References Cited

A complete list of all references cited in this document is available on the Internet at *http://www.regulations.gov,* or upon request from the Field Supervisor, Ventura Fish and Wildlife Office (see **ADDRESSES** section).

Authors

The primary authors of this notice are the staff members of the Ventura Fish and Wildlife Office (see **ADDRESSES** section).

Authority

The authority for this action is section 4 of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: September 23, 2011.

Rowan Gould,

Acting Director, Fish and Wildlife Service,

[FR Doc. 2011–25561 Filed 10–3–11; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R2–ES–2010–0072; MO 92210–0–0009–B4]

RIN 1018–AX17

Endangered and Threatened Wildlife and Plants; Endangered Status and Designation of Critical Habitat for Spikedace and Loach Minnow; Revised Proposed Rule

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; revision and reopening of the comment period.

SUMMARY: We, the U.S. Fish and Wildlife Service, announce the reopening of the October 28, 2010, public comment period on the proposed designation of critical habitat and proposed endangered status for the spikedace *(Meda fulgida)* and loach minnow *(Tiaroga cobitis)* under the Endangered Species Act of 1973, as amended (Act). We also announce the availability of a draft economic analysis (DEA) and draft environmental assessment (EA) on the proposed designation of critical habitat for spikedace and loach minnow, and an amended required determinations section of the proposal. We are also announcing a revision to proposed critical habitat units 6 (San Francisco River Subbasin) and 8 (Gila River Subbasin) for loach minnow. We are reopening the comment period to allow all interested parties an opportunity to comment simultaneously on the proposed rule, revisions to the proposed rule, the associated DEA and draft EA, and the amended required determinations section. Comments previously submitted need not be resubmitted and will be fully considered in preparation of the final rule.

DATES: *Comment submission:* We will consider comments received on or before November 3, 2011. Comments must be received by 11:59 p.m. Eastern Time on the closing date. Any comments that we receive after the closing date may not be considered in the final decision on this action.

Public hearing: We will hold a public hearing on the critical habitat proposal, draft economic analysis, and draft environmental assessment, preceded by an informational session. The informational session will be held from 3 to 4:30 p.m., followed by a public hearing from 6:30 to 8 p.m., on October 17, 2011.

ADDRESSES: *Document availability:* You may obtain a copy of the DEA or EA at *http://www.regulations.gov* at Docket No. FWS–R2–ES–2010–0072 or by contacting the person listed under **FOR FURTHER INFORMATION CONTACT.**

Comment submission: You may submit comments by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments to Docket No. FWS–R2–ES–2010–0072.
- *U.S. mail or hand-delivery:* Public Comments Processing, Attn: FWS–R2–ES–2010–0072, Division of Policy and Directives Management, U.S. Fish and Wildlife Service, 4401 N. Fairfax Drive, Suite 222, Arlington, VA 22203.

Public hearing: The public hearing of October 17, 2011, will be held at the Apache Gold Convention Center (Geronimo Room), located five miles east of Globe, Arizona on Highway 70. People needing reasonable accommodations in order to attend and participate in the public hearings should contact Steve Spangle, Arizona Ecological Services Office, at (602) 242–0210 as soon as possible (see **FOR FURTHER INFORMATION CONTACT**). In order to allow sufficient time to process requests, please call no later than one week before the hearing date.

FOR FURTHER INFORMATION CONTACT: Steve Spangle, Field Supervisor, U.S. Fish and Wildlife Service, Arizona Ecological Services Office, 2321 W. Royal Palm Road, Suite 103, Phoenix, AZ 85021; telephone (602) 242–0210; facsimile (602) 242–2513. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at (800) 877–8339.

SUPPLEMENTARY INFORMATION:

Public Comments

We will accept written comments and information during this reopened comment period on our proposed uplisting and designation of critical habitat for the spikedace and loach minnow that was published in the **Federal Register** on October 28, 2010 (75 FR 66482), our draft economic analysis and draft environmental assessment of the proposed designation, and the amended required determinations provided in this document. We will consider information and recommendations from all interested parties. We are particularly interested in comments concerning:

(1) The factors that are the basis for making a listing determination for a species under section 4(a) of the Endangered Species Act of 1973, as amended (Act) (16 U.S.C. 1531 *et seq.*), which are: (a) The present or threatened destruction, modification, or curtailment of its habitat or range; (b) Overutilization for commercial, recreational, scientific, or educational purposes; (c) Disease or predation; (d) The inadequacy of existing regulatory mechanisms; or (e) Other natural or manmade factors affecting its continued existence.

(2) Additional information concerning the range, distribution, and population size of this species, including the locations of any additional populations of this species.

(3) Any information on the biological or ecological requirements of the species.

(4) The reasons why we should or should not designate habitat as ''critical habitat'' under section 4 of the Endangered Species Act of 1973, as amended (Act) (16 U.S.C. 1531 *et seq.*) including whether there are threats to the species from human activity, the degree of which can be expected to increase due to the designation, and whether that increase in threat outweighs the benefit of designation such that the designation of critical habitat may not be prudent.

(5) Specific information on:

(a) The amount and distribution of spikedace and loach minnow habitat;

(b) What areas occupied at the time of listing and containing features essential to the conservation of the species should be included in the designation and why;

(c) Special management considerations or protections that features essential to the conservation of spikedace and loach minnow, as identified in this proposal, may require, including managing for the potential effects of climate change; and

(d) What areas not occupied at the time of listing are essential for the conservation of the species and why.

(6) Land use designations and current or planned activities in the subject areas and their possible impacts on proposed critical habitat.

(7) Any probable economic, national security, or other impacts of designating any area that may be included in the final designation. We are particularly interested in any impacts on small entities or families, and the benefits of including or excluding areas that exhibit these impacts.

(8) Whether we could improve or modify our approach to designating critical habitat in any way to provide for greater public participation and understanding, or to better accommodate public concerns and comments.

(9) Information on whether the benefit of an exclusion of any particular area outweighs the benefit of inclusion under section 4(b)(2) of the Act. We specifically solicit the delivery of spikedace- and loach minnow-specific management plans for areas included in this proposed designation. Management plans considered in previous critical habitat exclusions for spikedace and loach minnow are available through the contact information listed in **FOR FURTHER INFORMATION CONTACT**.

