applicable to a broad range of business activity.

(c) *Certification of Accounting Statement Accuracy.* (1) The Carrier shall certify the annual accounting statement in the form set forth in paragraph (c)(3) of this clause. The Carrier's chief executive officer and the chief financial officer shall sign the certificate.

(2) The Carrier shall require an authorized agent of its underwriter, if any, also to certify the annual accounting statement.

(3) The certificate required shall be in the following form:

Certification of Accounting Statement Accuracy

This is to certify that I have reviewed this accounting statement and to the best of my knowledge and belief:

1. The statement was prepared in conformity with the guidelines issued by the Office of Personnel Management and fairly presents the financial results of this reporting period in conformity with those guidelines.

2. The costs included in the statement are actual, allowable, allocable, and reasonable in accordance with the terms of the contract and with the cost principles of the Federal Employees Health Benefits Acquisition Regulation and the Federal Acquisition Regulation.

3. Income, rebates, allowances, refunds and other credits made or owed in accordance with the terms of the contract and applicable cost principles have been included in the statement.

4. If applicable, the letter of credit account was managed in accordance with 5 CFR part 890, 48 CFR chapter 16, and OPM guidelines.

Carrier Name: _____

_____

Name of Chief Executive Officer:
(Type or Print)

_____

Name of Chief Financial Officer:

_____

Signature of Chief Executive Officer:

_____

Signature of Chief Financial Officer:

_____

Date Signed:

_____

Date Signed:

_____

Underwriter: _____
Name and Title of Responsible Corporate Official:
(Type or Print:) _____
Signature of Responsible Corporate Official:

_____

Date Signed: _____

(End of Certificate)

(d) Exceptions for the 3-Year DoD Demonstration Project (10 U.S.C. 1108).

(1) The Carrier shall draw funds from its Letter of Credit (LOC) account to pay demonstration project benefits costs in the same manner as it does for benefits costs incurred by regular FEHB members. The Carrier shall account separately for health benefits charges paid using demonstration project funds and regular FEHB funds. Direct administrative costs attributable solely to the demonstration project shall be fully chargeable to the demonstration project. Indirect administrative costs associated with the demonstration project will be allocated to the demonstration project based on the percentage obtained by dividing the dollar amount of claims processed under the demonstration project by the total claims processed for FEHB Program activity. This same percentage will also be used to determine the amount of the Carrier's service charge that will be allocated to the demonstration project.

(2) The Carrier shall submit a separate annual accounting statement and monthly incurred claims report for demonstration project experience.

(End of Clause)

7. Section 1652.232–71 is amended by removing ''(Jan. 1999)'' from the clause heading and adding in its place ''(JAN 2000),'' and adding a new paragraph (f) to read as follows:

1652.232–71 Payments—experience-rated contracts.

* * * * *

(f) *Exception for the 3-Year DoD Demonstration Project (10 U.S.C. 1108).*

The Carrier will perform a final reconciliation of revenue and costs for the demonstration project group at the end of the demonstration project. Costs in excess of the premiums will be reimbursed first from the Carrier's demonstration project Contingency Reserve and then from OPM's Administrative Reserve. Any surplus after the final accounting will be paid by the Carrier to OPM's Administrative Reserve.

(End of Clause)

[FR Doc. 99–16913 Filed 7–2–99; 8:45 am]

BILLING CODE 6325–01–U

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Final Designation of Critical Habitat for the Rio Grande Silvery Minnow

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), designate critical habitat for the Rio Grande silvery minnow (*Hybognathus amarus*), a species federally listed as endangered under the authority of the Endangered Species Act of 1973, as amended (Act). This species, also referred to herein as silvery minnow or minnow, presently occurs only in the Rio Grande from Cochiti Dam downstream to the headwaters of Elephant Butte Reservoir, New Mexico, approximately five percent of its known historical range. Critical habitat overlays this last remaining portion of occupied range. It encompasses 262 kilometers (km) (163 miles (mi)) of the mainstem Rio Grande from the downstream side of the State Highway 22 bridge crossing the Rio Grande immediately downstream of Cochiti Dam, to the crossing of the Atchison Topeka and Santa Fe Railroad near San Marcial, New Mexico.

EFFECTIVE DATES: This rule becomes effective August 5, 1999.

ADDRESSES: You may inspect the complete file for this rule at the U.S. Fish and Wildlife Service, New Mexico Ecological Services Field Office, 2105 Osuna NE., Albuquerque, New Mexico 87113, by appointment, during normal business hours at the above address.

FOR FURTHER INFORMATION CONTACT: Field Supervisor, New Mexico Ecological Services Field Office (See **ADDRESSES** above).

SUPPLEMENTARY INFORMATION:

Background

The Rio Grande silvery minnow is one of seven species in the genus *Hybognathus* found in the United States (Pflieger 1980). The species was first described by Girard (1856) from specimens taken from the Rio Grande near Fort Brown, Cameron County, Texas. It is a stout silvery minnow with moderately small eyes and a small, slightly oblique mouth. Adults may reach 90 millimeters (mm) (3.5 inches (in)) in total length (Sublette *et al.* 1990). Its dorsal fin is distinctly pointed with the front of it located slightly closer to the tip of the snout than to the base of the tail. Life color is silver with emerald reflections. Its belly is silvery white; fins are plain; and barbels are absent (Sublette *et al.* 1990).

This species was historically one of the most abundant and widespread fishes in the Rio Grande Basin, occurring from Espanola, New Mexico, to the Gulf of Mexico (Bestgen and Platania 1991). It was also found in the Pecos River, a major tributary of the Rio Grande, from Santa Rosa, New Mexico, downstream to its confluence with the Rio Grande (Pflieger 1980). It is completely extirpated from the Pecos River and from the Rio Grande downstream of Elephant Butte Reservoir (Bestgen and Platania 1991). Throughout much of its historical range, decline of the silvery minnow may be attributed to modification of stream discharge patterns and channel drying because of impoundments, water

diversion for agriculture, and stream channelization (Cook *et al.* 1992; Bestgen and Platania 1991).

In the Pecos River, the silvery Minnow was replaced by the closely related, introducted plains minnow (*H. placitus*) (Hatch *et al.* 1985; Bestgen *et al.* 1989; Cook *et al.* 1992). It is believed the plains minnow was introduced into the Pecos drainage during 1968, probably the result of the release of ''bait minnows'' that were collected from the Arkansas River drainage. The displacement that ensured was complete in less than one decade (Cowley 1979). The plains minnow may be more tolerant of modified habitats and, therefore, able to replace the silvery minnow in the modified reaches of the Pecos River. It is also believed that the two species hybridized. Habitat alteration and resulting flow modification could have also contributed to extirpation of the species in the Pecos River.

Decline of the species in the Middle Rio Grande probably began in 1916 when the gates at Elephant Butte Dam were closed. Construction of the dam signaled the beginning of an era of main stream Rio Grande dam construction that resulted in five major main stem dams within the minnow's habitat (Shupe and Williams 1988). These dams allowed manipulation and diversion of the flow of the river. Often this manipulation resulted in the drying of reaches of river and elimination of all fish. Concurrent with construction of the main stream dams was an increase in the abundance of non-native and exotic fish species as these species were stocked into the reservoirs created by the dams (Sublette *et al.* 1990). Once established, these species often completely replaced the native fish fauna (Propst *et al.* 1987). Development of agriculture and the growth of cities within the historical range of the Rio Grande silvery minnow resulted in a decrease in the quality of water that may have also adversely affected the range and distribution of the species.

Historically there were four other small native fish species that are now either extinct or extirpated from the middle Rio Grande; the silvery minnow is the only one surviving today and it has been reduced to only 5 percent of its historical range. Although the minnow is a hearty fish, capable of withstanding many of the natural stresses of the desert aquatic environment, the majority of the individual minnows live only one year. A healthy annual spawn is key to the survival of the species.

The minnow's range has been so greatly restricted that the species is extremely vulnerable to a single naturally occurring chance event. The minnow prefers shallow waters with a sandy and silty substrate that is generally associated with a meandering river that includes sidebars, oxbows, and backwaters. However, physical modifications to the Rio Grande over the last century, including the construction of dams and channelization of the mainstem, have altered much of the historical habitat for the minnow. Channelization has straightened and shortened mainstem river reaches, increased the velocity of the current, and altered riparian vegetation, instream cover, and substrate composition. The spring runoff triggers the minnow's spawn and the eggs produced drift in the water column. Diversion dams prevent the minnow from subsequently being able to move upstream as waters recede or as the minnow approaches inhospitable habitat such as Elephant Butte Reservoir, where the waters are cold, deep and stocked with non-native predatory fish.

During the irrigation season (March 1 to October 31), minnows often become stranded in the diversion channels where they may, although are unlikely to, survive for a while. As the water is used on the fields, the chance for survival of the minnow in the irrigation return flows in slim. Unscreened diversion dams also entrain both adult minnow, fry, and buoyant eggs. Perhaps even more problematic for the minnow are irrigation seasons in drought years, when most or all of the water may be diverted from the two lower-most segments of the river to meet irrigation and other needs. This diversion causes minnows to become stranded in dewatered segments of the river.

Historically, the silvery minnow was able to withstand periods of drought primarily by retreating to pools and backwater refugia, and swimming upstream to repopulate upstream habitats. However, when the river dries too rapidly and dams prevent upstream movement, the minnow becomes trapped in dewatered reaches and generally dies. This becomes particularly significant for the silvery minnow below San Acacia diversion dam, where approximately 70 percent of the current population lives. In the river reaches above (north of) San Acacia Dam, return flows from irrigation and other diversions are returned back into the mainstem of the river, which assures a fairly consistent flow. However, at San Acacia Dam, one irrigation diversions are made the return flows continue in off-river channels until they enter Elephant Butt Reservoir.

Furthermore, because the river is an aggrading system below San Acacia (i.e,. the river bottom is rising due to sedimentation), the bed of the river is now perched above the bed of the 80 km (50 mile) low flow conveyance channel, which is immediately adjacent and parallel to the river channel. Because of this physical configuration, waters in the mainstem of the river tend to be drained into the low flow conveyance channel.

