

for this area include: National Park management activities (e.g., pesticide application and fishing regulations), U.S. International Boundary and Water Commission channel maintenance activities, certain Service activities (e.g., fire management plans, fish stocking), and the U.S. Environmental Agency (EPA) NPDES permitting for the Presidio or Lajitas wastewater treatment facility. We find sufficient regulatory and protective conservation measures in place from the consultations regarding the activities described above. We believe there would be little benefit to a designation in this reach because this area is protected and managed by the National Park Service and the number of consultations expected to occur in this area is relatively low.

As above, we believe that heightened public awareness of a listed species and its habitat may facilitate conservation efforts. Nevertheless, we believe that there would be little additional informational benefit gained from including the lower Rio Grande within designated critical habitat for the silvery minnow because we have identified in this final designation those areas that we believe are essential to the conservation of the species. For these reasons, we determine that any additional benefit of designation of critical habitat in this river reach does not outweigh the benefit of excluding this area, as discussed below.

(2) *Benefits of Exclusion*

As discussed in the "Recovery Plan" section of this rule, the primary goals of the silvery minnow Recovery Plan are to: (1) Stabilize and enhance populations of the silvery minnow and its habitat in the middle Rio Grande valley; and (2) reestablish the silvery minnow in at least three other areas of its historic range (Service 1999). We believe that the best way to achieve the second recovery goal will be to use the authorities under section 10(j) of the Act. Consequently, this final rule outlines our conservation strategy that we believe is consistent with the species' Recovery Plan. The conservation strategy is to reestablish the silvery minnow, under section 10(j) of the Act, within areas of its historic range, possibly including the river reach in the middle Pecos River and the river reach in the lower Rio Grande. Since the silvery minnow is extirpated from these areas and natural repopulation is not possible without human assistance, we believe a 10(j) rule is the appropriate tool to achieve this recovery objective. Nevertheless, any future recovery efforts, including reintroduction of the species to areas of its historic range,

must be conducted in accordance with NEPA and the Act. An overview of the process to establish an experimental population under section 10(j) of the Act is described below.

Section 10(j) of the Act enables us to designate certain populations of federally listed species that are released into the wild as "experimental." The circumstances under which this designation can be applied are the following: (1) The population is geographically separate from non-experimental populations of the same species (e.g., the population is reintroduced outside the species' current range but within its probable historic range); and (2) we determine that the release will further the conservation of the species. Section 10(j) is designed to increase our flexibility in managing an experimental population by allowing us to treat the population as threatened, regardless of the species' status elsewhere in its range. Threatened status gives us more discretion in developing and implementing management programs and special regulations for a population and allows us to develop any regulations we consider necessary to provide for the conservation of a threatened species. In situations where we have experimental populations, certain section 9 prohibitions (e.g., harm, harass, capture) that apply to endangered and threatened species may no longer apply, and a special rule can be developed that contains the prohibitions and exceptions necessary and appropriate to conserve that species. This flexibility allows us to manage the experimental population in a manner that will ensure that current and future land, water, or air uses and activities will not be unnecessarily restricted and the population can be managed for recovery purposes.

When we designate a population as experimental, section 10(j) of the Act requires that we determine whether that population is either essential or nonessential to the continued existence of the species, on the basis of the best available information. Nonessential experimental populations located outside National Wildlife Refuge System or National Park System lands are treated, for the purposes of section 7 of the Act, as if they are proposed for listing. Thus, for nonessential experimental populations, only two provisions of section 7 would apply outside National Wildlife Refuge System and National Park System lands: Section 7(a)(1), which requires all Federal agencies to use their authorities to conserve listed species, and section 7(a)(4), which requires Federal agencies

to informally confer with us on actions that are likely to jeopardize the continued existence of a proposed species. Section 7(a)(2) of the Act, which requires Federal agencies to ensure that their activities are not likely to jeopardize the continued existence of a listed species, would not apply except on National Wildlife Refuge System and National Park System lands. Experimental populations determined to be "essential" to the survival of the species would remain subject to the consultation provisions of section 7(a)(2) of the Act.

In order to establish an experimental population, we must issue a proposed regulation and consider public comments on the proposed rule prior to publishing a final regulation. In addition, we must comply with NEPA. Also, our regulations require that, to the extent practicable, a regulation issued under section 10(j) of the Act represent an agreement between us, the affected State and Federal agencies, and persons holding any interest in land that may be affected by the establishment of the experimental population (see 50 CFR 17.81(d)).

The flexibility gained by establishment of an experimental population through section 10(j) would be of little value if a designation of critical habitat overlaps it. This is because Federal agencies would still be required to consult with us on any actions that may adversely modify critical habitat. In effect, the flexibility gained from section 10(j) would be rendered useless by the designation of critical habitat. In fact, section 10(j)(2)(C)(ii) of the Act states that critical habitat shall not be designated under the Act for any experimental population determined to be not essential to the continued existence of a species.

The second goal of the Recovery Plan is to reestablish the silvery minnow in areas of its historic range. We strongly believe that, in order to achieve recovery for the silvery minnow, we would need the flexibility provided for in section 10(j) of the Act to help ensure the success of reestablishing the minnow in the middle Pecos River and lower Rio Grande areas. Use of section 10(j) is meant to encourage local cooperation through management flexibility. Critical habitat is often viewed negatively by the public since it is not well understood and there are many misconceptions about how it affects private landowners (Patlis 2001). We believe it is important for recovery of this species that we have the support of the public when we move toward meeting the second recovery goal. It is