(10) Information on the projected and reasonably likely impacts of climate change on spikedace and loach minnow and on the critical habitat areas we are proposing.

If you submitted comments or information on the proposed rule (75 FR 66482) during the initial comment period from October 28, 2010, to December 27, 2010, please do not resubmit them. We will incorporate them into the public record as part of this comment period, and we will fully consider them in the preparation of our final determination. Our final determination concerning critical habitat will take into consideration all written comments and any additional information we receive during both comment periods. On the basis of public comments, we may, during the development of our final determination, find that areas proposed are not essential, are appropriate for exclusion under section 4(b)(2) of the Act, or are not appropriate for exclusion.

You may submit your comments and materials concerning the proposed rule, DEA, or draft environmental assessment by one of the methods listed in **ADDRESSES**. We will not consider comments sent by e-mail or fax or to an address not listed in **ADDRESSES**.

If you submit a comment via *http://www.regulations.gov,* your entire comment—including any personal identifying information—will be posted on the Web site. We will post all hardcopy comments on *http://www.regulations.gov* as well. If you submit a hardcopy comment that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so.

Comments and materials we receive, as well as supporting documentation we used in preparing the proposed rule, DEA, and draft environmental assessment will be available for public inspection on *http://www.regulations.gov* at Docket No. FWS–R2–ES–2010–0072, or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Arizona Ecological Services Office (see **FOR FURTHER INFORMATION CONTACT**). You may obtain copies of the proposed rule and the DEA on the Internet at *http://www.regulations.gov* at Docket Number FWS–R2–ES–2010–0072, or by mail from the Arizona Ecological Services Office (see **FOR FURTHER INFORMATION CONTACT**).

Background

It is our intent to discuss only those topics directly relevant to the designation of critical habitat for the spikedace and loach minnow in this document. For more information on previous Federal actions concerning the spikedace and loach minnow, refer to the proposed designation of critical habitat published in the **Federal Register** on October 28, 2010 (75 FR 66482). For more information on the spikedace and loach minnow or their habitat, refer to the final listing rule published in the **Federal Register** on (51 FR 23769, July 1, 1986 (spikedace), and 51 FR 39468, October 28, 1986 (loach minnow), and the previous critical habitat designation (72 FR 13356, March 21, 2007), which are available online from the Arizona Ecological Services Office (see **FOR FURTHER INFORMATION CONTACT**). The recovery plans for spikedace and loach minnow were both finalized in 1991, and we have initiated updates and revisions for both plans.

On December 20, 2005, we published a proposed critical habitat designation (70 FR 75546), and on March 21, 2007, we published a final critical habitat designation (72 FR 13356) for the spikedace and loach minnow. The 2007 designation was challenged in *Coalition of Arizona/New Mexico Counties for Stable Economic Growth* v. *Salazar,* (D.N.M.), which was consolidated with another lawsuit brought by the Center for Biological Diversity. Both parties contested the validity of the designation, but for different reasons. We filed a motion for voluntary remand of the final rule on February 2, 2009, in order to reconsider the final rule in light of a recently issued Department of the Interior Solicitor's Opinion, which discusses the Secretary of the Interior's authority to exclude areas from a critical habitat designation under section 4(b)(2) of the Act. On May 4, 2009, the Court granted our motion for voluntary remand, but retained the 2007 critical habitat designation pending promulgation of a new designation.

On October 28, 2010, we published a proposed rule to designate critical habitat for the spikedace and loach minnow (75 FR 66482). We proposed 1,168 kilometers (km) (726 miles (mi)) of streams as critical habitat for spikedace, and 1,172.4 km (728.5 mi) of streams as critical habitat for loach minnow. Of this total mileage, 874 km (543 mi) of streams are overlapping (*proposed* for designation for both species). We are revising critical habitat unit 6 (San Francisco River Subbasin) for loach minnow by adding 22.8 km (14.2 mi) to the San Francisco River. In addition, we are proposing 31.4 km (19.5 mi) of Bear Creek for loach minnow in Grant County, New Mexico. This would be an addition to critical habitat unit 8 (Gila River subbasin). The explanation for these proposed changes are discussed below. The October 28, 2010, proposal had a 60-day comment period, ending December 27, 2010. We received two requests for public hearing, and have scheduled a public hearing on the date specified above in **DATES** and at the location specified above in **ADDRESSES**. We will submit for publication in the **Federal Register** a final critical habitat designation for spikedace and loach minnow on or before October 28, 2011.

We are notifying the public of several changes made to the proposed listing rule. First, in the proposed rule, we defined occupied areas as those streams for which we have species records up to 1986, when they were first listed (51 FR 39468, October 28, 1986, for loach minnow; and 51 FR 23769, July 1, 1986, for spikedace), as well as areas determined to be occupied since listing. To improve clarity, we are revising the

definition. We propose to include as occupied those areas which were identified as occupied for each species in the original listing documents, as well as any additional areas determined to be occupied after 1986. Our reasoning for the inclusion of these additional areas (post-1986) is that it is likely that those areas were occupied at the time of the original listings, but had not been detected in surveys. This change in definition does not result in a change to any of the areas included or excluded as critical habitat in the proposed rule, and the total amount designated as critical habitat will not change, except for the addition of critical habitat along the San Francisco River discussed below. However, some of the areas previously identified as occupied habitat in the proposed rule may now be classified as essential unoccupied habitat.

Second, we would like to provide clarification regarding the criteria that we used to identify critical habitat in our proposed rule. We based our criteria, in part, on a preliminary assessment of steps necessary to achieve recovery of spikedace and loach minnow. We refer to these criteria as a ruleset and the elements are described in the ''Criteria Used to Identify Critical Habitat'' section of the proposed rule (October 28, 2010, 75 FR 66482). One of the criteria used evaluates the potential of a stream segment to ''connect to other occupied areas, which will enhance genetic exchange between populations.'' In the proposed rule, we identified the following three segments under this criterion: Granite Creek in the Verde River Subbasin for both species; and Deer Creek and Turkey Creek for loach minnow in the San Pedro Subbasin. After additional review, we conclude that these three segments do not connect to other occupied areas, and there are no other unoccupied stream segments in the proposed rule that connect occupied habitats. At this time, we are unable to identify other areas that could serve as connective corridors between occupied and unoccupied habitat. Therefore, we are removing this criterion as an element of the rule set. The removal of this criterion does not alter the proposed rule or the amount of critical habitat being proposed, except for the revision within unit 6, as the areas proposed meet one or more of the remaining criteria outlined in the ruleset.