Seventy percent of the remaining minnow population resides between San Acacia diversion dam and the headwaters of elephant butte. In low water years in this reach, all the water in the stream may be diverted into the irrigation system or drained from the mainstem by the low flow conveyance channel. In effect, water is being conveyed to Elephant Butte reservoir through a bypass of the river in the San Acacia reach, resulting in a dry or drying Riverbed.

The designation of critical habitat for the Rio Grande silvery minnow includes 262 river-km (163 river-mi) in the Middle Rio Grande which are the last miles of habitat occupied by the species. The designation involves the mainstem of the Rio Grande or the active river channel including the water column, and its associated channel morphology. Land on either side of, but not within, the designated critical habitat, lies within the administrative boundaries of the Middle Rio Grande Conservancy District. Other landowners, sovereign entities, and managers include: the pueblos of Cochiti, San Felipe, Santo Domingo, Santa Ana, Sandia, and Isleta; the U.S. Bureau of Reclamation (BOR); the Service; the U.S. Bureau of Land Management; New Mexico State Parks Division; New Mexico Department of Game and Fish; New Mexico State Lands Department; and the U.S. Army Corps of Engineers (Corps). The communities of Algodones, Bernalillo, Rio Rancho, Corrales, Albuquerque, Bosque Farms, Los Lunas, Belen, and Socorro also border the length of critical habitat in the Middle Rio Grande Valley.

Previous Federal Action

On February 19, 1991, we mailed approximately 80 pre-proposal notification letters to the six Middle Rio Grande Indian pueblos, various governmental agencies, knowledgeable individuals, and the New Mexico Congressional delegation. The letter informed them of our intent to propose adding the Rio Grande silvery minnow to the Federal list of Endangered and Theratened Wildlife and Plants and solicited their comments and input. We were particularly interested in obtaining

additional status information or information concerning threats. On May 22, 1991, a second informational letter was sent to the New Mexico Congressional delegation. Comments were received from the Service's Dexter, New Mexico, Fisheries Assistance Office; New Mexico Department of Game and Fish City of Albuquerque; Texas Parks and Wildlife Department; U.S. Department of the Interior, Office of Surface Mining; and the New Mexico Interstate Stream Commission. No commenters offered additional information concerning the status of the species or information concerning additional threats. Most commented that the range of the species had been severely reduced and that Federal listing should be considered. The response from the New Mexico interstate Stream Commission included a historical review of water development in the Middle Rio Grande Valley.

The Rio Grande silvery minnow was included in our Animal Notice of Review (56 FR 58804; November 21, 1991) as a Category 1 candidate species. At that time, a Category 1 candidate species was one for which we had on file substantial information on biological vulnerability and threats to support a proposal to list it as an endangered or threatened species.

On March 20, 1992, we held a meeting in Albuquerque, New Mexico, to explore with various interested governmental and private entities any existing or potential flexibility in water delivery schedules that might avoid de-watering the Rio Grande through the area containing the remaining habitat of the silvery minnow. We also requested that attendees provide any information that would add to the knowledge of the current distribution of the species. No New information concerning distribution, abundance, or threats to the species was provided. No flexibility in the management of water in the river or the timing or duration of flows was identified by any meeting participant.

We proposed to list the Rio Grande silvery minnow as an endangered species with critical habitat on March 1, 1993 (58 FR 11821). The comment period, originally scheduled to close on April 30, 1993, was extended until August 25, 1993 (58 FR 19220; April 13, 1993). This extension allowed us to conduct public hearings and to receive additional public comments. Public hearings were held in Albuquerque and Socorro, New Mexico, on the evenings of June 2 and 3, 1993, respectively.

After a review of all comments received in response to the proposed rule, we published the final rule to list the Rio Grande silvery minnow on July 20, 1994 (59 FR 36988). Section 4(a)(3) of the Act requires that, to the maximum extent prudent and determinable, the Secretary designate critical habitat at the time a species is determined to be endangered or threatened. Our regulations (50 CFR 424.12(a)(2)) state that critical habitat is not determinable if information sufficient to perform required analyses of the impacts of the designation is lacking or if the biological needs of the species are not sufficiently well known to permit identification of an area as critical habitat. At the time of listing the silvery minnow, we found that critical habitat was not determinable because there was insufficient information to perform the required analyses of the impacts of the designation.

We contracted for an economic analysis of the proposed critical habitat designation in September 1994. Individuals and agencies were notified of the award of the contract on September 30, 1994. On October 27, 1994, we held a meeting with the contractors, inviting representatives from the BOR and Corps, as the two Federal agencies with significant activities within the range of the silvery minnow and the proposed critical habitat; the pueblos of Cochiti, San Felipe, Isleta, Sandia, Santa Ana, and Santo Domingo; the Middle Rio Grande Conservancy District; the Rio Grande Compact Commission; the cities of El Paso, Texas and Albuquerque, New Mexico; the Elephant Butte Irrigation District; and the International Boundary and Water Commission. At the meeting, we and the contractors outlined the approach under consideration to determine if economic impacts arose from critical habitat designation and sought input to the process and participation from these entities. Following the meeting, a paper prepared by the consulting economists on their methodology for estimating economic effects of critical habitat designation was provided to all attendees.

On November 3, 1994, letters soliciting any information considered germane to the economic analysis were sent to attendees of the October 27, 1994, meeting. We scheduled two additional meetings to discuss and clarify any questions of the agencies and entities who were asked to provide information for the economic analysis. Non-Pueblo entities were invited to a June 21, 1995, meeting. At that meeting we reviewed the description and evaluation provided in the proposed rule of activities that might adversely modify critical habitat or that may be affected by such designation. To assist respondents in replying to our information request, the following topics identified in the proposed rule were discussed:

Any action that would lessen the amount of the minimum flow or would significantly alter the natural flow regime;

any activity that would extensively alter the channel morphology of the Rio Grande; and

any activity that would significantly alter the water chemistry in the Rio Grande.

Further, at that meeting we identified activities that may be affected by the designation to include construction, maintenance, and operation of diversion structures; use of the conveyance channel and other canals; and levee and dike construction and maintenance. As detailed below, we have since determined that activities likely to result in a finding of adverse modification of critical habitat for the silvery minnow are also likely to jeopardize the continued existence of the species.

On June 22, 1995, a meeting was held solely for Pueblo representatives to discuss the proposed critical habitat and the process to be employed in determining economic effects of the designation with the content identical to that of the earlier meeting. No Pueblo representative attended.

On July 5, 1995, potential respondent agencies and individuals were provided a copy of a previous report prepared on potential economic consequences of designating critical habitat for fish species in southern Oregon and northern California, in order to familiarize them with the type of approach to be utilized for the silvery minnow. On July 14, 1995, we sent a questionnaire to all known Federal entities in the area of proposed critical habitat seeking their input in developing information on the potential economic consequences of the proposed designation. The entities were specifically requested to evaluate two scenarios. The ''no designation'' scenario represented the conditions that would exist, given that the Rio Grande silvery minnow has been listed as an endangered species, but assuming there were no designations of critical habitat. The other was the ''proposed designation'' scenario, which represented conditions that would exist if proposed critical designation was made final. Any difference between activities was to be identified as the designation's impacts. Five Federal agencies did not respond to the questionnaire. Twelve responded that their actions would not change between

the two scenarios. One Federal agency, the BOR, responded that the designation of critical habitat for the silvery minnow in the middle Rio Grande Valley would have a limited impact on activities that it would conduct, authorize, permit, or fund over and above any impact derived from the listing of the species.

Following the compilation and assessment of responses, the draft economic analysis was prepared and provided to us on February 29, 1996. The draft document was then provided to all interested parties on April 26, 1996. That mailing included 164 individuals and agencies, all affected pueblos in the valley, all county commissions within the occupied range of the species, and an additional 54 individuals who had attended the public hearings on the proposed listing and who had requested that they be included on our mailing list. At that time we notified the public that, because of the Congressional moratorium and funding rescission on final listing actions and designations of critical habitat imposed by Public Law 104–6, no work would be conducted on the analysis or on the final decision concerning critical habitat. However, we solicited comments from the public and agencies on the economic analysis for use when such work resumed.

On April 26, 1996, the moratorium was lifted. Following the waiver of the moratorium, we reactivated the listing program that had been shut down for over a year and faced a national backlog of 243 proposed species' listings. In order to address that workload, we published our listing Priority Guidance (LPG) for the remainder of Fiscal Year (FY) 1996 (May 16, 1999; 61 FR 24722). That guidance prioritized all listing actions and identified the designation of critical habitat as the lowest priority upon which we would expend limited funding and staff resources. Subsequent revisions of the LPG for Fiscal Years 1997 (61 FR 64475) and for 1998/1999 (63 FR 25502) retained critical habitat as the lowest priority.

The processing of this final rule designating critical habitat for the minnow does not conform with our current LPG for FY 1998/1999. That guidance gives the highest priority (Tier 1) to processing emergency rules to add species to the Lists of Endangered and Threatened Wildlife and Plants; second priory (Tier 2) to processing final determinations on proposals to add species to the lists, processing new listing proposals, processing administrative findings on petitions (to add species to the lists, delist species, or reclassify listed species), and processing a limited number of proposed and final rules to delist or reclassify species; and third priority (Tier 3) to processing proposed and final rules designating critical habitat. Our Southwest Region is currently working on Tier 2 actions; however, we are undertaking this Tier 3 action in order to comply with the court order in *Forest Guardians and Defenders of Wildlife* v. *Bruce Babbitt,* CIV 97–0453 JC/DIS, discussed below.

On February 22, 1999, the United States District Court for the District of New Mexico in *Forest Guardians and Defenders* ordered us to publish a final determination with regard to critical habitat for the Rio Grande silvery minnow within 30 days of that order. The deadline was subsequently extended by the Court to June 23, 1999. This final rule is issued to comply with that order and has been crafted within the time constraints imposed by the Court's orders. The draft economic analysis performed for the critical habitat designation was drafted in 1996 and represents data gathered from respondent entities about 4 years ago. We reviewed the content of that draft report in the context of Service policy, comments received from the public, and any other new information.

