questions about specific DTV assignments to supplement their petitions in these respects in light of OET Bulletin No. 69. They also state that, just as significantly, we did not extend the current deadline for filing oppositions and replies with regard to petitions for reconsideration. They agree that these deadlines should not be extended, noting that OET Bulletin No. 69, because of the narrowness of its scope, does not bear materially on general policy issues.

4. While recognize the arguments that Hogan and Hartson raise with regard to the desirability of avoiding multiple filings relating to the petitions for reconsideration and any supplemental information that may be filed, we are concerned that extending the time allowed for responding to the petitions would serve to delay the final resolution of issues relating to the allotment of DTV channels. We are particularly concerned that providing an extended period of time for filing oppositions to the petitions for reconsideration could increase uncertainty for broadcasters with regard to our DTV allotment policies and the availability of channels and thereby hinder their ability to proceed with the rapid introduction of DTV service. We believe that it is important that these issues be concluded as expeditiously as possible and therefore will proceed in accordance with the schedule and procedures for filing oppositions that is currently in place.

5. Accordingly, it is ordered that, pursuant to §§ 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i) and 303(r), and §§ 0.31, 0.241, 1.3, and 1.429 of the Commission's rules, 47 CFR 0.31, 0.241, 1.3, 1.429, Hogan and Hartson's request for consolidation of opposition deadlines is denied.

Federal Communications Commission.

William F. Caton,

Acting Secretary.

[FR Doc. 97–19235 Filed 7–21–97; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018–AB97

Endangered and Threatened Wildlife and Plants; Final Determination of Critical Habitat for the Southwestern Willow Flycatcher

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: The U.S. Fish and Wildlife Service (Service) designates critical habitat for the southwestern willow flycatcher (*Empidonax traillii extimus*), a species federally listed as endangered under the authority of the Endangered Species Act of 1973, as amended (Act). The Fish and Wildlife Service has identified 18 critical habitat units totaling 964 river kilometers (km) (599 river miles) in Arizona, California, and New Mexico. As required by section 4 of the Act, the Service considered economic and other relevant impacts prior to making a final decision on the size and configuration of critical habitat.

EFFECTIVE DATE: August 21, 1997.

ADDRESSES: The complete administrative record for this rule is on file at the U.S. Fish and Wildlife Service, Arizona Ecological Services Office, 2321 W. Royal Palm Road, Suite 103, Phoenix, Arizona 85021. The complete file for this rule will be available for public inspection, by appointment, during normal business hours at the above address.

FOR FURTHER INFORMATION CONTACT: Mr. Sam F. Spiller, Field Supervisor, Arizona Ecological Services Office, U.S. Fish and Wildlife Service, at the above address (Telephone 602/640–2720).

SUPPLEMENTARY INFORMATION:

Background

Ecological Considerations

The southwestern willow flycatcher (*Empidonax traillii extimus*) is a small passerine bird, approximately 15 centimeters (cm) (5.75 inches) in length. It is one of four subspecies of the willow flycatcher recognized in North America (Hubbard 1987, Unitt 1987, Browning 1993). The southwestern willow flycatcher's breeding range includes southern California, Arizona, New Mexico, western Texas, southwestern Colorado, southern portions of Nevada and Utah, and extreme northwestern Mexico (Hubbard 1987, Unitt 1987, Wilbur 1987). During the breeding season, the species occurs in riparian habitats along rivers, streams, open water, cienegas, marshy seeps, or saturated soil where dense growths of willows (*Salix* sp.), *Baccharis*, arrowweed (*Pluchea* sp.), tamarisk (*Tamarix* sp.) or other plants are present, sometimes with a scattered overstory of cottonwood (*Populus* sp.) (Grinnell and Miller 1944, Phillips 1948, Zimmerman 1970, Whitmore 1977, Hubbard 1987, Unitt 1987, Whitfield 1990, Brown and Trosset 1989, Brown 1991, Sogge *et al.* 1997). These riparian communities, which tend to be rare and widely separated, provide nesting, foraging, and migratory habitat for the southwestern willow flycatcher. *Empidonax traillii extimus* is an insectivore that forages within and occasionally above dense riparian vegetation, taking insects on the wing and gleaning them from foliage (Wheelock 1912, Bent 1960).

Empidonax traillii extimus nests in dense riparian vegetation approximately 4–7 meters (m) (13–23 feet) tall, often with a high percentage of canopy cover. Historically, *E. t. extimus* nested primarily in willows, with a scattered overstory of cottonwood (Grinnell and Miller 1944, Phillips 1948, Whitmore 1977, Unitt 1987, Sogge *et al.* 1997). In addition to nesting in riparian woodland vegetation consisting of willows, arrowweed, tamarisk ''or other species'', southwestern willow flycatchers nest almost exclusively in coast live oaks (*Quercus agrifolia*) on the Upper San Luis Rey River in San Diego County, California, which may be defined as an oak ''riparian woodland.'' Following modern changes in riparian plant communities in the southwest, *E. t. extimus* still nests in willows where available but is also known to nest in areas dominated by tamarisk and Russian olive (Zimmerman 1970, Hubbard 1987, Brown 1988). Sedgewick and Knopf (1992) found that sites selected as song perches by male willow flycatchers exhibited higher variability in shrub size than did nest sites and often included large central shrubs. Habitats not selected for either nesting or singing were narrower riparian zones, with greater distances between willow patches and individual willow plants.

Large scale losses of southwestern wetlands have occurred, particularly the cottonwood-willow riparian habitat of the southwestern willow flycatcher (Phillips *et al.* 1964, Johnson and Haight 1984, Katibah 1984, Johnson *et al.* 1987, Unitt 1987, General Accounting Office 1988, Dahl 1990, State of Arizona 1990). Changes in the riparian plant community have reduced, degraded and eliminated nesting habitat for the willow flycatcher, curtailing its

distribution and numbers (Serena 1982, Cannon and Knopf 1984, Taylor and Littlefield 1986, Unitt 1987, Schlorff 1990). Habitat losses and changes have occurred (and continue to occur) because of urban, recreational and agricultural development, fires, water diversion and impoundment, channelization, livestock grazing, and replacement of native habitats by introduced plant species (see 58 FR 39495 and Tibbitts *et al.* 1994 for detailed discussions of threats and impacts).

