblo lands. The benefits of excluding this area from critical habitat will encourage the continued cooperation and development of data-sharing and management plans. If this area is designated as critical habitat, we believe it is unlikely that sharing of information would occur.

Educational benefits will be provided to the Pueblo lands if they are excluded from the designation because their past and ongoing restoration projects, with management goals, provide for conservation benefits above any that would be provided by designating critical habitat. For example, the educational aspects are likely greater for this area if they are not included in the designation because the Pueblo will continue to work cooperatively with the Service to restore and enhance their Rio Grande floodplain with habitat that will contribute to the recovery of the species. Surveys that are conducted for the presence or absence of flycatchers at projects sites will record migration use of the area and the participation by tribal biologist in the survey process adds to educational benefits and conservation of the species.

(3) Benefits of Exclusion Outweigh the Benefits of Inclusion

In summary, the benefits of including the Pueblo in critical habitat are small, and are limited to minor educational benefits. The benefits of excluding these areas from critical habitat for the flycatcher are more significant, and include encouraging the continued development and implementation of special management measures such as surveys, enhancement, and restoration activities that are planned for the future or are currently being implemented. These activities and projects will allow the Pueblo to manage their natural resources to benefit the Upper Rio Grande Management Unit for the flycatcher, without the perception of Federal Government intrusion because of the designation of critical habitat on their land. This philosophy is also consistent with our published policies on Native American natural resource management. The exclusion of this area will likely also provide additional benefits to the species that would not otherwise be available to encourage and maintain cooperative working relationships. We find that the benefits of excluding this area from critical habitat designation outweigh the benefits of including this area.

We believe that exclusion of San Ildefonso Pueblo land will not result in extinction of the species. Current records do not document any nesting habitat on the Pueblo but recognize it as a migration corridor and potential area for dispersal. The Pueblo has committed to protecting and managing according to their tribal and cultural management plans and are in the process of creating an IRMP that includes management for threatened and endangered species. In short, the Pueblo has committed to greater conservation measures on their land than would be available through the designation of critical habitat. With these natural resource measures, we have concluded that this exclusion from critical habitat will not result in the extinction of the flycatcher. Accordingly, we have determined that the Pueblo lands of San Ildefonso should be excluded under subsection 4(b)(2) of the Act because the benefits of exclusion outweigh the benefits of inclusion and will not cause the extinction of the species.

Santa Clara Pueblo

During the open comment period, we worked with Santa Clara Pueblo (Pueblo) to consolidate information on their past, present, and future voluntary measures, restoration projects, and management to conserve the southwestern willow flycatcher and its habitat on their lands. We have determined that the lands of this Pueblo, in the Upper Rio Grande Management Unit, will not be designated as critical habitat. As described in our section 4(b)(2) analysis below, we have reached this determination because the benefits of excluding their lands from the final critical habitat designation outweigh the benefits of designating their lands.

Santa Clara Pueblo lies within the proposed designated critical habitat for the flycatcher in the Upper Rio Grande Management Unit. The Pueblo is located on the west bank of the Rio Grande approximately 48 km (30 mi) north of the City of Santa Fe in northern New Mexico. The Pueblo encompasses more than 21,449 ha (53,000 ac) of diverse vegetative communities, including approximately 714 ha (1,764 ac) of Rio Grande woodland/shrubs (bosque). Approximately 10 km (6 mi) of the Rio Grande corridor is a heavily ''checkerboarded'' area with private non-Indian in-holdings now belonging to the City of Espanola, the result of non-Indian encroachment that was sanctioned by the Federal government in the 1920s and 1930s.

The Rio Grande is an integral part of the Pueblo's history, culture, and continued preservation as a homeland. They view all of their natural resources, including the Rio Grande bosque, as important to the survival of the Santa Clara people. Many of the various vegetative communities within the Pueblo and the innumerable wildlife species they support have significant traditional and spiritual value to the tribal people. Because of this and because the Pueblo maintains the sovereign right to manage all the resources within their boundaries, the Tribal Council of Santa Clara Pueblo made a commitment in 2000, that was extended in 2001, to develop an Integrated Resource Management Plan (IRMP) that addresses multi-use, enhancement, and management of their natural resources. Progress is being made in completing the IRMP but it is not yet complete. The Pueblo has submitted a copy of the Tribal Council Resolution as documentation of their commitment to ensure that as part of the IRMP process they ''consider traditional and long-standing uses of tribal lands and utilize appropriate land management protocols while ensuring that culturally and biologically sensitive areas, plants, animals, and other resources will be provided the highest levels of protection.'' (Santa Clara Pueblo Tribal Council Resolution No. 2001–23; July 18, 2001). The IRMP, in its current draft form, was not submitted during the open comment period because it is undergoing review from the Santa Clara Pueblo community (Santa Clara Pueblo, July 12, 2005). They believe it would be inappropriate not to follow the community's internal review system, which experienced delays due to staff changes. Nonetheless, the Pueblo

has already sought and received over $600,000 in funds to complete the IRMP and has contributed approximately 4,500 staff hours within the Pueblo toward development of the IRMP.

Approximately 714 ha (1,764 ac) of Rio Grande bosque on Santa Clara Pueblo has become very susceptible to wildfire; changes in hydrology have encouraged the growth of vegetation that results in heavy fuel loads. The Pueblo had to contend with catastrophic wildfires just within the past decade. The ''Tuesday Fire,'' in the urban interface, burned approximately 61 ha (150 ac) of bosque in 1997; in 2004, the ''Black Mesa'' fire burned additional bosque acres. Other fires that occurred in the area were: the ''Oso Complex'' in June 1998, the ''Cerro Grande'' in May 2000, and bosque fires in the adjoining San Juan Pueblo. This susceptibility to wildfire has prompted Santa Clara Pueblo to undertake management activities along the bosque to protect the health and safety of the Tribal people. In conjunction with the comprehensive IRMP process, the Pueblo has undertaken projects to reduce the fire risk in the area.

The main Pueblo village, the City of Espanola, and nearby non-Indian communities are located close to the river and therefore the bosque acres on Santa Clara Pueblo, which are proposed designated critical habitat for the flycatcher, are considered by the Bureau of Indian Affairs (BIA) and the Pueblo to be Wildland-Urban Interface (WUI) for purposes of implementation of the Federal government's National Fire Plan. A key priority of the National Fire Plan is to reduce hazardous fuel loads in WUI areas in order to reduce the imminent danger to human life and property. However, the Pueblo recognizes the need for fuels reduction and habitat restoration to occur in small increments so as not to harm wildlife in the transition and has committed to this process (Santa Clara Pueblo, July 12, 2005).

The Pueblo has implemented fuel reduction and restoration in their bosque since 2001 and they have projects in various planning stages for the future. In 2001, fuel reduction and restoration took place on 64 ha (159 ac). After that, the Pueblo submitted a request to the BIA for additional funds to work on treatment and restoration of and additional 121 ha (298 ac). In addition, the Pueblo entered into an agreement with New Mexico Association of Conservation Districts and the East Rio Arriba and Water Conservation District for a two-year hazardous fuels treatment project which is in progress on 54 ha (133 ac). Finally, the Pueblo received approval from the U.S. Forest Service for an inter-tribal Collaborative Forest Restoration Proposal to treat and restore another 23 ha (58 ac). As is evidenced here, Santa Clara Pueblo, for the past five years, has systematically planned and received funding to do WUI bosque management and habitat restoration along their bosque.

The Pueblo and its consultants and the BIA have worked in close communication with the Service to address any impacts to the flycatcher and its habitat in connection with these projects (Service 2003). There have been informal meetings with Service staff and Pueblo staff that have resulted in a good working relationship. Another demonstration of this cooperative working relationship and the Pueblo's efforts for conservation of the flycatcher is that, in 2005, three Tribal members participated in training, held at the Service's Albuquerque Field Office, for conducting protocol surveys for the flycatcher. The Pueblo has also identified funding to conduct flycatcher surveys within their entire bosque for Spring of 2006.

The Pueblo has pointed out that their commitments to manage the bosque are in keeping with the goals and techniques and guidelines for fire management and habitat restoration outlined in the Recovery Plan for the flycatcher (Santa Clara Pueblo, July 12, 2005). Santa Clara's commitment to protect the health, well-being, safety, and economy of their people is not isolated from the commitment to protect and restore the ecosystem with its wildlife species and habitat. They view the world holistically and their management and commitments will result in long-term benefits to the ecosystem upon which a diverse array of plants and wildlife depend, including the endangered southwestern willow flycatcher.

(1) Benefits of Inclusion

The principal benefit of any designated critical habitat is that activities in and affecting such habitat require consultation under section 7 of the Endangered Species Act if a Federal action is involved. Such consultations ensure that adequate protection is provided to avoid destruction or adverse modification of critical habitat. The section 7 conferencing and consultations involving Santa Clara Pueblo for the flycatcher have been informal. Effects to the flycatcher from Pueblo projects have been insignificant and discountable with determinations of ''no effect'' to the flycatcher and its habitat (Santa Clara Pueblo, August 26, 2005). These determinations resulted from the lack of presence of the flycatcher.

Given that lands of the Santa Clara Pueblo are managed in a way that provide benefits to the flycatcher, it is highly unlikely that projects would be considered that would result in a depreciable diminishment or long-term reduction of the capability of the habitat to provide for areas of migration and dispersal. To the contrary, activities occurring on these lands will provide benefits to the flycatcher by restoring, improving, and protecting its habitat. Thus we conclude that few regulatory benefits to the flycatcher would be gained from a designation of critical habitat on the Pueblo lands because, as described above, and as evidence by the consultation history, the Pueblo is already managing their lands for the benefit of the flycatcher and its habitat. Furthermore, based on the consultation history and the beneficial nature of the projects undertaken by the Pueblo, it would be highly unlikely that the consultation would result in a determination of adverse modification. Thus, as described in the ''General Principles of Section 7 Consultations Used in the 4(b)(2) Balancing Process'' section above, when the threshold for adverse modification is not reached, additional conservation recommendations could result out of a consultation, but such measures would be discretionary on the part of the Federal agency.

Another possible benefit is that the designation of critical habitat can serve to educate the public regarding the potential conservation value of an area, and this may focus and contribute to conservation efforts by other parties by clearly delineating areas of high conservation value for certain species. Any information about the flycatcher and its habitat that reaches a wide audience, including other parties engaged in conservation activities, would be considered valuable. However, the Pueblo is already working with the Service to understand the habitat needs of the species and some of their biologists have participated in flycatcher survey training classes. Further, the Pueblo lands were included in the proposed designation, which itself has reached a wide audience, and has thus provided information to the broader public about the conservation value of this area. Thus, the educational benefits that might follow critical habitat designation, such as providing information to the BIA or the Pueblo on areas that are important for the long-term survival and conservation of the species, have already been provided by

proposing the area as critical habitat. For these reasons, then, we believe that designation of critical habitat would have few, if any, additional benefits beyond those that will result from continued consultation for the presence of the species.

(2) Benefits of Exclusion

The benefits of excluding Santa Clara Pueblo from designated critical habitat are significant. The proposed critical habitat designation included approximately 714 ha (1,764 ac) of Rio Grande woodland/shrubs (bosque) within the Pueblo boundaries. We believe that the significant benefits that would be realized by forgoing the designation of critical habitat on this area include: (1) The furtherance of our Federal Trust obligations and our deference to the Pueblo to develop and implement Tribal conservation and natural resource management plans for their lands and resources within the Rio Grande ecosystem, which includes the flycatcher and its habitat; (2) the continuance and strengthening of our effective working relationships with the Pueblo to promote the conservation of the flycatcher and its habitat, including future surveys; (3) the allowance for management and restoration in a WUI area that focuses on fire prevention, and human health and safety, and yet addresses conservation for the flycatcher; and (4) the provision of conservation benefits to the Rio Grande ecosystem and the flycatcher and its habitat that might not otherwise occur.

As discussed above, we met with Santa Clara Pueblo to discuss how they might be affected by the designation of critical habitat. The meeting with the Pueblo was conducted in accordance with Secretarial Order 3206; the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments'' (59 FR 22951); Executive Order 13175; and the relevant provision of the Departmental Manual of the Department of the Interior (512 DM 2). We believe that the Pueblos should be the governmental entities that manage and promote the conservation of the flycatcher on their lands. During our meetings with the Pueblo, we recognized and endorsed these resource management activities, including those relating to the Rio Grande ecosystem. Much of our discussions centered on providing technical advice/assistance to the Pueblo to develop, continue, or expand natural resource management such that the designation of critical habitat for the flycatcher would provide few if any benefits.

We have an effective working relationship with Santa Clara Pueblo, which was established and has evolved from informal consultations. As part of this cooperative working relationship, we provided technical advice/assistance to the Pueblo, in respect to project activity, to evaluate habitat for primary constituent elements and to develop measures to conserve the flycatcher and its habitat on their lands. Another demonstrable example of the trust and relationship that the Service has with the Pueblo is the participation by some of their staff. In 2005, in Service sponsored training for flycatcher surveys.

As part of maintaining a cooperative working relationship with the Pueblo, conservation benefits, including habitat restoration and enhancement have been possible. During our discussions with the Pueblo, and reiterated in their written comments, (Santa Clara Pueblo, July 12, 2005), we were informed that critical habitat would be viewed as an intrusion on their sovereign abilities to manage natural resources in accordance with their own policies, customs, and laws. To this end, we found that the Pueblo would prefer to work with us on a Government-to-Government basis. For these reasons, we believe that our working relationship with the Pueblo would be maintained if they are excluded from the designation of critical habitat for the flycatcher. We view this as a substantial benefit.

As mentioned above, the Pueblo is an important land manager in respect to its land being a Wildland-Urban Interface. Its bosque needs to be managed and restored with the focus of fire prevention and human health and safety. The restoration and management information submitted by the Pueblo documents their commitment to having meaningful collaborative and cooperative work for the flycatcher and its habitat continue within their lands as they address the need to manage for human protection (Santa Clara Pueblo, July 12, 2005). These commitments demonstrate the willingness of the Pueblo to work cooperatively with us toward conservation efforts that will benefit the flycatcher. The Pueblo has committed to several ongoing or future management, restoration, enhancement, and survey activities and we believe that the results of these activities will promote long-term protection and conserve the flycatcher and its habitat within the Pueblo lands (Santa Clara Pueblo, July 12, 2005). The benefits of excluding this area from critical habitat will encourage the continued cooperation and development of data-sharing and management plans. If this area is designated as critical habitat, we believe it is unlikely that sharing of information would occur.

Educational benefits will be provided to the Pueblo lands if they are excluded from the designation, because their past and ongoing restoration projects, with management goals, provide for conservation benefits above any that would be provided by designating critical habitat. For example, the educational aspects are likely greater for this area if they are not included in the designation because the Pueblo will continue to work cooperatively with the Service to restore and enhance their Rio Grande floodplain with habitat that will contribute to the recovery of the species. Surveys that are planned for 2006 for the presence or absence of flycatchers in their bosque will add to recovery information and the participation by tribal biologist in the survey process adds to educational benefits and conservation of the species.

(3) Benefits of Exclusion Outweigh the Benefits of Inclusion

In summary, the benefits of including the Pueblo in critical habitat are small, and are limited to minor educational benefits. The benefits of excluding these areas from being designated as critical habitat for the flycatcher are more significant, and include encouraging the continued development and implementation of special management measures such as surveys, enhancement, and restoration activities that are planned for the future or are currently being implemented. These activities and projects will allow the Pueblo to manage their natural resources to benefit the Upper Rio Grande management Unit and the flycatcher, without the perception of Federal Government intrusion. This philosophy is also consistent with our published policies on Native American natural resource management. The exclusion of this area will likely also provide additional benefits to the species that would not otherwise be available to encourage and maintain cooperative working relationships. We find that the benefits of excluding this area from critical habitat designation outweigh the benefits of including this area.

We believe that exclusion of the Pueblo land will not result in extinction of the species. The Pueblo has committed to protecting and managing according to their tribal and cultural management plans and natural resource management objectives. In short, the Pueblo has committed to greater conservation measures on their land than would be available through the

designation of critical habitat. With these natural resource measures, we have concluded that this exclusion from critical habitat will not result in the extinction of the flycatcher. Accordingly, we have determined that the Pueblo lands of Santa Clara should be excluded under subsection 4(b)(2) of the Act because the benefits of exclusion outweigh the benefits of inclusion and will not cause the extinction of the species.

As discussed in the ''Relationship of Critical Habitat to Tribal Lands'' section of the Proposed Rule, in accordance with the Secretarial Order 3206, ''American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act'' (June 5, 1997); the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments'' (59 FR 22951); Executive Order 13175; and the relevant provision of the Departmental Manual of the Department of the Interior (512 DM 2), we have found that fish, wildlife, and other natural resources on tribal lands are better managed under tribal authorities, policies, and programs than through Federal regulation wherever possible and practicable. Based on our experience, in many cases, designation of tribal lands as critical habitat provides very little additional benefit to threatened and endangered species. Conversely, such designation is often viewed by tribes as an unwanted intrusion into tribal self governance, thus compromising the government-to-government relationship essential to achieving our mutual goals of managing for healthy ecosystems upon which the viability of threatened and endangered species populations depend. In making our final decision with regard to tribal lands, we considered several factors including our relationship with the Tribe or Pueblo and whether conservation measures are in place for the southwestern willow flycatcher on their lands.

San Juan Pueblo (Ohkay Owingue)

During the open comment period, we worked with San Juan Pueblo (Pueblo) to consolidate information on their past, present, and future voluntary measures, restoration projects, and management to conserve the southwestern willow flycatcher and its habitat on their lands. We have determined that the lands of this Pueblo, in the Upper Rio Grande Management Unit, will not be designated as critical habitat. As described below, we have reached this determination because the benefits of excluding their lands from the final critical habitat designation outweigh the benefits of designating their lands.

San Juan Pueblo, is located just north of Espanola in Rio Arriba County, New Mexico, and adjoins the lands of Santa Clara Pueblo. The Pueblo includes the southern or downstream end of the Velarde reach of the Rio Grande, and comprises the largest contiguous area of generally intact bosque, as well as the largest riparian area under the control of a single landowner, within the Velarde reach. A total of about 17 km (10.3 mi) are located within the Pueblo, (USGS 1:24,000 map, 7.5 minute series, San Juan, NM), and over 445 ha (1100 ac) of riparian woodland, or bosque, are still extant within the Pueblo boundaries.

In June of 1993, the flycatcher was documented on the west side of the Rio Grande north of the NM 74 Bridge as a biological assessment was being prepared for the proposed San Juan Bridge project. The project proposed to replace an existing bridge and two-lane road section with a newly located bridge and two-lane road with shoulders. Subsequent evaluations indicated that a viable population of nesting flycatchers was using the area.

The presence of the nesting flycatcher prompted the Pueblo to restore the bosque habitat and associated wetlands for the flycatcher. Habitat within the Pueblo is much degraded relative to historic conditions for two main reasons: (1) River channelization that has caused floodplain desiccation, cessation of overbank flooding, and disruption of geomorphological processes; and (2) intensive invasion by non-native trees, primarily Russian olives. The increasing frequency and severity of fires in the Rio Grande bosque, accompanied by changes in vegetation and the water regime, underscores the urgency of restoration needs.

The San Juan Pueblo immediately began restoration/conservation projects to benefit the flycatcher following the bridge project in 1994. Two acres of native riparian vegetation were planted on the reclaimed old roadway; 0.1 ha (0.22 ac) of riparian vegetation were planted adjacent to the new bridge; 1 acre of riparian woodland was restored adjacent to the project; and, wetland restoration, which included open water and saturated soils, was developed at three sites encompassing 0.19 ha (0.46 ac), 0.14 ha (0.34 ac), and 0.06 ha (0.14 ac). Since 1999 the Pueblo has initiated or completed a variety of restoration/conservation projects, including further wetland creation and expansion, flycatcher habitat enhancement with vegetation and open water, and removal of non-native vegetation with replacement of native vegetation. These projects are funded through various programs of the Environmental Protection Agency, Wildland Urban Interface/Collaborative Forest Restoration Program, Endangered Species Act Collaborative Program, and the State of New Mexico; they affect 301 ha (744 ac) of riparian habitat on the Pueblo with direct and indirect benefits to the flycatcher. The project implementations include conservation, monitoring, and management for the flycatcher into the future. These efforts contribute to the long term goals of recovery for the flycatcher. In addition to the habitat work, the Pueblo supports flycatcher surveys and nest monitoring on the Pueblo lands.

The long-term goal of riparian management on San Juan Pueblo is to make significant additions of wetland areas for breeding flycatchers, as well as implement innovative restoration techniques, decrease fire hazards by restoring native vegetation, share information with other restoration practitioners, utilize restoration projects in the education of the tribal community and surrounding community, and provide a working and training environment for the people of the Pueblo. In 2004, the Pueblo sponsored a multi-agency/organization riparian restoration conference on their lands. Their restoration efforts and flycatcher conservation were highlighted at the conference. As such, the Service and its partners gained valuable information about restoring flycatcher habitat and management techniques that can be applied to other riparian areas.

Based on their traditional beliefs and ties to the bosque area, the Pueblo continues to protect, conserve, and restore the riparian habitat and the species that utilize the habitat. As is demonstrated through their projects, the Pueblo has invested a significant amount of ongoing time and effort to address the needs and recovery of the flycatcher. In addition, based on the long term goals of restoring additional wetland and native habitat, the Pueblo has shown that it is managing its resources to meet its traditional and cultural needs, while addressing the needs of the flycatcher. Currently, the San Juan Pueblo Environmental Affairs department employs nine Tribal members who work on holistic habitat restoration and management, which includes threatened and endangered species and their habitat.

(1) Benefits of Inclusion

There are few benefits of including San Juan Pueblo in the critical habitat designation above those that will be

achieved through the implementation of the Pueblo's voluntary conservation measures, restoration projects, and management. The principal benefit of any designated critical habitat is that activities affecting such habitat requires consultation under section 7 of the Endangered Species Act if a Federal action is involved. Such consultation would ensure that adequate protection is provided to avoid destruction or adverse modification of critical habitat. However, if adequate protection can be provided in another manner, such as those provided by the Pueblo, the benefits of including any area in critical habitat are insignificant.

Since 1993, the section 7 consultations involving San Juan Pueblo for the flycatcher have been informal. Effects to the flycatcher from these projects have been insignificant and discountable because conservation measures have focused on restoration and management for the flycatcher and its habitat. As stated in the environmental assessment, the primary conservation value of the proposed critical habitat segments is to sustain existing populations. The threshold for reaching destruction or adverse modification on lands of the San Juan Pueblo would likely require a reduction in the capability of the habitat to sustain existing populations. Given that these lands are managed for the benefit of the flycatcher, it is highly unlikely that projects would be considered that would result in a depreciable diminishment or long-term reduction of the capability of the habitat to sustain existing populations. To the contrary, activities occurring on these lands will provide benefits to the flycatcher by restoring, improving, and protecting its habitat.

Another possible benefit is that the designation of critical habitat can serve to educate the public regarding the potential conservation value of an area, and this may focus and contribute to conservation efforts by other parties by clearly delineating areas of high conservation value for certain species. Any information about the flycatcher and its habitat that reaches a wide audience, including other parties engaged in conservation activities, would be considered valuable. However, the Pueblo is already working with the Service to address the habitat needs of the species. Further, the Pueblo lands were included in the proposed designation, which itself has reached a wide audience, and has thus provided information to the broader public about the conservation value of this area. Thus, the educational benefits that might follow critical habitat designation, such as providing information to the BIA or Pueblos on areas that are important for the long-term survival and conservation of the species, have already been provided by proposing these areas as critical habitat. For these reasons, then, we believe that designation of critical habitat would have few, if any, additional benefits beyond those that will result from continued consultation for the presence of the species.

(2) Benefits of Exclusion

The benefits of excluding the Pueblo from designated critical habitat are significant. The proposed critical habitat designation included 10.3 mi (16.5 km) of river and over 445 ha (1100 ac) of riparian woodland, or bosque, within the Pueblo boundaries. We believe that the significant benefits that would be realized by forgoing the designation of critical habitat on this area include: (1) The furtherance of our Federal Trust obligations and our deference to the Pueblo to develop and implement Tribal conservation and natural resource management plans for their lands and resources within the Rio Grande ecosystem, which includes the flycatcher and its habitat; (2) the continuance and strengthening of our effective working relationships with the Pueblo to promote the conservation of the flycatcher and its habitat; (3) the allowance for continued meaningful collaboration and cooperation in surveys and nest monitoring as we work towards recovery of the species; and (4) the provision of conservation benefits to the Rio Grande ecosystem and the flycatcher and its habitat that might not otherwise occur.