On April 7, 1999, we reopened the public comment period on the proposal to designate critical habitat and announced the availability of two draft documents, the draft Economic Analysis prepared in 1996, and a draft Environmental Assessment on the proposed action of designating critical habitat (64 FR 16890). Also on April 7, 1999, we mailed copies of the notice and the two draft documents to approximately 425 entities known to have an interest in the Rio Grande silvery minnow and its proposed critical habitat. The April 7, 1999, **Federal Register** notice also announced a public hearing to discuss and receive comments on the proposed designation. That hearing was held in Albuquerque, New Mexico, on April 29, 1999.

Parallel to the process of reviewing the critical habitat proposal and the economic consequences of the designation, we initiated recovery planning for the silvery minnow. The Interagency Cooperative Policy Statement, issued jointly by us and the National Marine Fisheries Service on July 1, 1994 (59 CFR 34272), identified the minimization of social and economic impacts caused by implementing recovery actions as a priority of both Services. The Rio Grande Silvery Minnow Recovery Team was appointed pursuant to this guidance and includes both species and habitat experts and community and private interest stakeholders. Many of the representatives of agencies, municipalities, and private interests that were involved in the proposal to list and in the analysis of critical habitat are recovery team members. The draft Final Rio Grande Silvery Minnow Recovery Plan has been prepared and is currently under review.

Critical Habitat

Section 4(a)(3) of the Act, as amended, and implementing regulations (50 CFR 424.12), require that, to the maximum extent prudent and determinable, the Secretary designate critical habitat at the time the species is determined to be endangered or threatened. With this final rule, critical habitat is being designated for the RIO Grande silvery minnow.

Definition of 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.'' The term ''conservation,'' as defined in section 3(3) of the Act, means ''to use and the use of all methods and procedures which are necessary to bring an endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary'' (i.e., the species is recovered and removed from the list of endangered and threatened species).

We are required to base critical habitat designations upon the best scientific and commercial data available (50 CFR 424.12) after taking into account economic and other impacts of such designation. In designating critical habitat for the Rio Grande silvery minnow, we have reviewed the overall approach to the conservation of the silvery minnow undertaken by the local, State, Tribal, and Federal agencies operating within the Middle Rio Grande Valley since the species' listing in 1994, and the identified steps necessary for recovery outlined in the draft Final Rio Grande Silvery Minnow Recovery Plan (in review). We have also reviewed available information that pertains to the habitat requirements of this species, including material received during the

initial public comment period on the proposed listing and designation, the information received following the provision of the draft Economic Analysis to the public on April 26, 1996, and the comments and information provided during the 30-day comment period opened on April 7, 1999, including the public hearing.

Effect of Critical Habitat Designation

Section 7(a) of the Act, as amended, requires Federal agencies to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Section 7(a)(2) requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of a listed species or to destroy or adversely modify its critical habitat. If a Federal action may affect a list species or its critical habitat, the responsible Federal agency must enter into formal consultation with the Service.

The designation of critical habitat directly affects only Federal agencies, by prohibiting actions they fund, authorize, or carry out from destroying or adversely modifying critical habitat. Individuals, firms and other non—Federal entities are not affected by the designation of critical habitat so long as their actions do not require support by permit, license, funding, or other means from a Federal agency.

An understanding of the interplay of jeopardy and adverse modification standards is necessary to evaluate the likely outcomes of consultation under section 7, and to evaluate the environmental, economic and other impacts of any critical habitat designation. Implementing regulations (50 CFR part 402) define ''jeopardize the continued existence of'' (a species) and ''destruction or adverse modification of'' (critical habitat) in virtually identical terms. ''Jeopardize the continued existence of'' means to engage in an action ''that reasonably would be expected * * * to reduce appreciably the likelihood of both the survival and recovery of a listed species.'' ''Destruction or adverse modification'' means a direct or indirect alteration that ''appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species.''

Common to both definitions is an appreciable detrimental effect on both survival and recovery of a listed species. Thus, for most species, actions likely to result in destruction or adverse modification of critical habitat are nearly always found to jeopardize the species concerned, and in most cases the existence of a critical habitat designation does not materially affect the outcome of consultation. This is often in contrast to the public perception that the adverse modification standard sets a lower threshold for violation of section 7 than the jeopardy standard. In fact, biological opinions that conclude that a Federal agency action is likely to adversely modify critical habitat but not to jeopardize the species for which it is designated are extremely rare historically and none have been issued in recent years.

The duplicative nature of the jeopardy and adverse modification standards is true for the Rio Grande silvery minnow as well. Since the species was listed in 1994, there have been a number of consultations that included a determination of potential impacts to proposed critical habitat. Implementing regulations of the act found at 50 CFR 402.10 direct that each Federal agency shall confer with the Service on any action which is likely to jeopardize the continued existence of any proposed species or result in the destruction or adverse modification of proposed critical habitat. No additional restrictions resulted from these conferences. We do not anticipate that when the designation is finalized we will need to impose additional restrictions relative to critical habitat that were not previously in place due to the listing of the species.

In some cases, critical habitat may assist in focusing conservation activities by identifying areas that contain essential habitat features (primary constituent elements), regardless of whether they are currently occupied by the listed species. This alerts the public and land managing agencies to the importance of an area in the conservation of that species. Critical habitat also identifies areas that may require special management or protection.

Section 4(b)(8) of the Act requires us to 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 (defined below) to an extent that the value of designated critical habitat for both the survival and recovery of the silvery minnow is appreciably reduced. We note that such activities may also jeopardize the continued existence of the species. Because the area that is being designated as critical habitat represents the remaining 5 percent of its historical range and is currently occupied by the species, loss of habitat that would result in a finding of adverse modification would also significantly reduce the likelihood of survival and recovery of the species, which is the definition of jeopardy.

Federal activities that may be affected by critical habitat designation include construction, maintenance, and operation of diversion structures; management of the conveyance channel; and levee and dike construction and maintenance. Again, these types of activities have already been examined under consultation with us upon listing the species as endangered. No additional restrictions to these activities as a result of critical habitat designation are anticipated.

Recent consultations undertaken with the BOR and Corps have recognized and allowed for occasional drying of portions of the lower reaches of the minnow's occupied habitat. We anticipate that, in times of severe water shortages, similar actions must be permissible after the designation of critical habitat becomes final, as long as a managed reduction ion surface flows allows the minnow to remain in the water column and retreat upstream, minimizing mortality. However, any such circumstance would require consultation under section 7 of the Act, and adequate monitoring would be required to ensure that the action would not result in jeopardy to the species, adversely modify its critical habitat, or result in unpermitted taking of individuals. See the discussion on Primary Constituent Elements and our response to Issue 33, below.

The minnow does not need a large quantity of water to survive but it does need some water. The minnow requires habitat with sufficient flows through the irrigation season to avoid excessive mortality in downstream reaches, plus a spike in flow in the late spring or early summer to trigger spawning, and a relatively constant winter flow. Alterations of the primary constituent elements are evaluated to determine whether Federal activities are destroying or adversely modifying critical habitat; the identification of primary constituent elements for the minnow is not intended to create a high-velocity, deep flowing river. The minnow does not require such habitat characteristics.

Primary Constituent Elements

In identifying areas as critical habitat, 50 CFR 424.12 provides that we consider those physical and biological

attributes that are essential to a species' conservation, and that may require special management considerations or protection. Such physical and biological features, as outlined in 50 CFR 424.12, include, but are not limited to, the following:

Space for individual and population growth, and for normal behavior;

Food, water, or other nutritional or physiological requirements;

Cover or shelter;

Sites for breeding, reproduction, or rearing of offspring; and

Habitats that are protected from disturbances or are representative of the historical geographical and ecological distributions of a species.

Primary constituent elements of critical habitat required to sustain the Rio Grande silvery minnow include:

Stream morphology that supplies sufficient flowing water to provide food and cover needed to sustain all life stages of the species;

Water of sufficient quality to prevent water stagnation (elevated temperatures, decreased oxygen, carbon dioxide build-up, etc.); and

Water of sufficient quality to prevent formation of isolated pools that restrict fish movement, foster increased predation by birds and aquatic predators, and congregate pathogens.

All areas within the designated stretch of the Rio Grande are occupied by the Rio Grande silvery minnow. Areas within the designated stretch either contain, or are capable of containing, these primary constituent elements. Areas within the designated critical habitat that may not have minnows present at a given point in time are capable of supporting these constituent elements because habitat conditions can change rapidly in response to flows and other factors, such as the development of sand bars, shifting of islands within the channel, and creation and disappearance of pools.

Land Ownership

The area designated as critical habitat for the Rio Grande silvery minnow is the only area where the species has been collected in the recent past and where it is currently known to exist. Within this 160 mi (262 km) stretch of river, there are four identified reaches delineated to reflect the management of water and habitat. From its upstream end at the Highway 22 bridge to its downstream terminus at the railroad trestle, critical habitat is within the Cochiti, Angostura, Isleta, and San Acacia reaches.

Critical habitat for the silvery minnow includes only the active channel of the mainstem Rio Grande. Ownership of the channel itself is unclear. However, most of the land in the middle river valley that abuts critical habitat is within the administrative boundaries of the Middle Rio Grande Conservancy District. The Middle Rio Grande Conservancy District is the subdivision of the State of New Mexico which provides for irrigation, flood control, and drainage of the Middle Rio Grande valley in New Mexico, from Cochiti Dam downstream 150 mi (285 km) to the northern boundary of the Bosque del Apache del Apache National Wildlife Refuge. Within these 150 mi are also the lands of the communities of Algodones, Bernalillo, Corrales, Albuquerque, Los Lunas, Belen, Socorro, and a number of smaller incorporated and unincorporated communities. Within the upper third of the middle valley of the Rio Grande are six Indian pueblos: Cochiti, Santo Domingo, San Felipe, Santa Ana, Sandia, and Isleta. Approximately 45 river mi (86 km) of critical habitat run through Pueblo lands.

Summary of Economic and Other Impacts

The Act requires that we designate critical habitat after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat. We may exclude an area from designation if the benefits of its exclusion outweigh the benefits of its inclusion in critical habitat, unless failure to designate the area would result in extinction of the species concerned. We utilized the draft economic analysis prepared for the proposed critical habitat designation, in addition to our assessment of other impacts, to assist in our determination of whether any incremental economic effects of designation exist beyond the effects of the listing. The draft economic analysis, along with comments and other information available to us, allowed us to assess the benefits of exclusion versus inclusion for the area identified in the proposed rule.