We acknowledge the absence of connective corridors in the proposed designation. We continue to believe that both loach minnow and spikedace conservation will require genetic exchange between the remaining populations to allow for genetic variation, which is important for species' fitness and adaptive capability. Our inability to identify unoccupied streams that would provide connections between occupied areas is a result of the highly degraded condition of unoccupied habitat and the uncertainty of stream corridor restoration potential. We also acknowledge that other areas, outside of the critical habitat designation, may be necessary for long-term conservation. These areas will be subject to future on-the-ground recovery actions and opportunities under section 7(a)(1) of the Act. Furthermore, we will address the issue of restoration of genetic exchange in our revised Recovery Plan.

Third, we would like to correct an error we made in the October 28, 2010, proposed rule. The error is within Unit 6 (San Francisco River Subbasin), and applies to the amount of stream miles designated as critical habitat for loach minnow on the San Francisco River. On pp. 66515, 66533 (legal description), and 66534 (map), we state that 181.0 km (112.3 mi) of the San Francisco River, from the confluence with the Gila River in Greenlee County, Arizona, upstream to the confluence with the Tularosa River in Catron County, New Mexico, is included in the designation. We intended to use the same area described in the 2007 final rule (72 FR 13356); that is, 203.5 km (126.5 mi) of the San Francisco River, from the confluence with the Gila River upstream to the mouth of the Box, a canyon above the town of Reserve in Catron County, New Mexico. This will add 22.8 km (14.2 mi) to the current designation for loach minnow. The total amount of designated habitat for loach minnow is 1,164 km (723 mi), rather than the 1,141 km (709 mi) referred to in the October 28, 2010, proposed rule. The unit descriptions, legal description, and map will be corrected in the final rule. The stream miles (181.0 km (112.3)) of the San Francisco River designated for spikedace will remain the same.

Fourth, we are going to propose an additional stream segment in New Mexico for loach minnow. In our October 28, 2010, proposed rule, Bear Creek in Grant County, New Mexico, was not included in the proposed critical habitat designation. Although we had records of loach minnow occurrence in Bear Creek in 2005, we concluded that most of the stream was intermittent and that loach minnow were not likely to persist there over time. We also concluded that the loach minnow in Bear Creek likely moved upstream during a period of high flow when Bear Creek was temporarily connected to the Gila River where loach minnow are known to persist. After the receipt of agency and public comments and our internal review, we have also been made aware of loach minnow records in Bear Creek from 2006. Bear Creek would be categorized as a 1a stream under the ruleset found in the proposed rule because of the records of loach minnow from 2005 and 2006. Given the presence of loach minnow in the upper portion of Bear Creek, in this revised proposed rule in unit 8, we propose to include 31.4 km (19.5 mi) of Bear Creek from the confluence with the Gila River upstream to the confluence with Sycamore and North Fork Walnut creeks. We recognize that portions of this stream are intermittent, but also acknowledge that streams with intermittent flows can function as connective corridors through which the species may move when the area is wetted. We will continue to solicit additional information on this stream segment during the open comment period to aid us in making a determination of the suitability of including this stream in the final rule.

We have a final clarification on the language used in our proposed rule. Under the Act and its implementing regulations, we are required to identify the physical and biological features (PBFs) essential to the conservation of spikedace and loach minnow in areas occupied at the time of listing, focusing on the features' primary constituent elements (PCEs). We consider PCEs to be the elements of physical and biological features that, when laid out in the appropriate quantity and spatial arrangement to provide for a species' life-history processes, are essential to the conservation of the species. We outline the appropriate quantities and spatial arrangements of the elements in the *Physical and Biological Features (PBFs)* section of the October 28, 2010, proposed rule. For example, spawning substrate would be considered an essential feature, while the specific composition (sand, gravel, and cobble) and level of embeddedness are the elements (PCEs) of that feature.

Section 3 of the Act defines critical habitat as 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 essential to the conservation of the species and that may require special management considerations or protection, and 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. If the proposed rule is made final, section 7 of

the Act will prohibit destruction or adverse modification of critical habitat by any activity funded, authorized, or carried out by any Federal agency. Federal agencies proposing actions affecting critical habitat must consult with us on the effects of their proposed actions, under section 7(a)(2) of the Act.

Consideration of Impacts Under Section 4(b)(2) of the Act

Section 4(b)(2) of the Act requires that we designate or revise critical habitat based upon the best scientific data available, after taking into consideration the economic impact, impact on national security, or any other relevant impact of specifying any particular area as critical habitat. We may exclude an area from critical habitat if we determine that the benefits of excluding the area outweigh the benefits of including the area as critical habitat, provided such exclusion will not result in the extinction of the species.

When considering the benefits of inclusion for an area, we consider the additional regulatory benefits that area would receive from the protection from adverse modification or destruction as a result of actions with a Federal nexus (activities conducted, funded, permitted, or authorized by Federal agencies), the educational benefits of mapping areas containing essential features that aid in the recovery of the listed species, and any benefits that may result from designation due to State or Federal laws that may apply to critical habitat.

When considering the benefits of exclusion, we consider, among other things, whether exclusion of a specific area is likely to result in conservation; the continuation, strengthening, or encouragement of partnerships; or implementation of a management plan.

The final decision on whether to exclude any areas will be based on the best scientific data available at the time of the final designation, including information obtained during the comment period and information about the economic impact of designation. Accordingly, we have prepared a draft economic analysis (DEA) concerning the proposed critical habitat designation, which is available for review and comment (see **ADDRESSES**).

Draft Economic Analysis

To consider the economic impacts ''of specifying any particular area as critical habitat,'' as section 4(b)(2) of the Act requires, the Service must first identify the probable economic impacts that stem from a designation (50 CFR 424.19). We have interpreted ''probable economic impacts'' to be those potential impacts that are reasonably likely to occur as a result of the critical habitat designation. The identification of the probable incremental effects of a critical habitat designation involves comparing the economic and other relevant impacts that would be present without the designation of a particular area as critical habitat with what would be expected if the particular area is included in the designation—in other words, a comparison of the world with and without critical habitat. A key aspect of this comparison requires identifying, at a general level, the additional protections for species (*e.g.,* project modification or conservation measures) or changes in behavior (*e.g.,* increased awareness that may result in reinitiations of consultation, or additional consultations, under section 7 of the Act; compliance with other laws such as State environmental oversight regulations) and the corresponding costs and impacts to society that may result as a consequence of the critical habitat designation. The scope of probable impacts, then, is inevitably determined by the purpose and function of critical habitat as understood at the time of designation and the conservation measures in place prior to the designation for the particular species and its habitat.