Brood parasitism by the brown-headed cowbird (*Molothrus ater*) is another significant and widespread threat to the southwestern willow flycatcher (Rowley 1930, Garret and Dunn 1981, Unitt 1987, Sogge 1995a and 1995b, Whitfield and Strong 1995, Sferra *et al.* 1997). Although some host species seem capable of simultaneously raising both cowbirds and their own chicks, such is not the case with southwestern willow flycatchers. Of all the nests monitored throughout the southwest between 1988 and 1996, there are only two cases known where southwestern willow flycatchers successfully fledged both flycatchers and cowbirds. In all other cases, parasitism caused complete nest failure or the successful rearing of only cowbird chicks (Brown 1988, Whitfield 1990, Whitfield and Strong 1995, Sogge 1995a and 1995b, Maynard 1995, Sferra *et al.* 1997).

In a review of historical and contemporary records of *Empidonax traillii extimus* throughout its range, Unitt (1987) noted that the species has ''declined precipitously * * *'' and that ''the population is clearly much smaller now than 50 years ago.'' He believed the total was ''well under'' 1000 pairs, more likely 500 (Unitt 1987). Nesting groups monitored since that time have continued to decline (Whitfield 1990, Brown 1991, Sogge and Tibbitts 1992, Whitfield and Laymon, unpubl. data). Since 1992, more than 800 historic and new locations have been surveyed range wide to document the status of the southwestern willow flycatcher (USFWS, unpubl. data). The current known population of southwestern willow flycatchers is estimated at between 300 and 500 pairs (Sogge *et al.* 1997). This indicates a critical population status, with more than 75 percent of the locations where flycatchers are found having five or fewer territorial birds and up to 20 percent of the locations having single, unmated individuals. The distribution of breeding groups is highly fragmented, with groups often separated by considerable distances (e.g., approximately 88 kilometers (km) (55 miles) straight-line distance between breeding flycatchers at Roosevelt Lake, Gila County, Arizona, and the next closest breeding groups known on either the San Pedro River (Pinal County) or Verde River (Yavapai County). Additional survey effort, particularly in southern California, may discover additional small breeding groups. However, rangewide survey efforts have yielded positive results in fewer than 10 percent of surveyed locations. Moreover, survey results reveal a consistent pattern range wide; the southwestern willow flycatcher population as a whole is comprised of extremely small, widely-separated breeding groups or unmated flycatchers.

For a thorough discussion of the ecology and life history of the southwestern willow flycatcher, see Sogge *et al.* (1997), the proposed rule to list the southwestern willow flycatcher as endangered with critical habitat (58 FR 39495) or the final rule listing the southwestern willow flycatcher as endangered (60 FR 10694).

Previous Federal Actions

On January 25, 1992, a coalition of conservation organizations petitioned the Service, requesting listing of *Empidonax traillii extimus* as an endangered species, under the Act. The petitioners also appealed for emergency listing, and designation of critical habitat. On September 1, 1992, the Service published a finding that the petition presented substantial information indicating that listing may be warranted and requested public comments and biological data on the species (57 FR 39664). On July 23, 1993, the Service published a proposal to list *E. t. extimus* as endangered with critical habitat (58 FR 39495), and again requested public comments and biological data on the species. The Service published a final rule to list *E. t. extimus* as endangered on February 27, 1995 (60 FR 10694). The Service deferred the designation of critical habitat for this endangered species until July 23, 1995, pursuant to 16 U.S.C. Sec. 1533(b)(6)(C), citing issues raised in public comments, new information, and the lack of the economic information necessary to perform the required economic analysis. The Service reopened the comment period on the proposal to designate critical habitat. During and following the listing moratorium and a series of rescissions of listing funds imposed by Congress from April 1995 to April 1996, the Service took no action on the proposal to designate critical habitat due to resource constraints. On March 20, 1997, the U.S. District Court of Arizona, in response to a suit by the Southwest Center for Biological Diversity, ordered the Service to designate critical habitat for the southwestern willow flycatcher within 120 days. On July 3, 1997, the Court clarified that order, noting that the 120-day timeframe was provided for the Service to make a decision as to whether or not to designate critical habitat and not to make a substantive determination of designation.

The Service has not previously designated critical habitat for the flycatcher because, as discussed in detail below, critical habitat designation provides little or no conservation benefit despite the great cost to put it in place. The Service's conclusion in this regard is reflected in its Listing Priority Guidance (61 FR 64475), under which designation of critical habitat is accorded the lowest priority among the Service's various listing activities. In accordance with the Listing Priority Guidance, since the lifting of the moratorium the Service has spent the scarce resources available to it for listing activities on meeting other requirements of the Act that provide significantly more conservation benefit. Nonetheless, the Service has been ordered to make a final determination with regard to critical habitat in an exceedingly short period of time. This final rule is issued to comply with that order. The rule meets the technical requirements of the Act; however, because of the unprecedented time constraints resulting from the court order, the Service was not able to provide the level of analysis and completeness that it has in the past on such rules. The Service is designating critical habitat for the southwestern willow flycatcher as it was proposed in 1993, with the deletion of some minor areas that were found to have been proposed in error because they have little or no potential for flycatcher habitat (see Issue 4 in **Summary of Comments and Recommendations**). The Service concedes that there may be additional areas that could be excluded because they no longer require special management considerations or protection due to ongoing management agreements, such as that with respect to Camp Pendleton. Similarly, the Service has been unable to consider additional areas for inclusion in this rule in response to the comments received.

Even promulgating this rule stripped down to its essentials has placed an enormous burden on the Service. The Service had no option but to disrupt significant work at the Field Office, Regional, and National levels in order to provide the resources to generate this

final rule. The Service intends to further articulate its views concerning critical habitat, and to provide the public with an opportunity to comment on those views, in the development of a specific critical habitat policy in the very near future. However, the below analysis is provided to elaborate on why the Service has placed critical habitat designation among the lowest priorities in the Listing Priority Guidance, and therefore why critical habitat for the flycatcher was not designated prior to this time.