Educational benefits will be provided to the Pueblo lands if they are excluded from the designation, because their past and ongoing restoration projects, with management goals, provide for conservation benefits above any that would provided by designating critical habitat. For example, the educational aspects are likely greater for this area if they are not included in the designation because the Pueblo will continue to work cooperatively toward the conservation of the flycatcher, which will include continuing, initiating, and completing flycatcher surveys/research and habitat restoration. As mentioned above, the Pueblo has already actively contributed to the education of multiple individuals about the conservations efforts and needs of the flycatcher through their riparian restoration conference.

As discussed above, we met with San Juan Pueblo to discuss how they might be affected by the designation of critical habitat. We have an effective working relationship with the Pueblo, which was established and has evolved from the earlier informal consultations. As part of our cooperative working relationship, we provided technical advice/assistance to the Pueblo to develop measures to conserve the flycatcher and its habitat on their lands. San Juan Pueblo's past, present, and on-going voluntary conservation measures in connection with their Environmental Affairs Department, Federal/State habitat restoration grants, and species conservation grants were summarized and submitted to the Service (San Juan Pueblo, July 18/August 18, 2005). These actions were conducted in accordance with Secretarial Order 3206; the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments'' (59 FR 22951); Executive Order 13175; and the relevant provision of the Departmental Manual of the Department of the Interior (512 DM 2). We believe that these Pueblos should be the governmental entities to manage and promote the conservation of the flycatcher on their lands. During our meetings with each of these Pueblos, we recognized and endorsed these resource management activities, including those relating to the Rio Grande ecosystem. Much of our discussions centered on providing technical advice/assistance to the Pueblo to develop, continue, or expand natural resource management such that the designation of critical habitat for the flycatcher would provide few if any benefits.

We find that other conservation benefits are provided to the Upper Rio Grande Management Unit and the flycatcher and its habitat by excluding the Pueblo from the designation. For example, as part of maintaining a cooperative working relationship with the Pueblo, conservation benefits, including flycatcher surveys, nest and habitat monitoring, and habitat restoration and enhancement have been possible. During our discussions with the Pueblo, and reiterated in their written comments, (San Juan Pueblo, July 18/August 18, 2005), we were informed that critical habitat would be viewed as an intrusion on their sovereign abilities to manage natural resources in accordance with their own policies, customs, and laws. To this end, we found that the Pueblo would prefer to work with us on a Government-to-Government basis. For these reasons, we believe that our working relationship with the Pueblo would be maintained if they are excluded from the designation

of critical habitat for the flycatcher. We view this as a substantial benefit.

Proactive voluntary conservation efforts will promote the recovery of the flycatcher. As mentioned above, the Pueblo is an important land manager in the Upper Rio Grande management Unit. The consultation history, surveys, and conservation, restoration and management information submitted by the Pueblo documents that meaningful collaborative and cooperative work for the flycatcher and its habitat will continue within their lands. These commitments demonstrate the willingness of the Pueblo to work cooperatively with us toward conservation efforts that will benefit the flycatcher. The Pueblo has committed to several ongoing or future management, restoration, enhancement, and survey activities that may not occur with critical habitat designation. Therefore, we believe that the results of these activities will promote long-term protection and conserve the flycatcher and its habitat within the Pueblo lands. The benefits of excluding this area from critical habitat will encourage the continued cooperation and development of data-sharing and management plans. If this area is designated as critical habitat, we believe it is unlikely that sharing of information would occur.

(3) Benefits of Exclusion Outweigh the Benefits of Inclusion

In summary, the benefits of including the Pueblo in critical habitat are small, and are limited to insignificant educational benefits. The benefits of excluding these areas from designation as critical habitat for the flycatcher are significant, and include encouraging the continued development and implementation of special management measures such as monitoring, surveys, enhancement, and restoration activities that the Pueblo plans for the future or is currently implementing. These activities and projects will allow the Pueblo to manage their natural resources to benefit the Upper Rio Grande management Unit and the flycatcher, without the perception of Federal Government intrusion. This philosophy is also consistent with our published policies on Native American natural resource management. The exclusion of this area will likely also provide additional benefits to the species that would not otherwise be available to encourage and maintain cooperative working relationships. We find that the benefits of excluding this area from critical habitat designation outweigh the benefits of including this area.

We have determined that exclusion of the Pueblo land will not result in extinction of the species. The Pueblo is committed to protecting and managing Pueblo lands and species found on those lands according to their tribal and cultural management plans and natural resource management objectives, which provide conservation benefits for the species and its habitat. In short, the Pueblo is committed to greater conservation measures on their land than would be available through the designation of critical habitat. Accordingly, we have determined that the Pueblo lands of San Juan should be excluded under subsection 4(b)(2) of the Act because the benefits of exclusion outweigh the benefits of inclusion and will not cause the extinction of the species and we are excluding the Pueblo lands of San Juan from this critical habitat designation.

**Relationship of Critical Habitat to Partnerships and Conservation Plans/ Easements on Private Lands—Exclusions Under Section 4(b)(2) of the Act**

*Verde Management Unit, AZ*

Salt River Project Partnership at Horseshoe Lake

As discussed in the ''Summary of Changes from the Proposed Rule'' section above, we have determined that proposed critical habitat in the conservation space of Horseshoe Lake on the Verde River in Maricopa County, AZ will not be designated as critical habitat in this final rule due to our partnership and the ongoing HCP negotiations with Salt River Project (SRP). Salt River Project operates Horseshoe Dam and the Tonto National Forest manages the ground. We have reached this determination because we believe the benefits of excluding this segment from the final critical habitat designation outweigh the benefits of designating the lake as critical habitat.

Similar to Roosevelt Dam, flycatcher habitat in Horseshoe Lake is created as a result of the storage and release of water behind and from Horseshoe Dam, which exposes fine sediments across a broad/flat floodplain. These conditions maintained with Verde River inflow generates, through a vegetative successional process and timeframe, abundant riparian habitat for the flycatcher. Periodic flooding or inundation of the habitat can result in temporary losses or unavailability of habitat and incidental take of flycatchers due to operations. Over time though, water is needed to flow over the conservation space to recharge groundwater, prevent dessication, and re-establish vegetation. Therefore, in the long-term through this cyclical and successional process, dam operations are expected to help support the existence of flycatcher habitat within Horseshoe Lake. Flycatcher habitat and territories at Horseshoe Lake have improved over the last three years, growing from 6 territories in 2003, to 11 in 2004, and now approximately 27 territories in 2005 (R. Ockenfels, AGFD, e-mail).

Salt River Project and the Service have an ongoing partnership of working toward conserving federally-listed species that has existed for nearly two decades. As examples of our partnership that extends to a variety of threatened and endangered species, SRP has voluntarily worked with the Service toward bald eagle recovery since the 1980s. They have participated in the inter-agency Southwestern Bald Eagle Management Committee, and provided annual helicopter flights to assess annual eagle productivity, conduct winter counts, detect new breeding areas, and access remote sites to band eaglets. In some instances they have also volunteered helicopter time to rescue bald eagles in life-threatening situations or take a rehabilitated eagle back to its nest area quickly. SRP has further donated funds to hire Arizona Bald Eagle Nestwatchers in order to protect bald eagles at nest sites. SRP has also produced a variety of bald eagle educational materials (brochures, posters, etc.) and atlases to track nest and territory locations. Additionally, SRP has supported California condor recovery by providing helicopter transportation of birds and biologists to remote locations. SRP has also worked with the Service's law enforcement and other local power companies toward improving reporting of bird electrocutions, identifying locations of mortality, and retrofitting transmission poles to protect birds.

Salt River Project has also been active in developing HCPs for southwestern willow flycatchers. Together SRP and the Service developed a comprehensive plan that allows for the protection and persistence of southwestern willow flycatchers at Roosevelt Lake, and acquisition of properties to mitigate effects of water storage (see Roosevelt HCP portion of this Exclusion section). Bald eagles and yellow-billed cuckoos were also included in this HCP.

At Horseshoe Lake, SRP has committed resources to manage the lake not only for water storage, but also to retain habitat for southwestern willow flycatchers. Unlike some other reservoirs, because of the ability to store water downstream in Bartlett Lake, SRP

has more flexibility with how water is stored and released. Since the discovery of southwestern willow flycatchers at Horseshoe Lake, SRP has engaged in flycatcher and habitat surveys and has worked with the Service to determine ways in which the reservoir can be managed to balance the needs of the flycatcher and its purpose for water storage. This has been an ongoing two-year effort that will be formalized in a HCP, resulting in improved management of the dam to ensure long-term southwestern willow flycatcher habitat persistence, combined with off-site habitat acquisition. We published our notice of intent to conduct NEPA, prepare an Environmental Impact Statement, and hold scoping meetings related to the Horseshoe/Bartlett HCP in June 2003 (68 FR 36829). Since scoping, the Service and SRP continue to develop and refine plans that solidify development, maintenance, and protection of flycatcher habitat at Horseshoe Lake and conservation measures for other species involved in the Plan. The Horseshoe/Bartlett HCP, once completed, will result in conservation for bald eagles, yellow-billed cuckoos, and federally-listed and non-listed native fish. Collectively, our partnership in all of these areas has resulted in benefits that have contributed to immediate and long-term benefits to the conservation and recovery of protected species.

(1) Benefits of Inclusion

SRP has determined that any incidental take as a result of dam operations is appropriately authorized under section 10(a)(1)(B) of the Act (*i.e.*, Habitat Conservation Plan). Therefore, the eventual finalization of a HCP and issuance of this permit will commit an applicant (*i.e.*, SRP) to conduct southwestern willow flycatcher conservation activities, and minimize and/or mitigate to the maximum extent practicable for any incidental take. In order to issue this permit, the Service would have to conclude that the HCP would not jeopardize the southwestern willow flycatcher. Because southwestern willow flycatchers already exist at Horseshoe Lake, the scope of our analysis would include flycatcher habitat.

There is a Federal nexus for Tonto National Forest activities at Horseshoe Lake, because once the lake recedes, the Forest Service manages the dry lake bottom. Therefore, if the Forest carried out, funded, or permitted any activities that affected critical habitat at Horseshoe Lake, it would require consultation under section 7 of the Act. Forest Service management of activities that can reduce quality of flycatcher habitat such as cattle grazing and recreation at Horseshoe Lake helped foster habitat development since the lake receded due to drought in the mid-1990s, and since southwestern willow flycatcher territories were discovered at Horseshoe in 2002, no Forest Service projects have been proposed that have adversely affected southwestern willow flycatchers or their habitat. Because of this lake's importance for water storage and because water periodically floods the entire area, there is no reason to anticipate that the lake bottom will be anything but open space. Due to the periodic water flow, it limits the extent this lake bottom can be managed for any other activities. Because southwestern willow flycatchers currently occupy Horseshoe Lake, section 7 consultation and analysis of effects to habitat already occurs, leaving few additional benefits to the designation of critical habitat.

Designation of critical habitat also provides educational benefits, including informing project proponents (in this case SRP and the Forest Service) of areas that are important to the conservation of listed species and providing important information on those habitats and their primary constituent elements. Because SRP and the Forest Service are the water and land managers, they have conducted and contracted surveys, nest monitoring, and vegetation monitoring for the southwestern willow flycatcher at Horseshoe Lake. Therefore, the potential designation of critical habitat at Horseshoe Lake would not provide this educational benefit because both SRP and the Forest Service already know the birds are present and are studying its habitat and breeding locations. SRP and the Forest are also already aware that Horseshoe Lake has a high concentration of flycatchers, and are important to conservation goals on the Verde River Management Unit. In addition, this area was included in our proposed designation and is discussed in this final designation as an area essential to the conservation of the flycatcher.

(2) Benefits of Exclusion

The benefits of excluding lands within Horseshoe Lake area from critical habitat designation include recognizing the value of conservation benefits associated with a partnership and a developing HCP; encouraging actions that benefit multiple species; encouraging local participation in development of new HCPs; and facilitating the cooperative activities provided by the Service to groups such as SRP. Additionally, our existing partnership and the integration of Federal land management will generate a consistent management approach at Horseshoe Lake.

The partnership and cohesive management at Horseshoe Lake will maintain habitat for southwestern willow flycatchers for the long-term. This partnership will culminate in development, finalization, and implementation of an HCP that will provide long-term conservation benefits. In addition to maintaining habitat for the long-term at Horseshoe Lake, this partnership and subsequent HCP will include the development of status and distribution information needed to guide conservation efforts and assist in species conservation outside the HCP planning area, and the creation of innovative solutions to conserve species that can be applied wherever similar needs exist, irrespective of land ownership. The partnership with SRP also facilitates other cooperative activities with other similarly situated industry, communities, and landowners. Continued cooperative relations with SRP and their stakeholders (*i.e.*, City of Phoenix) are expected to influence other future partners and lead to greater conservation than would be achieved through multiple section 7 consultations.

Non-Federal landowners or dam operators such as SRP are motivated to work with the Service collaboratively to develop voluntary HCPs because of the regulatory certainty provided by an incidental take permit under section 10(a)(1)(B) of the Act with the No Surprises Assurances. This collaboration often provides greater conservation benefits than could be achieved through strictly regulatory approaches, such as critical habitat designation. The conservation benefits resulting from this collaborative approach are built upon a foundation of mutual trust and understanding. It takes considerable time and effort to establish this foundation of mutual trust and understanding which is one reason it often takes several years to develop a successful HCP. Already, the Horseshoe/Bartlett HCP development process has exceeded two years. Excluding this area from critical habitat would help promote and honor that trust by providing certainty for permittees that once appropriate conservation measures have been agreed to that additional consultation will not be necessary.

In discussions with the Service, SRP and their stakeholders have indicated they view critical habitat designation at Horseshoe Lake as unwarranted, and undermines the regulatory certainty that

would be provided by their expected incidental take permit and the No Surprises assurances. There is a concern by SRP and stakeholders that designation of critical habitat at Horseshoe Lake has the potential to threaten the storage and delivery of water to the greater Phoenix metropolitan area (described in the Economic Analysis). Should this ever come to pass, the results could be significant, however we do not believe that scenario is reasonably foreseeable. Having applicant's understand the Service's commitment will encourage continued partnerships with these permittees that could result in additional conservation plans or additional lands enrolled in HCPs. By excluding areas where our partnerships have been established following years of collaborative efforts that has resulted, and will continue to result in habitat protection for the flycatcher, preserves these partnerships and promote more effective conservation actions in the future.

A benefit of excluding Horseshoe Lake from critical habitat designation includes relieving additional regulatory burden and costs associated with the preparation of portions of section 7 documents related to critical habitat. While the cost of adding these additional sections to assessments and consultations to the Service and the Forest Service is relatively minor, there could be delays which can generate real costs to some project proponents. Since critical habitat is only proposed for occupied areas already subject to section 7 consultation and a jeopardy analysis, it is anticipated this reduction would be minimal.

(3) Benefits of Exclusion Outweigh the Benefits of Inclusion

In summary, we find that the benefits of designating critical habitat for the southwestern willow flycatcher at Horseshoe Lake are small in comparison to the benefits of exclusion. In making this finding, we have weighed the benefits of including Horseshoe Lake as critical habitat, and compared them to the benefits of these lands without critical habitat, but with management based on our existing partnership (with a future HCP) and management by the Forest Service. Excluding Horseshoe Lake would reduce some additional administrative effort and cost during the consultation process pursuant to section 7 of the Act. Excluding Horseshoe Lake would continue to help foster development of future partnerships and HCPs and strengthen our relationship with permittees and stakeholders. Because there is no Federal nexus for Horseshoe Dam operations, critical habitat, in and of itself, provides little benefit to Horseshoe Lake flycatcher habitat from Horseshoe Dam operations. Our 4(b)(8) determination in this final rule indicated that we did not believe dam operations, like Roosevelt Dam, would result in adverse modification. Horseshoe Dam operations, similar to Roosevelt Dam, will continue to foster the maintenance, development, and necessary recycling of habitat for the flycatcher in the long-term due to the dynamic nature of water storage and delivery. To date, Forest Service management has fostered the development, presence, and protection of flycatcher habitat. Because the lake bottom is intended for water storage, we believe there is virtually no risk of development or extensive land-use by the Forest Service that would be expected to result in adverse modification. Excluding Horseshoe Lake eliminates the concern of permittees and stakeholders of the possible risk to water storage and delivery to the greater Phoenix metropolitan area. This subsequently eliminates any uncertain risk of significant economic costs due to loss of water storage capabilities.

We have, therefore, concluded that the current partnership and management established with SRP for flycatcher habitat, existing Forest Service management fostering flycatcher habitat, and conservation commitment to flycatcher habitat, outweigh those benefits that would result from the area being included in the designation. We have therefore excluded these lands from the final critical habitat designation pursuant to section 4(b)(2) of the Act.

We also find that the exclusion of Horseshoe Lake will not lead to the extinction of the species, nor hinder its recovery. The periodic fluctuation in Horseshoe Dam operation, the maintenance of the dry lake bottom as open-space, and continued appropriate Forest Service management will ensure the long-term persistence and protection of flycatcher habitat at Horseshoe Lake.

*San Luis Valley Management Unit, CO*

San Luis Valley Partnership and Regional Habitat Conservation Plan

As discussed in the ''Summary of Changes from the Proposed Rule'' section above, we have determined that all proposed critical habitat in the San Luis Management Unit, CO (Rio Grande and Conejos River), will not be designated as critical habitat in this final rule due to our past and future conservation partnerships within the San Luis Valley, as discussed below. We have reached this determination because we believe the benefits of excluding this unit from the final critical habitat designation outweigh the benefits of designating the unit as critical habitat.

A partnership has been formed to develop a HCP in the San Luis Valley of Colorado. The State of Colorado received a $380,000 HCP Section 6 Planning Grant on behalf of the Rio Grande Water Conservation District in 2004 to develop the HCP for five counties, two cities, the State of Colorado, and 14 other smaller communities. In September 2005 the State received another $120,000 Section 6 grant to draft NEPA documents and finalize the HCP. A preliminary draft of the San Luis Valley Regional HCP has been submitted to the Service for review. The HCP as proposed would cover nearly 809,300 ha (2 million ac) and 241 km (150 mi) of habitat for the southwestern willow flycatcher, bald eagle, and yellow-billed cuckoo. The acreage covered by the HCP encompasses the entire Colorado portion of the San Luis Valley Management Unit, as described in the Southwestern Willow Flycatcher Final Recovery Plan, and extends well beyond the two stream segments in the Rio Grande and Conejos Rivers that we proposed as critical habitat.

The San Luis Valley has a strong tradition of locally supporting issues that provide for long-term conservation of natural resources. For instance, entities within the Valley fought a strong effort on two occasions by governmental entities from larger cities (Colorado Springs and Aurora, CO) to the north to withdraw water from the Valley's underground aquifer and have it pumped to the larger cities. A subsequent result of this effort was the expansion of the Service's National Wildlife refuge lands in the Valley (now referred to as the Baca Refuge under the administration of the Alamosa-Monte Vista Refuge) and expansion of the adjacent Great Sand Dunes National Park and Preserve, actions supported by the local community. These efforts have facilitated strong, meaningful, and enduring conservation partnerships with the Service.

The Valley has other strong conservation efforts that are locally driven: such as the Rio Grande Headwaters Restoration Project, Alamosa River Restoration Project, Colorado Wetlands Initiative—San Luis Valley Focus Area Group, Rio Grande Natural Area, and Saguache Creek Corridor Project. All these efforts, described in further detail below to demonstrate the history of conservation

efforts in the San Luis Valley, are within the HCP planning area and will provide conservation benefits to the southwestern willow flycatcher, bald eagle, and yellow-billed cuckoo, as well as other wildlife within riparian and wetland communities.

The Rio Grande Headwaters Restoration Project objective is to implement a master restoration plan for approximately 64 km (40 mi) of the upper Rio Grande. This project presents a plan to enhance the adequacy of the Rio Grande to fulfill historical function such as maintenance of riparian habitat and channel capacity, as well as meeting Rio Grande Compact commitments. The Alamosa River Restoration Project has $5 million in funds to restore and enhance the Alamosa River. This project's efforts include stream bank stabilization, boulder placement, vegetation plantings, and fencing of the riparian area to restore riparian function, The Colorado Wetlands Initiative—San Luis Valley Focus Area Group is a coalition of conservation organizations, private landowners, and State and Federal agencies that have contributed to several conservation projects that help protect southwestern willow flycatcher habitat. The Rio Grande Water Conservancy District is providing strong political support for establishment of the Rio Grande Natural Area, currently before Congress. The 33 mile stretch of the Rio Grande from the Alamosa National Wildlife Refuge to the New Mexico border will continue to managed by the Bureau of Land Management and private landowners as a Natural Area. If enacted, the Natural Area would establish an advisory council that would develop a plan and provide a framework for the conservation of riparian habitat. The Saguache Creek Corridor Project has been awarded a $3.7 million grant by the Colorado Cattleman's Agricultural Land Trust to assist landowners in the perpetual protection of conservation easements. These easements would permanently protect the agricultural, wildlife, and scenic values of this riparian corridor that contains significant patches of willow.

(1) Benefits of Inclusion

The draft environmental assessment found that minor changes through section 7 consultations, due to a critical habitat designation, may occur in the form of additional discretionary conservation recommendations to reduce impacts to the primary constituent elements. Thus, if the areas proposed in the San Luis Valley were designated as critical habitat, there may be some benefit through consultation under the adverse modification standard for federally sponsored actions. But, we believe this benefit is minimal since these locations are currently occupied by breeding flycatchers, dispersing young-of-the year flycatchers, migrating, foraging, and non-breeding flycatchers; thus, effects to flycatcher habitat are already considered in consultations under section 7 of the Act. In addition, the past history of conservation efforts, as well as efforts and funding to date in the development of the preliminary HCP, demonstrate the commitments of the San Luis Valley to provide for the conservation of the flycatcher and the growth and persistence of its habitat. For these reasons and because formal consultations in these proposed areas of critical habitat, as explained elsewhere in this rule, will likely result in only discretionary conservation recommendations due to existing appropriate management, we believe there is an extremely low probability of mandatory elements (*i.e.*, reasonable and prudent alternatives) arising from formal section 7 consultations that include consideration of designated critical habitat for the southwestern willow flycatcher.

With regard to the preliminary HCP, in order for the Service to issue this permit regardless of whether critical habitat is designated, we would have to conclude that the HCP would not jeopardize the southwestern willow flycatcher. However, because southwestern willow flycatchers already exist in these proposed critical habitat areas in the San Luis Valley, as noted above, the scope of our analysis pursuant to section 7 would also include effects to flycatcher habitat; therefore, we believe the additional designation of critical habitat would provide little benefit when we conduct our inter-Service consultation on the anticipated issuance of this HCP.

We have also determined through our review of the preliminary San Luis Valley Regional HCP that it provides for the development and accumulation of important biological information that would otherwise be unavailable and that will benefit the flycatcher and many other species. Specifically, we find that it will educate many people regarding the role of geology and topography in meeting the needs of wildlife in these stream habitats, and understanding the ecological processes that develop, maintain, or degrade these habitats. This HCP also provides conservation benefits that address and benefit multiple species and environmental concerns across broad landscapes, regardless of occupancy by southwestern willow flycatcher and other covered species. The HCP is anticipated to provide conservation beyond what could be achieved through a parcel-by-parcel avoidance of take, or through multiple section 7 consultations due to a diversity of actions undertaken through the HCP, including proactive restoration and remediation of existing problem areas. The HCP will serve as a foundation for landscape conservation planning on adjacent lands and allow longer-range planning, all of which would benefit the southwestern willow flycatcher, bald eagle, yellow-billed cuckoo and other riparian associated wildlife. For the reasons discussed above and because formal consultation on the issuance of the HCP would likely result in only discretionary conservation recommendations due to beneficial nature of the HCP, we believe there is an extremely low probability of mandatory elements (*i.e.*, reasonable and prudent alternatives) arising in this case. Therefore, as noted above, we believe the designation of critical habitat would provide little benefit as a result of our section 7 analysis on the anticipated issuance of this HCP.