The Service traditionally understood the first sentence of section 4(b)(2) of the Act to require consideration of only those impacts that are solely attributable to—that would not occur ''but for''—the proposed critical habitat designation. Under this approach, known as the ''incremental effects analysis'' (otherwise referred to by the courts as the ''baseline approach''), the Service isolates the probable impacts that would result solely from the designation (incremental effects) from those that stem also from other causes, such as the underlying listing determination or other conservation measures being implemented for the species and its habitat (baseline effects). Once identified, the resulting incremental effects of the designation are then used in the balancing analysis, if one is conducted, under the second sentence of section 4(b)(2) for evaluating the benefits of including a particular area in, or excluding it from, critical habitat, and for evaluating compliance with the required determinations.

However, the application of this relatively straightforward paradigm had become problematic by the late 1990s, in light of our interpretations and practices that had the effect of minimizing the role of critical habitat in safeguarding species' recovery. This stemmed in part from the Service's and National Marine Fisheries Service's 1986 joint regulations implementing the interagency consultation provisions of section 7 of the Act (50 CFR 402). Those regulations govern the assessment of Federal actions that may have adverse impacts on listed species or their critical habitat. They interpret and implement the statute's prohibitions against actions that are likely to jeopardize the continued existence of listed species or result in destruction or adverse modification of critical habitat. However, two key definitions (''jeopardize the continued existence of'' and ''destruction or adverse modification'') had been defined in a similar manner in that they each evaluated impacts on both survival and recovery of a species.

Moreover, our general practice had been to infrequently designate critical habitat in areas where the species was not currently present; because consultation under the jeopardy standard can occur wherever the species is present, this limited the circumstances in which a consultation under the adverse-modification standard would take place without a concomitant consultation under the jeopardy standard. Because the section 7 prohibition against Federal agency actions that may result in ''destruction or adverse modification'' is the most significant and direct protection afforded by a critical habitat designation, equating the two standards while making them occur in conjunction with each other made it practically impossible to distinguish the protections stemming from critical habitat (*i.e.,* incremental effects) from those afforded a species by it being listed as an endangered or threatened species (*i.e.,* baseline effects).

As a result, case law significantly influenced the Service's methodology for evaluating the probable economic effects of a critical habitat designation. In 2001, the United States Court of Appeals for the Tenth Circuit held that, in light of the narrow role reserved for critical habitat under the regulations and the Service's view at the time, the Service was legally precluded from relying on the incremental-effects approach. *New Mexico Cattle Growers Ass'n* v. *United States Fish & Wildlife Serv.,* 248 F.3d 1277, 1283–85 (10th Cir. 2001). The court specifically identified the source of the problem as being ''FWS's long held policy position that [critical habitat determinations] are unhelpful, duplicative, and unnecessary.'' The court held that this position was rooted in the interpretations of the ''jeopardy standard'' and the ''adverse

modification standard'' in 50 CFR 402.02, which the court saw as being defined either to be ''virtually identical'' or such that the latter was subsumed into the ''jeopardy standard.''

To satisfy section 4(b)(2) of the Act in light of the then-current regulations, the court ruled that the Service must consider all impacts that stem in any way from the proposed critical habitat designation, even if they are also partially caused (or, caused ''coextensively'') by listing. In other words, even if there was no ''but for'' economic impact as a result of critical habitat designation, the Service was still required to consider the coextensive economic impacts. The court did not define ''coextensive'' economic analysis; however, the Services interpreted ''coextensive'' to be the sum of anticipated baseline and incremental economic impacts. As a consequence, following the *New Mexico Cattle Growers* decision, the Service began to apply a coextensive approach that evaluated all costs related to the conservation of the species and its habitat, including those attributed to the species being listed as an endangered or threatened species.

Meanwhile, other courts began to conclude that the definition of ''destruction or adverse modification'' in the 1986 regulations did not adequately fulfill the statute's conservation purpose. In fact, the Ninth Circuit in *Gifford Pinchot Task Force* v. *U.S. Fish & Wildlife Service,* 378 F.3d 1059 (9th Cir.), *modified,* 387 F.3d 968 (9th Cir. 2004), invalidated the regulatory definition of ''destruction or adverse modification.'' Following the Ninth Circuit's decision, most district court decisions have rejected coextensive economic analyses. For example, the court in *Cape Hatteras Access Pres. Alliance* v *DOI,* 344 F. Supp. 2d 108, 128–30 (D.D.C. 2004) (*Cape Hatteras*) found that an evaluation of the incremental effect of a critical habitat designation was reasonable and permissible. In that decision the court stated, ''[t]he baseline approach is a reasonable method for assessing the actual costs of a particular critical habitat designation. To find the true cost of a designation, the world with the designation must be compared to the world without it. * * * In order to calculate the costs above the baseline, those that are the ''but for'' result of designation, the agency may need to consider the economic impact of listing and other events that contribute to and fall below the baseline.''

Similarly, in 2010, the Ninth Circuit concluded that the faulty underlying premises that led to the invalidation of the incremental effects (baseline approach) in 2001 no longer applied, and that our consideration of ''but for'' impacts in the increment above the baseline is permissible under the Act (*Arizona Cattle Growers Ass'n* v. *Salazar,* 606 F.3d 1160, 1173 (9th Cir. 2010). It, therefore, held, in light of this change in circumstances, that ''the FWS may employ the baseline approach in analyzing a critical habitat designation.'' In so holding, the court noted that the baseline approach is ''more logical than'' the coextensive approach. The Ninth Circuit further reaffirmed its conclusion in *Home Builders Ass'n of Northern California* v. *U.S. Fish & Wildlife Serv.* 616 F.3d 983 (9th Cir. 2010), in which plaintiffs challenged the use of the Service's incremental-effects (baseline) approach. The Court held that the Service properly analyzed the economic impacts of the critical habitat designation for vernal pool species and stated that the plain language of the Act directs the agency to consider only those impacts caused by the critical habitat designation itself.