Critical Habitat

Designation of critical habitat for endangered or threatened species has been among the most costly and controversial classes of administrative actions undertaken by the Service in administering the Act. Over 20 years of experience in designating critical habitat and applying it as a tool in conserving species leads the Service to seriously question its utility and the value it provides in comparison to the monetary, administrative, and other resources it absorbs. Although the Service is, in this case, designating critical habitat pursuant to a Court order that requires the Service to make a final determination, the Service believes that critical habitat is not an efficient or effective means of securing the conservation of species. An analysis supporting this conclusion is presented below.

The Designation Process

When the Service lists a species as threatened or endangered, the Act requires that it specify, ''to the maximum extent prudent and determinable,'' the species' critical habitat. If critical habitat is not considered determinable at the time a final rule is adopted to list a species, it must be designated ''to the maximum extent prudent'' within 1 additional year. Thus the ultimate test in determining whether or not critical habitat is designated for a species is one of prudence. The basis for the Court order directing the present designation was the Service's failure to either designate critical habitat or to find that its designation would not be prudent within 1 year of the listing of the southwestern willow flycatcher as an endangered species.

The Act's definitions of ''critical habitat'' and ''conservation'' are central to any interpretation of critical habitat's attributes and effects. Critical habitat is defined in Section 3(5)(A) of the Act as ''(i) the specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features (I) essential to the conservation of the species and (II) that may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.'' The term ''conservation,'' as defined in section 3(3) of the Act, means ''. . . to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary.'' A designation of critical habitat thus implies not only specific knowledge of the habitat needs of a species, but also an idea of what would be needed in the way of habitat protection and management to bring about the species' recovery.

The Act also requires a consideration of economic and other consequences as part of the designation process, with the option of excluding areas from designation if the benefits of such exclusion outweigh the benefits of designation, and if exclusion would not result in the extinction of the species. A good understanding of the effects of designation, both in general and for particular cases, is required to carry out this analytic requirement and to provide a basis for the consideration of potential exclusions.

At the time a species is listed, there is generally no detailed understanding of the management measures that will be required for its recovery, so that designation at this time can only crudely reflect its conservation needs. Meanwhile, the required analysis is necessarily highly speculative in that it must incorporate assumptions regarding future economic activity that may be difficult to characterize, and it is aimed at the increment of effect on these activities attributable to designation over and above those consequent to the species' listing. Finally, the economic balancing that is the object of the analysis is only possible to the extent that these two sets of effects can be differentiated, and the limit on this balancing (i.e., that exclusion may not cause extinction) is not meaningful if the failure to designate critical habitat cannot plausibly have this effect.

In determining the extent to which designation of critical habitat is prudent, Congress directed the Service to consider whether the designation would be of benefit to the species concerned. In recent years, the Service has foregone designating critical habitat for most species it has listed on the basis that it would not provide any net benefit to their conservation.

Designation by regulation

Critical habitats are designated in the Code of Federal Regulations and can be altered only through a rulemaking process that commonly requires over a year from start to finish. In fact, revision is a sufficiently complex undertaking that the Service has never revised a critical habitat designation, in spite of it being possible to do so. The range and habitat use of a species do not necessarily remain unchanged over time or change so slowly as to be readily tracked by costly and time-consuming regulatory amendments.

The Consequences of Designation

Section 7 of the Act requires that Federal agencies refrain from contributing to the destruction or adverse modification of critical habitat. This requirement is in addition to the prohibition against jeopardizing the continued existence of a listed species, and it is the only mandatory legal consequence of a critical habitat designation. An understanding of the interplay of the ''jeopardy'' and ''adverse modification'' standards is necessary to the proper evaluation of the prudence of designation as well as the conduct of consultation under section 7. Implementing regulations (50 CFR part 402) define ''jeopardize the continued existence of'' and ''destruction or adverse modification of'' in virtually identical terms. Jeopardize the continued existence of means to engage in an action ''that reasonably would be expected * * * to reduce appreciably the likelihood of both the survival and recovery of a listed species.'' Destruction or adverse modification means an ''alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species.'' Common to both definitions is an appreciable detrimental effect on both survival and recovery of a listed species, in the case of critical habitat by reducing the value of the habitat so designated. Thus, actions satisfying the standard for adverse modification are nearly always found to also jeopardize the species concerned, and the existence of a critical habitat designation does not materially affect the outcome of consultation. This is in contrast to the public perception that the adverse modification standard sets a lower threshold for violation of section 7 than that for jeopardy. In fact, biological opinions which conclude that a Federal agency action is likely to adversely

modify critical habitat but not to jeopardize the species for which it is designated are extremely rare historically, and none have been issued in recent years.

Scope of Analysis

Given the difficulty of separating the independent incremental effects of designation of critical habitat from those associated with the listing of a species, it should not be surprising that the approach to economic analysis is problematic. A recent analysis for the designation of nearly 4 million acres of critical habitat for the marbled murrelet concluded, in part, that the designation ''is not likely to restrict the activities of any federal agency'' and that it ''will not cause these agencies (the Forest Service and Bureau of Land Management) to manage federal lands in a manner that will have immediate, direct impacts on the flow of goods and services from these lands.'' Critics have complained that economic analyses of critical habitat designations greatly underestimate the effects of the ESA on the economy, or alternatively that environmental benefits are generally given cursory coverage. Both points of view have elements of validity. On the one hand, the effects of the ESA on society stem overwhelmingly from the protection afforded by the listing of species, but the tenuous effects of critical habitat designation are the only ones subject to the requirement of economic analysis. On the other hand, the object of the analysis is an examination of areas for possible exclusion from critical habitat, leading to a focus on possible deleterious economic effects that might provide grounds for exclusion, rather than the benefits society derives from the operation of the ESA.