There may also be non-regulatory and educational benefits to conservation of the flycatcher, including informing the public of areas important for conservation of the species, and focusing attention on and awareness of those areas. In *Sierra Club* v. *Fish and Wildlife Service,* 245 F.3d 434 (5th Cir. 2001), the Fifth Circuit Court of Appeals stated that the identification of habitat essential to the conservation of the species can provide informational benefits to the public, State and local governments, scientific organizations, and Federal agencies. The court also noted that heightened public awareness of the plight of listed species and their habitats may facilitate conservation efforts. However, we believe that there would be little educational and informational benefit gained from including proposed critical habitat in the Rio Grande and Conejos Rivers of the San Luis Valley within the designation, because they were included in the proposed rule as essential habitat, are discussed in this final rule, and have been the focus of conservation related activities for a number of years. Consequently, we believe that the informational benefits are already provided even though these areas are not designated as critical habitat.

(2) Benefits of Exclusion

The benefits of excluding lands within the proposed critical habitat area of the Rio Grande and Conejos Rivers, that are encompassed by the San Luis Valley HCP, from critical habitat

designation include recognizing the value of conservation benefits associated with HCP actions; encouraging actions that benefit multiple species; encouraging local participation in development of new HCPs; and facilitating the cooperative activities provided by the Service to landowners, communities, and counties in return for their adoption and support of the HCP. Additionally, the existing partnerships and the integration of Federal land management with non-Federal land management will enhance a consistent management approach on a landscape level.

If issued, the San Luis Valley HCP will help promote flycatcher recovery through the development and implementation of the HCP, as noted above, and by providing for other important conservation benefits, including the development of important biological information needed to guide conservation efforts and assist in species conservation within and outside the HCP planning area. In general, HCPs also aid in the creation of innovative solutions to conserve species that can be applied wherever similar needs exist, irrespective of land ownership.

If issued, the San Luis Valley HCP can also facilitate other cooperative activities with other similarly situated landowners. Continued cooperative relations with San Luis Valley citizens are expected to influence other future partners and lead to greater conservation than would be achieved through multiple section 7 consultations. We anticipate participating in a scientific advisory team that oversees the HCP, and allows for the sharing of information and development of relationships with a number of other entities, including Tribes.

Failure to exclude these two stream segments in the San Luis Valley could be a disincentive for other entities contemplating partnerships, as it would be perceived as a way for the Service to impose additional regulatory burdens once conservation strategies have already been agreed to or are underway, as is the case here with the development of the San Luis Valley HCP.

Nonfederal landowners are motivated to work with the Service collaboratively to develop HCPs because of the regulatory certainty provided by an incidental take permit under section 10(a)(1)(B) of the Act with the No Surprises Assurances. This collaboration often provides greater conservation benefits on nonfederal lands than could be achieved through strictly regulatory approaches, such as critical habitat designation. The conservation benefits resulting from this collaborative approach are built upon a foundation of mutual trust and understanding. It takes considerable time and effort to establish this foundation of mutual trust and understanding which is one reason it often takes several years to develop a successful HCP. Excluding these stream segments from critical habitat would help promote and honor that trust and thereby our partnership by providing greater certainty for the HCP applicant.

In discussions with the Service, HCP permittees and applicants have indicated they view critical habitat designation as an unwarranted and unwelcome intrusion on their property, and an erosion of the regulatory certainty that would be provided by their incidental take permit and the No Surprises Assurances. Having applicant's understand the Service's commitment will encourage continued partnerships that could result in additional conservation plans or additional lands enrolled in HCP's and, in this case, demonstrate the Service's commitment to continue to work in cooperation with these entities for the mutual benefit of the flycatcher.

Our collaborative relationships with an HCP applicant clearly make a difference in our partnership with the numerous landowners of the San Luis Valley and influence our ability to form partnerships with others. Concerns over added regulation potentially imposed by critical habitat harms this collaborative relationship by leading to distrust. Our experience has demonstrated that successful completion of one HCP has resulted in the development of other conservation efforts and HCPs with other landowners. We believe this HCP will result in implementation of conservation actions that we would be unable to accomplish otherwise and by excluding this area we preserve our partnership and promote more effective conservation actions in the future.

Additional benefits from excluding these two stream segments from critical habitat designation includes relieving landowners, communities, and counties from any additional regulatory burden and costs associated with the preparation of section 7 documents related to critical habitat. While the costs of these additional documents to the Service is relatively minor, there could be delays which generate very real costs to private landowners in the form of opportunity costs as well as direct costs. In addition, stigma costs are associated with the regulatory designation of critical habitat. There would be reduced costs and staffing requirements as consultations would be more extensive with a critical habitat designation thereby reducing costs associated with producing Biological Assessments and Biological Opinions. Since critical habitat is only proposed for occupied areas, already subject to a jeopardy analysis, it is anticipated this reduction would be minimal. If issued, the HCP will provide substantial protection to the ecosystem as a whole, which we believe will contribute to the conservation of the flycatcher and other covered species. This preliminary HCP covers a large area that is outside of our proposed stream segments, including areas not currently occupied by the flycatcher. Including these areas as part of the HCP can contribute to southwestern willow flycatcher recovery by including riparian habitats suitable for future occupancy by southwestern willow flycatcher.

(3) Benefits of Exclusion Outweigh the Benefits of Inclusion

In summary, we believe that the benefits of excluding these stream segments based upon our past and current partnership, including the current efforts towards development and issuance of the preliminary San Luis Valley HCP, from the designation of southwestern willow flycatcher critical habitat outweighs the benefits of their inclusion. We find that including these two stream segments, would result in very minimal, if any additional, benefits to the southwestern willow flycatcher, as explained above. However, including them would require additional administrative effort and cost during the consultation process pursuant to section 7 of the Act. Although the additional effort to consider and analyze the affects of various projects on critical habitat may not be substantial, it would require the citizens of the San Luis Valley and the Service to use additional resources that may otherwise be used towards beneficial projects for wildlife throughout the San Luis Valley.

We also find that the exclusion of these lands will not lead to the extinction of the species, nor hinder its recovery because the management emphasis of the San Luis Valley in general and specifically through the preliminary HCP and the various partners within the San Luis Valley is to protect and enhance riparian habitat, which the southwestern willow flycatcher depends on. This emphasis on conserving riparian habitat will ensure the long-term conservation of the southwestern willow flycatcher and other riparian species and contribute to flycatcher recovery by conserving

riparian habitat that is not currently occupied.

*Owens Management Unit, CA*

Los Angeles Department of Water and Power Conservation Strategy

As discussed in the ''Summary of Changes from the Proposed Rule'' section above, we have determined that the Owens Management Unit, CA (OMU) in the Basin and Mojave Recovery Unit will not be designated as critical habitat in this final rule. We have reached this determination because we believe the benefits of excluding the Owens River from the final critical habitat designation outweigh the benefits of designating the Owens River as critical habitat.

The OMU, which was proposed as critical habitat, includes a 111 km (69 mi) long reach of the Owens River and a 1.4 km (0.9 mi) long reach of Rock Creek in Inyo and Mono Counties, CA. The Owens River segment is bounded on the upstream end by a point that is 0.8 km (0.5 mi) east of the Long Valley Dam, and on the downstream end by a point that is 6.4 km (4 mi) north of Tinemaha Reservoir. The Rock Creek segment consists of the downstream-most portion of the creek in Birchim Canyon before it intersects the Owens River. All of the land within the OMU is owned and managed by the Los Angeles Department of Water and Power.

On July 12, 2005, the Service and the Los Angeles Department of Water and Power signed a memorandum of understanding (MOU) which included a southwestern willow flycatcher conservation strategy designed to proactively manage flycatchers in the OMU. The conservation strategy addresses three elements, livestock grazing, recreational activities, and wild land fires that have the potential to adversely affect the southwestern willow flycatcher in the OMU. The conservation strategy provides specific measures that: (1) are designed to create suitable breeding habitat for the southwestern willow flycatcher, and (2) avoid and minimize potential adverse effects such as the degradation or loss of habitat that may be associated with grazing activities, recreational activities, and wild land fires. The document also states the Los Angeles Department of Water and Power will implement the aforementioned measures with the goal of promoting the establishment of 50 southwestern willow flycatcher territories in the OMU; this number of territories was identified in the Southwestern Willow Flycatcher Recovery Plan (USFWS 2002), and reflects the number of territories the Service believes is necessary to recover this species in that area. The finalized MOU and conservation strategy signed by the Los Angeles Department of Water and Power were received by the Service during the public comment period which ended July 18, 2005.

The MOU provides a commitment by the Los Angeles Department of Water and Power to implement the conservation strategy for a minimum of 10 years, and also contains a clause stating that the MOU will become null and void if all or any part of the OMU is designated as critical habitat for the southwestern willow flycatcher. At the end of the 10-year period, the Service and LADWP will conduct a joint evaluation to determine if there is a need to renew the conservation strategy for an additional 10-year period. If it is deemed necessary, the renewal of the conservation strategy will provide assurances that the measures to conserve the habitat of the southwestern willow flycatcher will continue. In the event that the conservation strategy is renewed, the Service and LADWP will collectively determine if new measures need to be implemented to promote the establishment and persistence of additional habitat for the southwestern willow flycatcher.

(1) Benefits of Inclusion

As of the date of this final rule, the Service has not conducted any formal or informal consultations that involve the southwestern willow flycatcher in the Owens Valley area since this species was listed as endangered in 1995. We also note that staff from the Los Angeles Department of Water and Power have stated that, with regard to the OMU, they have not received or required any Federal permit, license, authorization, or funding to complete projects in this area, and they do not anticipate there will be a project that will create a Federal nexus within the foreseeable future. The lack of previous section 7 consultations during the past 10 years, and the expectation that there will be no future project within the OMU with a Federal nexus leads us to believe that critical habitat designation will create relatively few benefits for the southwestern willow flycatcher in this area.

Designation of critical habitat also provides educational benefits, including informing private landowners of areas that are important to the conservation of listed species and providing important information on those habitats and their primary constituent elements. Because the Los Angeles Department of Water and Power is the sole owner of the land within the OMU, and they have either conducted, or contracted surveys for the southwestern willow flycatcher, the agency is aware the species occurs on their property. Therefore, the potential designation of critical habitat in the OMU would not provide this educational benefit because the Los Angeles Department of Water and Power already knows the species is present on their property. Los Angeles Department of Water and Power staff is also already aware that their property has a relatively high concentration of southwestern willow flycatchers in relation to other areas outside of the Owens Valley area, and this species has specific habitat requirements that require proactive management. Additionally, these lands are identified in our proposed and final rule as areas essential to the conservation of the southwestern willow flycatcher.

(2) Benefits of Exclusion

The development of a MOU between the Service and another entity is an activity that both parties must voluntarily agree to; as such, both entities negotiate the terms and conditions of the document. In the case of the MOU involving the OMU, the Los Angeles Department of Water and Power agreed to implement the conservation strategy to benefit the southwestern willow flycatcher, provided that critical habitat in the Owens Valley is not designated.

The Service has reviewed the measures in the conservation strategy, and we believe the implementation of these measures will create a tangible and quantifiable benefit within the 19,830 ha (49,000 ac) area that constitutes the OMU. For example, the grazing prescriptions will enhance the survival of riparian shrubs and trees during their first years of growth and minimize adverse effects to young age classes of riparian willow and cottonwood trees, thereby allowing the riparian community to develop dense thickets of trees and shrubs that are likely to be used by the southwestern willow flycatcher. The regulation of recreational activities conducted by the public within the OMU will act to protect and/or restore riparian areas by minimizing erosion, reducing the number of trails that exist or could develop, and improving bank stability. Unintentional fires in riparian areas will be given high priority for fire suppression. If fires affect significant portions of the Owens River, Los Angeles Department of Water and Power staff will pursue management actions that facilitate a more rapid recovery of the affected riparian habitats. For

example, flows in the Owens River, authorized grazing activities, and recreational use may be adjusted to facilitate the recovery of burned riparian habitats.

The conservation strategy also provides a commitment by the Los Angeles Department of Water and Power and the Service to review the conservation strategy and management activities to determine what mutually agreeable protective measures could be further implemented/added to the existing conservation strategy. If such additional protective measures are needed, the Los Angeles Department of Water and Power will identify these measures in annual reports that will be sent to the Service, and implement the new measures as soon as possible. As stated above, the commitment to conduct the aforementioned activities is based on Los Angeles Department of Water and Power's desire to work with the Service and reduce the need to designate critical habitat in Owens Valley.

We also note the development of the MOU and conservation strategy for the southwestern willow flycatcher in the OMU has been a collaborative effort that has promoted the development of a positive relationship between the Service and the Los Angeles Department of Water and Power. The Service believes the collaborative relationship between the two agencies will be especially useful in the future because Los Angeles Department of Water and Power staff have indicated they will likely work with the Service on additional partnership efforts to conserve fish and wildlife resources within the next year or two. Such documents are more easily completed when the Service and an applicant have a collaborative relationship, and would benefit a variety of listed species in the Owens Valley area.

(3) Benefits of Exclusion Outweigh the Benefits of Inclusion

We find that the benefits of designating critical habitat within the OMU are relatively small in comparison to the benefits of exclusion. In making this finding, we have weighed the benefits of including these lands as critical habitat without the MOU and conservation strategy against the exclusion of these lands from critical habitat and the implementation of the MOU and conservation strategy. We have concluded that the benefits of the MOU and conservation strategy far outweigh those that would result from the designation. We have therefore excluded these lands from the final critical habitat designation pursuant to section 4(b)(2) of the Act.

We believe that exclusion of these lands will not result in extinction of the species, as they are considered occupied habitat. Any actions that might adversely affect the southwestern willow flycatcher, regardless of whether a Federal nexus is present, must undergo a consultation with the Service under the requirements of section 7 of the Act or receive a permit from us under section 10. The southwestern willow flycatcher is protected from take under section 9. The exclusions leave these protections unchanged from those which would exist if the excluded areas were designated as critical habitat. In addition, as discussed above, there are a substantial number of active conservation measures underway for the species, which provide greater conservation benefits than would result from a designation. Consistent with the recommendations in the Recovery Plan (USFWS 2002), LADWP will implement measures and activities with the goal of promoting the establishment of 50 southwestern willow flycatcher territories in the Owens Management Unit. There is accordingly no reason to believe that this exclusion would result in extinction of the species.

*Middle Rio Grande Management Unit, NM*

Rio Grande Valley State Park (City of Albuquerque)

Within the Middle Rio Grande Management Unit lies the Rio Grande Valley State Park (Park), an area proposed as critical habitat for the flycatcher. The Park consists of the entire wooded riparian forest and associated floodway of the Rio Grande within Bernalillo County, NM, with minor exceptions (*e.g.*, Pueblo lands, private lands, land within the Village of Corrales, and bridge rights-of-way). The Park is approximately 1,756 ha (4,340 ac), of which 1,060 ha (2,620 ac) are riparian forest (bosque) and 696 ha (1,720 ac) are floodway of the Rio Grande. Its outer boundaries are service roads that run along the land-side of several main riverside drains. The City of Albuquerque (City) has managed the Park since 1983 under legal authority granted by the State of New Mexico.

The City is designated by State law to manage the Park ''in such a manner as to protect and enhance the scenic and natural values of the Rio Grande,'' NMSA § 16–4–14 (D). It has done so since 1983 pursuant to a series of conservation-based management plans through the City's Open Space Division. In 1987 the City wrote a Management Plan emphasizing bosque management to conserve, preserve, protect, enhance and diversify the riparian ecosystem. Even though the Management Plan was developed before the listing of the flycatcher, the plan includes actions needed to provide conservation measures to the flycatcher. A 1993 Bosque Action Plan, written by the City of Albuquerque Parks and General Services Department and adopted by the City Council, includes preservation and conservation of vegetation and wildlife communities including the flycatcher and the habitat upon which it depends. Over the past decade the City's plans and management initiatives have focused increasingly on habitat restoration and management for endangered species, including the flycatcher. In 1999 a number of parties came together to develop a constructive solution that would resolve conflicts and benefit the flycatcher and Rio Grande silvery minnow. The City is one of these parties which signed a Memorandum of Understanding in April 2002 as the Middle Rio Grande ESA Collaborative Program (Program). The Program was created by Senator Domenici of New Mexico in 2000 and has since been funded through the Energy and Water Development Appropriations Subcommittee. The Program's goal is to contribute to the survival and recovery of the flycatcher and Rio Grande silvery minnow in the Middle Rio Grande basin. Most recently, the City's 2005 Environmental Enhancement Plan (EEP) includes numerous new revegetation and off-channel water improvements intended specifically to enhance flycatcher habitat. It focuses on establishing and maintaining a mosaic of habitat types and vegetation/plant communities within the Park. The City's commitment to managing established plant communities will ensure long-term sustainability of habitats preferred by and beneficial to the flycatcher. The EEP and current management of the Park represent a culmination of previous plans and ongoing research and management efforts.

The Park is contained within a highly urbanized environment and the EEP also focuses on the serious threat to public health and safety posed by bosque wildfire. Consistent with its mandate to manage the Park to protect and enhance the scenic and natural environment, the City manages the Park to prevent catastrophic wildfire. The threat to the public was made clear by the devastating bosque fires of 2003 in the Park. Major fires consumed over 162 ha (400 ac) of bosque, or approximately

⅙ of the riparian forest in Bernalillo County. These fires destroyed or threatened homes and lives and also resulted in serious damage to wildlife habitat.

The U.S. Army Corps of Engineers (Corps) was initially requested to assist with restoration of these burn areas and other work needed to improve access and prevent future fires. In January of 2004, the Corps was authorized to assist local efforts of this type. Pursuant to the authority of Public Law 108–137, Operations and Maintenance, Section 116, which states: ''the Secretary of the Army, acting through the Chief of Engineers, is authorized to undertake appropriate planning, design, and construction measures for wildfire prevention and restoration in the Middle Rio Grande bosque in and around the City of Albuquerque. Work shall be directed toward those portions of the bosque which have been damaged by wildfire or are in imminent danger of damage from wildfire due to heavy fuel loads and impediments to emergency vehicle access.''

High fuel loads that have accumulated over the past 50 years and growth of non-native species have added to the danger of fire in the bosque. Over the last five to ten years, this threat has grown due to drought conditions throughout the west causing the build-up of dead material to become extremely dry. Because of the proximity of structures to the bosque, the threat to human health and property is of imminent concern. In August 2004, we consulted on the Bosque Wildfire Project, Bernalillo and Sandoval Counties, New Mexico (Bosque Wildfire Project) with the Army Corps of Engineers (U.S. Army Corps of Engineers 2004; USFWS 2004a). The Bosque Wildlfire Project was designed to reduce the fuel loading in the bosque, as well as improving access for fire fighter safety, in case a fire were to break out. The project began in September 2004 and should be complete by March 2006. We found that the overall project and revegetation activities would begin to restore the bosque and improve habitat over the long-term for the flycatcher. Therefore, potential project modifications are likely to be minimal, given the beneficial nature of the current activities and projects. We note that protecting human life and property is the highest priority in the wildland urban interface. In addition, threats of wide-scale habitat loss due to fire are real and immediate on many private and public lands. As such, we will continue to encourage efforts such as this project to reduce the risk of wildfire, while conducting habitat restoration activities.

The City's response to these fires was to utilize State and Federal resources to accelerate broad-scale fuels reduction within the Park. The City's fire suppression program, developed in concert with State and Federal agencies, is part of the 2005 EEP and is largely based on thinning of the thick accumulations of dead and down vegetation; and replacement of non-native species with cottonwoods, willow, and other native species. Over 526 ha (1,300 ac) were treated in a six-month period; 890 ha (2,200 ac) (nearly 85%) of the riparian forest had been treated or previously burned by the beginning of May 2005. The only untreated areas remaining are those scheduled for habitat restoration projects in the fall of 2005, or selected research sites, which will have fuels reduction at a later date. The outcome of these public safety actions has been to greatly alter the former hazardous conditions within the Park in order to favor re-establishment of native vegetation communities.

The loss of bosque due to fire and the vegetation management to reduce the threat of future fire destruction has created the opportunity to recreate a healthy native bosque. The circumstances have allowed the Park to analyze the bosque ecosystem and plan for a mosaic of plant community types that will benefit the wildlife, including the flycatcher. Plant communities are proposed that would significantly improve the existing habitats in the Park to those more beneficial to the flycatcher. Acreages of restored under-canopy species, thickets of native shrubs, and plantings at edges of standing or slow-moving water are identified. Suitable vegetation structure is but one side of an equation for potential flycatcher habitat; proximity to water is also a vital consideration. Planned features include created or enhanced wetland or outfall channels, moist soil depressions, and overbank flooding areas. Several Park zones are considered ''special management areas'' due to their high habitat values or unique existing characteristics and will be managed for the flycatcher. All of these feature types are proposed as part of the EEP and will work towards sustained conservation for the flycatcher.

(1) Benefits of Inclusion

We believe that there is minimal benefit from designating critical habitat for the southwestern willow flycatcher within the Park because, as explained above, these lands are already managed for the conservation of flycatcher.

As stated in the environmental assessment, the primary conservation value of the proposed critical habitat segments is to sustain existing populations. The threshold for reaching destruction or adverse modification on Park lands would likely require a reduction in the capability of the habitat to sustain existing populations. Currently, the only territories known are immediately downstream of the Park, so the only populations expected to use this area are migrant or dispersing southwestern willow flycatchers. As noted above, a consultation with the Corps for restoration and fire prevention activities within the Park was finalized in 2004 at which time we concurred that the project ''may affect, but is not likely to adversely affect'' the flycatcher. The Service recognized the beneficial effects to flycatcher habitat from the Corps' proposed activities to reduce the risk of catastrophic wildfire and to reestablish native vegetation. Because southwestern willow flycatchers use the Park as habitat for migration and dispersal, the scope of our analysis in this consultation already included consideration of the effects to flycatcher habitat and determined that the project provides benefits to the flycatcher through reducing the risk of wildfire that can destroy its habitat and through the restoration of native riparian vegetation.

Given the consultation history and the fact that these lands are managed in a way that provide a conservation benefit for the flycatcher, it is highly unlikely that projects would be considered that would result in a depreciable diminishment or long-term reduction of the capability of the habitat to sustain existing populations. To the contrary, activities occurring on these lands will provide benefits to the flycatcher by restoring, improving, and protecting its habitat.

We believe the conservation measures for the flycatcher that are occurring or will be used in the future in the Park (*i.e.*, riparian restoration and fire prevention measures) provide as much, and possibly more benefit than would be achieved through section 7 consultations involving consideration of critical habitat using a conservation standard based on the Ninth Circuit Court's decision in *Gifford Pinchot*. This is because management that is occurring or future activities will be the same activities which would be implemented in order to maintain or restore flycatcher habitat.

We believe that there would be little additional informational benefit gained

from including the Park within the designation because the final rule identifies all areas that are essential to the conservation of the flycatcher, regardless of whether all of these areas are included in the regulatory designation. Consequently, we believe that the informational benefits are already provided for areas that are being excluded from the designation of critical habitat.

(2) Benefits of Exclusion

The proposed critical habitat designation would be an administrative and economic burden to the ongoing ecological stewardship of the Park by the City, and the multi-agency cooperative projects now planned. The costs of section 7 consultations for the Corps and non-Federal project proponents would increase due to the administrative costs associated with allocating staff time to the consultation process, costs associated with delay of thinning and revegetation activities until consultations are completed, and direct monetary expenditures associated with potential project delays. As such, the benefits of excluding the Park from the designation include a reduction in administrative costs associated with engaging in consultations pursuant to section 7 of the Act.

Designation could thwart ongoing conservation efforts by the City and by others, adding additional regulatory burdens. The Corps also has an ongoing revitalization project that will create a 32 km (20 mi) aquatic park/wetland along the Middle Rio Grande (Tingley Beach) (USFWS 2004). There has been some concern that critical habitat designation for the flycatcher may hinder the efforts of these programs. Effects to actions planned by these programs to date has been similar to those experienced by other saltcedar removal and vegetation management projects, primarily including avoiding removal of vegetation during flycatcher breeding season (USFWS 2005a). Costs and any potential delays for reinitiation of consultation will be minimized by excluding this area from designated critical habitat.

The City's collective management plans for the Park represent a complete and comprehensive program, which will provide a conservation benefit to the flycatcher. The City's management of the Park is consistent with the recovery plan for the flycatcher; the collective plans implement or propose to implement many of the conservation measures set forth in the flycatcher recovery plan. The City's various management plans provide assurances that the management will be implemented. Indeed, as noted, the City is mandated by State law to manage the Park. Finally, the collective plans provide assurances that management of the Park will be effective in providing benefits to the southwestern willow flycatcher through continued monitoring and reporting, among other things, and the City's management of the Park is of a perpetual nature.

