

lands (65 FR 45336). The initial comment period was open until September 19, 2000. During this 60-day comment period, we held 6 public hearings on the proposed rule. On October 20, 2000, we published a notice announcing the reopening of the comment period and the availability of the draft economic analysis and draft environmental assessment on the proposal to designate critical habitat for the owl (65 FR 63047). The final comment period was open until November 20, 2000. On February 1, 2001 (66 FR 8530), we published the final rule designating critical habitat for the owl. The final rule excluded all National Forest Service lands in Arizona and New Mexico and certain tribal lands and designated critical habitat on approximately 1.9 million ha (4.6 million ac). On August 27, 2001, the Center for Biological Diversity filed a complaint challenging our decision to exclude these lands from the final designation of critical habitat for the owl.

On January 13, 2003, the United States District Court for the District of Arizona, (*Center for Biological Diversity v. Norton*, Civ. No. 01-409 TUC DCB), ruled that our final rule designating critical habitat for the owl violated the Act, as well as the Administrative Procedure Act (5 U.S.C. 551 *et seq.*). The Court ordered us to repropose critical habitat within 3 months and finalize within 6 months from the date of the order. The Court also stated that the current critical habitat designation for the owl (*i.e.*, that promulgated by 66 FR 8530 and codified at 50 CFR 17.95) shall remain in effect and be enforced until such time as we publish a new final designation of critical habitat for the owl. In a subsequent order, on February 18, 2003, the original deadlines were extended to allow until October 13, 2003, to repropose critical habitat for the owl and until April 13, 2004, to publish a new final designation of critical habitat.

On August 28, 2003, we filed a motion with the Court seeking a stay from the Court's January 13, 2003, order and an extension of time to complete the redesignation. A supporting declaration explained our budgetary difficulties for work on critical habitat designations in Fiscal Year 2003, and explained how we would completely exhaust our budget for critical habitat designations well before the end of the fiscal year due to other court orders with due dates preceding this one. On October 10, 2003, the Court ruled that it would permit a limited extension and ordered the parties to meet and confer within 15 days of the order to prepare

a reasonable timeline for compliance with the January 13, 2003, order. The Court also indicated that a notice reopening the comment period on the July 2000 proposal is appropriate. On October 30, 2003, the parties submitted a Joint Proposed Timeline and Memorandum of Dispute to the Court. The parties agreed that this notice would solicit comment regarding all of the lands proposed for designation that were not included in the final designation. The parties did not agree to a schedule for completion of the final rule, and a variety of other matters. We anticipate that the Court will resolve these issues shortly.

#### *Designation of Critical Habitat on Tribal Lands*

In accordance with the Secretarial Order 3206, "American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act" (June 5, 1997); the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951); Executive Order 13175; and the relevant provision of the Departmental Manual of the Department of the Interior (512 DM 2), we believe that fish, wildlife, and other natural resources on tribal lands are better managed under tribal authorities, policies, and programs than through Federal regulation wherever possible and practicable. Based on this philosophy, we believe that, in many cases, designation of tribal lands as critical habitat provides very little additional benefit to threatened and endangered species. This is especially true where the habitat is occupied by the species and is therefore already subject to protection under the Act through section 7 consultation requirements. Conversely, such designation is often viewed by tribes as an unwanted intrusion into tribal self-governance, thus compromising the government-to-government relationship essential to achieving our mutual goals of managing for healthy ecosystems upon which the viability of threatened and endangered species populations depend.

At this time, for the general reasons described above and the preliminary 4(b)(2) analysis below, as well as the specific mechanisms in place for each tribe whose lands are at issue, we anticipate that the 4(b)(2) analysis process will lead us to exclude all tribal lands in our final designation for the owl. We emphasize that this is only a tentative conclusion. Any exclusions in the final rule will be the result of a reanalysis, including consideration of

all comments received and the findings of the economic analysis and NEPA assessment.

In making our final decision with regard to tribal lands, we will be considering several factors. At this time, we have received management plans from those tribes whose lands were excluded from the January 2001 final rule based on the definition of critical habitat, and we have been notified by the San Carlos Apache Tribe that their completed management plan is in the process of being submitted to the Tribal Council for approval. We anticipate receiving either a draft or final management plan shortly and will make it available to the public upon receipt. You may request copies of these by contacting the New Mexico Ecological Services Field Office (see **ADDRESSES** section above). As discussed below, we will consider the benefits to the owl from these management plans. Additionally, we and the tribes currently have cooperative working relationships, that have enabled us to implement natural resource programs of mutual interest for the benefit of the owl and other threatened and endangered species. We will take into account the potential adverse impact to these current working relationships from designation of critical habitat on tribal lands.

We provide the following preliminary 4(b)(2) analysis so that we may obtain more meaningful comment on our anticipated exclusion of these tribal lands:

#### (1) Benefits of Inclusion

Few additional benefits would derive from including tribal lands of the San Carlos Apache, Mescalero Apache Tribe, and the Navajo Nation in a critical habitat designation for the owl beyond what will be achieved through the implementation of their management plans. The principal benefit of any designated critical habitat is that activities in and affecting such habitat require consultation under section 7 of the Act. Such consultation would ensure that adequate protection is provided to avoid destruction or adverse modification of critical habitat. If adequate protection can be provided in another manner, the benefits of including any area in critical habitat are minimal. We previously determined that the tribal management plans for the owl conform with the Mexican Spotted Owl Recovery Plan and provide a conservation benefit. Thus, we tentatively conclude that few regulatory benefits to the owl would be gained from a designation of critical habitat on these tribal lands.