The Cost of Designation

In a recent declaration filed in a Federal District Court, the Service's Assistant Director estimated that economic analyses alone for the designation of critical habitat for the marbled murrelet (quoted above) and Mexican spotted owl cost in excess of $100,000 each. The *total* cost of other recent designations, as those for the desert tortoise and Colorado River fishes, have been estimated at approximately $1,000,000 each. The Service currently has on hand information sufficient to propose nearly 200 candidate species for listing, and several hundred other species are known to require status surveys to determine whether they qualify. The resources required to designate a critical habitat typically are ten times what would be required to list a backlogged candidate species. On conservation grounds, the Service cannot justify devoting resources to a critical habitat designation that would otherwise be available to afford basic protection to ten or more candidate species. Critical habitat designations have too little effect on the way land and water is managed for the conservation of species to justify the drain they represent on Federal resources.

Public Perception of Designation

Controversy over critical habitat designation arises in substantial part from public misunderstanding of the effects designation has on potential resource uses. The common public perception is that critical habitat is an inviolate preserve within which human activities are excluded entirely or drastically curtailed. It is not difficult to understand this misperception given the common-sense meaning of ''critical habitat.'' In fact, the designation of critical habitat may provide some benefits to a species by identifying areas important to the species' conservation, particularly until a recovery plan is adopted, including habitat that is not presently occupied and that may require restoration efforts to support recovery. However, these benefits are minor, apply only where there is Federal agency involvement, and consume considerable funds that could be spent elsewhere to much greater benefit.

Identification of Critical Habitat for the Southwestern Willow Flycatcher

Empidonax traillii extimus is endangered by extensive loss of nesting habitat and is now extirpated across much of its former breeding range. A neotropical migratory bird, *E. t. extimus* is present in its breeding habitat from late April until August or September. It then migrates to wintering grounds in Mexico, Central America, and perhaps northern South America (Gorski 1969, McCabe 1991). Little is known about threats in its wintering grounds. However, even during the nonbreeding season when the species is not present, nesting habitat and especially potentially recoverable nesting habitat remain vulnerable. Conserving and enhancing the constituent elements of current and potential nesting habitat is necessary to facilitate recovery of the species. The Service may designate as critical habitat areas outside the geographical area presently occupied by a species when a designation limited to its present range would be inadequate to ensure the conservation of the species (50 CFR 424.12(e)). Such a situation exists for the southwestern willow flycatcher, for which recovery of the physical and biological features and constituent elements of nesting habitat and space for population growth are needed to ensure the conservation and recovery of the species.

Primary Constituent Elements

The Service is required to base critical habitat determinations on the best available scientific information (50 CFR 424.12). In determining what areas to designate as critical habitat, the Service considers those physical and biological features that are essential to the conservation of the species and that may require special management considerations or protection. Such requirements include but are not limited to the following: (1) Space for individual and population growth; (2) food, water, air, light, minerals, or other nutritional or physiological requirements; (3) cover or shelter; (4) sites for breeding, reproduction, rearing of offspring, germination, or seed dispersal; and (5) habitats that are protected from disturbance or are representative of the historic geographical and ecological distributions of a species. The Service is proposing to designate as critical habitat areas which provide or with rehabilitation will provide the above five physical and biological features and primary constituent elements.

For all areas of critical habitat designated here, these physical and biological features and primary constituent elements are provided or will be provided by dense thickets of riparian shrubs and trees (native and exotic species). This vegetation, by definition, occurs near rivers, streams, open water, cienegas, marshy seeps, or saturated soil. Constituent elements of critical habitat include the riparian ecosystem within the 100-year floodplain, including areas where dense riparian vegetation is not present, but may become established in the future. The species composition of vegetation ranges from nearly monotypic stands (i.e., single species) to stands with multiple species (see Sogge *et al.* 1997). Vegetation structure ranges from simple, single stratum patches as low as 3 meters (9 feet) in height and lacking a distinct overstory to complex patches with multiple strata and canopies nearing 18 meters (60 feet) in height. Vegetation patches may be uniformly dense throughout, or occur as a mosaic of dense thickets interspersed with small openings, bare soil, open water, or shorter/sparser vegetation. Riparian patches used by breeding flycatchers vary in size and shape, and may be relatively dense, linear contiguous

stands or irregularly-shaped mosaics of dense vegetation with open areas. The size of vegetation patches or habitat mosaics used by southwestern willow flycatchers varies considerably and ranges from as small as 0.8 hectares (2 acres) to several hundred hectares. However, narrow linear riparian patches only one to two trees deep that have no potential (absent limiting factors) to increase in depth are not considered breeding habitat, although they may be used by southwestern willow flycatchers during migration.

A total of approximately 964 km (599 miles) of stream and river are being designated as critical habitat. The areas described were chosen for critical habitat designation because they contain the remaining known southwestern willow flycatcher nesting sites, and/or formerly supported nesting southwestern willow flycatchers, and/or have the potential to support nesting southwestern willow flycatchers. All areas contain or with restoration will contain suitable nesting habitat in a patchy, discontinuous distribution. This distribution is partially the result of natural regeneration patterns of riparian vegetation (e.g. cottonwood-willow). The distribution of these habitat patches is expected to shift over time. Because of this spatial and temporal distribution of habitat patches, it is important that the entirety of the proposed river reaches be considered critical habitat. All areas contain some unoccupied habitat or former (degraded) habitat, needed to recover ecosystem integrity and support larger southwestern willow flycatcher numbers during the species' recovery. A number of separate, protected, healthy populations of southwestern willow flycatchers are needed to protect the species from extinction by functioning as population sources (Pulliam 1988). Protection of this proposed critical habitat should ensure sufficient quantity and quality of habitat to stabilize and recover this species. The southwestern willow flycatcher is already extirpated from a significant portion of its former range.

Critical habitat for the southwestern willow flycatcher will include riparian areas within the 100-year floodplain along streams and rivers in southern California, Arizona, and New Mexico (Figure 1). Descriptions and maps of each area are located in this rule under ''Regulation Promulgation.''