(3) Benefits of Exclusion Outweigh the Benefits of Inclusion

In summary, we believe that the benefits of excluding the Park from critical habitat for the flycatcher outweigh the benefits of its inclusion in critical habitat. Including this area may result in some benefit through additional consultations with those whose activities may affect critical habitat. However, overall this benefit is minimal because the Park is currently being managed in a manner that provides a conservation benefit to the flycatcher. On the other hand, exclusion will greatly benefit the expeditious completion of scheduled bosque restoration activities for the fall of 2005 and will encourage the ongoing management for the sustainability of flycatcher habitat. It will recognize the benefits to conservation of the flycatcher in the management plans and the multi-agency collaborative efforts that are based on the premise that it is better to work in the spirit of cooperation to develop solutions to shared problems regarding resource management and meeting the needs of our endangered species. It will also recognize the need to manage the bosque, a wildland-urban interface, for health and human safety.

We also find that the exclusion of these lands will not lead to the extinction of the species, nor hinder its recovery because Park projects follow the guidelines set by the Recovery Plan for the flycatcher thereby providing a benefit to the flycatcher and its habitat. In addition, proposed projects will still require consultation pursuant to section 7 as a result of the species presence under the jeopardy standard and, as discussed above, the mandate of the Park is to manage this area for the protection and enhancement of the scenic and natural environment and prevent catastrophic wildfire.

*Kern Management Unit, CA*

Hafenfeld Ranch Conservation Easement

Section 4(b)(2) of the Act requires us to consider other relevant impacts, in addition to economic impacts, of designating critical habitat. One approximately 37 ha (93 ac) parcel (Hafenfeld Parcel) located on lands owned by the Hafenfeld Ranch in the proposed Kern Management Unit warrants exclusion from the final designation of critical habitat under section 4(b)(2) of the Act because we have determined that the benefits of excluding the Hafenfeld Parcel from the critical habitat designation will outweigh the benefits of including it in the final designation based on the special management considerations and protections afforded for southwestern willow flycatcher habitat through a conservation easement and Conservation Plan developed by the Natural Resources Conservation Service (NRCS). The following represents our rationale for excluding the Hafenfeld Parcel from the final designated critical habitat for the southwestern willow flycatcher in the Kern Management Unit.

The dominant vegetation in the Kern Management Unit is mature willows (*Salix gooddingii, S. lasiandra,* and *S. laevigata*) and Fremont cottonwood (*Populus fremontii*). Other plant communities of the Kern Management Unit include open water, wet meadow, and riparian uplands. Approximately 9.3 ha (23 ac) of mature riparian forest habitat is found on the Hafenfeld Parcel, mainly located along the braided channels of the Kern River that meander through the parcel. Portions of the Hafenfeld Parcel are seasonally flooded, forming fragmented wetland communities throughout the area. The remainder of the parcel consists of wet meadow and riparian upland habitats, consistent with the character of habitats located throughout the larger Kern Management Unit. The Hafenfeld Parcel completes a continuous corridor of willow-cottonwood riparian habitat along the south fork of the Kern River that connects the east and west segments of the Audubon Society's Kern River Preserve, which is known to be occupied by the southwestern willow flycatcher. The southwestern willow flycatcher has been documented on the Kern Management Unit, which includes the Hafenfeld Parcel. The Hafenfeld Parcel is currently protected under an Easement and Conservation Plan developed by the NRCS.

We proposed as critical habitat, but have now excluded from the final designation, as described below, portions of the Hafenfeld property within the Kern Management Unit.

(1) Benefits of Inclusion

We believe that there is minimal benefit from designating critical habitat for the southwestern willow flycatcher within portions of the Hafenfeld property because, as explained above,

these lands are already managed for the conservation of flycatcher.

As stated in the environmental assessment, the primary conservation value of the proposed critical habitat segments is to sustain existing populations. The threshold for reaching destruction or adverse modification on the Hafenfeld property would likely require a reduction in the capability of the habitat to sustain existing populations. Given that these lands are managed for the benefit of the flycatcher it is highly unlikely that projects would be considered for this area that would result in depreciable diminishment or a long-term reduction of the capability of the habitat to sustain existing populations. To the contrary, activities occurring on these lands have provided benefits to the flycatcher by restoring, improving, and protecting its habitat.

As described above, the Hafenfeld property proposed for critical habitat may have additional conservation value above sustaining existing populations, because they are managing these lands to improve, protect, and possibly expand upon the amount of nesting habitat that would provide for growth of existing populations. Expansion of existing populations in these areas would be an element of recovering the southwestern willow flycatcher. Accordingly, and as further discussed above in the ''General Principles of Section 7 Consultations Used in the 4(b)(2) Balancing Process'' section, through section 7 consultations that may occur, some benefit may incur through the adverse modification standard and whether or not the activity results in a reduction in the suitability of the habitat to support expansion of existing populations. However, because formal consultations will likely result in only discretionary conservation recommendations (*i.e.*, adverse modification threshold is not likely to be reached), we believe there is an extremely low probability of mandatory elements (*i.e.*, reasonable and prudent alternatives) arising from formal section 7 consultations that include consideration of designated southwestern willow flycatcher critical habitat.

We believe the conservation measures for the flycatcher on the Hafenfeld property that include the activities described in this section that include willow planting and management of surface flows to achieve the optimal flooding regime for the enhancement of important riparian and wetland habitat provide as much benefit than would be achieved through section 7 consultations involving consideration of critical habitat. This is because they are already implementing actions that restore and maintain flycatcher habitat.

As discussed in the ''Educational Benefits of Critical Habitat'' section above, we believe that there would be little additional informational benefit gained from including the Hafenfeld property within the designation because this area was included in the proposed rule as having essential flycatcher habitat. Consequently, we believe that the informational benefits are already provided even though this area is not designated as critical habitat. Additionally, in light of the existing Easement and Conservation Plan executed between the Hafenfeld Ranch and the NRCS, we believe that an education benefit has largely been achieved.

(2) Benefits of Exclusion

The southwestern willow flycatcher occurs on public and private lands throughout the Kern Management Unit. Proactive voluntary conservation efforts by private or non-Federal entities are necessary to prevent the extinction and promote the recovery of the southwestern willow flycatcher in the Kern Management Unit.

The Hafenfeld Parcel is managed in such a way as to promote the conservation of the southwestern willow flycatcher through provisions of the Conservation Plan developed by the NRCS. Management activities include: (1) Limiting public access to the site, (2) winter-only grazing practices (outside of the flycatcher nesting season), (3) protection of the site from development or encroachment, (4) maintenance of the site as permanent open space that has been left predominantly in its natural vegetative state, and (5) the spreading of flood waters which promotes the moisture regime and wetland and riparian vegetation determined to be essential for the conservation of the southwestern willow flycatcher. Other prohibitions of the easement which would benefit the conservation of the southwestern willow flycatcher include: (1) Haying, mowing or seed harvesting; (2) altering the grassland, woodland, wildlife habitat, or other natural features; (3) dumping refuse, wastes, sewage, or other debris; (4) harvesting wood products; (5) draining, dredging, channeling, filling, leveling, pumping, diking, or impounding water features or altering the existing surface water drainage or flows naturally occurring within the easement area; and, (6) building or placing structures on the easement. Funding for the implementation of the Conservation Plan is apportioned between the United States and the Hafenfeld Ranch by provisions of the Conservation Easement.

We have determined that the southwestern willow flycatcher within properties covered by management plans or conservation strategies that protect or enhance the conservation of the species will benefit substantially from voluntary landowner management actions due to an enhancement and creation of riparian and wetland habitat and a reduction in risk of loss of riparian habitat. The conservation benefits of critical habitat are primarily regulatory or prohibitive in nature. Where consistent with the discretion provided by the Act, the Service believes it is necessary to implement policies that provide positive incentives to private landowners to voluntarily conserve natural resources and that remove or reduce disincentives to conservation (Wilcove *et al.* 1996; Bean 2002). Thus, we believe it is essential for the recovery of the southwestern willow flycatcher to build on continued conservation activities such as these with a proven partner, and to provide positive incentives for other private landowners who might be considering implementing voluntary conservation activities but have concerns about incurring incidental regulatory or economic impacts.

(3) The Benefits of Exclusion Outweigh the Benefits of Inclusion

Based on the above considerations, we have determined that the benefits of excluding the Hafenfeld Parcel from critical habitat in the Kern Management Unit outweigh the benefits of including it as critical habitat for the southwestern willow flycatcher.

The Hafenfeld Parcel is currently operating under a Conservation Plan to implement conservation measures and achieve important conservation goals through the conservation measures described above, as well as willow planting and management of surface flows to achieve the optimal flooding regime for the enhancement of important riparian and wetland habitat for the southwestern willow flycatcher.

The Service believes the additional regulatory and educational benefits of including these lands as critical habitat are relatively small. The Service anticipates that the conservation strategies will continue to be implemented in the future, and that the funding for these activities will be apportioned in accordance with the provisions of the Conservation Plan. The designation of critical habitat can serve to educate the general public as well as conservation organizations regarding the potential conservation

value of an area, but this goal is already being accomplished through the identification of this area in the Conservation Plan described above. Likewise, there will be little additional Federal regulatory benefit to the species because (a) there is a low likelihood that the Hafenfeld Parcel will be negatively affected to any significant degree by Federal activities requiring section 7 consultation, and (b) we believe that based on ongoing management activities there would be no additional requirements pursuant to a consultation that addresses critical habitat.

Excluding these privately owned lands with conservation strategies from critical habitat may, by way of example, provide positive social, legal, and economic incentives to other non-Federal landowners who own lands that could contribute to listed species recovery if voluntary conservation measures on these lands are implemented.

In conclusion, we find that the exclusion of critical habitat on the Hafenfeld Parcel would most likely have a net positive conservation effect on the recovery and conservation of the southwestern willow flycatcher when compared to the positive conservation effects of a critical habitat designation. As described above, the overall benefits to these subspecies of a critical habitat designation for these properties are relatively small. In contrast, we believe that this exclusion will enhance our existing partnership with these landowners, and it will set a positive example and provide positive incentives to other non-Federal landowners who may be considering implementing voluntary conservation activities on their lands. We conclude there is a higher likelihood of beneficial conservation activities occurring in these and other areas for the southwestern willow flycatcher without designated critical habitat than there would be with designated critical habitat on these properties.

We believe that exclusion of these lands will not result in the extinction of the southwestern willow flycatcher as these areas are considered occupied habitat. Actions which might adversely affect the species are expected to have a Federal nexus, and would thus undergo a section 7 consultation with the Service. The jeopardy standard of section 7 of the Act and routine implementation of habitat preservation through the section 7 process provide assurance that the species will not go extinct. In addition, the subspecies is protected from take under section 9 of the Act. The exclusion leaves these protections unchanged from those that would exist if the excluded areas were designated as critical habitat.

Critical habitat is being designated for the subspecies in other areas that will be accorded the protection from adverse modification by Federal actions using the conservation standard based on the Ninth Circuit decision in *Gifford Pinchot*. Additionally, the flycatcher occurs on lands protected and managed either explicitly for the subspecies, or indirectly through more general objectives to protect natural values, this provides protection from extinction while conservation measures are being implemented. The subspecies also occurs on lands managed to protect and enhance wetland values under the Wetlands Reserve Program of the NRCS.

*Upper Gila Management Unit*

U-Bar Ranch

Pacific Western Land Company (PWLC), a Phelps Dodge subsidiary, owns the U-Bar Ranch (Ranch) near Cliff, in Grant County New Mexico, in the Upper Gila Management Area. As discussed in the proposed rule, flycatchers have been detected nesting along stream segments in the Upper Gila Management Unit since 1993. In 1999, a high of 262 territories at 8 sites were detected; the Ranch had 209 of these territories. In 2003, 191 territories at 8 sites were detected on the Gila River stream segments proposed as critical habitat and the Ranch had 123 of these territories. Many of the territories on the Ranch were found outside of the flood-prone area, off-channel in habitat along irrigation ditches. This privately owned Ranch is an important site for the conservation and recovery of the flycatcher in Upper Gila Management Area.

Through the efforts of PWLC and its long-time lessee, Mr. David Ogilvie, Phelps Dodge has demonstrated a commitment to management practices on the Ranch that have conserved and benefited the flycatcher population in that area over the past decade. In addition, Phelps Dodge has privately funded scientific research at and in the vicinity of the Ranch in order to develop data that has contributed to the understanding of habitat selection, distribution, prey base, and threats to the flycatcher. Considering the past and ongoing efforts of management and research to benefit the flycatcher, done in coordination and cooperation with the Service, we find the benefits of excluding areas of the U-Bar Ranch outweigh the benefits of including it in critical habitat.

The U-Bar Ranch utilizes a management plan on its pastures within the Gila Valley that are north of the Highway 180 West Bridge and south of the boundary of the Gila National Forest. Eight pastures that incorporate approximately 1,372 ha (3,390 ac) are managed with a plan that is adapted annually for operation of livestock and farming enterprises. The management consists of a multifaceted and highly flexible rest-rotation system utilizing both native forage and irrigated fields. The Ranch's numerous pastures allow a relatively dynamic rotation system that is modified based upon current conditions. Grazing use of river bottom pastures is monitored by daily visual inspections. Use of these pastures is limited to ensure that forage utilization levels are moderate and over-use does not occur. In addition, the riparian areas are monitored regularly, and riparian vegetation is allowed to propagate along the river as well as in irrigation ditches.

Some specific management practices, varying in different pastures, which relate to the flycatcher and its habitat are: (1) Grazing is limited to November through April to avoid negative impacts during migration and nesting season; (2) animal units are adjusted to protect and maintain the riparian vegetation needed by the flycatcher; (3) the irrigation ditches are maintained, along with the vegetation, to benefit the flycatcher; (4) restoration efforts follow flood events that destroy habitat; and (5) herbicide and pesticides are only used in rare circumstances and are not used near occupied territories during breeding season. These flexible and adaptive management practices have resulted in the expansion, protection, and successful continuance of a large flycatcher population.

In 1995, active restoration followed the flooding destruction of the Bennett Farm fields in the 162 ha (400 ac) River Pasture. The Bennett Restoration Project is a series of artificially created, flooded marshy areas located between irrigated and dry-land pastures and the river. The Bennett Restoration Project is a mosaic of vegetation in successional stages with dense patches and lines of young willows and cottonwoods occurring in manmade oxbows. The oxbows occur outside of the active flood channel behind a levee. Water is continuously present and the project has become a marshy habitat in which flycatcher nesting was noted in 1997 (Dave Ogilvie, pers. comm., 2005). The site now supports one of the higher numbers of territories on the U-Bar Ranch and in the Upper Gila Management Area. The 2004 survey review resulted in recording 35 territories for the Bennett site (N. Baczek, USFWS, pers. com.).

The second-most successful nesting site on the U-Bar Ranch is in the Lower River Pasture. A significant feature of this riparian area is the amount of water it receives from adjacent irrigated fields. The Ranch has rehydrated ditches and no longer follows past land-use practices, which involved active clearing of woody vegetation from ditch banks. The Ranch has developed tree growth and a network of wooded strips in connection with the ditch-banks to attract breeding flycatchers.

Besides land management practices, Phelps Dodge and the U-Bar Ranch have supported flycatcher surveys and research in the Gila valley since 1994. Surveyors are trained and permitted in coordination with the Service and survey results are submitted to the Service in annual reports. Flycatcher research on the Ranch has included: nest monitoring (sites, substrate, and success), diet, microhabitat use, climatic influences on breeding, cowbird parasitism, and distribution and characteristics of territories. Permits for studies are coordinated with the Service and reports are submitted to us for review and comments. The research provides information to apply to grazing and land management (David Ogilvie, May 30, 2005). A current study involves eliminating grazing in the Lower River Pasture, but continuing it in the Out Pasture and Bennett during flycatcher breeding season to evaluate the effect of grazing on nest success and population trends.

(1) Benefits of Inclusion

There are few benefits in including the U-Bar Ranch in the critical habitat designation above those that will be achieved through the implementation of their voluntary management and restoration projects. As discussed above, the principal benefit of any designated critical habitat is that activities affecting habitat require consultation under section 7 of the Endangered Species Act if a Federal action is involved. Such consultation would ensure that adequate protection is provided to avoid destruction or adverse modification of critical habitat. Since the U-Bar Ranch is privately owned, unless there is a Federal nexus in connection with their activities, the designation of critical habitat will not result in a consultation.

Another possible benefit is that the designation of critical habitat can serve to educate the public regarding the potential conservation value of an area, and this may focus and contribute to conservation efforts by other parties by clearly delineating areas of high conservation value for certain species. Any information about the flycatcher and its habitat that reaches a wide audience, including other parties engaged in conservation activities, would be considered valuable. However, the U-Bar Ranch is already working with the Service to address the conservation and recovery of the species. Further, the Ranch was included in the proposed designation, which itself has reached a wide audience, and has thus provided information to the broader public about the conservation value of this area. Thus, the educational benefits that might follow critical habitat designation have already been provided by proposing the area as critical habitat. For these reasons, then, we believe that designation of critical habitat would have few, if any, additional benefits beyond those that will result from continued consultation for the presence of the species.

(2) Benefits of Exclusion

We believe that significant benefits would be realized by excluding the U-Bar Ranch that include: (1) The continuance and strengthening of our effective cooperative relationship with the Ranch to promote the conservation of the flycatcher and its habitat; (2) the allowance for continued meaningful collaboration and cooperation in surveys, nest monitoring, and research as we work towards recovery of the species; and (3) the provision of conservation benefits to the Gila River ecosystem and the flycatcher and its habitat that might not otherwise occur.

As mentioned above, the U-Bar Ranch is an important land manager in the Upper Gila Management Unit. The surveys, conservation, restoration and management information submitted by the Ranch document that meaningful collaborative and cooperative work for the flycatcher and its habitat will continue on their land. The Ranch has committed to several ongoing or future management, restoration, enhancement, and survey activities that may not occur if we were to designate critical habitat on the Ranch. We believe that the results of these activities promote long-term protection and conserve the flycatcher and its habitat on the Ranch land. The benefits of excluding this area from critical habitat will encourage the continued conservation, land management, and coordination with the Service. If this area is designated as critical habitat, we may jeopardize future conservation, research, and information sharing for the recovery of the flycatcher.

(3) Benefits of Exclusion Outweigh the Benefits of Inclusion

In summary, the benefits of including the U-Bar Ranch in critical habitat are small, and are limited to insignificant educational benefits since these lands are privately owned and the trigger for section 7 consultation is lacking. The benefits of excluding this area from designation as critical habitat for the flycatcher are significant, and include encouraging the continuation of adaptive management measures such as monitoring, surveys, research, enhancement, and restoration activities that the Ranch currently implements and plans for the future. The exclusion of this area will likely also provide additional benefits to the species by encouraging and maintaining a cooperative working relationship with the Ranch. We find that the benefits of excluding this area from critical habitat designation outweigh the benefits of including this area.

We have determined that exclusion of areas of the Ranch will not result in extinction of the species. The Ranch is committed to greater conservation measures on their land than would be available through the designation of critical habitat. Accordingly, we have determined that areas of the U-Bar Ranch should be excluded under subsection 4(b)(2) of the Act because the benefits of exclusion outweigh the benefits of inclusion and will not cause the extinction of the species.

TABLE 4.—TOTAL SIZE OF FINAL CRITICAL HABITAT FOR THE SOUTHWESTERN WILLOW FLYCATCHER, INCLUDING AREAS EXCLUDED AND EXEMPTED FROM THE FINAL DESIGNATION

| | |
|---|---|
| Total area identified in proposal as containing essential features | 143486 (354562) |
| Areas exempted under section 4(a)(3) of the Act: Camp Pendleton and Fallbrook Naval Weapons Station | 1793 (4430) |
| Exclusion of areas under section 4(b)(2) of the Act: HCP plan areas including Western Riverside County, CA, Multiple Species Habitat Conservation Plan; San Diego County, CA, Multiple Species Conservation Plan; City of Carlsbad, CA, Habitat Management Program; Lower Colorado River, CA/AZ Multiple Species Conservation Plan; Roosevelt, AZ Habitat Conservation Plan | 27494 (67940) |

TABLE 4.—TOTAL SIZE OF FINAL CRITICAL HABITAT FOR THE SOUTHWESTERN WILLOW FLYCATCHER, INCLUDING AREAS EXCLUDED AND EXEMPTED FROM THE FINAL DESIGNATION—Continued

| | |
|---|---|
| Exclusion of Tribes and Pueblos under section 4(b)(2) of the Act that have completed Southwestern Willow Flycatcher Management Plans and/or have developed flycatcher habitat specific partnerships with the Service: Hualapai, Chemehuevi, Colorado River, Fort Mojave, Quechan (Fort Yuma), Yavapai-Apache, and San Carlos Tribes in AZ, La Jolla, and Rincon Tribes in CA; Isleta, San Illdefonso, Santa Clara, and San Juan Pueblos in NM | 10480 (25897) |
| Exclusion of National Wildlife Refuges under section 4(b)(2) of the Act with completed CCPs or developed management programs/strategies for the southwestern willow flycatcher habitat: Pahranagat, NV; Havasu, Cibola, Imperial, and Bill Williams in AZ, Alamosa, CO; Bosque del Apache and Sevilleta, NM | 18788 (46427) |
| Exclusion of State and Federal Wildlife Areas under section 4(b)(2) of the Act with plans/programs for the management and protection of southwestern willow flycatcher habitat: Overton and Key Pittman Wildlife Area, NV; Alamo Wildlife Area, AZ; Kern River Wildlife Area and Sprague Ranch, CA | 5199 (12847) |
| Exclusions of partnerships, management plans/programs or easements under section 4(b)(2) of the Act that provide protections specific to southwestern willow flycatcher habitat: Los Angeles Department of Water and Power-Owens River Southwestern Willow Flycatcher Conservation Strategy; San Luis Valley, CO, Partnership; Hafenfeld Ranch—Kern River, CA; Salt River Project Partnership—Horseshoe Lake, AZ; U-Bar Ranch—Gila River, NM; Rio Grande Valley State Park (City of Albuquerque), NM | 30836 (76198) |
| Total Final Critical Habitat | 48896 (120824) |

*Section 7 Consultation*

The regulatory effects of a critical habitat designation under the Act are triggered through the provisions of section 7, which applies only to activities conducted, authorized, or funded by a Federal agency (Federal actions). Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR 402. Individuals, organizations, States, local governments, and other non-Federal entities are affected by the designation of critical habitat only if their actions occur on Federal lands, require a Federal permit, license, or other authorization, or involve Federal funding.

Section 7(a)(2) of the Act requires Federal agencies, including us, to insure that their actions are not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of designated critical habitat. This requirement is met through section 7 consultation under the Act. Our regulations define ''jeopardize the continued existence of'' as 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 CFR 402.02). ''Destruction or adverse modification of designated critical habitat'' for this species would include habitat alterations that appreciably diminish the value of critical habitat by significantly affecting any of those physical or biological features that were the basis for determining the habitat to be critical. We are currently reviewing the regulatory definition of adverse modification in relation to the conservation of the species.

Section 7(a)(4) of the Act requires Federal agencies to confer with us on any action that is likely to jeopardize the continued existence of a proposed species or result in destruction or adverse modification of proposed critical habitat. Conference reports provide conservation recommendations to assist Federal agencies in eliminating conflicts that may be caused by their proposed actions. The conservation measures in a conference report are advisory.

If a species is listed or critical habitat is designated, section 7(a)(2) of the Act requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of such a species or to destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. Through this consultation, the Federal action agency would ensure that the permitted actions do not destroy or adversely modify critical habitat.

If we issue a biological opinion concluding that a project is likely to result in the destruction or adverse modification of critical habitat, we also provide ''reasonable and prudent alternatives'' to the project, if any are identifiable. Reasonable and prudent alternatives are defined at 50 CFR 402.02 as alternative actions identified during consultation that can be implemented in a manner consistent with the intended purpose of the action, that are consistent with the scope of the Federal agency's legal authority and jurisdiction, that are economically and technologically feasible, and that the Service's Regional Director believes would avoid the likelihood of jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat. Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 require Federal agencies to reinitiate consultation on previously reviewed actions under certain circumstances, including instances where critical habitat is subsequently designated and the Federal agency has retained discretionary involvement or control over the action or such discretionary involvement or control is authorized by law. Consequently, some Federal agencies may request reinitiation of consultation or conference with us on actions for which formal consultation has been completed, if those actions may affect designated critical habitat, or adversely modify or destroy proposed critical habitat.