In 2008, the Solicitor for the Department of the Interior drafted a Memorandum Opinion summarizing case law on the Secretary's authority to exclude areas from a critical habitat designation under section 4(b)(2) of the Act, including the appropriate use of economic analyses in critical habitat determinations. [Department of the Interior Solicitor Memorandum, October 3, 2008, The Secretary's Authority to Exclude Areas from a Critical Habitat Designation under Section 4(b)(2) of the Endangered Species Act (Opinion M–37016)] In this opinion, the Solicitor concluded that—

> the reasoning in the *Cape Hatteras* line of cases persuasive for the proposition that ''to find the true cost of a designation, the world with the designation must be compared to the world without it.'' Cape Hatteras, 344 F. Supp. 2d at 130. The purpose of excluding an area from critical habitat is to avoid the impacts of the designation, or to realize the benefits that the Secretary determines will flow from that exclusion. Benefits of exclusion are often in the form of avoiding a cost imposed by the designation. By definition, when impacts are completely ''coextensive'', ''such that they will occur even if the area is not designated, any ''cost'' imposed by the designation will not be avoided if the area at issue is excluded. Therefore, exclusion of the area based on such costs would serve no purpose.

Consistent with recent case law and the 2008 Solicitors Memorandum Opinion, the Service concludes that the appropriate analysis to consider economic impacts of a critical habitat designation is to limit the evaluation of the probable economic effects to those that are incremental to, or result solely from, the designation itself. The Service also believes that the use of an incremental-effects analysis is sufficient to fulfill the requirement under section 4(b)(2) of the Act. However, given that we do not have a new definition of ''destruction or adverse modification,'' there may be certain circumstances where we may want to evaluate impacts beyond those that are solely incremental. Such is the case with spikedace and loach minnow, where we have extensive case law and determinations of effects that suggest we evaluate not only incremental effects, but also coextensive effects. While we think that the incremental effects approach is appropriate and meets the intent of the Act, we have taken a conservative approach in this instance to ensure that we are fully evaluating the probable effects of this designation.

The Service attempted to clarify the difference between the jeopardy and adverse modification standards for the spikedace and loach minnow critical habitat in our Incremental Effects Memorandum. This memorandum outlined typical conservation actions, project modifications, and minimization measures that would be requested by the Service to meet the ''not likely to destroy or adversely modify'' standard, above what would be requested to avoid jeopardy to the species. This evaluation of the incremental effects as outlined in the Incremental Effects Memorandum has been used as the basis to develop the draft economic analysis of this proposed designation of critical habitat.

The purpose of the draft economic analysis is to identify and analyze the probable incremental economic impacts associated with the proposed critical habitat designation for the spikedace and loach minnow. The analysis focuses on quantification of the incremental costs of this rulemaking, but provides information on expected costs of conservation efforts expected to occur under the regulatory baseline as context. The ''incremental'' economic impacts are those not expected to occur absent the designation of critical habitat for the spikedace and loach minnow. For a further description of the methodology of the analysis, see Chapter 2, ''Framework for Analysis,'' of the draft economic analysis.

The draft economic analysis provides estimated costs of the reasonably probable incremental economic impacts of the proposed critical habitat designation for the spikedace and loach minnow over the next 20 years, which was determined to be the appropriate period for analysis because limited planning information is available for

most activities to forecast activity levels for projects beyond a 20-year timeframe. It also notes that the timeframe over which certain future impacts can be forecast may be a shorter period. The draft economic analysis quantifies economic impacts of spikedace and loach minnow conservation efforts associated with the following categories of activity:

(1) *Water management:* Including agricultural, municipal, and industrial water diversions. Other affected activities may include flood control and dam operation and maintenance.

(2) *Grazing:* Particularly, increased sedimentation and erosion related to grazing on Bureau of Land Management and U.S. Forest Service lands.

(3) *Mining:* In particular, copper mining operations along Eagle Creek previously have expressed concerns about the potential for critical habitat designation to affect ongoing operations.

(4) *Species management:* Including installation of fish barriers, native species recovery, annual monitoring, and impacts to sportfishing.

(5) *Residential and commercial development:* Including construction in riparian areas and runoff from roads and golf courses.

(6) *Transportation:* Particularly construction and maintenance of bridges, roads, and culverts.

(7) *Fire Management.* Including increased ash, change in water temperature, debris flows, and the use of chemical flame retardants.

The draft economic analysis also describes various concerns expressed by Arizona Tribes concerning possible restrictions on their water rights or water management, but does not quantify potential tribal impacts, except additional administrative costs.

Total incremental impacts for all of the above activities are estimated to be $2.29 to $47.2 million over 20 years ($202,000 to $4.16 million annually) using a real rate of seven percent. However, as discussed above, we are taking a more conservative approach in that we are also evaluating coextensive effects (the sum of baseline and incremental effects). Coextensive effects are estimated to be $75.29 to $169.2 million over 20 years ($6.602 to $15.16 million annualized) using a real rate of seven percent. Quantified baseline costs are primarily associated with:

(1) Water conservation and protection measures that are currently ongoing at Fort Huachuca related to the San Pedro River unit ($4.4 million, annualized at a seven percent discount rate). Many of these actions have been undertaken at the Fort to be protective of the Huachuca water umbel, but are expected to provide baseline protections to the spikedace and loach minnow.

(2) $0.1 million to $2.6 million (annualized at a seven percent discount rate) related to grazing-related conservation efforts, including riparian fencing construction and maintenance.

(3) $1.7 to $3.0 million (annualized at a seven percent discount rate) in other species management efforts, including activities undertaken by the U.S. Bureau of Reclamation, the Arizona Game and Fish Department, and the New Mexico Department of Game and Fish.

As we stated earlier, we are soliciting data and comments from the public on the draft economic analysis, as well as all aspects of the proposed rule and our amended required determinations. We may revise the proposed rule or supporting documents to incorporate or address information we receive during the public comment period. In particular, we may exclude an area from critical habitat if we determine that the benefits of excluding the area outweigh the benefits of including the area, provided the exclusion will not result in the extinction of this species.