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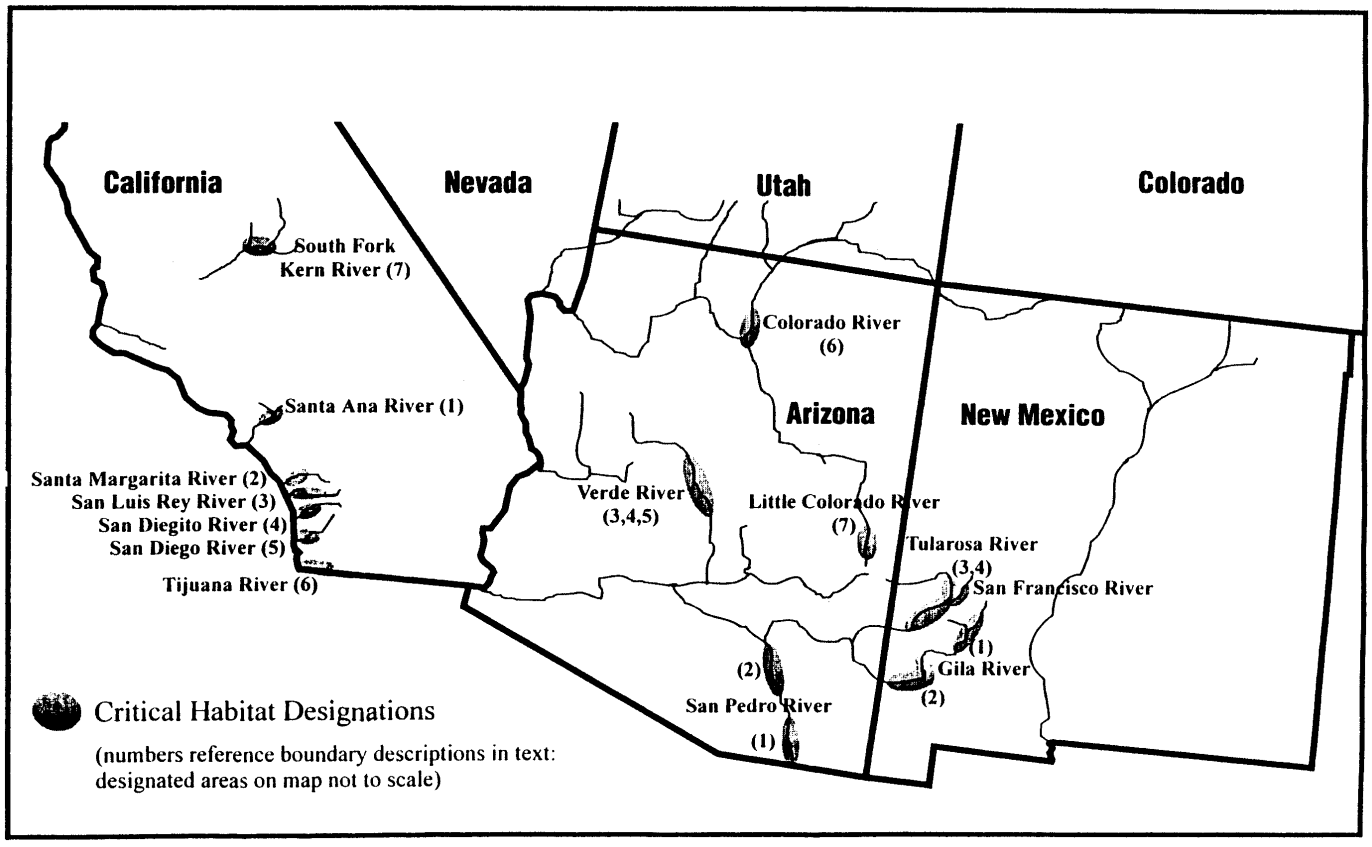
Figure 1. Location of critical habitat areas designated for the southwestern willow flycatcher.



Available Conservation Measures

Because *Empidonax traillii extimus* is a listed species, the Act provides conservation measures, including recognition, recovery actions, requirements for Federal protection, and prohibitions against certain practices. Recognition through listing encourages and results in conservation actions by Federal, State, and private agencies, groups, and individuals. The Act provides for possible land acquisition and cooperation with the States and authorizes recovery plans for all listed species. The protection required of Federal agencies and the prohibitions against taking and harm are discussed, in part, below.

Section 7(a) of the Act requires Federal agencies to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened and with respect to its critical habitat, if any is being designated. Regulations implementing this interagency cooperation provision of the Act are codified in 50 CFR part 402. Section 7(a)(2) requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of such a species or to destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency must enter into formal consultation with the Service.

The U.S. Marine Corps and Service have worked together to develop a comprehensive, ecosystem-oriented wildlife conservation management plan covering all riparian and coastal wetland habitat areas on the base at Camp Pendleton. This effort culminated in a mutually agreed upon conservation strategy and implementation program that was endorsed by the Secretary of the Interior and Service at a signing ceremony with the Commanding General in October 1995. The conservation program has contributed substantially to the protection and recovery of the least Bell's vireo, southwestern willow flycatcher, and other listed species (i.e., arroyo toad, tidewater goby, California least tern, and western snowy plover) found in riparian and coastal wetland habitats along the Santa Margarita River and Pacific Ocean. Indeed, the Department of Defense awarded Camp Pendleton the Department's Natural Resources Award for 1996 largely because of the successful implementation of the riparian and coastal wetland conservation program. The Service does not intend the designation of critical habitat to result in the imposition of any additional restrictions for actions taken at Camp Pendleton which are consistent with the conservation measures outlined under the management plan. Thus, for example, if the Marine Corps needed a permit under the Clean Water Act for an activity which was consistent with the conservation management plan, the Service would not view such activity as adversely modifying or destroying critical habitat for the willow flycatcher.