Federal activities that may affect southwestern willow flycatcher or its critical habitat will require consultation under section 7. Activities on private, State, or county lands, or lands under local jurisdictions requiring a permit from a Federal agency, such as Federal Highway Administration or Federal Emergency Management Act funding, or a permit from the Corps under section 404 of the Clean Water Act, will continue to be subject to the section 7 consultation process. Federal actions not affecting listed species or critical habitat, and actions on non-Federal lands that are not federally funded, authorized, or permitted, do not require section 7 consultations.

Section 4(b)(8) of the Act requires us to evaluate briefly and describe, in any proposed or final regulation that designates critical habitat, those activities involving a Federal action that

may adversely modify such habitat or that may be affected by such designation. Activities that may destroy or adversely modify critical habitat include those that alter the primary constituent elements to an extent that the value of critical habitat for both the survival and recovery of southwestern willow flycatcher is appreciably reduced. We note that such activities may also jeopardize the continued existence of the species. Activities that, when carried out, funded, or authorized by a Federal agency that may affect the southwestern willow flycatcher and which may require consultation under section 7 of the Act to determine if they adversely modify critical habitat include, but are not limited to: Removing, thinning, or destroying riparian vegetation without a riparian restoration plan to cause habitat to become of equal or better quality in abundance and extent. Activities that remove, thin, or destroy riparian vegetation, by mechanical, chemical (herbicides or burning), or biological (grazing, biocontrol agents) means reduce constituent elements for southwestern willow flycatcher sheltering, feeding, breeding, and migrating. Each of the specific areas designated in this rule as critical habitat for the southwestern willow flycatcher have been determined to contain sufficient PCEs to provide for one or more of the life history functions for the flycatcher. In some cases, the PCEs exist as a result of ongoing Federal actions. As a result, ongoing Federal actions at the time of designation will be included in the baseline in any consultation pursuant to section 7 of the Act conducted subsequent to this designation.

(1) Activities that appreciably diminish value or quality or habitat or primary constituent elements through direct or indirect effects (*e.g.*, degradation of watershed and soil characteristics, diminishing surface and subsurface flow, altering flow regimes, introduction of exotic plants, animals, or insects, or fragmentation of habitat);

(2) Alteration of current surface water diversion or impoundment, groundwater pumping, dam operation, or any other activity which changes the frequency, magnitude, duration, timing or abundance of surface flow (Poff *et al.* 1997), and/or quantity/quality of subsurface water flow in a manner which permanently reduces available riparian habitats by reducing food availability, or the general suitability, quality, structure, abundance, longevity, vigor, micro-habitat components, and distribution of riparian habitat for nesting or migrating. This would not apply to the normal rise and fall of storage pools behind dams, as discussed below.

(3) Permanent destruction/alteration of the species habitat by discharge of fill material, draining, ditching, tiling, pond construction, levee construction and stream channelization (*i.e.*, due to roads, construction of bridges, impoundments, discharge pipes, stormwater detention basins, dikes, levees, etc.).

(4) Management of livestock in a manner that reduces the volume and composition of riparian vegetation, physically disturbs nests, alters floodplain dynamics such that regeneration of riparian habitat is impaired or precluded, facilitates excessive brood parasitism by brown-headed cowbirds, alters watershed and soil characteristics, alters stream morphology, and facilitates abundance and extent of exotic species.

The designation of critical habitat does not imply that lands outside of critical habitat do not play an important role in the conservation of the flycatcher. Federal activities outside of critical habitat are still subject to review under section 7 if they may affect the flycatcher. The prohibitions of section 9 also continue to apply both inside and outside of designated critical habitat.

In general, activities that do not remove or appreciably degrade the primary constituent elements of habitat for southwestern willow flycatchers are not likely to destroy or adversely modify critical habitat. For example, certain dam operations, like Roosevelt Dam in central AZ, allow water to significantly increase and decrease in the conservation space depending on availability and demand. This fluctuation results in the exposure of fine/moist soils in the flat/broad floodplain of the exposed ground and has led to the development of hundreds of acres of flycatcher habitat. The same operating regime that creates the habitat will also inundate and cause loss of habitat. At this particular location, habitat is expected to persist on the perimeter and over time will increase and decrease (USFWS 2003). It is this very process of the ebb and flow of the conservation pool that ensures persistence of habitat over time, although that habitat will vary spatially and temporally, as does flycatcher habitat in natural settings. As a result, the dry conservation space would not be adversely modified when inundated. Riparian restoration can also cause a temporary loss of habitat through the actual removal of existing riparian vegetation. However, if this action is combined with positive site-specific evaluation (through an analysis of on the ground features such as groundwater elevation, etc.) and an implementation/restoration plan (USFWS 2002) that together are expected to cause habitat to become of the same quality or better for the flycatcher, it would be expected that those types of restoration activities would not destroy or adversely modify critical habitat. Each proposed action will be examined pursuant to section 7 of the Act in relation to its site-specific impacts.

All lands designated as critical habitat are within the geographic area occupied by the subspecies and are essential for the conservation of southwestern willow flycatcher. Within the 15 Management Units we are designating as critical habitat, only stream segments from the Santa Ana Management Unit (Santa Ana River, Bear Creek, Mill Creek, Oak Glen Creek, and Waterman Creek), San Diego Management Unit (Santa Margarita River, Temecula Creek, Agua Hedionda Creek, Santa Ysabel River, and Temescal Creek), Mohave Management Unit (Deep Creek, Holcomb Creek, and Mohave River), Virgin Management Unit (Virgin River in NV and UT), and Lower Colorado Management Unit (East Fork of the Little Colorado River and the Little Colorado River) were not known to be specific areas within the geographic area occupied by the species at the time of listing. Due to the wide geographic area this bird inhabits due to it being a neo-tropical migrant, in all likelihood, these areas were inhabited by southwestern willow flycatchers for nesting, dispersing, or migrating, but had not been detected or re-confirmed (some areas were historically occupied) until after the species became listed in 1995. Much of the increase in the distribution and abundance of southwestern willow flycatcher territories since listing has largely been a result of increase survey effort (Durst *et al.* 2005). We have provided our rationale for why these specific areas have features essential for the southwestern willow flycatcher. We consider all of the units designated as critical habitat, as well as those that have been excluded, to be essential to the conservation of the southwestern willow flycatcher and to contain features essential to the conservation of the subspecies. All Management Units are within the geographical range by the species, all are occupied by the species (based on observations made within the last 10 years), and are likely to be used by breeding, non-breeding, territorial, dispersing, or migrating southwestern willow flycatchers. Federal agencies already consult with us on actions that may affect southwestern willow

flycatcher to ensure that their actions do not jeopardize the continued existence of the species. Thus, we do not anticipate substantial additional regulatory protection will result from critical habitat designation.

If you have questions regarding whether specific activities will constitute destruction or adverse modification of critical habitat, contact the Field Supervisor of the appropriate Service Office (see list below). In NM and AZ requests for copies of the regulations on listed wildlife and plants and inquiries about prohibitions and permits may be addressed to the U.S. Fish and Wildlife Service, Branch of Endangered Species, Post Office Box 1306, Albuquerque, NM 87103–1306 (telephone 505/248–6920; facsimile 505/248–6922).

| Area/State | Address | Phone No. |
|---|---|---|
| Southern CA | 6010 Hidden Valley Road, Carlsbad, CA 92011 | 760/431–9440 |
| Central Coastal CA | 2493 Portola Road, Suite B, Ventura, CA 93003 | 805/644–1766 |
| Central California | 2800 Cottage Way, Sacramento, CA 95821 | 916/414–6600 |
| Nevada | 4701 North Torrey Pines Way, Las Vegas, NV 89130 | 702/515–5230 |
| Utah | 2369 West Orton Circle, West Valley City, UT 84119 | 801/975–3330 |
| Arizona | 2321 W. Royal Palm Road Ste. 103, Phoenix, AZ 85021 | 602/242–0210 |
| New Mexico | 2105 Osuna Rd. NE, Albuquerque, NM 87113 | 505/761–4718 |

## Economic Analysis

Section 4(b)(2) of the Act requires us to designate critical habitat on the basis of the best scientific and commercial information available, and to consider the economic and other relevant impacts of designating a particular area as critical habitat. We may exclude areas from critical habitat upon a determination that the benefits of such exclusions outweigh the benefits of specifying such areas as critical habitat. We cannot exclude such areas from critical habitat when such exclusion will result in the extinction of the species concerned. We conducted an economic analysis to estimate potential economic effects of the proposed southwestern willow flycatcher critical habitat designation (USFWS 2005a). The draft analysis was made available for public review on April 28, 2005 (70 FR 21988). We accepted comments on the draft analysis until May 31, 2005, and once again between July 7 and July 18, 2005 (70 FR 39227).

The primary purpose of the economic analysis is to estimate the potential economic impacts associated with the conservation of the southwestern willow flycatcher, including the designation of critical habitat. This information is intended to assist the Secretary in making decisions about whether the benefits of excluding particular areas from the designation outweigh the benefits of including those areas in the designation. This economic analysis considers the economic efficiency effects that may result from the designation, including habitat protections that may be co-extensive with the listing of the species. It also addresses distribution of impacts, including an assessment of the potential effects on small entities and the energy industry. This information can be used by the Secretary to assess whether the effects of the designation might unduly burden a particular group or economic sector.

This analysis focuses on the direct and indirect costs of the rule. However, economic impacts to land use activities can exist in the absence of critical habitat. These impacts may result from, for example, local zoning laws, State and natural resource laws, and enforceable management plans and best management practices applied by other State and Federal agencies. Economic impacts that result from these types of protections are not included in the analysis as they are considered to be part of the regulatory and policy baseline. The total conservation costs from reported efficiency effects associated with the designation of critical habitat in this rule are approximately $9 million from 2004 to 2025. This total includes losses in land value (by far the primary cost source), as well as project modification, administrative, CEQA, delay, and uncertainty costs.

A copy of the final economic analysis and description of the exclusion process with supporting documents are included in our administrative record and may be obtained by contacting the Arizona Ecological Services Fish and Wildlife Service office (see **ADDRESSES** section) or retrieved at *http://www.fws.gov/arizonaes/*.

## Required Determinations

### *Regulatory Planning and Review*

In accordance with Executive Order 12866, this document is a significant rule because it may raise novel legal and policy issues. However, based on our economic analysis, it is not anticipated that this designation of critical habitat for the southwestern willow flycatcher will result in an annual effect on the economy of $100 million or more or affect the economy in a material way. Due to the timeline for publication in the **Federal Register**, the Office of Management and Budget (OMB) has not formally reviewed the proposed rule or accompanying economic analysis.

Further, Executive Order 12866 directs Federal Agencies promulgating regulations to evaluate regulatory alternatives (Office of Management and Budget, Circular A–4, September 17, 2003). Pursuant to Circular A–4, once it has been determined that the Federal regulatory action is appropriate, then the agency will need to consider alternative regulatory approaches. Since the determination of critical habitat is a statutory requirement pursuant to the Endangered Species Act of 1973, as amended (Act) (16 U.S.C. 1531 *et seq.*), we must then evaluate alternative regulatory approaches, where feasible, when promulgating a designation of critical habitat.

In developing our designations of critical habitat, we consider economic impacts, impacts to national security, and other relevant impacts pursuant to section 4(b)(2) of the Act. Based on the discretion allowable under this provision, we may exclude any particular area from the designation of critical habitat providing that the benefits of such exclusion outweighs the benefits of specifying the area as critical habitat and that such exclusion would not result in the extinction of the species. As such, we believe that the evaluation of the inclusion or exclusion of particular areas, or combination thereof, in a designation constitutes our regulatory alternative analysis.

### *Regulatory Flexibility Act (5 U.S.C. 601 et seq.)*

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*, as amended by the SBREFA), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available

for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (*i.e.*, small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency certifies the rule will not have a significant economic impact on a substantial number of small entities. Based upon our draft economic analysis we certified in our July 7, 2005 (70 FR 39227), **Federal Register** notice that this designation would not result in a significant effect as defined under SBREFA.

According to the Small Business Administration (SBA), small entities include small organizations, such as independent nonprofit organizations and small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents, as well as small businesses (13 CFR 121.201). Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than $5 million in annual sales, general and heavy construction businesses with less than $27.5 million in annual business, special trade contractors doing less than $11.5 million in annual business, and agricultural businesses with annual sales less than $750,000. To determine if potential economic impacts to these small entities are significant, we considered the types of activities that might trigger regulatory impacts under this designation as well as types of project modifications that may result. In general, the term significant economic impact is meant to apply to a typical small business firm's business operations.

To determine if this designation of critical habitat for the southwestern willow flycatcher would affect a substantial number of small entities, we considered the number of small entities affected within particular types of economic activities (*e.g.*, water management and supply, livestock grazing, land development, recreation). We considered each industry or category individually to determine if certification is appropriate. In estimating the numbers of small entities potentially affected, we also considered whether their activities have any Federal involvement; some kinds of activities are unlikely to have any Federal involvement and so will not be affected by the designation of critical habitat. Designation of critical habitat only affects activities conducted, funded, permitted or authorized by Federal agencies; non-Federal activities are not affected by the designation. Federal agencies must consult with us if their activities may affect designated critical habitat. Consultations to avoid the destruction or adverse modification of critical habitat would be incorporated into the existing consultation process.

In our economic analysis we evaluated the potential economic effects on small business entities and small governments resulting from conservation actions related to the listing of this species and proposed designation of its critical habitat. We evaluated small business entities in four categories: dam operations and water supply activities, and by extension, crop agriculture, ranching activities, residential development, and businesses affected by changes to recreational use. The following summary of the information contained in Appendix A of the final economic analysis provides the basis for our determination.

Dam Operations and Water Supply Activities

Under scenario two analyzed in the draft economic analysis, water operators are assumed to be required to change their management regimes to avoid adverse effects to southwestern willow flycatcher habitat, resulting in a loss of water for beneficial use (*i.e.* reservoir pools will be limited to current levels in order to avoid inundation of southwestern willow flycatcher habitat). Facilities assessed under this scenario include Lake Hodges, Cuyamaca Reservoir, Vail Dam, Pleasant Valley Reservoir (*i.e.* Owens River), Isabella Dam, Hoover Dam, Parker Dam, Alamo Dam, Roosevelt Dam, and Horseshoe Dam. No small businesses would be directly affected under this scenario because dams are not operated by small businesses. Additionally, as described elsewhere in this rule, these reservoirs have been excluded from the designation pursuant to section 4(b)(2) of the Act. Therefore no impacts to these water operators will result from a critical habitat designation.

Some water users may be more directly affected by changes in water supply that could occur as a result of southwestern willow flycatcher conservation activities, specifically, agricultural users dependent on the drought reserves provided by these systems. Appendix A of the draft economic analysis provides a profile of the agricultural users that are at greatest risk from direct losses in water supply under this scenario. The four water systems that provide water to agricultural users include Lake Isabella (including the North Kern Water Storage District, the Buena Vista Storage District, and the City of Bakersfield Water Resources Department); Roosevelt and Horseshoe (the Salt River Project operates six reservoirs and dams on the Salt and Verde Rivers); Coolidge Dam (San Carlos Irrigation Project); and Lower Colorado River (water from the Colorado River is diverted to six States and is used for every purpose, including agricultural uses). As described elsewhere in this rule, these reservoirs have been excluded from the designation pursuant to section 4(b)(2) of the Act. Therefore no direct impacts to these water users, as described above and in Appendix A of the economic analysis, will result from a critical habitat designation.

Water users in the Safford Valley on the Gila River, Arizona, expressed concerns that groundwater and/or surface water withdrawals could need to be curtailed to accommodate flycatcher concerns. Water withdrawals have not been impacted under past operations, even during the period when critical habitat for the flycatcher was previously designated. As stated in the ''Section 7'' section above, ongoing Federal actions at the time of designation will be included in the baseline in any consultation pursuant to section 7 of the Act conducted subsequent to this designation. Therefore, we do not anticipate a significant economic impact to water users on the Gila River.

Ranching Activities

The economic analysis assumes that, in the future, grazing efforts on areas included in the proposed designation will be reduced, or, in the high-end estimate, be eliminated due to flycatcher concerns. Based on this analysis, the high impact scenario for allotments in the proposed critical habitat is a reduction of 89,400 AUMs (animal unit months) over 20 years. Of the total AUMs lost, 1,200 are federally permitted and 88,000 are private. Converting AUM reductions to cattle reductions reveals that the 37 affected counties may lose a total of 3,385 head of beef cattle, or 0.6 percent of the total number of beef cattle in the affected region. Even for counties for which percentage losses appear relatively large, absolute losses per average size ranch are one to three cows over a twenty year period.

Residential Development

Impacts to development activities within the proposed designation include land value loss, other project modifications, California Environmental Quality Act costs, and project delay costs in the Mojave and Santa Ana

Management Units in California. The economic analysis determines that less than 1 percent of land developers will be affected, and 0.02 percent of annual revenues of small land developers in this area may be lost.

Recreation Activities

Impacts to recreation activities include limitations on vehicle use, fires, and cigarette smoking in two areas near Roosevelt Lake on the Tonto National Forest, and fewer trips to the area for hunting and fishing for a total annual impact of approximately 0.25 percent of annual small business revenues in Gila County. As described elsewhere in this rule, Roosevelt Lake has been excluded from the designation pursuant to section 4(b)(2) of the Act. Therefore, no direct impacts to recreation activities at Roosevelt Lake will result from a critical habitat designation.

Based on this data we have determined that the designation of critical habitat will not affect a substantial number of small businesses involved in or affected by water management and supply activities, livestock grazing, land development, and recreation. Further, we have determined that the designation will not result in a significant effect to the annual sales of those small businesses impacted by this designation. As such, we are certifying that the final designation of critical habitat will not result in a significant economic impact on a substantial number of small entities. Please refer to Appendix A of our economic analysis for this designation for a more detailed discussion of potential economic impacts to small business entities.

*Executive Order 13211*

On May 18, 2001, the President issued Executive Order (E.O.) 13211 on regulations that significantly affect energy supply, distribution, and use. E.O. 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This rule is considered a significant regulatory action under E.O. 12866 due to it potentially raising novel legal and policy issues, but it is not expected to significantly affect energy supplies, distribution, or use. Appendix B of the economic analysis provides a detailed discussion and analysis of this determination. Specifically, two criteria were determined to be relevant to this analysis: (1) Reductions in electricity production in excess of 1 billion kilowatt-hours per year or in excess of 500 megawatts of installed capacity, and (2) increases in the cost of energy production in excess of 1 percent. The draft analysis finds that no net reduction in electricity production is anticipated, and thus we do not anticipate that the suggested OMB threshold of 1 billion kilowatt hours will be exceeded. In addition, total financial impacts related to southwestern willow flycatcher conservation activities ($2.7 million annually) represent 0.02 percent of the estimated annual baseline cost of regional energy production, and this is well below the 1 percent threshold suggested by OMB. Therefore, this action is not a significant action, and no Statement of Energy Effects is required.

*Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)*

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501), the Service makes the following findings:

(a) This rule will not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or tribal governments, or the private sector, and includes both ''Federal intergovernmental mandates'' and ''Federal private sector mandates.'' These terms are defined in 2 U.S.C. 658(5)–(7). ''Federal intergovernmental mandate'' includes a regulation that ''would impose an enforceable duty upon State, local, or tribal governments,'' with two exceptions. It excludes ''a condition of federal assistance.'' It also excludes ''a duty arising from participation in a voluntary Federal program,'' unless the regulation ''relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and tribal governments under entitlement authority,'' if the provision would ''increase the stringency of conditions of assistance'' or ''place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding'' and the State, local, or tribal governments ''lack authority'' to adjust accordingly. (At the time of enactment, these entitlement programs were: Medicaid; AFDC work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement.) ''Federal private sector mandate'' includes a regulation that ''would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance; or (ii) a duty arising from participation in a voluntary Federal program.''

The designation of critical habitat does not impose a legally binding duty on non-Federal Government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7. Non-Federal entities that receive Federal funding, assistance, permits, or otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat. However, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply; nor would critical habitat shift the costs of the large entitlement programs listed above on to State governments.

(b) The economic analysis discusses potential impacts of critical habitat designation for the southwestern willow flycatcher on water management activities, administrative costs, livestock grazing, mining, residential and commercial development activities, Tribes, transportation activities, recreation activities, and fire management activities. The analysis estimates that annual costs of the rule could range from $32.7 to $38.00 million annually using the most likely costs scenario. Impacts are largely anticipated to affect water operators and Federal and State agencies, with some effects on livestock grazing operations, land development activities, and recreation activities. Impacts on small governments are not anticipated, or they are anticipated to be passed through to consumers. For example, costs to water operations would be expected to be passed on to consumers in the form of price changes. Consequently, for the reasons discussed above, we do not believe that the designation of critical habitat for the southwestern willow flycatcher will significantly or uniquely affect small government entities. As such, a Small Government Agency Plan is not required.

*Federalism*

In accordance with Executive Order 13132, this rule does not have significant federalism effects. A federalism assessment is not required. In keeping with Department of the Interior policies, we requested information from and coordinated development of this proposed critical habitat designation with appropriate

State resource agencies in all affected states.

The designation of critical habitat in areas currently occupied by southwestern willow flycatcher imposes few restrictions beyond those currently in place and, therefore, has little incremental impact on State and local governments and their activities. The designation of critical habitat may have some benefit to the State and local resource agencies in that the areas essential to the conservation of this species are more clearly defined, and the primary constituent elements of the habitat necessary to the conservation of this species are specifically identified. While this definition and identification does not alter where and what federally sponsored activities may occur, it may assist local governments in long-range planning (rather than waiting for case-by-case section 7 consultations to occur).

*Civil Justice Reform*

In accordance with Executive Order 12988, the Department of the Interior's Office of the Solicitor has determined that this rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order. We are designating critical habitat in accordance with the provisions of the Endangered Species Act. The rule uses standard property descriptions and identifies the primary constituent elements within the proposed areas to assist the public in understanding the habitat needs of the southwestern willow flycatcher.

*Takings*

In accordance with Executive Order 12630 (''Government Actions and Interference with Constitutionally Protected Private Property Rights''), we have analyzed the potential takings implications of designating critical habitat for the southwestern willow flycatcher in a takings implications assessment. The takings implications assessment concludes that this designation of critical habitat for the southwestern willow flycatcher does not pose significant takings implications.

*Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)*

This rule does not contain new or revised information collection for which OMB approval is required under the Paperwork Reduction Act. This rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

*National Environmental Policy Act*

It is our position that, outside the Tenth Circuit, we do not need to prepare environmental analyses as defined by the NEPA in connection with designating critical habitat under the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This assertion was upheld in the courts of the Ninth Circuit (*Douglas County* v. *Babbitt,* 48 F.3d 1495 (9th Cir. Ore. 1995), cert. denied 116 S. Ct. 698 (1996).] However, when the range of the species includes States within the Tenth Circuit, such as that of the southwestern willow flycatcher, pursuant to the Tenth Circuit ruling in *Catron County Board of Commissioners* v. *U.S. Fish and Wildlife Service,* 75 F.3d 1429 (10th Cir. 1996), we will undertake a NEPA analysis for critical habitat designation. We have conducted a NEPA evaluation and notified the public of the draft document's availability on April 28, 2005 (70 FR 21988). The final document can be retrieved off the Internet at *http://www/fws.gov/arizonaes/.*

*Government-to-Government Relationship With Tribes*

In accordance with the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments'' (59 FR 22951), Executive Order 13175, and the Department of the Interior's manual at 512 DM 2, we have coordinated with federally-recognized Tribes on a Government-to-Government basis. We have excluded specific Tribal lands from critical habitat pursuant to section 4(b)(2) of the Act.

*Relationship to Mexico*

We are not aware of any existing national regulatory mechanism in Mexico that would protect the southwestern willow flycatcher or its habitat. Although new legislation for wildlife is pending in Mexico, and Mexico has laws that could provide protection for rare species, there are enforcement challenges. Even if specific protections were available and enforceable in Mexico, the portion of the southwestern willow flycatcher's range in Mexico alone, in isolation, would not be adequate to ensure the long-term conservation of the species.

