

proposed and final rules with appropriate resource agencies in NM and TX (e.g., during the EIS scoping and proposed rule public comment period). During the open comment period for the proposed rule, we met on several occasions with the New Mexico Interstate Stream Commission (NMISC) to further coordinate and address issues concerning the designation of critical habitat for the silvery minnow.

We do not anticipate that this regulation will intrude on State policy or administration, change the role of the Federal or State government, or affect fiscal capacity. For example, we have conducted two formal consultations, one of which included a formal conference, with the Corps and BOR, and non-Federal entities over actions related to water operations on the middle Rio Grande (Service 2001b, 2002a). In our experience, the vast majority of such projects can be successfully implemented with, at most, minor changes that avoid significant economic impacts to project proponents.

(29) *Comment:* Other than the initial scoping letter, the City of Socorro or Bernalillo County was not contacted for either development of the EIS or economic analysis. Several other commenters voiced concern that they were not directly contacted for their opinions on the economic impacts of critical habitat designation.

*Our Response:* On April 5, 2001, the **Federal Register** notice announcing public scoping meetings and development of a draft EIS was mailed to the Mayor of Socorro and the Socorro County Board of Commissioners and to Bernalillo County Commissioners. Moreover, on October 4, 2001, our EIS contractor mailed letters to the Chairman of Socorro County Board of Commissioners and the Bernalillo County Manager, and on August 22, 2001, a letter was mailed to the Mayor of the City of Socorro requesting specific information for the development EIS. We did not receive any response to these letters. Economic Analysis contractors utilized databases with information provided by the County of Socorro.

It was not feasible to contact every potential stakeholder in order for us to develop a draft economic analysis. We believe we were able to understand the issues of concern to the local communities on the basis of our review of public comments submitted on the proposed rule and draft economic analysis, transcripts from public hearings, and detailed discussions with 65 local governments. To clarify issues, we solicited information and comments

from representatives of Federal, State, Tribal, and local government agencies, as well as some landowners.

(30) *Comment:* The amount of time and information available were insufficient for more detailed responses.

*Our Response:* On June 6, 2002, we published the proposed critical habitat determination in the **Federal Register** (67 FR 39205), announced public hearings, and invited public comment for 90 days. The public hearings were held on June 25 and 26. These public hearings were also announced in several newspapers (described above under the introduction of the "Summary of Comments and Recommendations" section). On June 6, we mailed the proposed rule and information on how to obtain the draft economic analysis and draft EIS to over 600 different interested parties. All of the documents were also available at the hearings, from us by request, or by download from our Web site. On August 28, we mailed a prepublication notice of the comment period extension. The comment period was subsequently extended and closed on October 2, 2002.

(31) *Comment:* The Service held public hearings only to fulfill a legal obligation and will not pay attention to any public comment.

*Our Response:* All comments received, including oral comments provided at the public hearing, were carefully evaluated before we made a final determination. In fact, we used special management plans received during the public comment period and other relevant issues to determine specific areas to not include for the final critical habitat designation.

(32) *Comment:* Some commenters asked whether critical habitat designation would affect the building or maintenance of flood control systems (e.g., levee) to protect the town of Socorro and other areas within the designation.

*Our Response:* Levees are specifically excluded from the designation (see "Regulation Promulgation" section below). Since 1995, the Corps has entered into section 7 consultation with us regarding its water operations, flood control and levee maintenance, bridge construction, section 404 permitting under the Clean Water Act, and other activities. Through this process, we have reviewed various Corps projects to ensure that the continued existence of the silvery minnow is not jeopardized and that previously designated critical habitat was not adversely modified or destroyed. Since the silvery minnow was federally listed, no Corps projects have been stopped, delayed, or altered in a significant way resulting from

section 7 consultation. The draft EIS noted that the Corps will likely propose a design and develop a plan for construction that would permit levees to be rehabilitated without adversely modifying critical habitat.

It is also important to note that we have a special category of section 7 consultation, and corresponding regulations (50 CFR 402.05) called "Emergency Consultations." The consultation process does not affect the ability of an agency to respond to emergency events such as levee failure or fire. During emergency events, our primary objective is to provide recommendations for minimizing adverse effects to listed species without impeding response efforts. During emergency events, protecting human life and property comes first every time. Consequently, no constraints for protection of listed species or their critical habitat are ever recommended if they place human lives or structures (e.g., houses) in danger. We are currently working with many of our Federal partners to provide technical assistance, coordination, and, in some instances, section 7 consultation for proactive projects to reduce the potential for emergency events (e.g., wildland urban interface fuels management).

(33) *Comment:* The designation of critical habitat will impose section 9 restrictions against taking of silvery minnow in areas that do not currently have those restrictions (e.g., within the headwaters of Elephant Butte Reservoir).

*Our Response:* Section 9 of the Act prohibits the harm or harassment of individuals of listed species. There are no section 9 take prohibitions for critical habitat. Within the middle Rio Grande, prohibitions against take are in effect regardless of whether or not critical habitat has been designated because we consider this area occupied by the silvery minnow. Whether or not a species has designated critical habitat, it is protected from any actions resulting in an unlawful take under section 9 of the Act.

(34) *Comment:* The Service needs to provide specific analyses on whether each reach contains or is void of primary constituent elements. The constituent elements described are vague and violate 50 CFR 424.12(c), lack sufficient detail and justification, and should include a more specific description that defines what constitutes critical habitat. Several commenters were concerned that the mapping lacked precision for use by the public and the critical habitat boundaries are ambiguous and difficult