On other Federal lands, various ongoing activities within riparian areas may benefit the flycatcher. The Forest Service and Bureau of Land Management have focused attention on modifying livestock grazing practices in recent years, particularly as they affect riparian ecosystems. The Bureau of Land Management's San Pedro National Riparian Conservation Area in Arizona has excluded livestock for 10 years which has resulted in significant restoration of riparian habitats and increased populations of bird species associated with riparian habitat, including the willow flycatcher. The Forest Service, in cooperation with others, is monitoring the southwestern willow flycatcher population on the San Luis Rey River on Forest Service lands, and has an on-going brown-headed cowbird trapping program on the San Luis Rey River and other streams within the Cleveland National Forest. As mitigation for other projects impacting riparian habitats, the Bureau of Reclamation is engaged in a cowbird management program and riparian habitat restoration projects in several areas in the range of *Empidonax traillii extimus,* including some historical nesting locations. Riparian habitat rehabilitation is also underway at several National Wildlife Refuges in the breeding range of *E. t. extimus,* which are managed by the Service. Grand Canyon National Park has instituted a seasonal recreation closure at the remaining site with nesting willow flycatchers in the Grand Canyon.

In addition to conservation on Federal lands, in 1991, the State of California established the Natural Communities Conservation Planning (NCCP) Program to address conservation needs of natural ecosystems throughout the State. The Multiple Species Conservation Program (MSCP) in southwestern San Diego County is one of the first subregional plans under the NCCP to be developed. The MSCP planning area consists of 12 jurisdictions and several water districts, each of which will develop subarea plans to implement the MSCP within their boundaries. The City of San Diego has approved the MSCP and finalized their subarea plan. The remaining jurisdictions and the Otay Water District are expected to finalize their subarea plans within the near future.

The southwestern willow flycatcher is considered a covered species under the MSCP based on the proposed level of conservation. The MSCP will preserve over 9,000 acres or 75 percent of the remaining riparian habitats within the planning boundary. Impacts to riparian areas outside of the preserve will be avoided, minimized, and mitigated under local guidelines and ordinances, and existing State and Federal wetland regulations. Thus, no net loss of acreage of riparian habitat is proposed within the MSCP, and no additional restrictions are anticipated as a result of critical habitat designation.

All of the designated critical habitat for the southwestern willow flycatcher along the San Dieguito, San Diego, and Tijuana Rivers will be conserved and managed within the MSCP preserve system. The MSCP assures permittees that compliance with the Federal policy of ''no net loss'' of wetland functions and values, the U.S. Environmental Protection Agency's section 404(b)(1) guidelines, and the requirements of the MSCP and local subarea plan will constitute the full extent of mitigation measures directed specifically at the incidental take of covered species recommended by the Service pursuant to the Act and the National Environmental Policy Act. In addition, the Service has agreed that, if the subarea plans for each jurisdiction under the MSCP are properly functioning, the Service will not require that permittees or third party beneficiaries commit additional land, additional land restrictions, or additional financial compensation beyond that provided in each implementing agreement should critical habitat for a covered species be designated.

The approved NCCP/Habitat Conservation Plan for the Central and Coastal Subregions of Orange County, California, provides benefits to the southwestern willow flycatcher. The plan establishes an approximately 37,300-acre nature preserve and requires surveys for the southwestern willow flycatcher to ensure that occupied habitat with potentially significant long-term conservation value will be conserved. The adaptive management program for the preserve includes monitoring, cowbird control, and habitat enhancement measures for the flycatcher. Again, the Service anticipates that no additional restrictions will apply to activities undertaken in accordance with the

approved Orange County NCCP plan as a result of this critical habitat designation.

The Audubon Society manages one of the largest remaining flycatcher populations in California, and The Nature Conservancy (TNC) manages several areas with high recovery potential. TNC maintains a cowbird trapping program in Orange County that provides indirect benefits to potential nesting habitat for the southwestern willow flycatcher.

In addition to public and private lands, critical habitat occurs on land belonging to the Yavapai-Apache Tribe in Arizona and on land belonging to the Pala Mission Tribe in California. Pursuant to Tribal sovereignty and the Service's associated responsibilities, as well as the recent Secretarial Order for American Indian Tribal Rights, Federal-Tribal Trust Responsibilities and the Endangered Species Act, the Service has consulted with both tribes prior to completion of this rule in order to ensure that tribal cultural values, and reserved hunting, fishing, gathering and other rights were considered in this designation. The Service will continue to work cooperatively with the tribes and remain available to assist in development of conservation plans for the area that meet both the intent of the Act and Tribal needs.

It is the policy of the Service to identify to the maximum extent practicable at the time of listing those activities that would or would not constitute a violation of section 9 of the Act. The intent of this policy is to increase public awareness of the effect of the listing on proposed or on-going activities. These activities are listed in the final rule listing the southwestern willow flycatcher (60 FR 10694). Likewise, section 4(b)(8) requires, for any proposed or final regulation that designates critical habitat, a brief description and evaluation of those activities (public or private) that may adversely modify such habitat or may be affected by such designation. Such activities may include:

(1) Removing, thinning or destroying riparian vegetation. Activities which remove, thin, or destroy riparian vegetation, by mechanical, chemical (herbicides or burning), or biological (grazing) means reduce constituent elements for southwestern willow flycatcher sheltering, feeding, breeding, and migrating.

(2) Surface water diversion or impoundment, groundwater pumping, or any other activity which may alter the quantity or quality of surface or subsurface water flow. Activities which alter the quantity or quality of surface or subsurface water flow may affect riparian vegetation, food availability, or the general suitability of the site for nesting or migrating.

(3) Destruction/alteration of the species' habitat by discharge of fill material, draining, ditching, tiling, pond construction, and stream channelization (i.e., due to roads, construction of bridges, impoundments, discharge pipes, stormwater detention basins, etc.).

(4) Overstocking of livestock. Excessive use of riparian areas and uplands for livestock grazing may affect the volume and composition of riparian vegetation, may physically disturb nests, may alter floodplain dynamics such that regeneration of riparian habitat is impaired or precluded, and may facilitate brood parasitism by brown-headed cowbirds.

(5) Development of recreational facilities and off-road vehicle operation. Activities which facilitate recreational activities and off-road vehicle use may affect riparian vegetation, result in compaction of soils degrading areas where riparian vegetation is established or would become established, alter floodplain dynamics such that riparian regeneration is impaired or precluded, promote fires in riparian habitats, reduce space for individual and population growth, and inhibit normal behavior.

In general, activities that do not remove or degrade constituent elements of habitat for *Empidonax traillii extimus* are not likely to destroy or adversely modify critical habitat. Each proposed action will be examined pursuant to section 7 of the Act in relation to its site-specific impacts.