**References Cited**

A complete list of all references cited in this rulemaking is available upon request from the Field Supervisor, Arizona Ecological Services Fish and Wildlife Office (see **ADDRESSES** section), or retrieve this information from the Internet at *http://www.fws.gov/arizonaes.*

**Author**

The primary author of this notice is the U.S. Fish and Wildlife Service (see **ADDRESSES** section).

**List of Subjects in 50 CFR Part 17**

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

**Regulation Promulgation**

■ Accordingly, we amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations as set forth below:

## PART 17—[AMENDED]

■ 1. The authority citation for part 17 continues to read as follows:

**Authority:** 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500; unless otherwise noted.

■ 2. In § 17.95(b), revise the critical habitat for ''Southwestern Willow Flycatcher (*Empidonax traillii extimus*)'' to read as follows:

**§ 17.95 Critical habitat—fish and wildlife.**

* * * * *

(b) *Birds.*

* * * * *

**Southwestern Willow Flycatcher** *(Empidonax traillii extimus)*

(1) Critical habitat units are depicted for Apache, Cochise, Gila, Graham, Greenlee, Maricopa, Mohave, Pinal, Pima, and Yavapai counties in Arizona, Kern, Santa Barbara, San Bernardino, and San Diego counties in southern California, Clark County in southern Nevada, Grant, Hidalgo, Mora, Rio Arriba, Soccoro, Taos, and Valencia counties in New Mexico, and Washington County in southwestern Utah on the maps and as described below.

(2) The primary constituent elements of critical habitat for southwestern willow flycatcher are:

(i) Riparian habitat in a dynamic successional riverine environment (for nesting, foraging, migration, dispersal, and shelter) that comprises:

(A) Trees and shrubs that include Gooddings willow (*Salix gooddingii*), coyote willow (*Salix exigua*), Geyers willow (*Salix geyerana*), arroyo willow (*Salix lasiolepis*), red willow (*Salix laevigata*), yewleaf willow (*Salix taxifolia*), pacific willow (*Salix*

*lasiandra*), boxelder (*Acer negundo*), tamarisk (*Tamarix ramosissima*), Russian olive (*Eleagnus angustifolia*), buttonbush (*Cephalanthus occidentalis*), cottonwood (*Populus fremontii*), stinging nettle (*Urtica dioica*), alder (*Alnus rhombifolia, Alnus oblongifolia, Alnus tenuifolia*), velvet ash (*Fraxinus velutina*), poison hemlock (*Conium maculatum*), blackberry (*Rubus ursinus*), seep willow (*Baccharis salicifolia, Baccharis glutinosa*), oak (*Quercus agrifolia, Quercus chrysolepis*), rose (*Rosa californica, Rosa arizonica, Rosa multiflora*), sycamore (*Platinus wrightii*), false indigo (*Amorpha californica*), Pacific poison ivy (*Toxicodendron diversilobum*), grape (*Vitus arizonica*), Virginia creeper (*Parthenocissus quinquefolia*), Siberian elm (*Ulmus pumila*), and walnut (*Juglans hindsii*);

(B) Dense riparian vegetation with thickets of trees and shrubs ranging in height from 2 to 30 meters (m) (6 to 98 feet (ft). Lower-stature thickets (2 to 4 m or 6 to 13 ft tall) are found at higher elevation riparian forests, and tall-stature thickets are found at middle- and lower-elevation riparian forests;

(C) Areas of dense riparian foliage at least from the ground level up to approximately 4 m (13 ft) above ground or dense foliage only at the shrub level, or as a low, dense tree canopy;

(D) Sites for nesting that contain a dense tree and/or shrub canopy (the amount of cover provided by tree and shrub branches measured from the ground) (*i.e.*, a tree or shrub canopy with densities ranging from 50 percent to 100 percent); or

(E) Dense patches of riparian forests that are interspersed with small openings of open water or marsh, or shorter/sparser vegetation that creates a mosaic that is not uniformly dense. Patch size may be as small as 0.1 ha (0.25 ac) or as large as 70 ha (175 ac); and

(ii) A variety of insect prey populations found within or adjacent to riparian floodplains or moist environments, including: flying ants, wasps, and bees (Hymenoptera); dragonflies (Odonata); flies (Diptera); true bugs (Hemiptera); beetles (Coleoptera); butterflies/moths and caterpillars (Lepidoptera); and spittlebugs (Homoptera).

(3) Maps and legal descriptions for southwestern willow flycatcher critical habitat follow:

(4) Bill Williams Management Unit.

(i)

| Management unit | River | Start lat | Start lon | End lat | End lon |
|---|---|---|---|---|---|
| Bill Williams | Big Sandy River | 34.705270 | −113.598290 | 34.479650 | −113.618700 |

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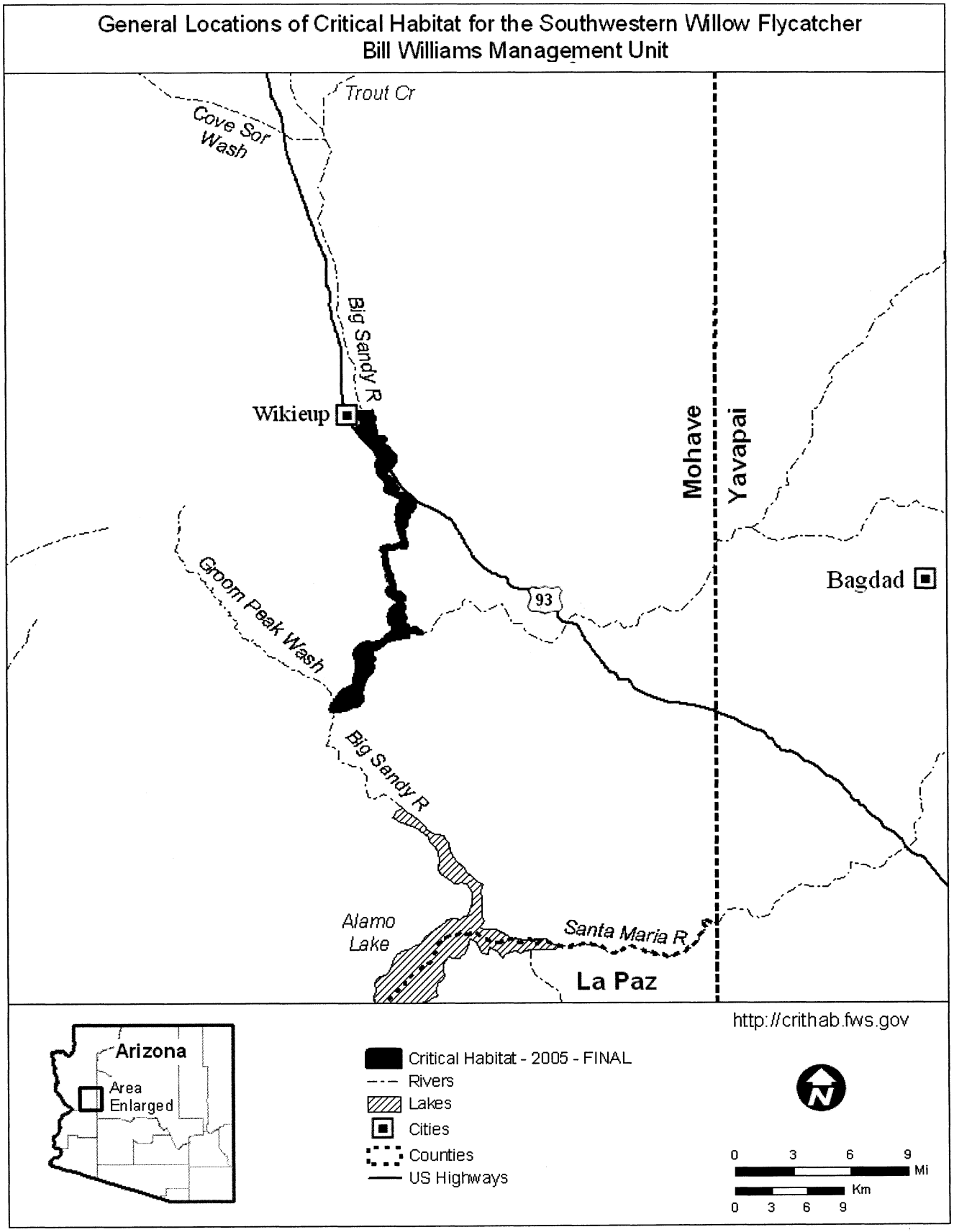
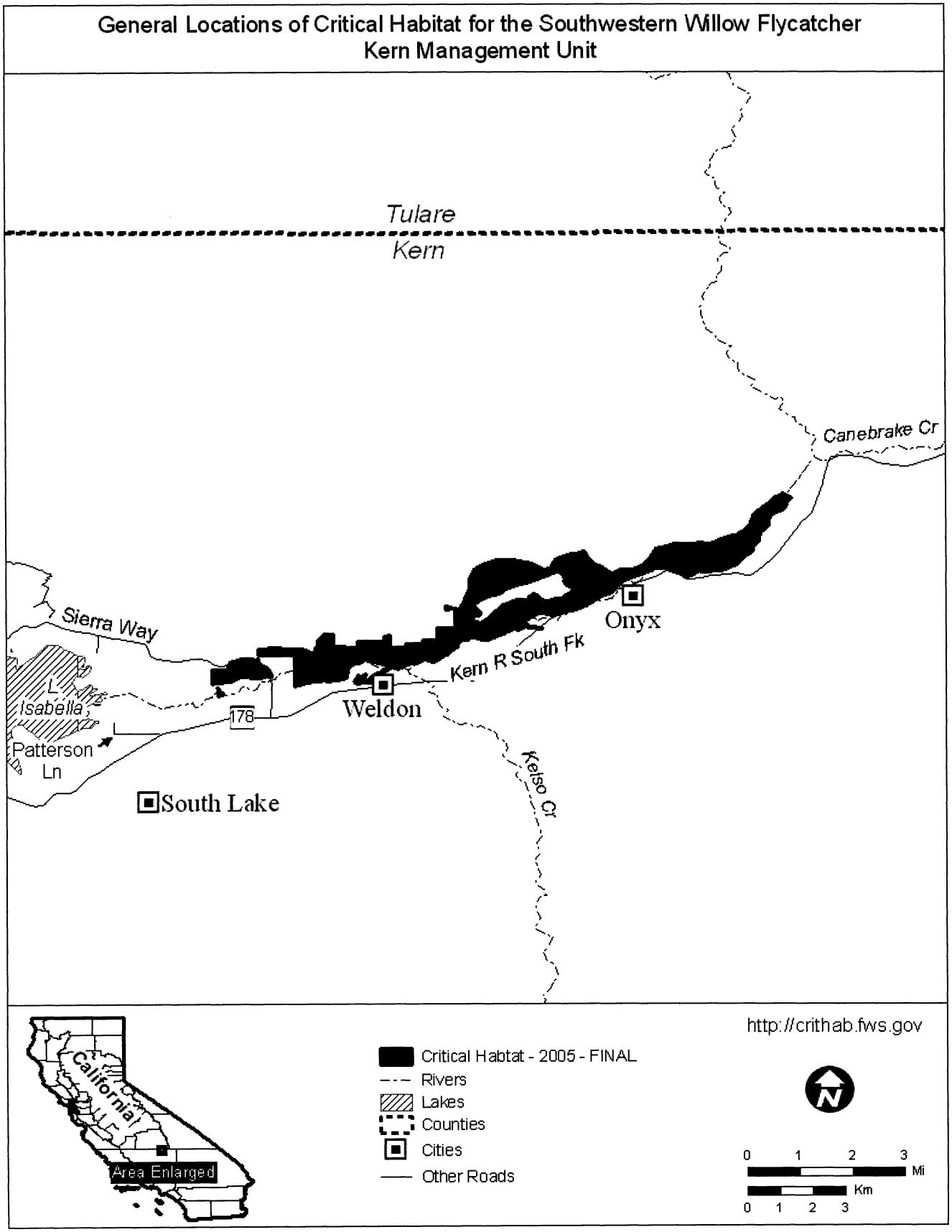
(ii) Bill Williams Management Unit
Map follows:



(5) Kern Management Unit.
(i)

| Management unit | River | Start lat | Start lon | End lat | End lon |
|---|---|---|---|---|---|
| Kern | South Fork Kern River | 35.717690 | −118.180890 | 35.668890 | −118.339040 |

(ii) Kern Management Unit Map follows:

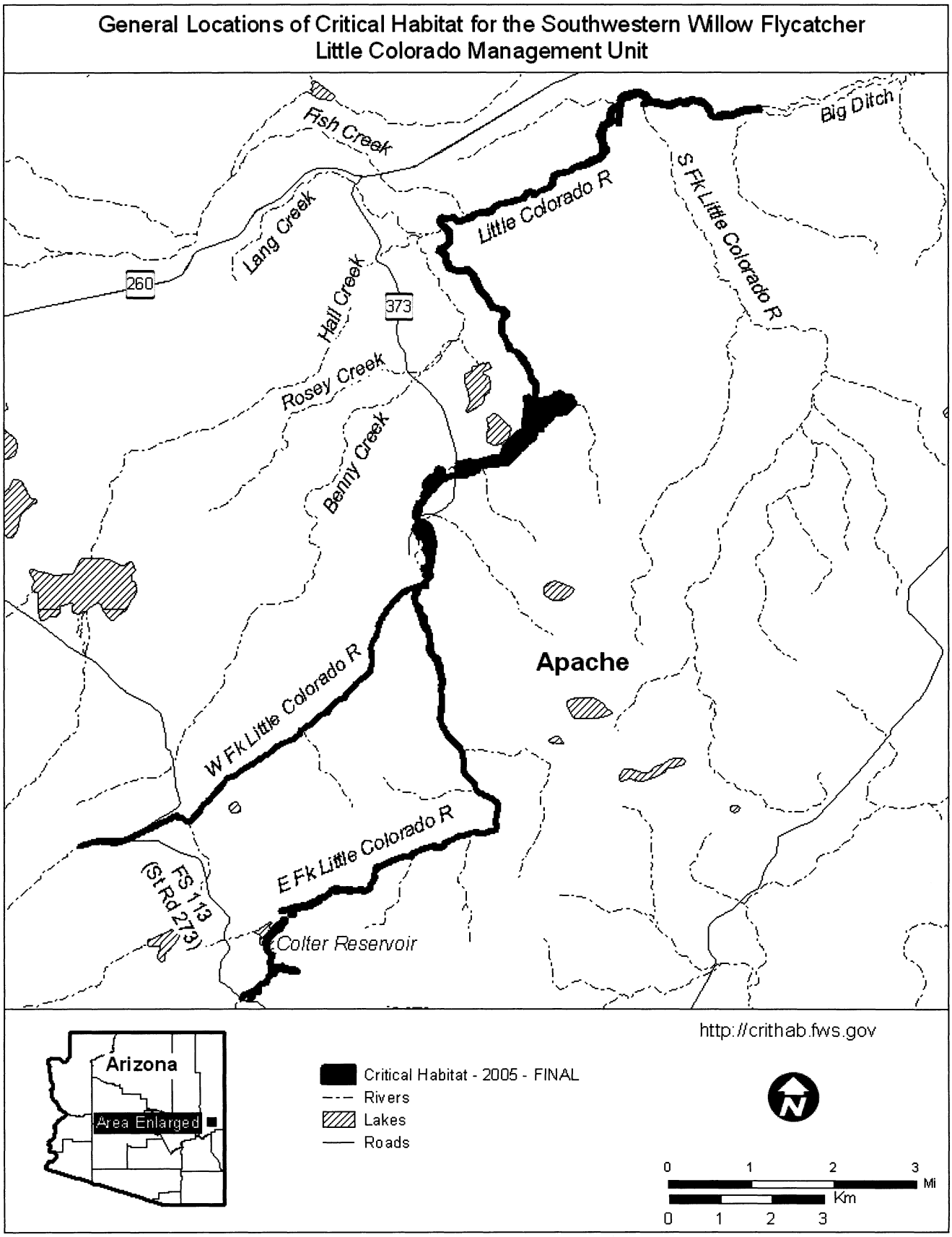


(6) Little Colorado Management Unit.
(i)

| Management unit | River | Start lat | Start lon | End lat | End lon |
|---|---|---|---|---|---|
| Little Colorado | Little Colorado River | 34.086800 | −109.397000 | 34.003660 | −109.456870 |
| | Little Colorado River East Fork | 34.003660 | −109.456870 | 33.931370 | −109.487290 |
| | Little Colorado River West Fork | 34.003660 | −109.456870 | 33.958300 | −109.516210 |

(ii) Little Colorado Management Unit

Map follows:

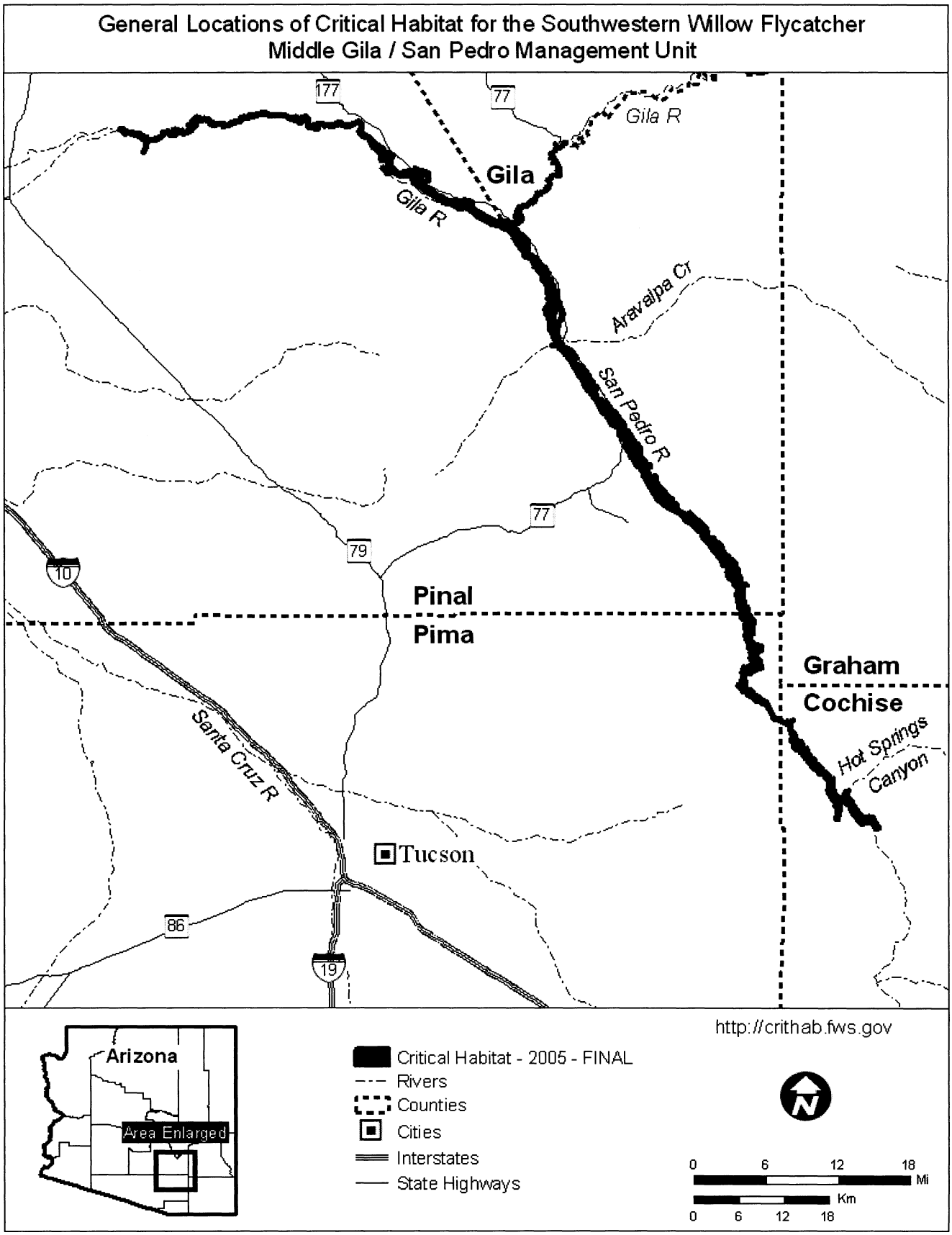


(7) Middle Gila/San Pedro Management Unit.

(i)

| Management unit | River | Start lat | Start lon | End lat | End lon |
|---|---|---|---|---|---|
| Middle Gila/San Pedro | Gila River | 33.082830 | −110.709340 | 32.981320 | −110.778790 |
| | San Pedro River | 33.099950 | −111.246310 | 32.252490 | −110.335190 |

(ii) Middle Gila/San Pedro Management Unit Map follows:

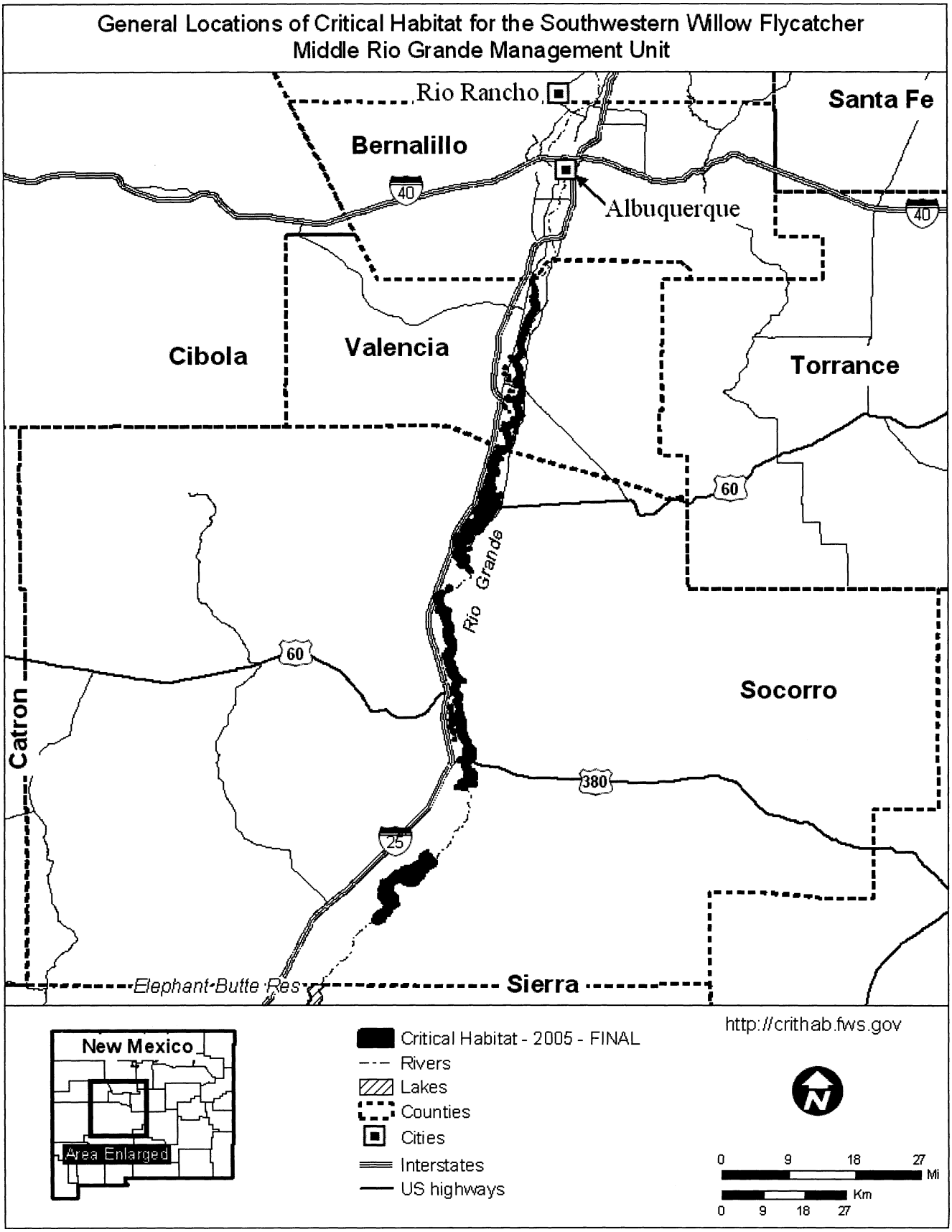


(8) Middle Rio Grande Management Unit.