Draft Environmental Assessment

The purpose of this draft EA, prepared pursuant to the National Environmental Policy Act (NEPA), is to identify and disclose the environmental consequences resulting from the proposed action of designating critical habitat for the spikedace and loach minnow. In the draft EA, three alternatives are evaluated: Alternative A, the proposed rule with exclusion areas; Alternative B, proposed rule without exclusion areas; and the no action alternative. Under Alternative A, critical habitat segments flowing through tribal and other lands could potentially be excluded in the final rule based on economic impact, national security, or other relevant impacts. The potential exclusion areas discussed in the proposed rule include stream segments that flow through Yavapai-Apache, White Mountain Apache, and San Carlos tribal lands and through lands owned by Freeport-McMoRan. Alternative B is the current proposal, and the no action alternative is equivalent to the 2007 final rule designating critical habitat for spikedace and loach minnow. The no action alternative is required by NEPA for comparison to the other alternatives analyzed in the draft EA.

As we stated earlier, we are soliciting data and comments from the public on the draft EA, as well as all aspects of the proposed rule. We may revise the proposed rule or supporting documents to incorporate or address information we receive during the comment period on the environmental consequences resulting from our designation of critical habitat.

Required Determinations—Amended

In our proposed rule, we indicated that we would defer our determination of compliance with several statutes and executive orders until the information concerning potential economic impacts of the designation and potential effects on landowners and stakeholders became available in the DEA and the draft environmental assessment. We have now made use of the DEA data to make these initial determinations. In this document, we affirm the information in our proposed rule concerning Executive Order (E.O.) 12866 (Regulatory Planning and Review), E.O. 13132 (Federalism), E.O. 12988 (Civil Justice Reform), E.O. 13211 (Energy, Supply, Distribution, and Use), the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), and the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments'' (59 FR 22951). However, based on the DEA data and the draft environmental assessment, we are amending our required determination concerning the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), E.O. 12630 (Takings), and National Environmental Policy Act (42 U.S.C. 4321 *et seq.*).

Regulatory Flexibility Act

Under the Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 802(2)), 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 on our DEA of the proposed designation, we provide our analysis for determining whether the proposed rule would result in a significant economic impact on a substantial number of small entities. Based on comments we receive, we may revise this determination as part of our final rulemaking.

According to the Small Business Administration, small entities include small organizations, such as independent nonprofit organizations;

small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; and 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 the proposed designation of critical habitat for the spikedace and loach minnow would affect a substantial number of small entities, we considered the number of small entities affected within particular types of economic activities, such as mining, species management, transportation, and fire management activities, water management, grazing, and development. In order to determine whether it is appropriate for our agency to certify that this rule would not have a significant economic impact on a substantial number of small entities, we considered each industry or category individually. In estimating the numbers of small entities potentially affected, we also considered whether their activities have any Federal involvement. Critical habitat designation will not affect activities that do not have any Federal involvement; designation of critical habitat only affects activities conducted, funded, permitted, or authorized by Federal agencies. In areas where the species are present, Federal agencies already are required to consult with us under section 7 of the Act on activities they fund, permit, or implement that may affect the species. If we finalize this proposed critical habitat designation, consultations to avoid the destruction or adverse modification of critical habitat would be incorporated into the existing consultation process.

In the DEA, we evaluated the potential economic effects on small entities resulting from implementation of conservation actions related to the proposed designation of critical habitat for the spikedace and loach minnow. No incremental impacts are anticipated for mining, species management, transportation, or fire management activities. The DEA concluded that incremental impacts may be borne by water management, grazing, and development activities. The analysis estimates that 92 small entities may be affected by the rule, each with estimated revenues ranging from $750,000 to $6.4 million per entity. Depending on the activity, annualized impacts may represent between 0 percent and 1.18 percent of annual revenues. Please refer to the DEA of the proposed critical habitat designation for a more detailed discussion of potential economic impacts.

In summary, we have considered whether the proposed designation would result in a significant economic impact on a substantial number of small entities. Information for this analysis was gathered from the Small Business Administration, stakeholders, and the Service. For the above reasons and based on currently available information, we certify that, if promulgated, the proposed designation would not have a significant economic impact on a substantial number of small business entities. Therefore, an initial regulatory flexibility analysis is not required.

Takings—Executive Order 12630

In accordance with E.O. 12630 (Government Actions and Interference with Constitutionally Protected Private Property Rights), we have analyzed the potential takings implications of designating critical habitat for the Spikedace and Loach minnow in a takings implications assessment. Critical habitat designations do not affect landowner actions that do not require Federal funding or permits, nor do they preclude development of habitat conservation programs or issuance of incidental take permits to allow actions that do require Federal funding or permits to go forward. The takings implications assessment concludes that these proposed designations of critical habitat do not pose significant takings implications for lands within or affected by the designations. However, we will further evaluate this issue as we complete our final economic analysis, and review and revise this assessment as appropriate.

National Environmental Policy Act (NEPA)

It is our position that, outside the jurisdiction of the U.S. Court of Appeals for the Tenth Circuit, we do not need to prepare environmental analyses as defined by NEPA (42 U.S.C. 4321 *et seq.*) 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 position was upheld by the U.S. Court of Appeals for the Ninth Circuit (*Douglas County* v. *Babbitt,* 48 F.3d 1495 (9th Cir. 1995), cert. denied 516 U.S. 1042 (1996)).] However, when the range of the species includes States within the Tenth Circuit, such as that of the Spikedace and Loach minnow, under 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. In accordance with the Tenth Circuit, we have completed a draft environmental assessment to identify and disclose the environmental consequences resulting from the proposed designations of critical habitat for the Spikedace and Loach minnow. Our preliminary determination is that the designations of critical habitat for the Spikedace and Loach minnow would not have direct impacts on the environment. However, we will further evaluate this issue as we complete our final environmental assessment.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Regulation Promulgation

Accordingly, we propose to further amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as proposed to be amended at 75 FR 66482, October 28, 2010, as follows:

PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

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. Amend § 17.95(e), in the entry for ''Loach minnow *(Tiaroga cobitis),''* by revising paragraphs (6), (12)(i) and (v), and (14)(vi) and by adding paragraph (14)(vii) to read as follows:

§ 17.95 Critical habitat—fish and wildlife.