The designation of critical habitat does not imply that lands outside of critical habitat do not play an important role in the conservation of *Empidonax traillii extimus.* Federal activities outside of critical habitat are still subject to review under section 7 if they may affect *E. t. extimus.* Prohibitions of Section 9 also continue to apply both inside and outside of designated critical habitat.

Summary of Comments and Recommendations

In the July 23, 1993, proposed rule to list the *Empidonax traillii extimus* as endangered with critical habitat (58 FR 39495), all interested parties were requested to submit comments or information that might bear on the listing of or designation of critical habitat for the southwestern willow flycatcher. The comment period was originally scheduled to close October 21, 1993, but was extended to November 30, 1993. Appropriate State agencies, Federal agencies, county governments, scientific organizations, and other interested parties were contacted and requested to comment. Newspaper notices inviting public comment were published in the following newspapers: In California, the Los Angeles Times, L.A. Watts Times, Kern Valley Sun, and San Diego Union-Tribune; in Arizona, the Arizona Daily Sun, Arizona Republic, Tucson Daily Citizen, White Mountain Independent, and Arizona Daily Star; in New Mexico, the Albuquerque Journal, Albuquerque Tribune, Santa Fe New Mexican, Carlsbad Current-Argus, Silver City Daily Press; in Nevada, the Las Vegas Sun; in Colorado, the Durango Herald; in Utah, the Daily Spectrum; and in Texas, the El Paso Times. The inclusive dates of publications were August 31 through September 13, 1993, for the initial comment period and October 28 through November 5, 1993, for the public hearings and extension of public comment period.

The Service held six public hearings. Three of these were held in anticipation of interest in the proposed rule, and three additional were held in response to requests from the public. A notice of the hearing dates and locations was published in the **Federal Register** on October 18, 1993 (58 FR 53702). Approximately 424 people attended the hearings. Approximately 17 people attended the hearing in Tucson, AZ; 27 in Flagstaff, AZ; 10 in Las Cruces, NM; 12 in Albuquerque, NM; 350 in Lake Isabella, CA; and 8 in San Diego, CA. Transcripts of these hearings are available for inspection (see **ADDRESSES** section).

A second public comment period was held from February 27, 1995, to April 28, 1995, during which comments were solicited on proposed critical habitat. A total of 3,240 written and oral responses was received during the two public comment periods. All comments received were reviewed for substantive issues and new data regarding critical habitat and the southwestern willow flycatcher. Comments of a similar nature are grouped into a number of general issues. Ten general issues were identified relating specifically to proposed critical habitat. These are addressed in the following summary.

Issue 1: Development of conservation agreements would be more effective in providing a net benefit to the southwestern willow flycatcher than designation of critical habitat, and existing agreements make designation of critical habitat unnecessary in some areas.

Service Response: The Service agrees that implementation of comprehensive conservation agreements could effectively protect and enhance both occupied and unoccupied habitat for the southwestern willow flycatcher, and also have the potential to provide for recovery of the species. Toward this end, the U.S. Marine Corps and the State of California have both worked with the Service to develop ecosystem-oriented conservation plans that the Service believes will be highly effective in providing for the conservation needs of the southwestern willow flycatcher at Camp Pendleton and in portions of San Diego and Orange counties. Unfortunately, due to imposed time constraints and lack of funding, at this time the Service is not able to undertake further analysis with regard to critical habitat designation although such analysis might ultimately negate the need for designation in areas such as these.

Issue 2: Designation of critical habitat would offer no additional protection above listing; critical habitat can only be designated for areas on which essential biological and physical features are currently found.

Service Response: The designation of critical habitat may provide some benefits to the southwestern willow flycatcher by identifying for the public areas important to the species' conservation and highlighting areas important to the species until a recovery plan is adopted, including habitat that is not presently occupied by flycatchers and that may require restoration efforts to support recovery. The areas included in this designation are believed to be justified as providing biological and physical features essential to the flycatcher's conservation. Nevertheless, the Service generally agrees that the protection afforded by the designation of critical habitat is marginal in comparison to the protective measures provided by the species' listing. Regardless of the perceived benefit of this designation, however, the Service is required to comply with the Court order requiring a final determination on designation within a specified time limit.

Issue 3: Critical habitat would not improve the status of the southwestern willow flycatcher because cowbirds, rather than habitat, are the limiting factor.

Service Response: The Service recognizes that cowbird parasitism is a major threat to the viability of the southwestern willow flycatcher. That threat is exacerbated by the small size and highly fragmented nature of extant riparian habitats. Habitat suitability for cowbirds, and thus cowbird abundance and rates of parasitism, appear to decrease as habitat size and extent increases, ostensibly because patches with higher ratios of interior to edge habitat are more difficult for cowbirds to penetrate. In addition, larger habitat patches should have more host species. Thus, increasing the size and extent of riparian habitat on a local scale should reduce the rate of cowbird parasitism on southwestern willow flycatchers by decreasing habitat suitability for the cowbird and by increasing the number of non-flycatcher host species that can be parasitized. In many of the small riparian stands inhabited by flycatchers the number of cowbirds may outnumber host species, including the flycatcher. In those areas cowbird management programs will be needed to increase flycatcher reproductive success in the short-term. The Service believes, however, that over the long-term the most effective strategy to reduce the rate and extent of cowbird parasitism is to reduce riparian habitat fragmentation on a regional scale and to vastly increase the size and extent of riparian habitat on a local scale.

Issue 4: The proposed critical habitat includes areas with little potential for appropriate habitat and omits areas with known flycatcher breeding groups or areas with high potential for occupancy by flycatchers.