Regional Economic Profile

The study area for the draft economic analysis included the strip of land adjacent to the Rio Grande, stretching from the Santa Fe metropolitan area, at the northern edge of the proposed designation to the El Paso, Texas metropolitan area, lying about 150 miles downstream from the southern terminus of the proposed critical habitat designation. This area embraces the designated habitat area and the majority of the economic activity that directly interacts with resources potentially affected by the designation. This area includes nine counties in two states and four metropolitan areas: Santa Fe, Albuquerque, Las Cruces, and El Paso. Albuquerque and El Paso, each with a population of about 650,000, are considerably larger than the others.

Irrigated agriculture accounts for more than 80 percent of permitted water use in the Middle Rio Grande Valley. Total private-sector employment in the agricultural industry in 1993 was 14,078, about two percent of total employment in the study area. Agricultural employment is a higher percentage of total employment in the two non-metropolitan counties (Socorro and Sierra counties in the lower reaches of designated critical habitat) than in the metropolitan areas, and a higher percentage in the Las Cruces metropolitan area than in the other metropolitan areas. For the study area as a whole, growth in agricultural employment during the past decade did not keep pace with total employment. In 1993, proprietors and employees in the study area's agricultural industry earned income of about $269 million, or one percent of total income. Agricultural incomes in this area have grown more rapidly than incomes in other sectors during the past decade, largely because farm incomes were depressed throughout the nation in the early 1980s. Nonetheless, average earnings in the agricultural industry are approximately two-thirds of the overall average.

These data indicate that the agricultural industry, the resource-intensive industry primarily associated with the critical habitat of the silvery minnow, generally reflects the national trends for resource-intensive industries. In particular, the data indicate that nationwide this industry is a small component of the overall economy and it is not growing as rapidly as other sectors of the economy.

Although from a geographic perspective the landscape surrounding the critical habitat for the silvery minnow is predominantly non-metropolitan, the economy of the study area is highly concentrated in the area's four metropolitan centers: Santa Fe, Albuquerque, Las Cruces, and El Paso. Approximately 98 percent of the population in the study area resides in the counties that constitute the area's four metropolitan statistical areas. This percentage somewhat overstates the portion of the area's population that actually has a metropolitan residence, because these are large counties and each one contains both urban and non-urban residents.

Economic Impacts and Effects

We reviewed and assessed the draft economic analysis report, which was based on questionnaires to Federal agencies. These questionnaires reported Federal agencies' own assessments of the extent to which they would alter their activities in response to critical habitat designation. Most agencies stated that the designation would have no effect. Only one agency, the BOR, indicated that it would alter its activities in response to the proposed designation of critical habitat for the minnow. Specifically, the BOR indicated that it would alter its river maintenance program in the proposed designated critical habitat area from just below Cochiti Dam to just above Elephant Butte Reservoir. Because of numerous uncertainties, however, the BOR was unable to give a specific estimate of the designation's potential impact on its river maintenance activities.

The BOR's response to the questionnaire was their own interpretation of the ramifications of avoiding adverse modification of critical habitat. However, we believe that if the identified activities had an impact on the silvery minnow significant enough to result in a finding of adverse modification of the minnow's critical habitat, we would also find that those activities would jeopardize the continued existence of the species in the absence of designated critical habitat. Thus, the designation of critical habitat should not require any change in the activities identified by the Bureau that were not already changed due to the listing of the minnow, and no economic effects should flow from the designation itself.

No Federal agency that commented during the April–May 1999, public comment period amended or added to its original response about impacts to its operations that would be caused by critical habitat. The BOR, in its May 7, 1999, comments, stated that the designation of critical habitat will likely have minimal impacts on that agency's Endangered Species Act-related activities.

In summary, although the draft economic analysis provided to us identified a perceived economic impact of critical habitat designation, we consider this potential economic impact to be a result of the minnow's listing, not critical habitat designation. In addition, the BOR's original estimate of economic impacts resulting from critical habitat designation discussed ceasing river maintenance; an unlikely occurrence. It is more likely that the Bureau would employ different design and construction techniques to accomplish river maintenance objectives. We have concluded that there are no incremental economic effects associated with the designation of critical habitat above and beyond the effects of listing the species as endangered. We have thus determined that there are no areas within the proposed designation where the benefits of exclusion can be shown to outweigh any benefits of inclusion.

Secretarial Order 3206

Secretarial Order 3206 was issued to clarify the responsibilities of the component agencies, bureaus, and offices of the Department of the Interior and the Department of Commerce, when actions taken under authority of the Act and associated implementing regulations affect, or may affect, Indian lands, Tribal trust resources, or the exercise of American Indian Tribal rights. In keeping with the trust responsibility and government-to-government relationships, we recognize our responsibility to consult with affected tribes and provide written notice to them as far in advance as practicable of conservation restrictions that we consider necessary to protect listed species.

If a proposed conservation restriction is directed at a Tribal activity that could raise the potential issue of direct (directed) take under the Act, then meaningful government-to-government consultation shall occur, in order to strive to harmonize the Federal trust responsibility to Tribes, Tribal sovereignty, and the statutory missions of the Departments of the Interior and Commerce. In cases involving an activity that could raise the potential issue of an incidental take under the Act, Tribal notification shall include an analysis and determination that all of the following conservation standards have been met—(i) the restriction is reasonable and necessary for conservation of the species at issue; (ii) the conservation purpose of the restriction cannot be achieved by reasonable regulation of non-Indian activities; (iii) the measure is the least restrictive alternative available to achieve the required conservation purpose; (iv) the restriction does not discriminate against Indian activities, either as stated or applied; and (v) voluntary tribal measures are not adequate to achieve the necessary conservation purpose.

Below we have specifically assessed the designation of critical habitat with respect to the five factors listed in Secretarial Order 3206:

1. The designation of critical habitat is required by law. The initial inclusion of reaches of the Rio Grande within or adjacent to Pueblo boundaries was based solely on biology and the contribution of those reaches of the river to the conservation of the species. Moreover, as discussed previously, critical habitat designation will impose no additional restrictions on activities on Indian lands beyond the prohibitions already in place against jeopardy and unpermitted taking of the species.

2. In the process of designating critical habitat for the Rio Grande silvery minnow, specific biological criteria were applied to all potential river reaches. This critical habitat designation includes a continuous stretch of river that constitutes the remaining 5 percent of the historical range of the species, and that we consider essential to the silvery minnow's conservation. The contiguity of habitats within and among the different reaches of the Rio Grande and the importance of the linkage between upstream and downstream activities and habitats does not allow for the removal from designation of one river section from its adjacent upstream and downstream non-Indian counterparts without potentially decreasing the value of all sections. Additionally, because of the unique relationship existing between the pueblos and the non-Indian Middle Rio Grande Conservancy District (the District is obligated to deliver water to the pueblos; the pueblos are represented on the Board of the District), and the interdependence of Tribal and non-Tribal activities throughout the stretch of critical habitat lying within the District does not facilitate the separation of the two.

3. The critical habitat as designated encompasses the last remnant of habitat still occupied by the silvery minnow (approximately 5 percent of the species' historical habitat) and is considered the least amount available with which to achieve the survival and recovery of the species.

4. The designation of critical habitat does not discriminate against Indian activities, either as stated or applied. The identified threats to the habitat of the Rio Grande silvery minnow were based on range-wide information that neither discriminated against nor favored particular land owners. Any ''restrictions'' which might be derived from the designation would have to arise from the obligation, under the Act, of Federal agencies to ensure that their actions do not result in the destruction or adverse modification of critical habitat. As stated in 1 (above), critical habitat does not create additional

restrictions because the areas are currently occupied, and no increased burdens have been identified.

5. Voluntary Tribal measures are not adequate to achieve the necessary conservation purpose. Tribal representation has been included in the Rio Grande Silvery Minnow Recovery Team and we continue to work with individual pueblos when requested to provide expertise in the rehabilitation and maintenance of aquatic habitats on Pueblo lands. Santa Ana Pueblo has taken a leadership role in forming a broad interest-based consortium, which is seeking funding for recovery projects for the silvery minnow. In addition, Santa Ana is also actively pursuing habitat restoration within the Santa Ana Pueblo boundaries. Both Sandia Pueblo (which is north of Albuquerque on the Rio Grande) and Isleta Pueblo (which is immediately south of Albuquerque on the Rio Grande) have enacted EPA-approved water quality standards as authorized under the Clean Water Act.

Because of the time constrains in rendering this final determination, we have had limited opportunity to engage in consultation with the pueblos adjacent to the designated critical habitat. However, on March 4, 1999, following the receipt of the court order, information was provided to Tribal representatives at the meeting of the Six Middle Rio Grande Basin Pueblos Coalition. Written comments to the proposed critical habitat designation for the Rio Grand silvery minnow were received from Sandia Pueblo (generally supporting the designation), Isleta Pueblo, and the Jicarilla Apache Tribe (both expressing concerns about the effects of the designation). On May 3, 1999, the Service's Regional Director, the Department of the Interior's Office of the Regional Solicitor, and staff met with representatives of and legal counsel for the Pueblo of Santa Ana to discuss critical habitat designation and solicit input from the Pueblo. We will continue to provide assistance to and cooperate with pueblos abutting critical habitat at their request.

Summary of Comments

Following the proposal to list the Rio Grand silvery minnow as an endangered species with critical habitat, we received comments from the public, scientific community, and management and regulatory agencies at the State and Federal levels concerning critical habitat. Additionally, following the provision of the draft Economic Analysis to the entities on our mailing list, we also received comments on the draft document and the economic impacts predicted by that document. Finally, during the public comment period opened from April 7 to May 7, 1999, we received a total of 94 comments concerning the proposal, the draft Economic Analysis document, and the draft Environmental Assessment. Thirty-two comments were provided orally at the public hearing, and we received 62 written comments. All comments on critical habitat and the draft documents, both oral and written, received during the comment period are addressed in the following summary. Comments of a similar nature are grouped into a number of general issues. Issues that were addressed in the final rule to list the Rio Grande silvery minnow may be found in that publication (59 FR 36988).

