

and wildlife agencies, local government entities, affected Federal agencies, and affected private landowners in developing and implementing experimental population rules (50 CFR 17.81(d)). As noted above, any future recovery efforts, including reintroduction of the species to areas of its historic range, will be conducted in accordance with NEPA and the Act.

(16) *Comment:* Executive Orders 12866 and 12988 appear to apply to the proposed designation of critical habitat.

*Our Response:* We again read through the comments and information provided concerning Executive Orders 12866 ("Regulatory Planning and Review") and 12988 ("Civil Justice Reform"). While the commenter did not adequately explain the rationale for why they believe our initial determinations in the proposed critical habitat designation were inadequate, we found nothing to warrant changing our original determinations about the applicability of these Executive Orders.

(17) *Comment:* How can critical habitat include the Isleta reach that the District Court for the District of New Mexico has determined could be dry? The District Court order provides for the potential draining of Heron Reservoir. If the current drought continues through 2003, potentially 75 percent of critical habitat could be dry. The court order from the District Court changes all of the previous analyses and conclusions concerning critical habitat designation. The Service has not considered Judge Parker's recent court order to provide water for the silvery minnow. The Service must consider and analyze all sources of storage water that will now be used for the silvery minnow.

*Our Response:* On September 23, 2002, the District Court for the District of New Mexico ordered the following: (1) The BOR must provide sufficient flows of water for the remainder of 2002 to maintain a flow of 50 cfs at San Acacia Diversion Dam, and to maintain a flow in the Albuquerque Reach from Angostura Diversion Dam to Isleta Diversion Dam; (2) if necessary to meet these flow requirements for the remainder of 2002, the BOR must release water from Heron Reservoir in 2002; and (3) the Federal Government must compensate those, if any, whose contractual rights to water are reduced in order to meet the flow requirements (*Rio Grande Silvery Minnow v. Keys*, Civ. No. 99-1320 JP/RLP-ACE).

In a court order issued October 16, 2002, the Tenth Circuit Court of Appeals stayed the District Court's order (*Rio Grande Silvery Minnow v. Keys*, Civ. No. 02-2254, 02-2255, 02-2267). The court order from the District Court

for the District of New Mexico is currently under appeal in the Tenth Circuit Court of Appeals and a written decision has not been issued. On the basis of the consultation history of the silvery minnow, we do not anticipate that the voluntary supplemental water program discussed in responses to comments 56 and 57 will change. Because we anticipate that supplemental flows to avoid destruction or adverse modification of critical habitat will be similar, if not identical, to what is currently required to avoid jeopardizing the species, we do not believe that critical habitat will result in additional flow requirements during consultation. Nevertheless, future section 7 consultations will evaluate whether proposed actions jeopardize the continued existence of the silvery minnow or adversely modify or destroy critical habitat. Each consultation will be evaluated on a case-by-case basis following our regulations (50 CFR part 402).

(18) *Comment:* The Service should consider water table augmentation to satisfy the primary constituent elements rather than flow augmentation. Habitat restoration activities need to move forward quickly because the supplemental water program cannot continue at the current level.

*Our Response:* We appreciate these and other numerous suggestions we received regarding special management considerations. Water table augmentation and habitat restoration activities may provide for the maintenance and improvement of one or more of the primary constituent elements important for the species' long-term conservation. These types of special management activities, as well as other measures to avoid or minimize incidental take, will be reviewed during consultations with Federal agencies. (Refer to our response to comment 3 above for information on the collaborative working group.)

(19) *Comment:* The Service should consider the affidavits that were filed in September 2002, in response to the court case (*Rio Grande Silvery Minnow v. Keys*, Civ. No. 99-1320 JP/RLP-ACE). These include: Dr. Thomas Wesche, Subhas K. Shah, Sterling Grogan, Dr. Richard Valdez, Christopher S. Altenbach, John Whipple, John M. Stomp III, Rolf-Schmidt-Peterson, F. Lee Brown, and Walter G. Hines.

*Our Response:* We have considered the affidavits and found that none of the information appears to contradict the relevant conclusions for this final designation of critical habitat.

(20) *Comment:* The Service needs to consult with the State Department and

Mexico as directed by Executive Order 12114 because the designation of critical habitat in the lower Rio Grande may have international implications.

*Our Response:* We are not designating critical habitat along the international border in the lower Rio Grande. We did not consult with the State Department and Mexico because we believe that the action of designating critical habitat within the middle Rio Grande will not have significant effects on the environment outside the geographical borders of the United States and its territories.

(21) *Comments:* The economic analysis and proposed critical habitat demonstrate a complete disregard for the unique culture and historic heritage associated with agriculture within the middle Rio Grande.

*Our Response:* As described in the final EIS, we are aware of the unique heritage associated with agriculture within the middle Rio Grande. Still, the regulatory requirements associated with critical habitat do not apply to any agricultural activities, including farming or livestock grazing, or any other activity carried out on private land that does not require and/or involve a Federal permit, authorization, or funding. Because the silvery minnow is listed as endangered, Federal agencies already are required to consult with us on any of their actions that are likely to adversely affect the species and to ensure that their actions do not jeopardize the species' continued existence, regardless of whether critical habitat has been designated. Therefore, we do not believe the designation of critical habitat for the silvery minnow will result in any significant additional regulatory burden on landowners or affect the use of their private property.

(22) *Comment:* No one was aware that the silvery minnow was going to be listed in 1994. Once a species is listed, critical habitat appears to be an unavoidable consequence.

*Our Response:* On February 19, 1991, about 80 prelisting proposal letters of inquiry were mailed to various governmental agencies, knowledgeable individuals, and the New Mexico Congressional delegation. On March 20, 1992, we held a meeting in Albuquerque, NM, with various interested governmental and private entities to explore existing or potential flexibility in water delivery schedules that might avoid dewatering of the Rio Grande within the range of the silvery minnow. In the March 1, 1993, proposed rule and associated notifications, all interested parties were requested to submit factual reports or information that might contribute to the