

### Previous Federal Action

We proposed to list the 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 to August 25, 1993 (58 FR 19220; April 13, 1993). That extension allowed us to conduct public hearings and to receive additional public comments. Public hearings were held in Albuquerque and Socorro, NM, 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 silvery minnow as endangered on July 20, 1994 (59 FR 36988).

Section 4(a)(3) of the Act requires that the Secretary, to the maximum extent prudent and determinable, designate critical habitat at the time a species is listed as 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 the silvery minnow was listed, we found that critical habitat was not determinable because there was insufficient information to allow us 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, and a draft 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, particularly for the economic analysis. At that time, we notified the public that, because of a moratorium on final listing actions and determinations 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 document for use at the time 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 backlog of 243 proposed species listings. In order to address that workload, we published, on May 16, 1996, our Listing Priority Guidance for the remainder of Fiscal Year 1996 (61 FR 24722). That guidance identified the designation of critical habitat as the lowest priority upon which we could expend limited funding and staff resources. Subsequent revisions of the guidance for Fiscal Years 1997 (December 5, 1996; 61 FR 64475) and for 1998-1999 (May 8, 1998; 63 FR 25502) retained critical habitat as the lowest priority for the listing program within the Service. Thus, no work resumed on the economic analysis.

On February 22, 1999, in *Forest Guardians v. Babbitt*, Civ. No. 97-0453 JC/DIS, the United States District Court for the District of New Mexico ordered us to publish a final determination with regard to critical habitat for the silvery minnow within 30 days. The deadline was subsequently extended by the court to June 23, 1999. On July 6, 1999, we published a final designation of critical habitat for the silvery minnow (64 FR 36274), pursuant to the court order.

On November 21, 2000, the United States District Court for the District of New Mexico, in *Middle Rio Grande Conservancy District v. Babbitt*, 206 F. Supp. 2d 1156 (D.N.M. 2000), set aside the July 6, 1999, critical habitat designation because we had not issued an EIS, hence we were ordered to issue both an EIS pursuant to the National Environmental Policy Act (NEPA) and a new proposed rule designating critical habitat for the silvery minnow. This final rule and the EIS are being issued pursuant to that court order.

On April 5, 2001, we mailed approximately 500 copies of a preproposal notification letter to the 6 middle Rio Grande Indian Pueblos (Cochiti, Santo Domingo, San Felipe, Santa Ana, Sandia, and Isleta), various governmental agencies, interested individuals, and the New Mexico Congressional delegation. The letter informed them of our intent to prepare an EIS for the proposed designation of critical habitat for the silvery minnow and announced public scoping meetings pursuant to NEPA. On April 17, 23, 24, and 27, 2001, we held public scoping meetings in Albuquerque, NM; Carlsbad, NM; Fort Stockton, TX; and Socorro, NM, respectively. We solicited oral and written comments and input. We were particularly interested in obtaining additional information on the status of the species or information concerning threats to the species. The comment period closed June 5, 2001.

We received approximately 40 comments during the EIS scoping process. During April 2001, we contracted with Industrial Economics Incorporated for an economic analysis and the Institute of Public Law at the University of New Mexico School of Law for an EIS on the proposed critical habitat designation.

Following the closing of the scoping comment period, we outlined possible alternatives for the EIS. We held a meeting on September 12, 2001, to solicit input on the possible alternatives from the Rio Grande Silvery Minnow Recovery Team (Recovery Team) and other invited participants including individuals from the Carlsbad Irrigation District, Fort Sumner Irrigation District, the States of New Mexico and Texas, and potentially affected Pueblos and Tribes. Following this meeting, we sent letters to the Recovery Team and other invited participants, including Tribal entities and resource agencies in NM and TX, to solicit any additional information (particularly biological, cultural, social, or economic data) that may be pertinent to the economic analysis or EIS. We received 10 comments in response to our requests for additional information. We fully considered the information provided in the comment letters as we developed the alternatives analyzed in the draft EIS, which included the proposed rule as our preferred alternative.

On June 6, 2002, we proposed that 212 mi (339 km) be designated as critical habitat for the silvery minnow (67 FR 39206). The comment period for the proposed rule, draft EIS, and draft Economic Analysis was originally scheduled to close on September 4, 2002, but was extended until October 2, 2002 (67 FR 57783).

In this final rule, we determine that a river reach in the lower Rio Grande in Big Bend National Park downstream of the park boundary to the Terrell/Val Verde County line, TX (lower Rio Grande), and a river reach in the middle Pecos River, from Sumner Dam to Brantley Dam in De Baca, Chaves, and Eddy Counties, NM (middle Pecos River), are essential to the conservation of the silvery minnow. However, these areas are not designated as critical habitat because of our analysis under section 4(b)(2) (see "Exclusions Under Section 4(b)(2) of the Act" section of this rule). This critical habitat designation includes the middle Rio Grande from Cochiti Dam to the utility line crossing the Rio Grande just east of the Bosque Well as demarcated on USGS Paraje Well 7.5 minute quadrangle (1980), Socorro County, NM, with the Universal Transverse Mercator