Issue 1: Considerable discrepancy exists within the comments received related to geographical extent of the proposed designation. Some commenters stated that the extent of critical habitat proposed by the Service is inadequate to address survival and recovery of the species. Others asserted that there is no basis for excluding the river above Cochiti Reservoir (including the Colorado portions of the watershed) from designation. Still others recommended that additional reaches of the Rio Grande should be evaluated, such as the river between Elephant Butte and Caballo reservoirs and downstreams of Caballo Reservoir. Some commented that the reach of the Rio Grande below San Acacia, because of its known episodes of intermittency, should be removed from the proposal. Some commenters recommended that, because the reach upstream from San Acacia Cochiti Reservoir would appear to offer an opportunity to provide critical habitat for the silvery minnow without insurmountable adverse effects on water supply, that we do not designate as critical habitat the reach downstream from San Acacia. Some commenters stated that there were no east-west boundaries identified for critical habitat. Some commenters, misinterpreting the scale of the map prepared for critical habitat, interpreted the proposal to incorporate miles of terrestrial habitat bordering the river throughout the length of the Middle Rio Grande Valley.

Service Response: The areas finalized as critical habitat in this rule meet the designation criteria in 50 CFR part 424. This designation of critical habitat is based on the last remaining area still occupied by the species. The Service considers this area in need of special management and protection and essential for the conservation of the species. The area designated includes the mainstem of the Rio Grande (comprised of the active river channel including the water column), and its associated channel morphology. Although some actions on lands within the floodplain of the river may affect critical habitat, these areas are not included within the designation.

The river reach between San Acacia and Elephant Butte Reservoir is of primary importance because 70 percent of the population currently inhabits that reach. The river above Cochiti Dam was not a significant part of the species' historical range, is colder than the optimal temperature for silvery minnows, and is stocked with predatory non-native fish. The area between Elephant Butte and Caballo reservoirs is also stocked with non-native fish, and its channel morphology is not conductive to silvery minnows. Finally, the river below Caballo Reservoir is not currently occupied by the species. As we progress through the recovery process for the Rio Grande silvery minnow, we may identify areas below the Caballo Reservoir, or other areas, that are suitable for reintroduction. Those areas would first have to be examined to determine why the minnow no longer occurs there, what remedial action would be necessary to reestablish the species, and whether remediation is feasible. However, until we have this information, we believe that the habitat essential to the silvery minnow's conservation is that which we originally proposed. If information becomes available that confirms that additional areas are essential for the species' conservation, we can revise the critical habitat designation. In addition, under section 4 of the Act, persons can petition the Service to modify the designation.

Issue 2: The economic analysis for regional impacts must be able to assess the effects on regional income that result from changes in the natural resource supply such as water. An inter-industry general equilibrium resource assessment model that can account for true resource limits and interdependence in the regional economy should be utilized.

Service Response: Because any finding of adverse modification of critical habitat will also result in a finding of jeopardy to this species, we have determined that there are no incremental economic effects above and beyond any effects associated with the listing of this species. Therefore, we believe that there is no need for further economic analysis as suggested by these commentors.

Immediately following initiation of the draft economic analysis, we arranged a meeting for all interested

agencies to meet with the consulting economists and to discuss the approach and methodology that was to be utilized in the determination of economic impacts. Those commenters who expressed their desire to interact with the economists were invited to the meeting. A second meeting was also held with agencies prior to the provision of the questionnaire; interested parties were invited to these meetings and also provided informational copies of the questionnaire that was sent to Federal entities for response.

Issue 3: We must evaluate the direct and indirect impacts of critical habitat. Indirect costs are associated with the societal implications on small communities in the middle Rio Grande valley dependent upon adequate flows from the Rio Grande to sustain the practice of irrigated agriculture. Designation of critical habitat could limit the ability of municipalities and other water providers in the middle valley to provide water to residents and affect the agricultural economy.

Service Response: As indicated in the proposal, the designation of critical habitat would affect only Federal agency actions that would adversely modify or destroy that habitat. As stated previously, actions that would destroy or adversely modify critical habitat would also result in jeopardy to the species. The draft economic analysis discussed the possibility that cessation or alternation of Federal actions in order to avoid jeopardy to the species or adverse modification or destruction of critical habitat might affect water availability to irrigators, cities, and other water rights holders. It also stated that complete cessation might have far reaching impacts on the viability of conveyance structures linked to and dependent upon the maintenance of the channel of the Rio Grande. The draft economic analysis further included the BOR's estimates of increased costs of river maintenance, and possible loss of water caused by an equivalent reduction in river maintenance capability as a worst case scenario based on the Bureau's interpretation of critical habitat.

In commenting on the draft report, the BOR has clarified that those actions under its control within the boundaries of critical habitat would not necessarily cease, rather the Bureau would likely employee different design and construction techniques to accomplish river maintenance objectives. Additionally, the BOR, in its commenting letter of May 7, 1999, said that the designation of critical habitat will likely have minimal impacts on that agency's Endangered Species Act-related activities.

Issue 4: The draft Economic Analysis is incomplete and flawed. The draft Environmental Assessment, relying on the conclusions of the economic analysis, is also flawed and inadequate. The Service should prepare a thorough economic analysis with necessary studies to adequately assess the requirements of the silivery minnow and the impact of the critical habitat designation. The Service is strongly encouraged to provide adequate time for public review and comment on studies to determine the impact of the critical habitat designation and a final rule should not be issued until this new information has been fully considered.

Service Response We have reviewed the draft economic analysis, draft Environmental Assessment, and all comments relieved on those documents and the proposal to designate critical habitat. We considered all comments in the final preparation of this designation. We believe that designation of critical habitat will have no incremental effects beyond those resulting from listing the species as endangered. The absence of impacts attributable to critical habitat designation is clearly and adequately explained in both this final rule and in the environmental assessment prepared for this action. Further, while we welcome and encourage additional studies on the biological requirements of the silvery minnow, we believe the best available information has been used in defining the primary constituent elements necessary for the species' conservation.

Issue 5: The Service should place the silvery minnow critical habitat designation on hold in order to establish a coordinating committee composed of interests above and below Elephant Butte Reservoir to develop a full-scale report on the existing data available on the silvery minnow, with several subcommittees, one of which would be charged with evaluation of the overall impact of the designation on other significant environmental interests.

Service Response: The Act does not allow the indefinite suspension of determination of critical habitat. It does, however, allow for a 1-year delay in designation if we find that critical habitat is not determinable. We stated in the final listing rule that we would need an additional year to determine the economic and other impacts of designation.

The Act requires that we determine the extent of critical habitat and the economic and other relevant impacts of such a determination using the best scientific and commercial information available at that time. We believe that considerable information is available on the silvery minnow, including numerous scientific studies on the species and on the hydrology of the Rio Grande. In addition, a recovery plan has been drafted by a team of experts and is currently under review. This recovery plan represents a compilation and analysis of the existing data on the species and its habitat. Within the constraints imposed by the Act and, in this instance, time constraints from the Court, we have attempted to contact all knowledgeable and interested entities to gather information for use in the determination of critical habitat and in the analysis of the economic and other relevant impacts that might arise from its designation.

Issue 6: The proposed rule provided no data or factors that were considered concerning economic and other impacts.

Service Response: The proposed designation of critical habitat was based solely on biological information concerning the needs and potential conservation of the silvery minnow. Economic data were not required for the proposal, nor were the economic data developed at the time the proposed rule was published. The economic analysis of impacts from the proposed designation was initiated in September 1994. The draft economic analysis was shared with all interested parties in April 1996, and its availability announced along with the reopening of the public comment period on the proposal in April 1999, giving interested parties ample opportunity to comment on the draft economic analysis.

Issue 7: An Environmental Impact Statement is required and must be provided before critical habitat can be designated.

Service Response: We have determined that an Environmental Impact Statement, as defined by the National Environmental Policy Act (NEPA) of 1969, need not be prepared in connection with actions under section 4 of the Endangered Species Act, including designation of critical habitat. A notice outlining our reasons for this determination was published in the **Federal Register** on October 25, 1983 (48 FR 49244). However, the Tenth Circuit Court of Appeals ordered compliance with NEPA on critical habitat designation for two fish species in *Catron County Board of Commissioners* v. U.S. Fish and Wildlife Service, 75 F.3d 1429 (10th Cir. 1996). Based on that decision, in order to comply with NEPA, we have completed an Environmental Assessment to delineate those environmental, socio-economic, and other relevant impacts

arising from this designation. That Environmental Assessment resulted in a Finding of No Significant Impact for this action. Under NEPA, an Environmental Impact Statement is not required in instances where a Finding of No Significant Impact is made on an Environmental Assessment.

Issue 8: Several commenters stated their concern that critical habitat would affect water rights. Other stated that while the proposed critical habitat is totally upstream of Elephant Butte. Reservoir, action taken in accordance with the proposal may decrease the amount and delivery of water available for use by the El Paso Water Utilities.

Service Response: We have determined that any alternations of BOR activities due to the prohibition against destruction or adverse modification of critical habitat would also be required under the prohibition of jeopardy to the species. Thus, there are no additional impacts of critical habitat designation. Further, neither the listing of the species nor designation of crucial habitat can or will determine State water rights.

Issue 9: The City of Albuquerque's wasterwater treatment facility discharges into the reach of the Rio Grande designated as critical habitat for the silivery minnow. To avoid significantly altering the water chemistry of the Rio Grande, the City of Albuquerque may have to remove the treated effluent entirely from the river, and to control and treat stormwater runoff.

Service Response: The City of Albuquerque is correct in stating that the Environmental Protection Agency (EPA), as the Federal agency issuing a permit for the City's wasterwater treatment plant under the National Pollutant Discharge Elimination System, would be required to ensure that its action would not destroy or adversely modify critical habitat for the silvery minnow. However, the EPA would be required to ensure that its proposed action would not likely jeopardize the continued existence of the species. Given the similarity of the definition of jeopardy and destruction or adverse modification, no additional restrictions will result from designation of critical habitat.

Issue 10: The designation of critical habitat will require continuous instream flow. The working of the primary constituent element to require a quantity of water sufficient to avoid isolated pools in the river equates to perennial bank to bank flows. The amount of water predicted for critical habitat is unobtainable.