* * * * *

(e) *Fishes.*

* * * * *

Loach minnow *(Tiaroga cobitis)*

* * * * *

(6) *Note:* Index map for loach minnow critical habitat units follows:

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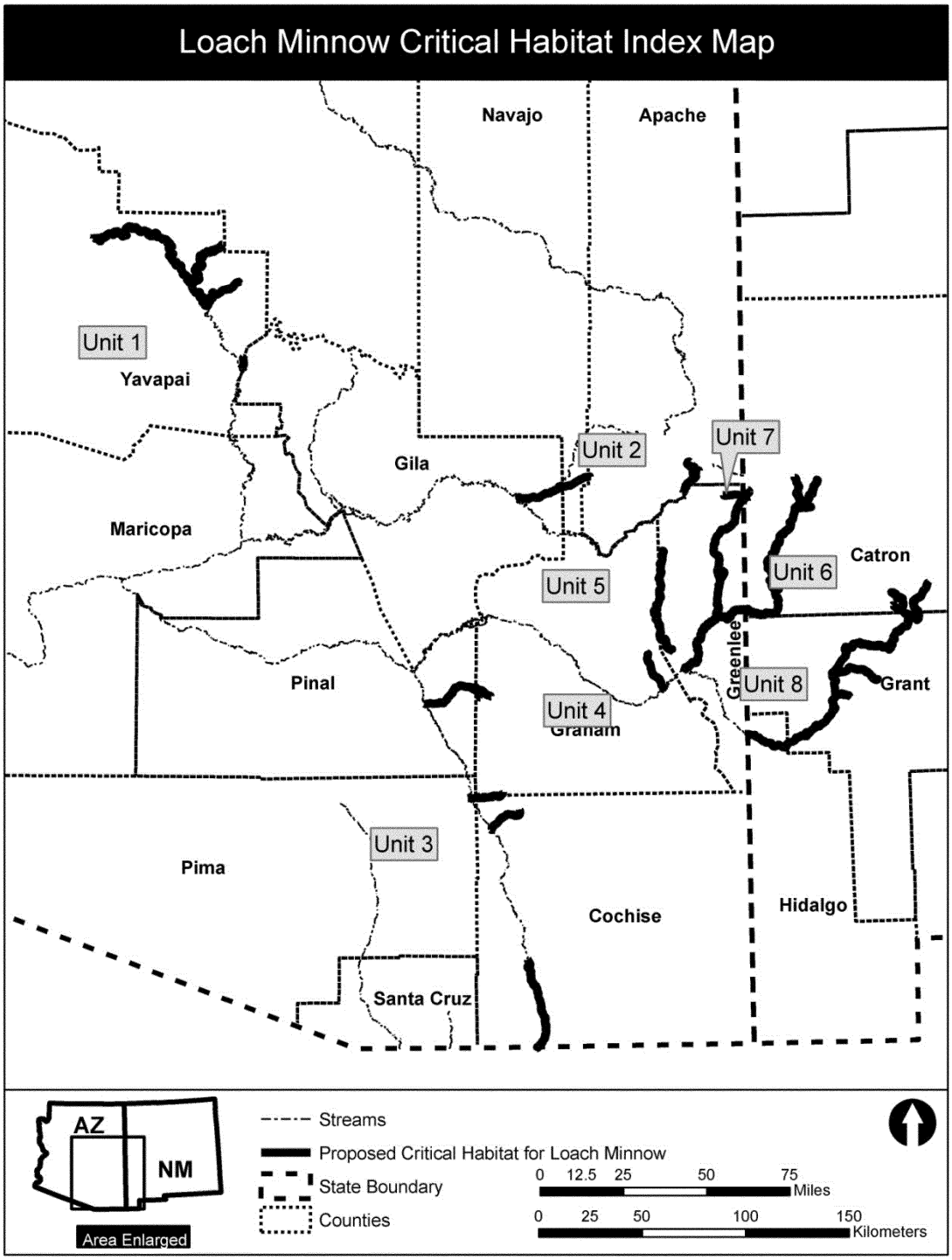


