

be either positive (benefits) or negative (costs).

In *New Mexico Cattle Growers Ass'n v. U.S. Fish and Wildlife Service*, 248 F.3d 1277, however, the Tenth Circuit recently held that the baseline approach to economic analysis of critical habitat designations used by us for the southwestern willow flycatcher designation was "not in accord with the language or intent of the ESA." In particular, the court was concerned that we had failed to analyze any economic impact that would result from the designation, because it took the position in the economic analysis that there was no economic impact from critical habitat that was incremental to, rather than merely co-extensive with, the economic impact of listing the species. We had therefore assigned all of the possible impacts of critical habitat designation to the listing of the species, without acknowledging any uncertainty in this conclusion or considering such potential impacts as transaction costs, reinitiations, or indirect costs. The court rejected the baseline approach incorporated in that designation.

In our analysis, we addressed the Tenth Circuit's concern that we give meaning to the Act's requirement of considering the economic impacts of critical habitat designation by acknowledging the uncertainty of assigning certain post-designation economic impacts (particularly section 7 consultations) as having resulted from either the listing or the designation. We believe that for many species the designation of critical habitat has a relatively small economic impact, particularly in areas where consultations have been ongoing with respect to the species. This is because the majority of the consultations and associated project modifications, if any, already consider habitat impacts and, as a result, the process is not likely to change significantly as a result of the designation of critical habitat. Nevertheless, we recognize that the nationwide history of consultations on critical habitat is not broad, and, in any particular case, there may be considerable uncertainty whether an impact results from the critical habitat designation or the listing alone. We also understand that the public wants to know more about the kinds of costs section 7 consultations impose and frequently believes that critical habitat designation could require additional project modifications. Therefore, the final economic analysis incorporates two baselines. One addresses the impacts of critical habitat designation that may be "attributable co-extensively" to the listing of the species.

Because of the potential uncertainty about the benefits and economic costs resulting from critical habitat designations, we believe it is reasonable to estimate the upper bounds of the cost of project modifications on the basis of the benefits and economic costs of project modifications that would be required by consultation under the jeopardy standard. It is important to note that the inclusion of impacts attributable co-extensively to the listing does not convert the economic analysis into a tool to be considered in the context of a listing decision. As the court reaffirmed in the southwestern willow flycatcher decision, "the ESA clearly bars economic considerations from having a seat at the table when the listing determination is being made." The other baseline, the lower boundary baseline, will be a more traditional rulemaking baseline. The economic analysis attempts to provide our best analysis of which of the effects of future section 7 consultations actually result from the regulatory action under review (*i.e.*, the critical habitat designation). These costs will in most cases be the costs of additional consultations, reinitiated consultations, and additional project modifications that would not have been required under the jeopardy standard alone, as well as costs resulting from uncertainty and perceptual impacts on markets. The final economic analysis provides a detailed study concerning the baseline and potential incremental effects of the designation of critical habitat for the silvery minnow, and we believe it is in compliance with the Tenth Circuit's decision in *New Mexico Cattle Growers Ass'n v. U.S. Fish and Wildlife Service*, 248 F.3d 1277.

### Issue 3: Tribal and Pueblo Concerns

(47) *Comment*: The Service is legally mandated to have Government-to-Government consultations with affected Tribes and Pueblos. The designation will affect the trust assets of Tribes and Pueblos. Will the designation of critical habitat affect the Pueblos of Taos, San Juan, or the Jicarilla Apache Nation?

*Our Response*: In accordance with 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" (May 4, 1994; 59 FR 22951); Executive Order 13175; and the Department of the Interior's requirement at 512 DM 2, we recognize the need to consult with Federally recognized Indian Pueblos and Tribes on a

Government-to-Government basis. Section 4(b)(2) of the Act requires us to gather information regarding the designation of critical habitat and the effects thereof from all relevant sources, including Indian Pueblos and Tribes.

We were available to confer with the affected Indian Pueblos and Tribes during the comment period for this proposed rule. Recognizing our Federal trust responsibility, we met with the following Pueblos and Tribes (some meetings were to provide technical assistance and are not considered Government-to-Government consultations): Jicarilla Apache Nation (October 22, 2001; January 9 and 25, 2002; March 7, 2002), San Juan (December 11, 2001; February 25, 2002; September 6, 2002), Isleta (July 25, 2002; August 8 20, 2002), Sandia (October 22, 2001; February 12, 2002; September 25, 2002), Santa Ana (December 11, 2001; July 9 and 10, 2002; August 2 and 6, 2002; September 13, 2002), Santo Domingo (August 8, 2002), and Taos Pueblos (April 2, 2002; September 11, 2002; October 23, 2002) to discuss how they might be affected by the designation of critical habitat or other issues related to the Act. We provided technical assistance to Santo Domingo, Santa Ana, Sandia, and Isleta Pueblos in the development of their management plans (*see* "Relationship of Critical Habitat to Pueblo Lands under Section 3(5)(A) and Exclusions Under Section 4(b)(2)" section of this rule below).

The designation of critical habitat is not anticipated to impact Indian Trust Assets, which are legal interests in assets held in trust by the United States Government for Tribes and Pueblos. Water rights are considered an Indian Trust Asset. For an impact to occur, the designation of critical habitat would need to diminish the Tribe's access to or the value of any Indian Trust Asset. For example, the BOR recently indicated that the six middle Rio Grande Pueblos would receive prior and paramount water deliveries through November 15, 2002, and that future deliveries of prior and paramount water for the six middle Rio Grande Pueblos will also be ensured. Prior and paramount water deliveries are not dependent on, and are not expected to affect, supplemental water deliveries for the silvery minnow (BOR 2002). We also do not believe that other Tribes or Pueblos (*e.g.*, Taos and San Juan Pueblos, Jicarilla Apache Nation) outside of the critical habitat designation will be affected. We believe that the consultation history of the silvery minnow demonstrates that previous section 7 consultations have not affected or impaired Indian Pueblo