(i)

| Management unit | River | Start lat | Start lon | End lat | End lon |
|---|---|---|---|---|---|
| Middle Rio Grande ..... | Rio Grande—South segment—1 ..... | 34.870940 | −106.720440 | 34.294030 | −106.843240 |
| | Rio Grande—South segment—2 ..... | 34.241980 | −106.898780 | 33.869720 | −106.845540 |
| | Rio Grande—South segment—3 ..... | 33.730610 | −106.918770 | 33.605530 | −107.032890 |

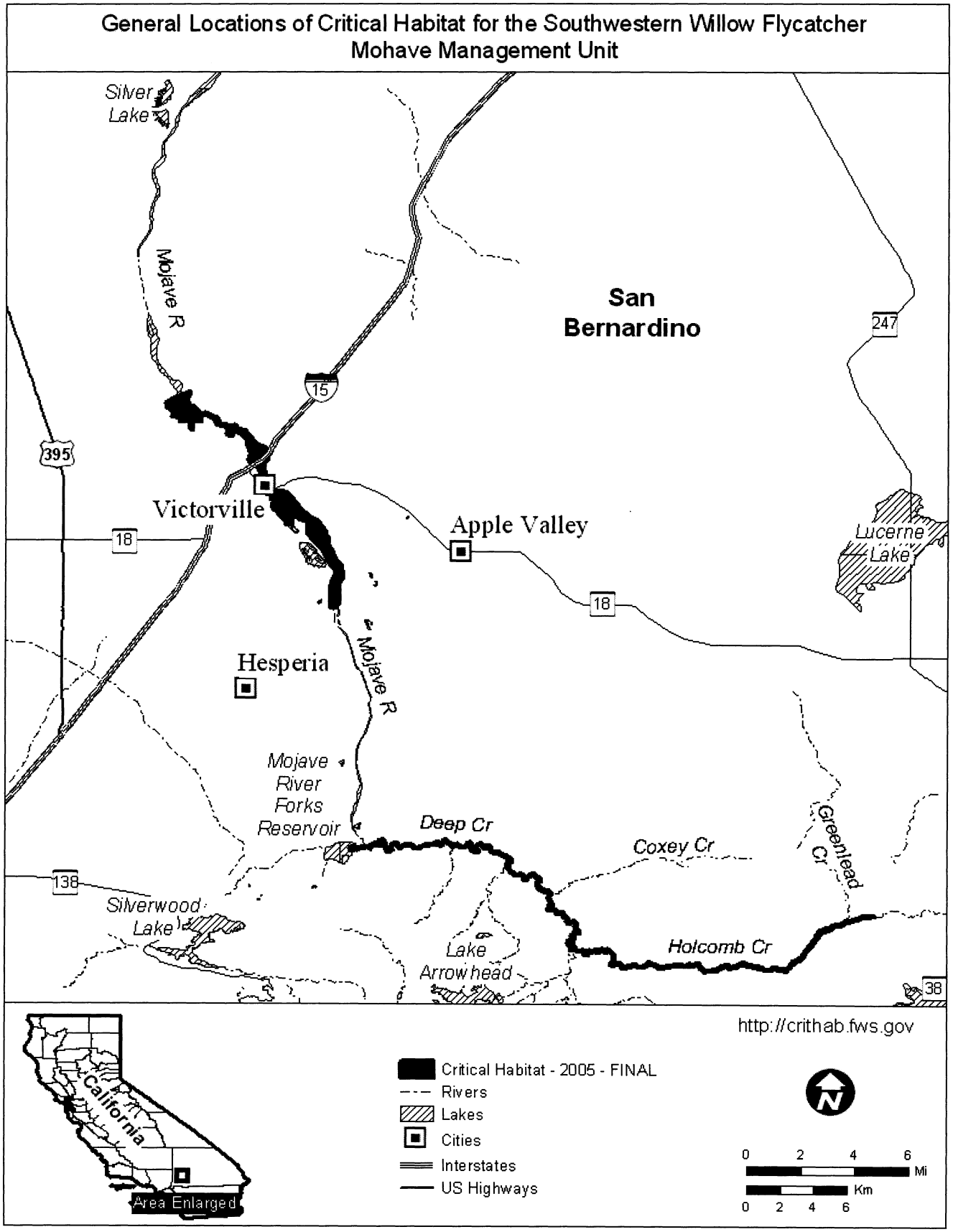
(ii) Middle Rio Grande Management Unit Map follows:



(9) Mojave Management Unit.
(i)

| Management unit | River | Start lat | Start lon | End lat | End lon |
|---|---|---|---|---|---|
| Mojave | Deep Creek (incl. Mojave Fks Res) | 34.287310 | −117.126850 | 34.340410 | −117.245700 |
| | Holcomb Creek | 34.304920 | −116.964650 | 34.287310 | −117.126850 |
| | Mojave River | 34.470190 | −117.254670 | 34.583870 | −117.337400 |

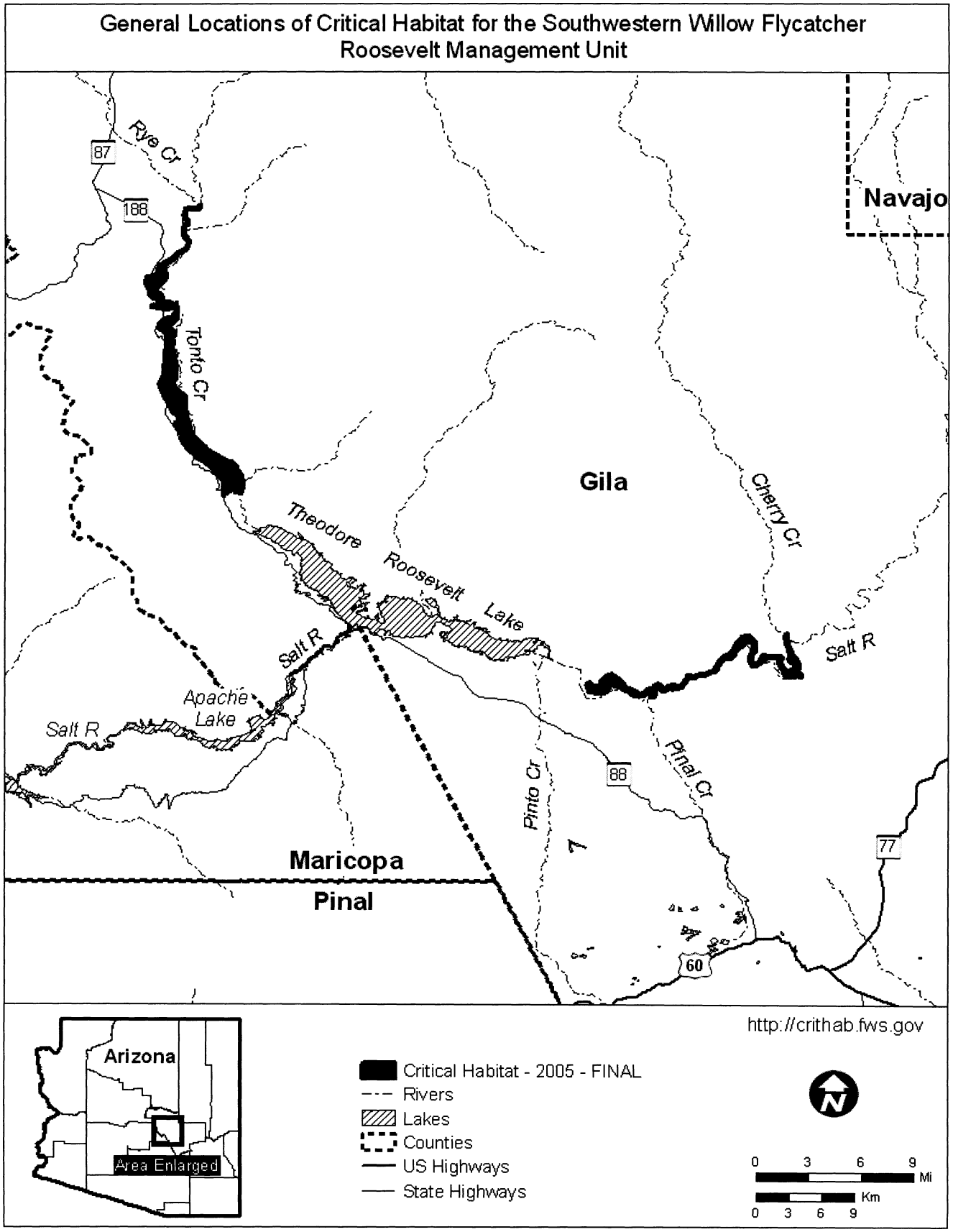
(ii) Mojave Management Unit Map follows:



(10) Roosevelt Management Unit.
(i)

| Management unit | River | Start lat | Start lon | End lat | End lon |
|---|---|---|---|---|---|
| Roosevelt | Salt River | 33.670900 | −110.800840 | 33.626350 | −110.964550 |
| | Tonto Creek | 34.023900 | −111.282800 | 33.785650 | −111.256270 |

(ii) Roosevelt Management Unit Map follows:



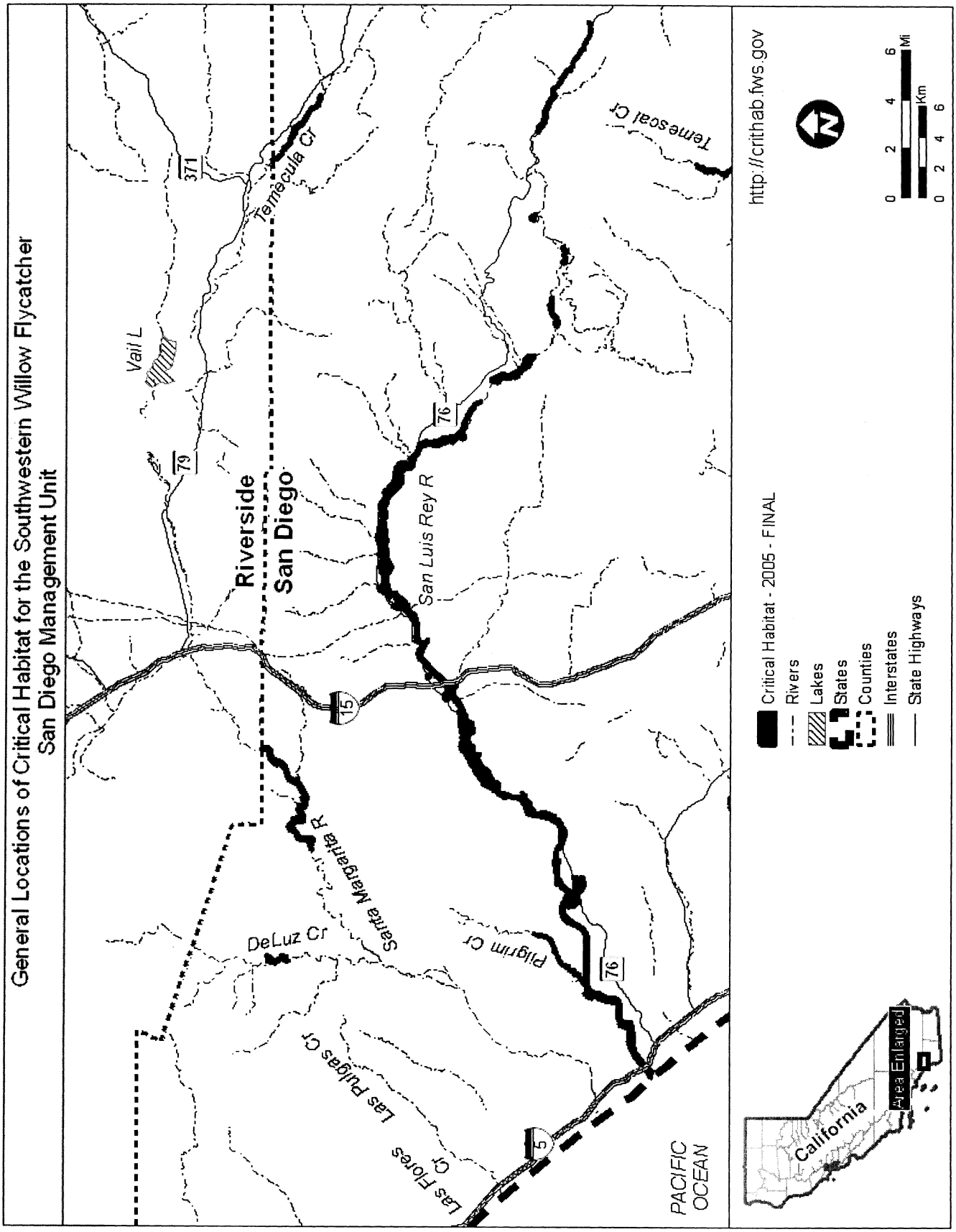
(11) Salton Management Unit.
(i)

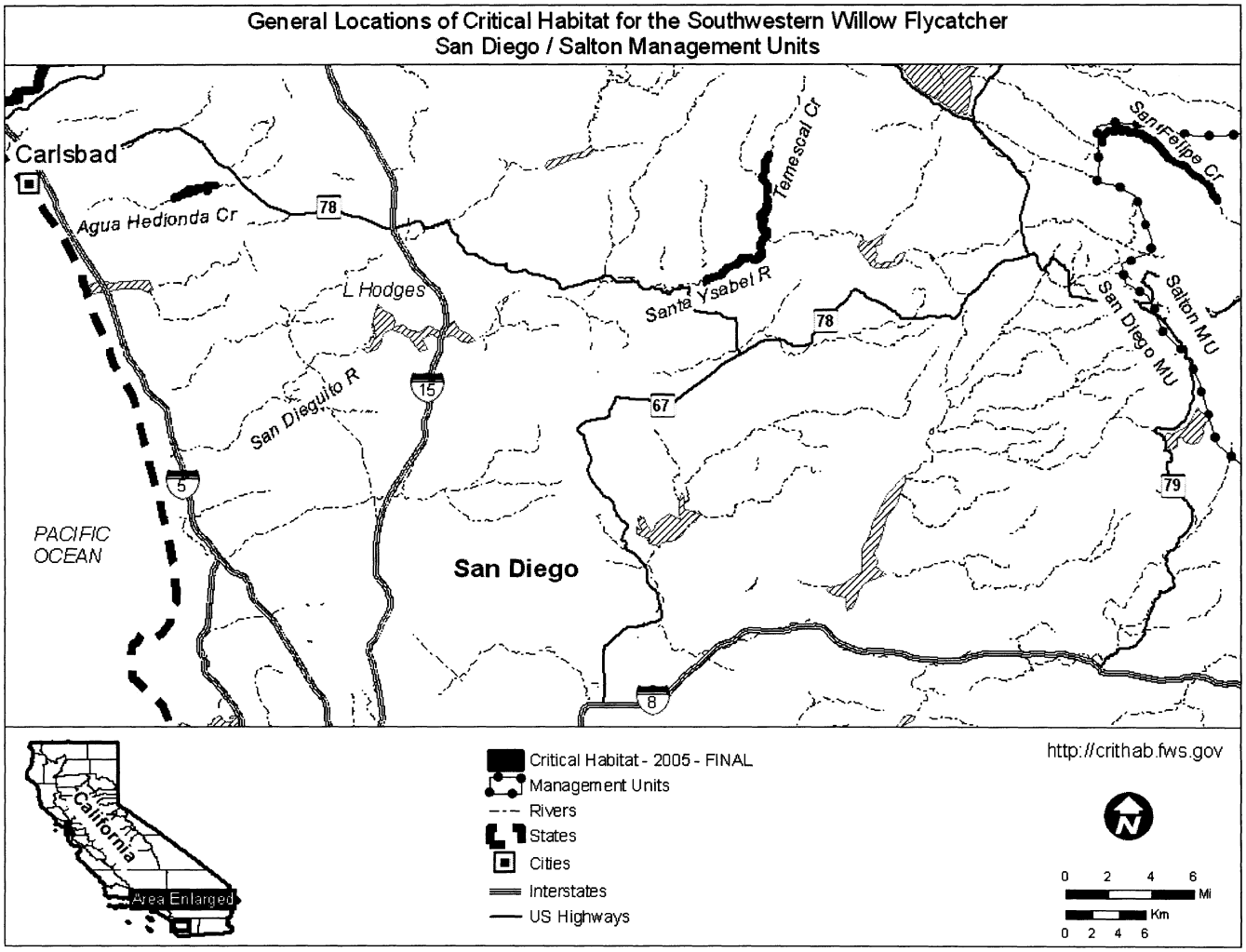
| Management unit | River | Start lat | Start lon | End lat | End lon |
|---|---|---|---|---|---|
| Salton | San Felipe Creek | 33.145510 | −116.544860 | 33.184870 | −116.623790 |

(ii) San Diego Management Unit.

| Management unit | River | Start lat | Start lon | End lat | End lon |
|---|---|---|---|---|---|
| San Diego | Agua Hedionda Creek | 33.156960 | −117.224330 | 33.148330 | −117.253480 |
| | Deluz Creek | 33.428730 | −117.319360 | 33.416570 | −117.321050 |
| | Pilgrim Creek | 33.271930 | −117.305790 | 33.241240 | −117.335920 |
| | San Dieguito River | 33.120070 | −116.853380 | 33.090540 | −116.892610 |
| | San Luis Ray River—West segment | 33.304240 | −116.989540 | 33.202520 | −117.389560 |
| | San Luis Rey River—East segment—1 | 33.273480 | −116.962270 | 33.295780 | −116.978050 |
| | San Luis Rey River—East segment—2 | 33.262670 | −116.927970 | 33.260640 | −116.944880 |
| | San Luis Rey River—East segment—3 | 33.256180 | −116.898390 | 33.256110 | −116.907120 |
| | San Luis Rey River—East segment—4 | 33.272450 | −116.881990 | 33.271960 | −116.878110 |
| | San Luis Rey River—East segment—5 | 33.240720 | −116.764750 | 33.270630 | −116.828580 |
| | San Margarita River | 33.432130 | −117.197380 | 33.402580 | −117.255860 |
| | Temecula Creek | 33.397690 | −116.809070 | 33.426680 | −116.847560 |
| | Temescal Creek | 33.177900 | −116.848790 | 33.120070 | −116.853380 |

(iii) Salton and San Diego Management Unit Maps follow:



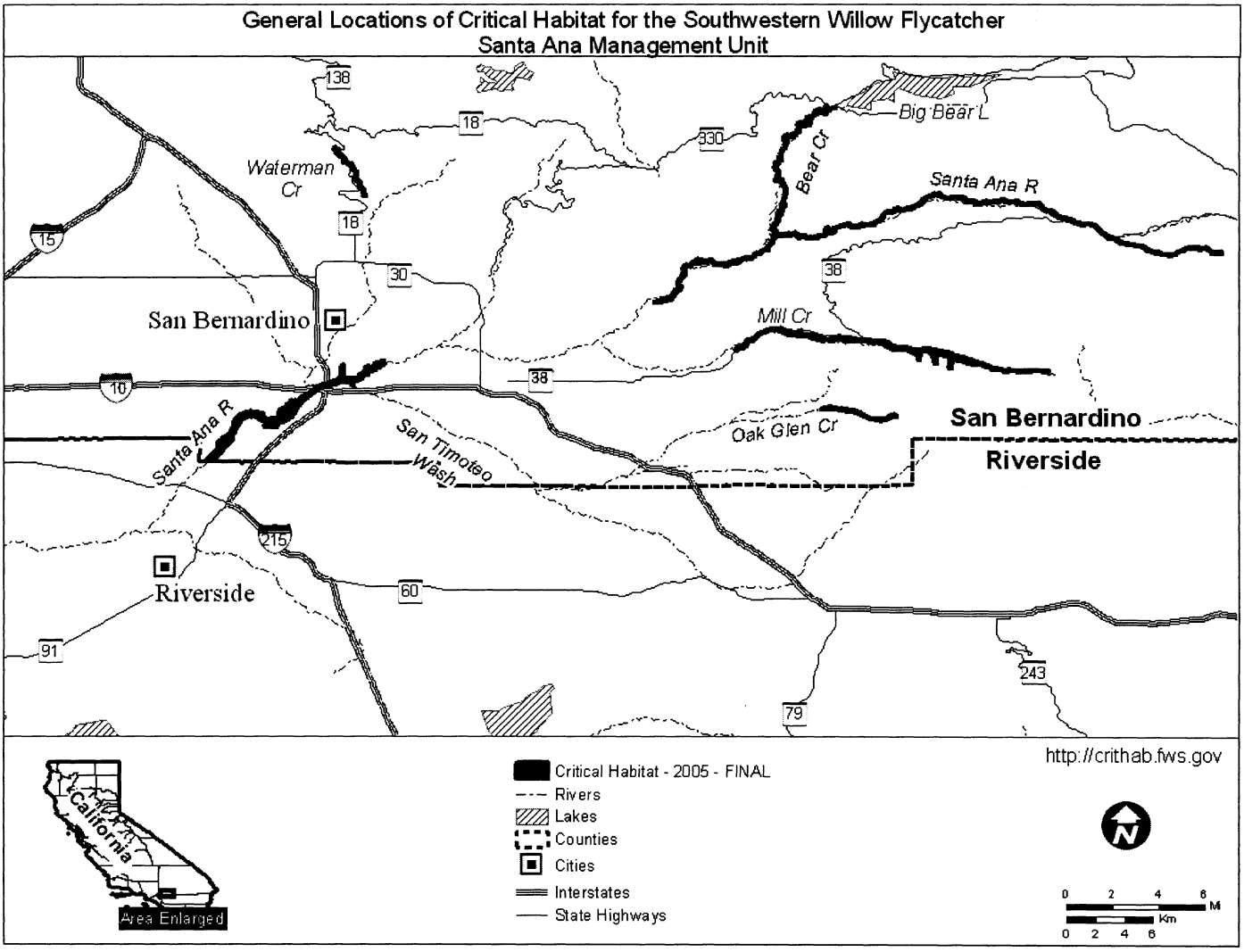



(12) Santa Ana Management Unit.

(i)

| Management unit | River | Start lat | Start lon | End lat | End lon |
|---|---|---|---|---|---|
| Santa Ana | Bear Creek | 34.242210 | −116.977290 | 34.160970 | −117.015100 |
| | Mill Creek | 34.076650 | −116.844390 | 34.089290 | −117.039560 |
| | Oak Glen Creek | 34.048340 | −116.939470 | 34.052820 | −116.986090 |
| | Santa Ana River—East segment | 34.151300 | −116.735070 | 34.119560 | −117.090380 |
| | Santa Ana River—West segment | 34.081720 | −117.259830 | 34.019510 | −117.368930 |
| | Waterman Canyon | 34.186350 | −117.272120 | 34.216970 | −117.290940 |

(ii) Santa Ana Management Unit Map follows:

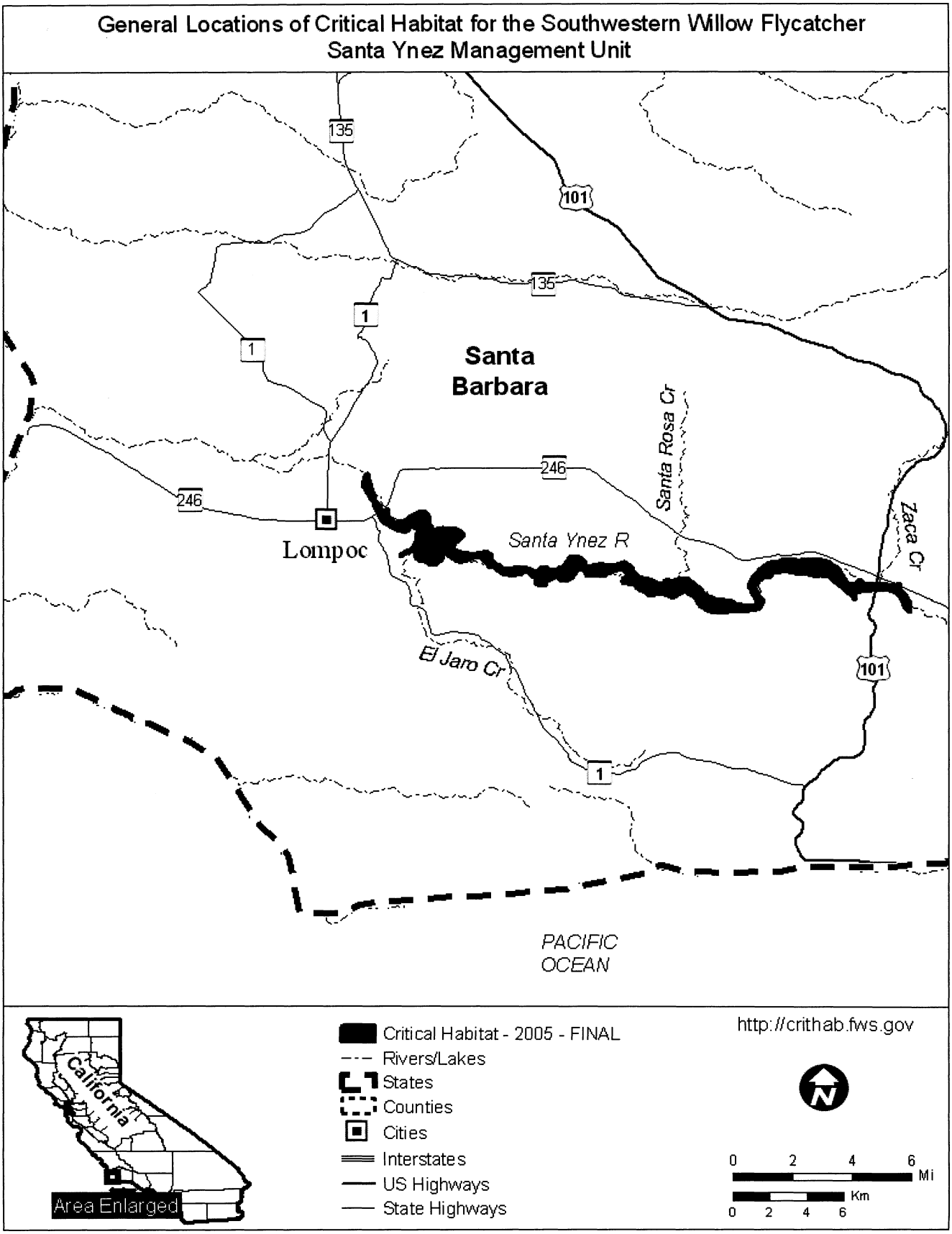



(13) Santa Ynez Management Unit.