Service Response: We have made no determination that continuous bank-to-bank flow is or will be a requirement to avoid jeopardy to the species or adverse modification of critical habitat. (See discussion above under *Effect of Critical Habitat Designation*.) As an evolutionary product of arid southwest river systems such as the Rio Grande, the silvery minnow has adapted to low flow and intermittent flow conditions. However, complete dewatering of extensive reaches of the only section of river where it now exists are of great concern, particularly when the impacts of dewatering are combined with the inability of the silvery minnow to access stillflowing reaches upstream of diversion dams.

We have made no prediction of the amount of water needed for maintenance of critical habitat. However, since the silvery minnow was listed and critical habitat proposed, the amount of water needed in low-water years to avoid jeopardy to the species ranged from about 17,000 to 58,000 acre-feet, depending upon specific yearly conditions of water use, climate, water availability, and response of the silvery minnow to those river conditions. We do not anticipate that flow management necessary to avoid destruction or adverse modification of critical habitat will be different than what is currently required to avoid jeopardizing the species.

Issue 11: The draft economic analysis displayed a bias against irrigated agriculture and flood control activities. It argues against irrigation subsidies even though society through its congressional representatives has made the decision that such subsidies provide important benefits to society.

Service Response: We disagree with the commenter's interpretation that the report's presentation of economic values and commitments identified for irrigated agriculture and flood control is biased against these activities. The report does not argue for or against subsidies of any kind, it merely notes their existence within the context of economic analysis. The costs and revenues from agriculture in the Rio Grande valley are a matter of record, not generated by the authors of the report, but taken from published data of the U.S. Department of Commerce, Bureau of Economic Analysis, and the New Mexico Cooperative Extension Service.

Issue 12: The draft Economic Analysis should have included some analysis to gauge the impacts if the United States' ability to comply with its treaty obligations to Mexico are compromised. Similarly, if the ability of New Mexico to deliver water to Elephant Butte is hampered, there will be drastic consequences for the water users in southern New Mexico and Texas.

Service Response: We believe that there are alternatives in the delivery of water that will allow the United States and the State of New Mexico to comply with compact and treaty obligations without either jeopardizing the continued existence of the species or destroying or adversely modifying critical habitat. Some commenters are concerned that if water is transported in the river channel instead of the conveyance structures, additional water will be lost. However, we do not believe that the accounting of water transport or carriage losses is of sufficient accuracy and precision; the loss of salvaged surface water could be a loss to only one reach of the river, to the overall system, or merely transported subsurface to Elephant Butte. A better understanding of the hydrology and a more precise accounting system would also aid in the management of flow of the river.

Issue 13: The amount of time and data available to agencies in responding to the economic questionnaire were insufficient to allow for more detailed reporting of economic effects.

Service Responses: The initial contact with the identified agencies that might have actions affected by the designation of critical habitat was in October 1994. Coordination by both ourselves and the consulting economists continued with the agencies to clarify information needs, to provide examples of questionnaires utilized in and reports produced by other economic impact assessments of critical habitat, and to exhaustively discuss what would be considered the components of critical habitat and how adverse modification to those components might be analyzed by the Service. These efforts continued for over seven months. In June 1995, another meeting was held with all involved agencies invited to discuss the process, the information needs, the questionnaire, and the assessment parameters. It was only after that extensive period of coordination that the questionnaire was sent to the agencies for their response. The requested response time was 30 days; based on the discussions and meetings of the preceding seven months, we do not believe that the response time was unreasonably brief.

Issue 14: The authors of the draft economic analysis cannot seriously consider the estimate of 4,000 acre-feet additional depletion to represent the actual impact of the designation of critical habitat.

Service Response: The authors of the draft report utilized the information provided to them from the Federal

agencies who have been managing the Rio Grande for over 90 years. The quantity of 4,000 acre-feet was provided by the BOR. Although the BOR estimated that a potential loss of 4,000 acre feet of surface flow could be realized from the cessation of some of their river maintenance program, it is not known if this amount of water would be lost to the system entirely, or travel subsurface down the channel of the Rio Grande to arrive, in some quantity, at Elephant Butte Reservoir.

Issue 15: If critical habitat is declared there is a real possibility that the BOR will be unable to perform periodic maintenance on the Rio Grande upstream from Elephant Butte Reservoir.

Service Response: This concern was not voiced by the BOR. No data provided by the Bureau indicated that a complete cessation of periodic maintenance would occur if critical habitat were to be designated for the Rio Grande silvery minnow. We concur that river maintenance activities may need to be altered in order to avoid jeopardizing the species or destroying or adversely modifying critical habitat, but the resultant impacts in channel capacity, water conveyance efficiencies, or water conservation have not been provided by the Bureau for such alterations.

Issue 16: The New Mexico Interstate Stream Commission commented that the prior appropriation doctrine in New Mexico does, to some extent, protect instream flows. New Mexico State law and the Rio Grande Compact both ensure delivery of water downstream through the Middle Rio Grande Valley to water users in the Rio Grande Project south of Elephant Butte Dam.

Service Response: Both State law and the Rio Grande Compact require the delivery of water downstream. However, currently the water that is released during the irrigation season is native water plus any waters called for to meet irrigation, municipal, and industrial needs. Additional water to meet Compact deliveries are released during the non-irrigation months in accordance with instructions from the Compact Commission, which is composed of representatives from Colorado, New Mexico, and Texas. Alterations to this plan require consent of the Compact Commission. Release of additional Compact waters during the irrigation season would only be helpful to the minnow if the waters traveled down the riverbed. As discussed above, if water is not transported through the reach of river between San Acadia Dam and Elephant Butte Reservoir, increased water in the system may not result in increased wet habitat for the minnow.

Issue 17: Critical habitat should not be designated until such time as a recovery plan has been developed for the silvery minnow that includes a determination that such designation is necessary for survival and recovery of the species.

Service Response: A recovery plan has been drafted for the silvery minnow and the plan is being reviewed. Although we agree that it would be appropriate to make a detailed determination of habitat needs of listed species during the recovery planning process, the Endangered Species Act does not currently link the designation critical habitat to the development of the recovery plan. The Act requires that, to the maximum extent prudent and determinable, we designate critical habitat when it lists a species. If critical habitat is not considered determinable at the time a final rule is adopted to list a species, it must be designated ''to the maximum extent prudent'' within 1 additional year. There is no provision in the Act to delay designation of critical habitat until such time as a recovery plan is prepared. The timing of this designation also is in compliance with a court order.

Issue 18: The calculation of the value of the BOR's river maintenance program in the Middle Rio Grande is misleading. The river maintenance program has flood control and drainage purposes and benefits as well as water salvage benefits. The draft report did not evaluate the economic value of these benefits.

Service Response: The BOR did not provide estimates of the value of the benefits identified by the commenter, nor did they provide data that would have allowed us to estimate the value of those benefits. Therefore, economists were not able to include the value of those benefits in the draft economic analysis.

Issue 19: The BOR estimated that the proposed designation of critical habitat would cause the cost of continuing the current level of river maintenance in the Middle Rio Grande to increase by up to 40 percent. This would mean that if funding for river maintenance activities remains stable or declines, what river maintenance activities in the Middle Rio Grande would be decreased. Reclamation did not estimate what percentage reduction in the river maintenance program might occur.

Service Response: We assumed that if the Bureau estimated that costs might increase by 40 percent, an alternative scenario would be that activities might instead decrease by 40 percent. However, as discussed above, the Service has determined that any activities likely to result in destruction or adverse modification of critical habitat would also result in a finding of jeopardy to the species. Therefore, any changes in river maintenance activities are attributed to the listing of the silvery minnow, and are not a result of critical habitat designation.

Issue 20: The draft Economic Analysis does not appear to present facts regarding the values of benefits of designating critical habitat for the silvery minnow. The discussion of recreational fishing benefits does not apply to this section of the Rio Grande.

Service Response: In responding to the questionnaire, the BOR provided estimates of costs identified as resulting from the critical habitat designation, without the amelioration or perceived benefits. As stated previously, we have concluded that no additional restrictions will result from the designation of critical habitat. We also concur that recreational fishing in the mainstem of the Rio Grande within the boundaries of critical habitat is a minimal input to the regional economy. The draft Economic Analysis prepared for our use in determining effects presented some potential benefits to be derived from healthy riverine and riparian systems, but that draft did not quantify the benefits to be derived from designation; nor did it address any mitigative actions that might be employed or implemented to lessen the identified economic impacts.

Issue 21: The minnow has not done well in stretches of the river that have perennial flowing water and has done quite well in some places that are seasonally dry.

Service Response: Although we concur that the distribution of silvery minnow shows low members in areas now receiving flows year round (Cochiti and Albuquerque reaches) and high numbers in stretches of the river subject to low or no flows (Isleta and San Acacia reaches), we disagree with the conclusion that they are doing well in the seasonally dry reaches. The silvery minnows transported from upstream reaches to the Isleta and San Acacia stretches cannot regain the upstream habitat. They are blocked by the diversion dams. Their presence does not necessarily indicate that the species is doing well in the lower portions of the river. Their presence indicates that they are vulnerable to the dewatering of these important habitats.

Issue 22: It is not water depletion that threatens the silvery minnow, but the structural changes that have narrowed and confined the channel.

Service Response: We concur that it is not one action or factor that is solely responsible for the endangerment of the

silvery minnow. The morphology of the channel, the quality of the water in the channel, and the provision of some flows to avoid dewatering are all important and, thus, have been identified as constituent elements of the species' critical habitat.

Issue 23: In order to justify the determination of no difference between critical habitat and listing, the Service should limit the components of critical habitat so that there is no difference between critical habitat and listing.

Service Response: We believe that the primary constituent elements identified for critical habitat—channel morphology, water quality, and water quantity—are the attributes needed in the river for the silvery minnow's survival and recovery. It is these attributes that we evaluate whether conducting section 7 consultation on the species with or without critical habitat.

Issue 24: Critical habitat in the Middle Rio Grande is dependent on restoring the low-velocity flows at locations within some reaches of the Middle Rio Grande. The required habitat for the recovery of the Rio Grande silvery minnow in the Middle Rio Grande does not include the entire 163-mile segment from Cochiti Dam to the headwaters of Elephant Butte Reservoir, nor does it include the entire cross section of the river at the locations designated for critical habitat. Only those reaches below the present, modified, or future diversion structures should be considered in arriving at locations designated for the critical habitat for this species.