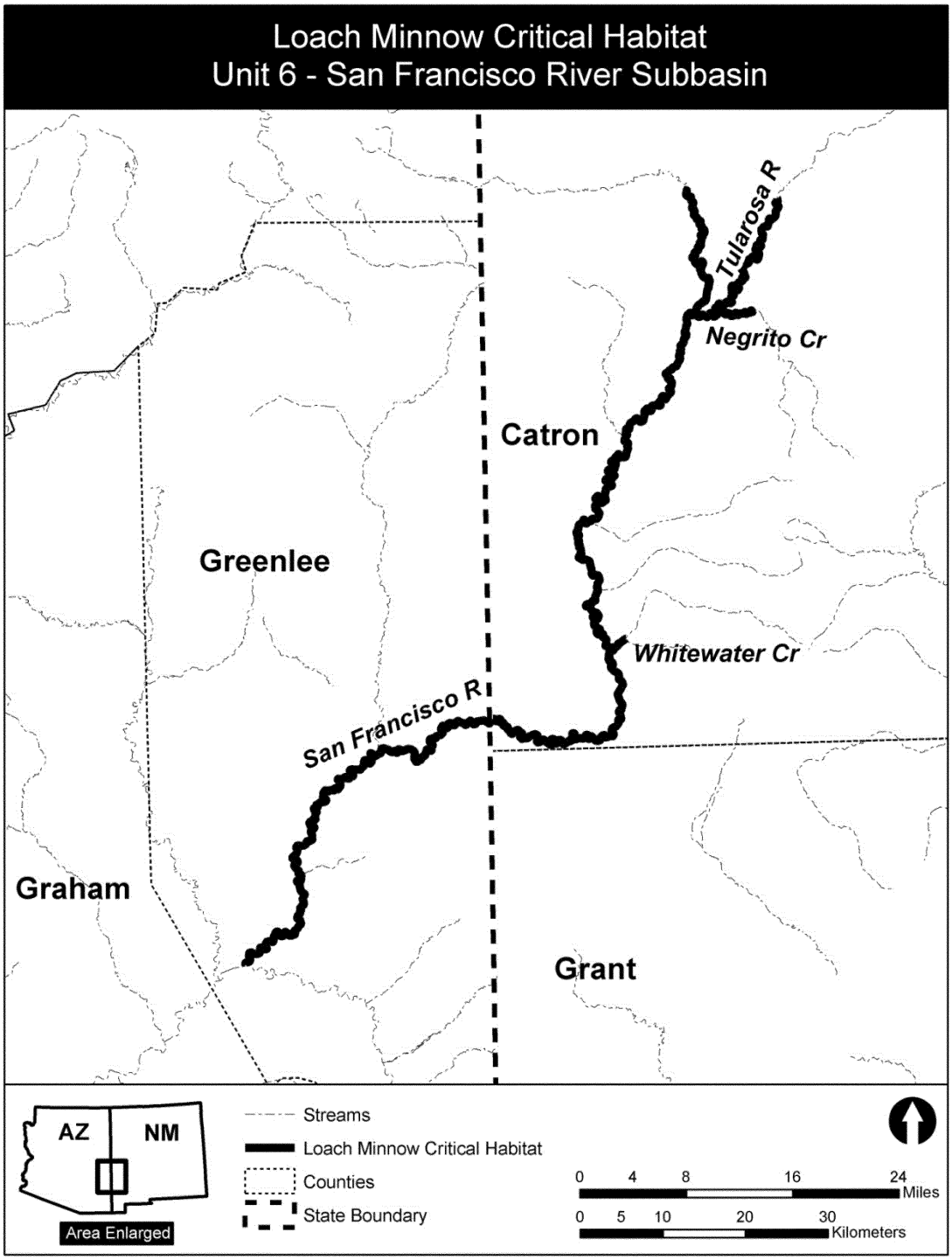
* * * * *

(12) * * *

(i) San Francisco River for approximately 202.6 km (125.9 mi) of the San Francisco River extending from the confluence with the Gila River in Arizona in Township 5 South, Range 29 East, southeast quarter of section 21 upstream to Township 6 South, Range 19 West, section 2 in New Mexico.

* * * * *

(v) *Note:* Map of Unit 6, San Francisco Subbasin, follows:

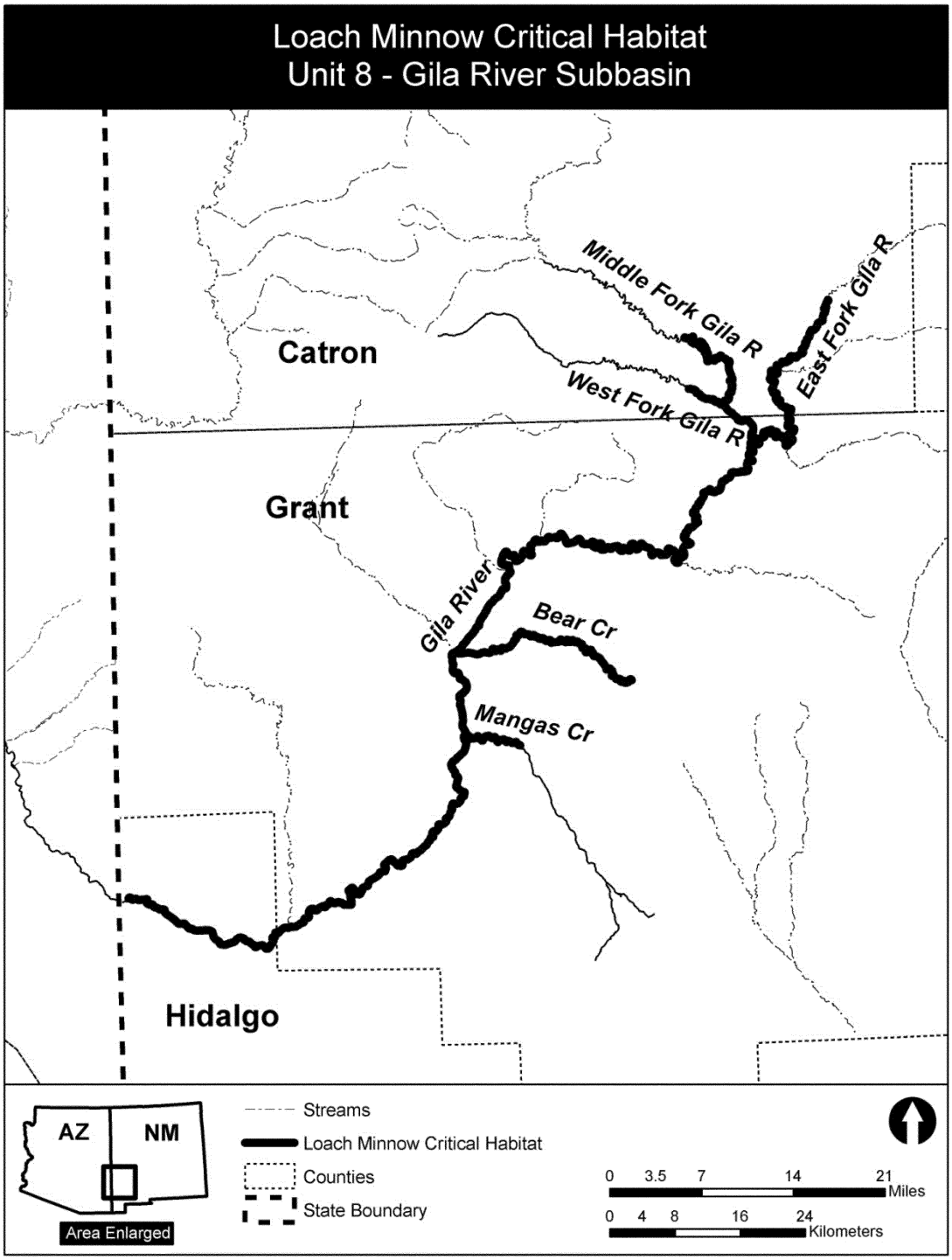


* * * * *

(14) * * *

(vi) Bear Creek for approximately 31.4 km (19.5 mi) extending from the confluence with the Gila River at Township 15 South, Range 17 West, center of section 33 upstream to the confluence with Sycamore and North Fork Walnut creeks at Township 16 South, Range 15 West, northeast quarter of section 15.

(vii) *Note:* Map of Unit 8, Gila River Subbasin, follows:



* * * * *

Authority

The authority for this action is the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*).

Dated: September 20, 2011.

Rachel Jacobson,

Acting Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 2011–25083 Filed 10–3–11; 8:45 am]

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