(i)

| Management unit | River | Start lat | Start lon | End lat | End lon |
|---|---|---|---|---|---|
| Santa Ynez ..... | Santa Ynez River ..... | 34.597290 | −120.174410 | 34.659670 | −120.439490 |

(ii) Santa Ynez Management Unit Map follows:

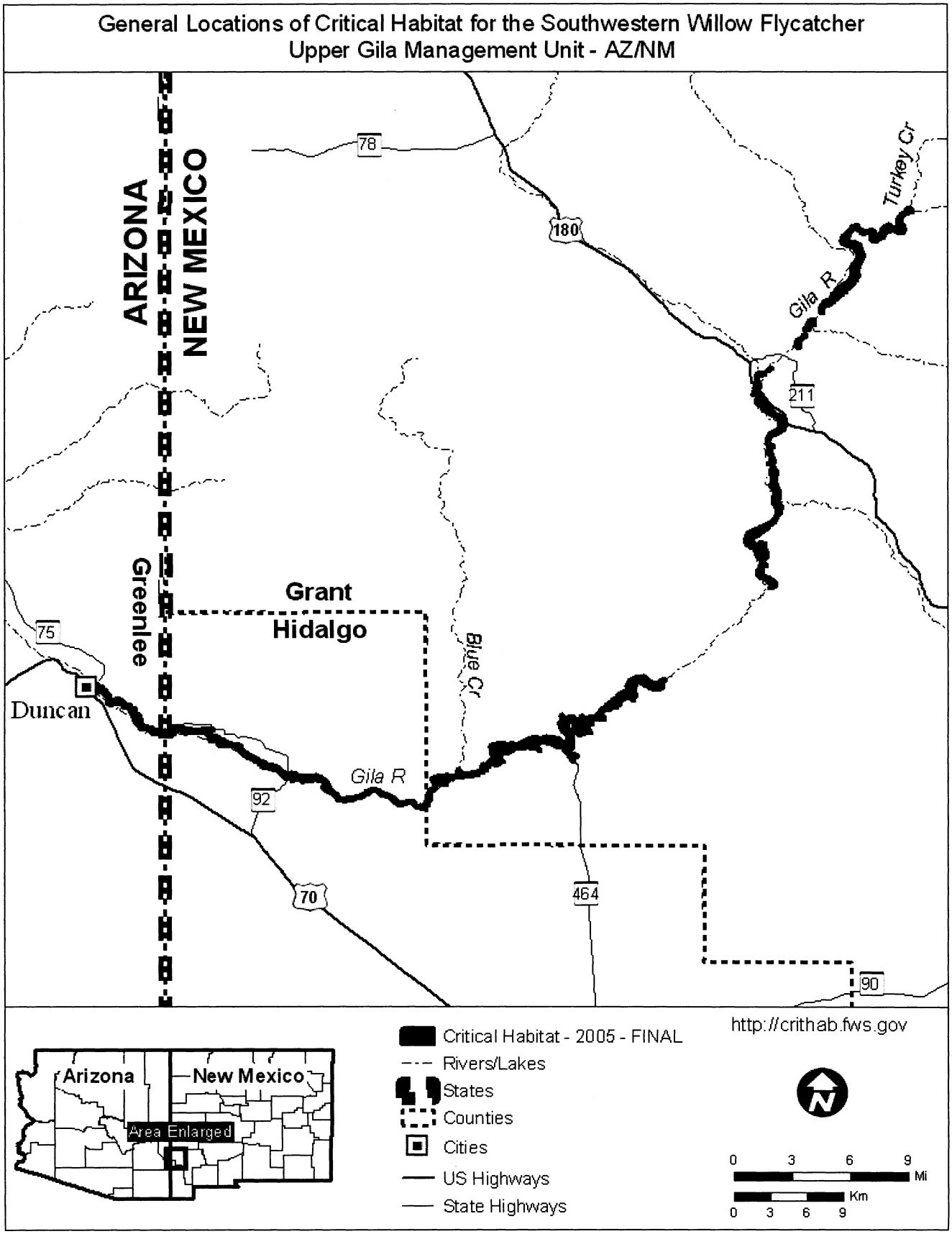


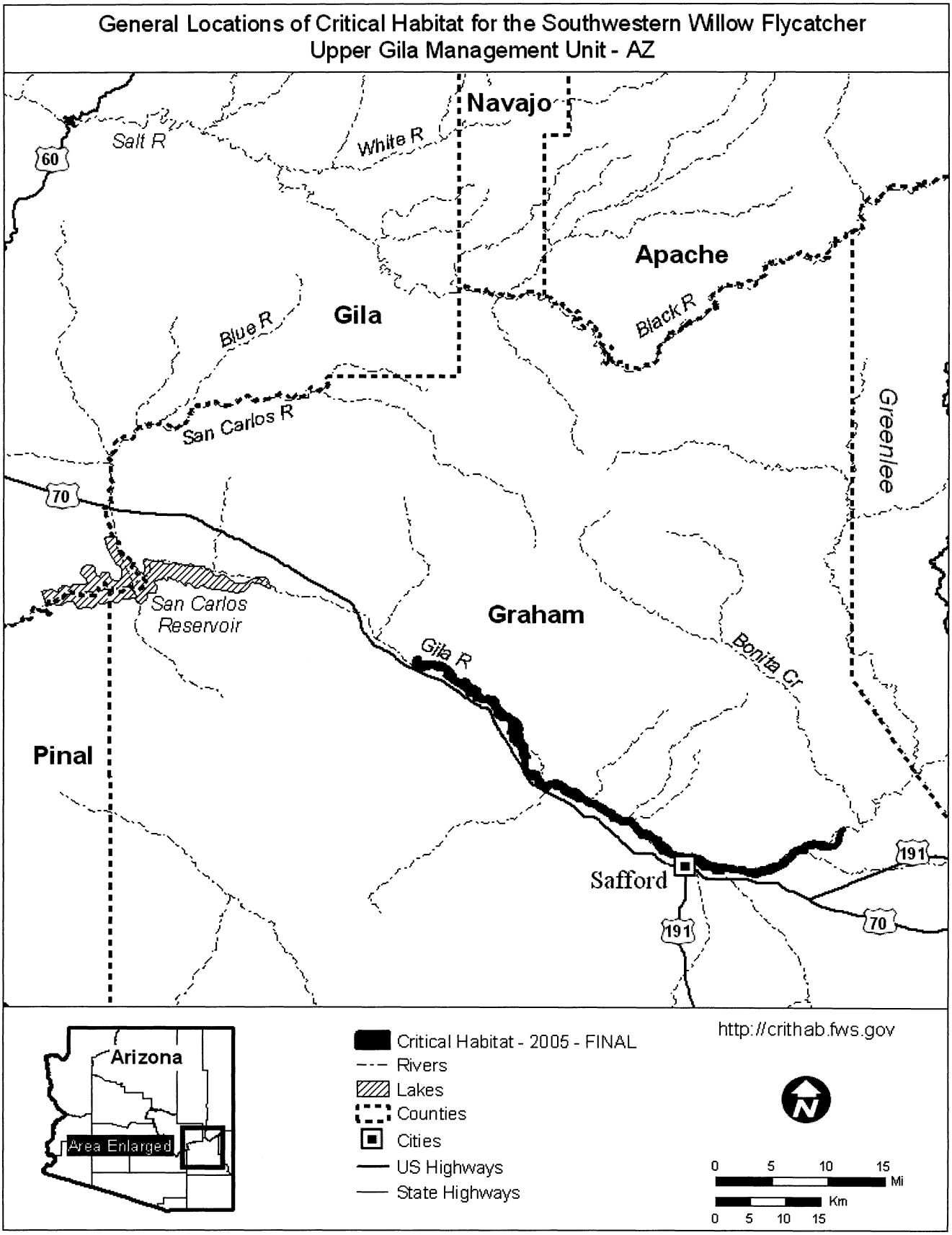
(14) Upper Gila Management Unit.
(i)

| Management unit | River | Start lat | Start lon | End lat | End lon |
|---|---|---|---|---|---|
| Upper Gila | Gila River—East segment—1 | 33.076740 | −108.491160 | 33.004370 | −108.560150 |
| | Gila River—East segment—2 | 32.995070 | −108.566320 | 32.987960 | −108.570190 |
| | Gila River—East segment—3 | 32.984180 | −108.571800 | 32.982890 | −108.573220 |
| | Gila River—East segment—4 | 32.980550 | −108.575780 | 32.977840 | −108.577660 |
| | Gila River—East segment—5 | 32.958940 | −108.597440 | 32.958010 | −108.599150 |
| | Gila River—East segment—6 | 32.955270 | −108.604210 | 32.795670 | −108.597480 |
| | Gila River—Middle East segment | 32.727070 | −108.675580 | 32.723890 | −109.101250 |
| | Gila River—Middle West segment | 32.882390 | −109.506890 | 33.094110 | −110.056150 |

(ii) Upper Gila Management Unit

Maps follow:



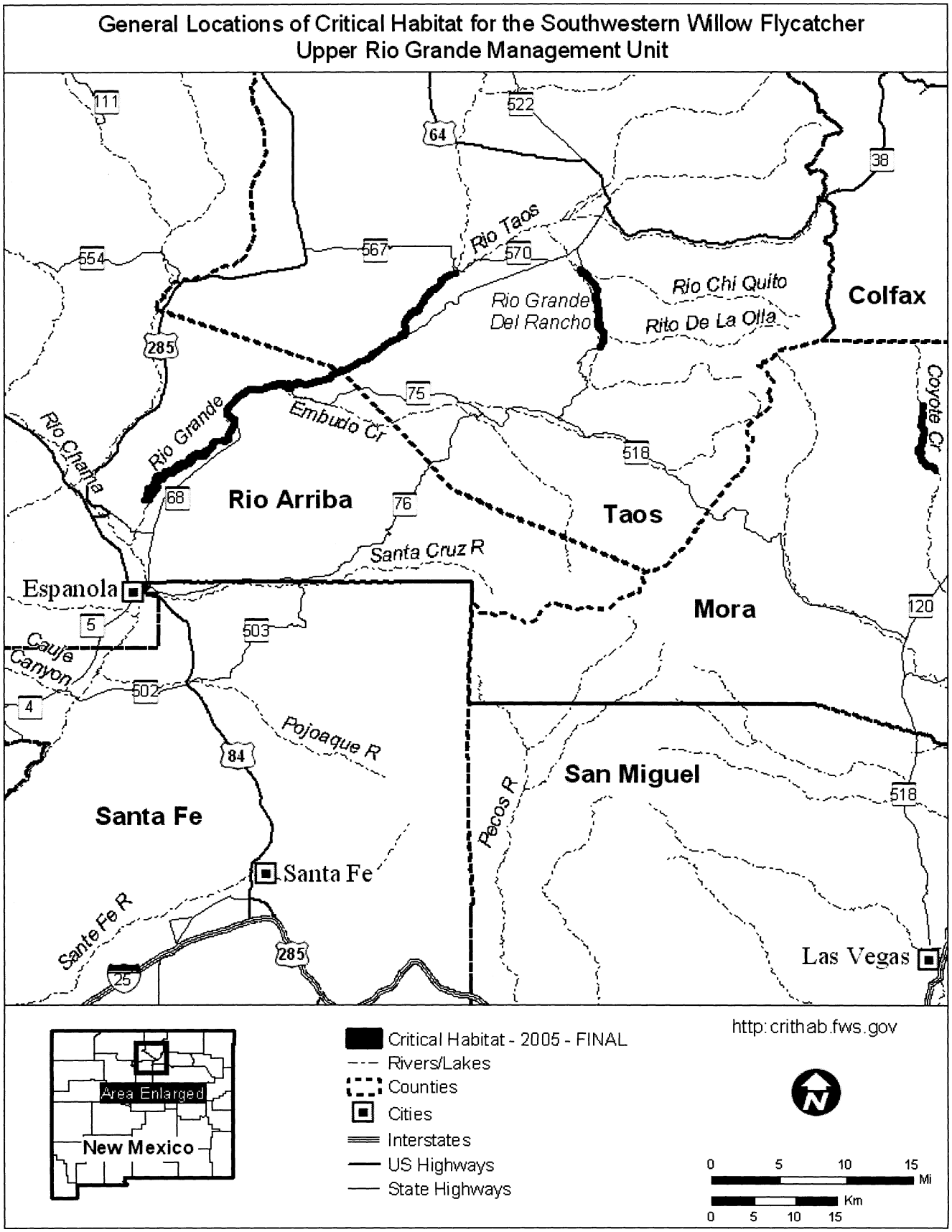

General Locations of Critical Habitat for the Southwestern Willow Flycatcher
Upper Gila Management Unit - AZ
Navajo
Salt R
White R
60
Apache
Gila
Blue R
Black R
San Carlos R
Greenlee
70
San Carlos Reservoir
Graham
Gila R
Bonita Cr
Pinal
Safford
191
70
Arizona
Area Enlarged
Critical Habitat - 2005 - FINAL
Rivers
Lakes
Counties
Cities
US Highways
State Highways
http://crithab.fws.gov
N
0 5 10 15 Mi
0 5 10 15 Km

(15) Upper Rio Grande Management Unit.

(i)

| Management unit | Rivers | Start lat | Start lon | End lat | End lon |
|---|---|---|---|---|---|
| Upper Rio Grande | Coyote Creek | 36.193960 | −105.230880 | 36.122910 | −105.217570 |
| | Rio Grande—North segment | 36.336150 | −105.733810 | 36.090460 | −106.066250 |
| | Rio Grande del Rancho | 36.338610 | −105.601060 | 36.254780 | −105.579670 |

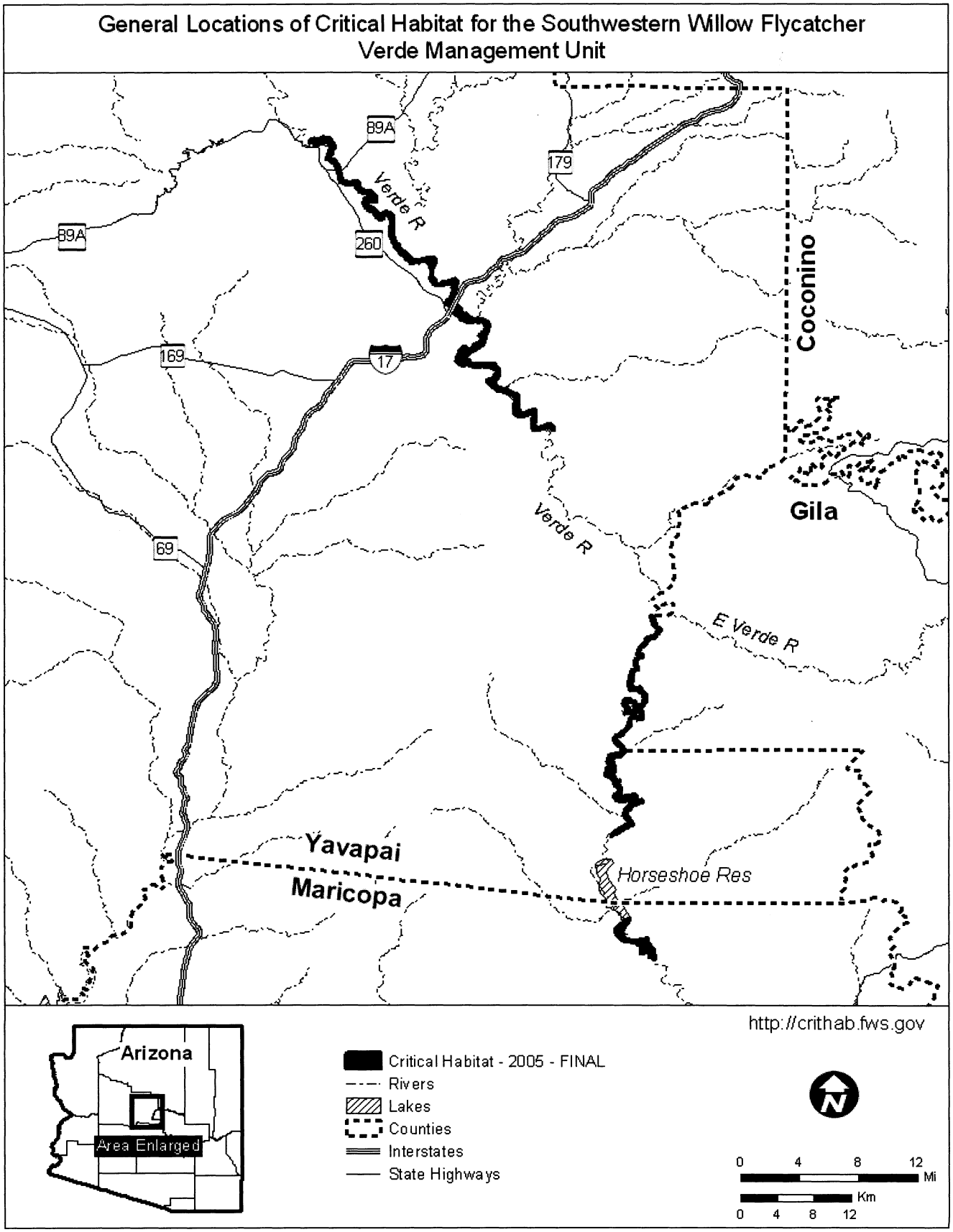
(ii) Upper Rio Grande Map Management Unit Map follows:



(16) Verde Management Unit.
(i)

| Management unit | River | Start lat | Start lon | End lat | End lon |
|---|---|---|---|---|---|
| Verde | Verde River–North segment—1 | 34.750760 | −112.017580 | 34.628670 | −111.899680 |
| | Verde River–North segment—2 | 34.614280 | −111.898960 | 34.465930 | −111.781330 |
| | Verde River–South segment—1 | 34.282320 | −111.685650 | 34.072320 | −111.716420 |
| | Verde River–South segment—2 | 33.984470 | −111.708580 | 33.944900 | −111.682380 |

(ii) Verde Management Unit Map follows:

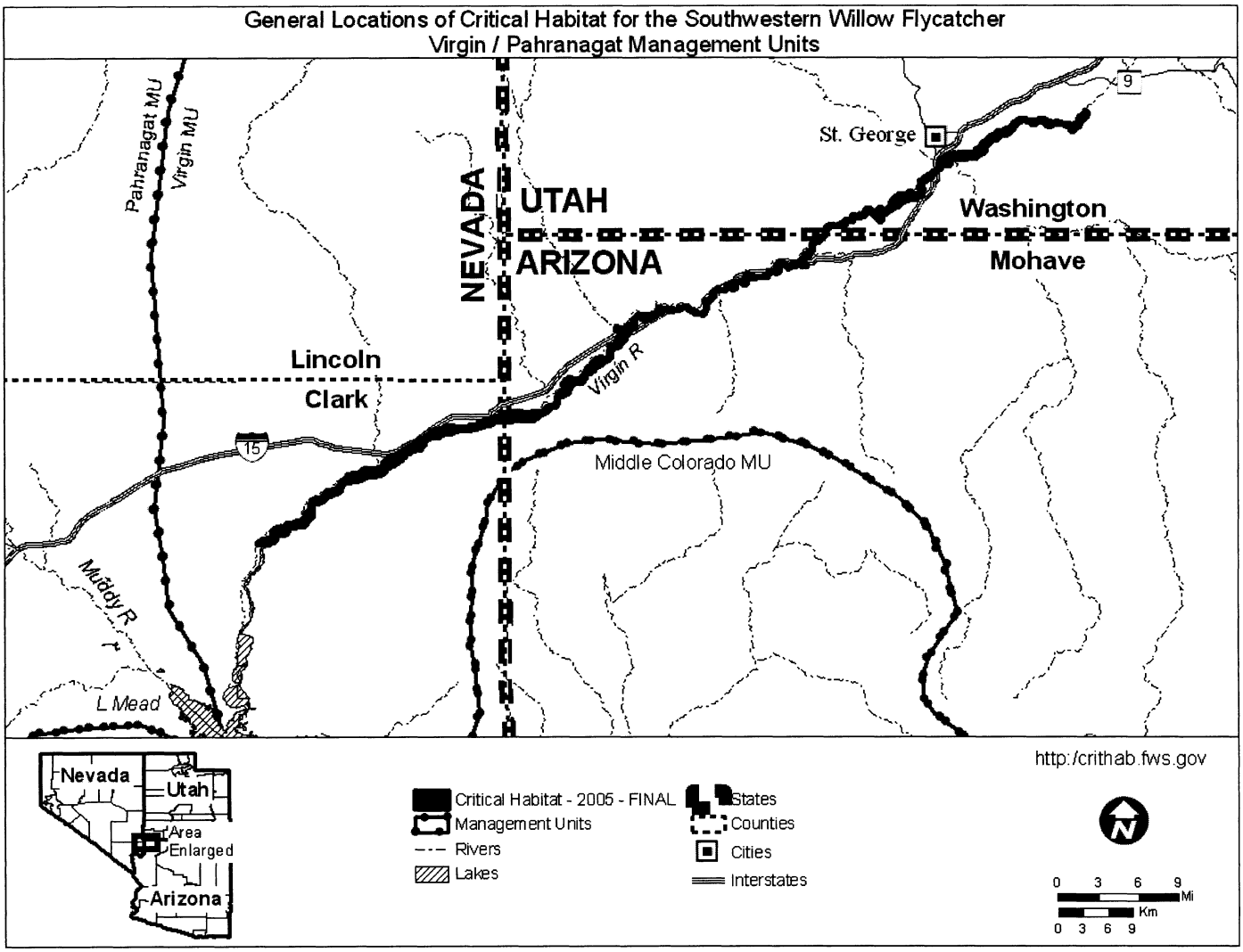


(17) Virgin River/Pahranagat Management Unit.

(i)

| Management unit | River | Start lat | Start lon | End lat | End lon |
|---|---|---|---|---|---|
| Virgin | Virgin River | 37.132920 | −113.422990 | 36.666210 | −114.310410 |

(ii) Virgin River/Pahranagat Management Unit Map follows:




Dated: September 30, 2005.

**Craig Manson,**

*Assistant Secretary for Fish and Wildlife and Parks.*

[FR Doc. 05–20144 Filed 10–18–05; 8:45 am]

BILLING CODE 4310–55–C