

consider whether such plans provide adequate special management or protection for the species. We also indicated that we would use this information in determining which, if any, river reaches or portions of river reaches within the middle Rio Grande should not be included in the final designation of critical habitat for the silvery minnow. We based this discussion on section 3(5) of the Act, which defines critical habitat, in part, as areas within the geographical area occupied by the species “on which are found those physical and biological features (I) essential to the conservation of the species and (II) which may require special management considerations and protection.” We noted that “special management considerations or protection” is a term that originates in the definition of critical habitat and that adequate special management consideration or protection can be provided by a legally operative plan or agreement that addresses the maintenance and improvement of the primary constituent elements important to the species and manages for the long-term conservation of the species. The three criteria identified in the proposed rule for determining if a plan provides adequate special management or protection are as follows: (1) A current plan or agreement must be complete and provide sufficient conservation benefit to the species; (2) the plan or agreement must provide assurances that the conservation management strategies will be implemented; and (3) the plan or agreement must provide assurances that the conservation management strategies will be effective (*i.e.*, provide for periodic monitoring and revisions as necessary).

In a recent opinion (*Center for Biological Diversity v. Norton*, Civ. No. 01–409 TUC DCB D. Ariz. Jan. 13, 2003), a federal district court determined that our definition of critical habitat, as it applies to special management, is not correct. The court stated that “whether habitat does or does not require special management is not determinative on whether the habitat is “critical” to a threatened or endangered species.” Although we do not necessarily agree with the court’s analysis, we nevertheless do not intend to delete areas from this final designation because additional special management is not required. We do however, as explained below, believe that the management plans submitted by the Pueblos of Santo Domingo, Santa Ana, Sandia, and Isleta during the comment period provide for special management of the silvery minnow on their lands and we have, as

explained below, excluded their lands under section 4(b)(2) of the Act.

During the open comment period, we worked with the Pueblos of Santo Domingo, Santa Ana, Sandia, and Isleta to develop voluntary measures to conserve the silvery minnow on their lands. These Pueblos each completed special management plans for the silvery minnow and submitted them to us during the open comment period. Excluding the Tribal lands in this designation of critical habitat for the silvery minnow will not adversely affect the conservation and future delisting of the species. Whether or not a species has designated critical habitat, that species is protected from any actions resulting in an unlawful take, under section 9 of the Act, and from Federal actions that could jeopardize the species’ continued existence. The four Pueblo plans are summarized below:

(1) Santo Domingo Tribe Rio Grande Silvery Minnow Management Plan (Santo Domingo management plan): A resolution was passed by the Santo Domingo Tribal Council for the Santo Domingo management plan to exercise the Tribe’s sovereign status and provide for special management protections and conservation of the silvery minnow. The Santo Domingo management plan sets the goal of gathering and analyzing data to formulate and prioritize actions to improve the status of these lands. Additionally, the Santo Domingo Tribe will attempt to secure funding to: (1) Determine and quantify the extent of the silvery minnow population and habitat found on Santo Domingo lands; (2) develop management actions and strategies to address the threats to the species and provide protection of silvery minnow populations and habitat; (3) develop methods and protocols for gathering, storing, and monitoring data for the Rio Grande watershed; and (4) analyze, revise, and strengthen the Santo Domingo management plan to promote long-term improvement of the watershed and protect the silvery minnow and other species.

The Santo Domingo Tribe intends to coordinate with us to follow methods and protocols that were provided to the Tribe in 2001 to survey for silvery minnows or habitat, to conduct water quality sampling, to develop water quality standards, and to devise relocation or augmentation protocols (Santo Domingo 2002; Service 2001e). The Santo Domingo management plan organizes these activities into silvery minnow population and habitat monitoring, silvery minnow research, bosque (the riparian areas adjacent to the Rio Grande) restoration, and data

sharing. Because Santo Domingo commits to implementing these activities, we find that the Santo Domingo management plan provides significant conservation benefit to the silvery minnow. We believe that the resolution passed by the Santo Domingo Tribal Council and the development of the Santo Domingo management plan demonstrate that the management plan will be implemented. The Santo Domingo management plan specifically provides periodic updates as appropriate, including updates based upon silvery minnow population and habitat monitoring and research.

(2) Santa Ana Management Plan: During the open comment period, the Pueblo of Santa Ana submitted comments and a draft safe harbor agreement to us. The comments and draft safe harbor agreement indicate that the Pueblo is currently enhancing, restoring, and maintaining habitat for the silvery minnow and other species. The Pueblo’s current natural resource programs—along with the draft safe harbor agreement—will, along with providing other conservation benefits, serve as the foundation for managing the silvery minnow and other species within the Pueblo’s lands. The Pueblo has actively coordinated with us to implement these voluntary conservation programs to augment the silvery minnow population within its lands and intends to continue its existing natural resource management programs that currently provide special management considerations or protections for the silvery minnow. These programs include ecosystem restoration, range and wildlife, water resources, GIS, and environmental education. The ecosystem restoration program concentrates on the restoration of riparian, wetland, and riverine systems by eradicating non-native plant species and restoring native wildlife habitat, including habitat for the silvery minnow. Its current scope includes developing methods and implementing bosque, wetland, and channel restoration along the Rio Grande within the boundaries of the Pueblo and in the Rio Jemez watershed. The range and wildlife program concentrates on improving the health of the Pueblo’s rangeland. The water resources program is responsible for surface water and groundwater projects and programs ongoing and in development at the Pueblo. Activities currently being implemented and anticipated to continue focus on water quality standards development, technical support for water rights establishment, conserving riparian areas, improving