Service Response: We concur that not every cross section of the river within the 163 miles of designated critical habitat may provide all constituent elements at any moment in time. However, within this relatively short reach of river, habitat conditions change in response to flows and other factors: sand bars develop, islands shift within the channel; pools are created and then filled in. The interconnectedness of the habitat is also vitally important to its value for the survival and recovery of the species. We believe that a continuum of habitat, rather than disjunct reaches, is the best way to maximize the probability of the species' survival and recovery.

Issue 25: The Service is rushing to designate critical habitat with inadequate information; both Secretary of the Interior Bruce Babbitt and Service Director Jamie Rappaport Clark conceded that the Service has insufficient information to declare critical habitat for the minnow and that additional time is required. Judge Conway granted additional time and may grant even more time if an environmental impact statement is required.

Service Response: The Act requires that, to the extent prudent, critical habitat be designated concurrently with a species' listing. Further, the Act requires that the designation be based on the best available information, even if the information is incomplete. Further, the court ordered us to make a determination concerning the designation of critical habitat within a specific time frame. This final rule, therefore, complies with both the Act and the court order. As we stated earlier, we have determined that an Environmental Impact Statement is not required for this action.

Although there is always additional information we would like to have concerning a species, there has been considerable research done on the Rio Grande silvery minnow and on the hydrology of the Middle Rio Grande. In addition, a recovery plan has been prepared and is currently being reviewed, which compiles and analyzes the existing data for the species. In the preparation of this final rule designating critical habitat for the minnow, we used the best scientific and commercial data available.

Issue 26: If it is the Fish and Wildlife Service's conclusion that there is little or no difference in benefit or effect between the No Action and Preferred Action alternatives, the Service should conclude that the designation of critical habitat for the Rio Grande silvery minnow is not needed at this time.

Service Response: This final rule complies with the Act and the court order that we make a final determination on critical habitat for the Rio Grande silvery minnow. A more complete discussion of the Service's view on this designation is found in *Effect of the Critical Habitat Designation* above.

Issue 27: The statement in the Economic Analysis that ''If the designation will have no impact on the activities of Federal agencies, then it will have no economic impact'' is not true. Although the designation of critical habitat only directly curtails the actions of Federal agencies, it does not follow that no private entities are affected by the Federal agencies' actions or lack thereof.

Service Response: We acknowledge that private entities could be affected if Federal actions are curtailed by the designation of critical habitat. However, the Federal agencies responded that critical habitat would not or would very minimally affect their actions. Thus, we believe that there will be no change from what has occurred in the Federal arena for the past 4 years since the species was listed and critical habitat proposed. Critical habitat, based on the responses received from the Federal agencies, will not ''curtail'' their actions. Critical habitat will have no incremental affect on their actions over and above that resulting from listing of the Rio Grande silvery minnow.

Issue 28: The economic report is not site-specific. An economic model that does not take local land and water use into account does not benefit the Fish and Wildlife Service.

Service Responses: The economic analysis was specific to the Middle Rio Grande Valley and utilized all information provided by the Federal, State, and local, and Native American respondents operating in the valley. Baseline information concerning the regional economy was provided that dealt specifically with the Middle Rio Grande.

Issue 29: Not only is the Fish and Wildlife Service's conclusion that Rio Grande silvery minnow population declines are due to habitat loss questionable, but the assertion that these declines are the result of agricultural dewatering between 1987 and 1992 are also suspect. Salt cedar and municipal and industrial water use could also be causative factors. The natural flow regime referenced in the proposed critical habitat designation has not existed since irrigation began in the basin over 800 years ago. The drying of the river for days, weeks, and months has been in place for at least 100 years.

Service Responses: As indicated in the proposed and final rules to list the Rio Grande silvery minnow, the species is no longer found in 95 percent of its historical range. This range-wide constriction predates the status of the species between 1987 and 1992 in the Middle Rio Grande Valley. We agree that many factors, in addition to diversions for agricultural use, that contribute to the dewatering of the river may be responsible for the imperiled status of the silvery minnow. The intensity of impact of diversions and water management has certainly grown with the ability to control the river. Diversions 800 years ago did not have the capacity to affect the river to the extent that modern management structures can . As management and manipulation of the river have intensified in the past 100 years, not only in the Middle Rio Grande Valley, but throughout the range of the silvery minnow, the species has been lost from 95 percent of its historical range. Moreover, the contraction in the

minnows' range makes it must more vulnerable to adverse conditions locally, where previously it could have recolonized areas temporarily depopulated from areas where conditions were more favorable.

Issue 30: The Fish and Wildlife Service found an economic impact arising from critical habitat for the Mexican spotted owl. For the Rio Grande silvery minnow, it found no effect attributable to critical habitat. On what basis has the Fish and Wildlife Service's interpretation of critical habitat and its associated impacts been modified?

Service Response: There has been no modification, but we must judge the impacts of individual and specific critical designations based upon the case-specific information before us. The impacts can differ between species and habitats, based on the effects of designation on Federal activities. In the case of the Mexican spotted owl, effects were identified. In the case of the Rio Grande silvery minnow, we found no effects from designation. As we have gained more experience with critical habitat, it has become increasingly apparent that its designation has little, if any, influence on the outcome of section 7 consultations. This has been true of consultations involving the silvery minnow that included a conference on proposed critical habitat. We do not anticipate that the outcome of section 7 consultations will be materially changed upon final critical habitat designation.

Issue 31: The draft Environmental Assessment provides no clarification regarding whether or how the Service believes the designation of critical habitat will affect the BOR's operation of the San Juan-China Project and how such an action may impact trust resources, tribally-owned fee lands, or the exercise of tribal rights for the Jicarilla Apache Tribe.

Service Response: We have been working with the BOR to manage flows for the Rio Grande silvery minnow since the species was listed and critical habitat was proposed. Those management scenarios involved consideration of the San Juan-Chama Project. We do not anticipate a change in that process with the final critical habitat designation, nor do we foresee an impact on trust resources, tribally-owned fee lands, or the exercise of tribal, rights for the Jicarilla Apache.

Issue 32: The economic documents do not evaluate the economic impact of the constituent elements or of the various activities that may adversely affect critical habitat: channelization, impoundment, deprivation of substrate source and riparian destruction, and any activity that would significantly alter the water chemistry in the Rio Grande.

Service Response: The economic analysis evaluated the effect critical habitat designation could be expected to have on the activities mentioned in this comment. The analysis of impacts of a particular action on critical habitat under section 7 will take into account the effects of that action on the primary constituent elements. Any consultation on the effects of an action on the species would also consider the effects on habitat attributes identified as the primary constituent elements.

Issue 33: No attempt has been made to establish a relationship between abundance of Rio Grande silvery minnow and flow conditions.

Service Response: It is correct that specific flow amounts needed for numeric population goals have not been identified. However, data are available to describe habitats, including flow conditions where most Rio Grande silvery minnows have been found. Additionally, data are available to show that a spring pulse is necessary for reproduction of the silvery minnow, and flows sufficient to produce low-velocity habitats are required for the young to survive and be recruited into the population. Flows are necessary to provide habitat to allow survival of this year's fish to next year so that they can spawn and thus contribute to the population. Investigations have not yet been conducted to determine the specific volume of a spring pulse to trigger spawning or to determine the amount of water and its rate of flow to ensure the provision of habitats for the survival of the species.

Issue 34: The primary constituent elements of the critical habitat designation create hydrological operating criteria which add an entirely new component of regulation beyond those imposed by the listing of the minnow. In essence, the constituent elements require the entire length of the river designated as critical habitat to be wet from bank to bank at all times. Because of the carriage losses in the system, to attain a constant flow at San Marcial (just above Elephant Butte Reservoir) would require the release of a quantity of water upstream that would virtually destroy, rather than create habitat for the minnow, which tends to like low-flows over sandy river bottoms. The Service should also identify the source of the water to be used for the minnow.

Service Response: The minnow does not need a large quantity of water but it does need some water to survive. We agree that the minnow could be sustained with low flows in the summer and late spring. In the spring and summer, runoff generally triggers spawning. The primary constituent elements we have described are intended to require the provision of these low flows to create habitat throughout the existing range of the species, not to change the hydrography to a raging, high flowing river.

The Service has not stated the exact flow regime needed to sustain the minnow nor has it required a minimum cubic feet per second flow at any point in the river system. There are a multiplicity of variables to be taken into account at any given time on any point in the river and there may be an equal number of ways to solve the problem of ensuring adequate flows. Not only has the Recovery Team (which includes interested parties in addition to scientific experts) been meeting since the species was listed, but a number of different stakeholders continue to explore possible solutions to the problem. Potential solutions include establishing a conservation pool from which to draw in low-water years; conserving water which might then be used to support the minnow and other life in the river; creating and enhancing silvery minnow habitat upstream and increasing populations upstream; purchasing or leasing unused contract water for use in the mainstem; passing downstream during the irrigation season some of the water used to meet Compact deliveries; creating ways to get some flows returned to the mainstem of the river below the San Acacia Dam; and engaging in a full-scale water rights adjudication on the entire Rio Grande. To limit the methods of assuring the survival of the minnow—such as by requiring a stated minimum flow or a source of water—might not only have unintended consequences to the minnow and the ecosystem, but it might also prematurely limit development of other methods or combinations of methods for preventing jeopardy and adverse modification to the minnow and its critical habitat.

Required Determinations

Regulatory Planning and Review. In accordance with Executive Order 12866, this action was submitted for review by the Office of Management and Budget. This final rule identifies the areas being designated as critical habitat for the silvery minnow. The designation will not have an annual economic effect of $100 million. Our summary of the economic impacts of designation is discussed earlier in this final rule. This rule will create inconsistencies with other agencies' actions. This rule will

not materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients. This rule will not raise novel legal or policy issues. Proposed and final rules designating critical habitat for listed species are issued under the authority of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*). Critical habitat regulations are issued under procedural rules contained in 50 CFR part 424.

Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). This rule will not have a significant economic effect on a substantial number of small entities as defined under the Regulatory Flexibility Act. As explained previously in the final rule, the designation will not have economic effects above and beyond the listing of the species. This is because the prohibition against destroying or adversely modifying critical habitat is essentially duplicative of the prohibition against jeopardizing the continued existence of the species, and therefore there are no additional economic effects that are not already incurred by the listing of the species.

Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 804(2)). This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rue does not have an annual effect on the economy of $100 million or more. As explained in this rule, we do not believe that the designation will have economic effects above and beyond the listing of the species. This rule will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions, because the designation will not have economic effects above and beyond the listing of the species. This rule does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. Proposed and final rules designating critical habitat for listed species are issued under the authority of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*). The prohibition against destruction or adverse modification of critical habitat applies only to actions authorized, funded, or carried out by Federal agencies. Competition, employment, investment productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises are not affected by a final rule designating critical habitat for this or any other species.

Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.).* This rule will not significantly affect small governments because this rule will not place additional burdens on small governments beyond any burdens that may have been a result of listing the species as endangered. This rule will not produce a Federal mandate of $100 million or greater in any year, i.e. it is not a significant regulatory action under the Unfunded Mandates Reform Act.

Takings. In accordance with Executive Order 12630, this rule does not have significant takings implications. A takings implication assessment is not required. This final rule will not ''take'' private property and will not alter the value of private property. Critical habitat designation is only applicable to Federal lands, or to private lands if a Federal nexus exists (i.e., if a Federal agency authorizes or funds an action on private land). The regulatory impacts of this rule are small to non-existent and will not result in a taking of private property rights.

Federalism. This final rule will not affect the structure or role of states, and will not have direct, substantial, or significant effects on states as defined in Executive Order 12612. As previously stated, critical habitat is only applicable to Federal lands. Other lands only become subject to the provisions of critical habitat if a Federal nexus exists.

Civil Justice Reform. In accordance with Executive Order 12988, the Office of the Solicitor has determined that the rule does not unduly burden the judicial system and does meet the requirements of sections 3(a) and 3(b)(2) of the Order. The final designation of critical habitat for the Rio Grande silvery minnow has been reviewed extensively. Every effort has been made to ensure that the rule contains no drafting errors, provides clear standards, simplifies procedures, reduces burden, and is clearly written such that litigation risk is minimized.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This rule does not contain any information collection requirements for which Office of Management and Budget approval under the Paperwork Reduction Act is required.

National Environmental Policy Act. It is our position that, outside the Tenth Circuit, environmental analyses as defined by the National Environmental Policy Act of 1969, (NEPA) need not be prepared in connection with listing species under the Endangered Species Act of 1973, as amended. A notice outlining the Service's reasons for this determination was published 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 Rio Grande silvery minnow, the Service, 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), is to undertake a NEPA analysis for critical habitat designations. We have completed that analysis through an Environmental Assessment and Finding of No Significant Impact.

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) and 512 DM2:

We understand that federally-recognized Indian Tribes maintain a Government-to-Government relationship with the United States. The 1997 Secretarial Order on Native Americans and the Act clearly states that Tribal lands should not be designated unless absolutely necessary for the conservation of the species. According to the Secretarial Order, ''Critical habitat shall not be designated in any such areas [an area that may impact Tribal trust resources] unless it is determined essential to conserve a listed species. In designating critical habitat, the Services shall evaluate and document the extent to which the conservation needs of a listed species can be achieved by limiting the designation to other lands.'' The designation of critical habitat for the Rio Grande silvery minnow contains Tribal lands belonging to the pueblos of Cochiti, San Felipe. Santo Domingo, Santa Ana, Sandia, and Isleta.

On October 27, 1994, we held a meeting with the economic analysis contractors and invited Federal agencies, the pueblos of Cochiti, San Felipe, Isleta, Sandia, Santa Ana, and Santo Domingo, and other entities. At the meeting, the Service and our contractors outlined the approach under consideration to define the economic impacts of critical habitat designation and sought input to the process and participation from these entities. On June 22, 1995, a meeting was held solely for Pueblo representatives to discuss the proposed critical habitat and the process to be employed in determining economic effects of the designation with the content identical to that of the earlier meeting. No Pueblo representatives attended. Following the compilation and assessment of

responses to questionnaires, we transmitted the draft analysis to the pueblos on April 26, 1996. Finally, on March 4, 1999, we met with Pueblo officials to discuss the impending designation of critical habitat. Thus, we have sought to consult with tribes on Government to Government basis.

References Cited

A complete list of all references cited herein, as well as others, is available upon request from the New Mexico Ecological Services Field Office (see **ADDRESSES** above).

Author: The primary author of this final rule is Jennifer Fowler-Propst (see **ADDRESSES**).

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and record keeping 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.

§ 17.11 [Amended]

2. Amend section 17.11(h) by revising the entry in the Critical habitat column of the entry for the minnow, Rio Grande silvery, under FISHES, to read ''17.95(e)''.

3. Section 19.95(e) is amended by adding critical habitat of the Rio Grande silvery minnow (*Hybognathus amarus*), in the same alphabetical order as the species occurs in 17.11(h).

§ 17.95 Critical habitat—fish and wildlife.

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(e) * * *

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RIO GRANDE SILVERY MINNOW (*Hybognathus Amarus*).

New Mexico: Socorro, Valencia, Bernalillo, and Sandoval Counties. Rio Grande from the downstream side of State highway 22 bridge crossing of the Rio Grande, immediately downstream of Cochiti Dam, NW¼ sec. 17, T. 16N., R. 15 E. of the New Mexico Meridian, extending downstream approximately 163 mi (260 km) to where the Atchison Topeka and Santa Fee Railroad crosses the river near San Marcial, Lat 33°40′50″, long 106°59′30″, Socorro County.

Primary constituent elements for the Rio Grande silvery minnow include stream morphology that supplies sufficient flowing water to provide food and cover needed to sustain all life stages of the species; water of sufficient quality to prevent water stagnation (elevated temperatures, decreased oxygen, carbon dioxide build-up, etc); and water of sufficient quantity to prevent formation of isolated pools that restrict fish movement, foster increased predation by birds and aquatic predators, and congregate pathogens.

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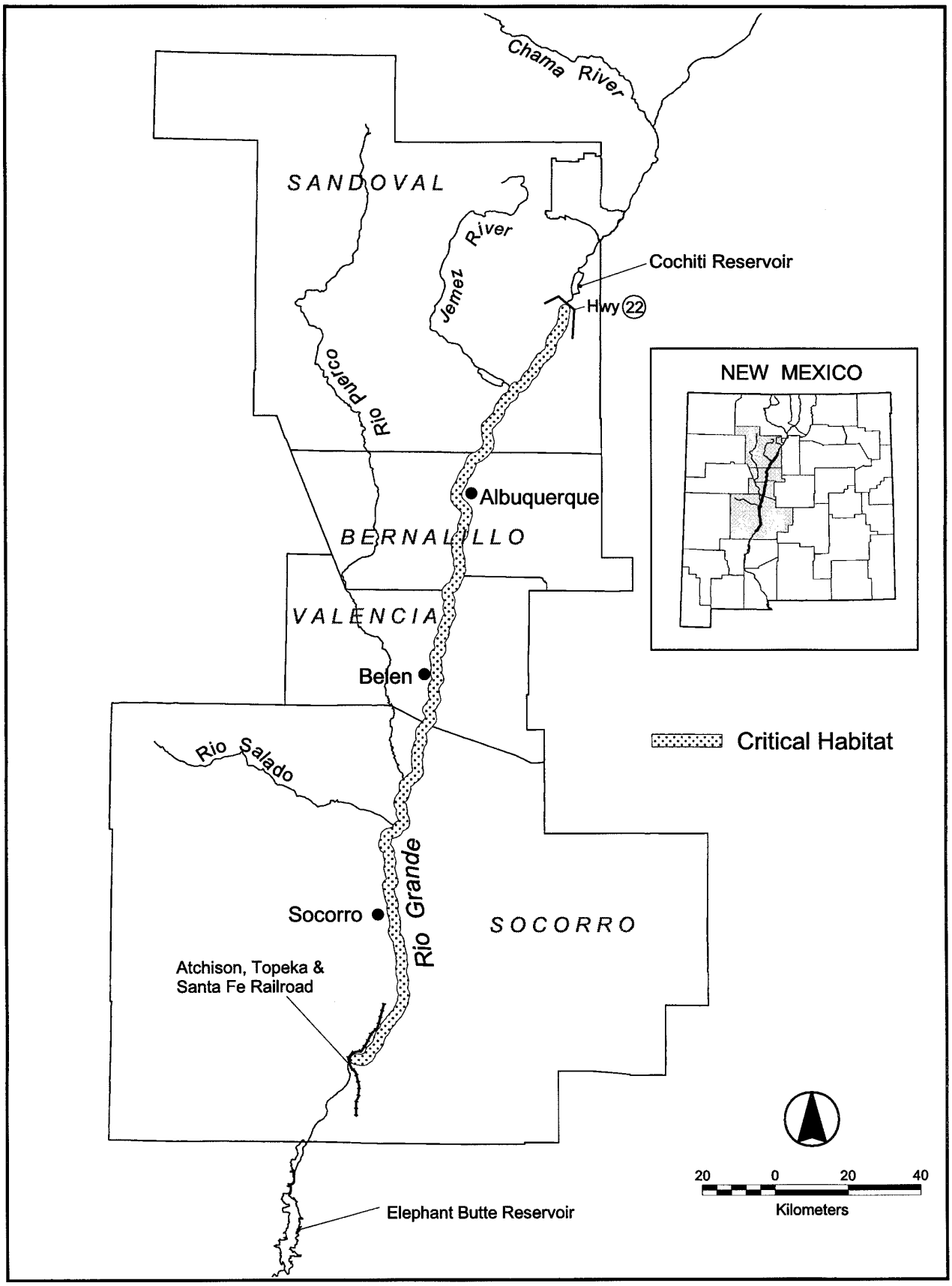
Chama River
SANDOVAL
Jemez River
Cochiti Reservoir
Hwy 22
Rio Puerco
NEW MEXICO
Albuquerque
BERNALILLO
VALENCIA
Belen
Critical Habitat
Rio Salado
Rio Grande
Socorro
SOCORRO
Atchison, Topeka &
Santa Fe Railroad
20 0 20 40
Kilometers
Elephant Butte Reservoir

Dated June 22, 1999.

Stephen C. Saunders,

Acting Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 99–16985 Filed 6–30–99; 10:26 am]

BILLING CODE 4310–55–C