Service Response: The Service received many comments from Federal, State, and private entities recommending deletions and additions to proposed critical habitat. In response to public comments, some areas that were included in the proposed rule were found to be proposed in error because they have little or no potential for flycatcher habitat, and were omitted from the final designation. These include: Approximately 5 miles of shoreline at Lake Isabella downstream of the South Fork Wildlife Area, removed due to a lack of potential for habitat to develop along the lakeshore (Kern County, CA); Peck's Lake, removed due to a lack of potential for habitat to develop around shoreline (Yavapai County, AZ); approximately 5 miles along the upper portion of Wet Beaver Creek, removed due to lack of potential for suitable habitat to develop (Yavapai County, AZ); approximately 14 miles along the upper portion of West Clear Creek, removed due to lack of potential for suitable habitat to develop (Yavapai County, AZ); approximately 20 miles along the Rio Grande, removed due to lack of potential for suitable habitat to develop (Bernalillo County, NM).

The Service did not consider omissions for other reasons or additions to the critical habitat proposed in 1993 because imposed time constraints and lack of resources made this impracticable. This does, not, however, preclude the Service from considering further omissions and additions to critical habitat for this species at some time in the future as resources allow.

Issue 5: Existing regulatory mechanisms and agency management plans targeted at listed species provide adequate protection.

Service Response: The Service agrees that some existing regulatory mechanisms and management plans provide conservation benefits to the flycatcher. As mentioned in Issue 1, the U.S. Marine Corps and the State of California have both worked with the Service to develop ecosystem-oriented conservation plans that the Service believes will be highly effective in providing for the conservation needs of the southwestern willow flycatcher at Camp Pendleton and in portions of San Diego and Orange counties. Although designation of critical habitat should not impose any additional restrictions on actions consistent with the management agreements in these areas now or in the future, they do not cover sufficient area to provide adequate protection for the species as a whole. Furthermore, the Service is obliged to comply with a Court order to designate critical habitat for the flycatcher.

Provisions of section 404 of the Clean Water Act do not specifically protect the southwestern willow flycatcher or its habitat, but do provide some protection to the aquatic and riparian ecosystems of which it is a part. Section 404 also provides for mitigation for destruction of these habitats, although even temporary destruction and subsequent replacement of important riparian habitat may adversely affect the southwestern willow flycatcher. Regardless of the possible conservation benefits of the Clean Water Act, however, this designation is required by Court order.

Issue 6: The Service is required to comply with the National Environmental Policy Act in designating critical habitat.

Service Response: An Environmental Assessment (EA) and a draft Finding of No Significant Impact (FONSI) have been prepared for this rule in accordance with 40 CFR 1501.3 (see following section entitled National Environmental Policy Act). The EA and FONSI are available upon request from the Field Supervisor, Arizona Ecological Services Field Office (see **ADDRESSES** above).

Issue 7: Designation of critical habitat would result in loss of revenues that local communities derive from use of public lands; critical habitat will adversely affect State, Municipal, and private lands.

Service Response: Critical habitat only applies to Federal actions on Federal lands or Federally-permitted actions on private lands. The economic analysis provided in this final rule demonstrates that there will be no adverse economic effects above the effects that would result from the listing of the species.

Issue 8: Riparian habitats are in a constant state of change, making any boundaries established under critical habitat also subject to change; lateral boundaries of critical habitat do not meet regulatory requirements because they are difficult to interpret and change seasonally; the constituent elements of critical habitat for the southwestern willow flycatcher have not been adequately described.

Service Response: The upstream/downstream boundaries established with this final rule, to a limited extent, incorporated the dynamic nature of riparian habitats that commentors referred to and that is discussed under issue number two. The Service agrees, however, that the lateral boundaries of critical habitat are inadequate and do not incorporate the dynamic nature of riparian systems. For example, changes in the distribution of riparian habitats in response to natural flooding events, or changes in stream flow due to droughts, impoundments, etc., sometimes leave suitable habitat more than 100 meters from surface water. To alleviate this inadequacy, the lateral boundaries of critical habitat were established by the 100-year floodplain, which is delineated on maps available at county offices and the Federal Emergency Management Agency.

Issue 9: The Service is focusing management efforts for the southwestern willow flycatcher too narrowly on factors affecting the species only on its breeding grounds.

Service Response: The Service agrees that factors affecting the southwestern willow flycatcher during the non-breeding season could be playing a significant role in the status of this species. To that end the Service has supported work currently funded by the Bureau of Reclamation to identify the distribution of the southwestern willow flycatcher during the non-breeding season. If research demonstrates adverse effects outside of the United States, the Secretary has the authority under section 8 of the Act to provide assistance to foreign governments in developing management programs necessary for the conservation of the southwestern willow flycatcher. This opportunity, however, does not eliminate, reduce, or change the obligations of Federal agencies under sections 7 and 9 of the Act, nor does it change the obligations of citizens under section 9 of the Act.

Issue 10: The goal of the critical habitat designation is protection of riparian habitat, not protection of the flycatcher.

Service Response: Section 2(b) of the Act states, ''(t)he purposes of this Act are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section.'' The purpose established in section 2(b) of the Act explicitly recognizes the critical role of ecosystems and, therefore, habitat, in the protection of endangered species. In so far as the southwestern willow flycatcher is a neotropical migratory bird species that is dependent solely on riparian areas to carry out the portion of its life cycle devoted to breeding, the Service acknowledges and supports the concept of protecting habitat in order to conserve the southwestern willow flycatcher. However, the goal of the critical habitat designation for the southwestern willow flycatcher is to protect areas essential to the conservation of this species. Other riparian areas that were not found to be essential to the conservation of the flycatcher have been omitted from this final rule.

Paperwork Reduction Act

The Service has examined this regulation under the Paperwork Reduction Act of 1995 and found it to contain no information collection requirements.

Economic Effects

Section 4(b)(2) of the Act requires the Service to consider economic and other impacts of designating a particular area as critical habitat. The Secretary may exclude areas from critical habitat if the benefits of exclusion outweigh the benefits of including the area in critical habitat, unless failure to designate a specific area would result in extinction of the species. The economic analysis assists in making that determination by examining how the designation may affect Federal lands, and any non-Federal activity with some Federal involvement. Activities on private or State-owned lands that do not involve Federal permits, funding or other Federal actions are not restricted by the designation of critical habitat.

Economic effects caused by the listing of the flycatcher as endangered and by other statutes are the baseline upon which critical habitat is imposed. The analysis examines the incremental economic and conservation effects of the critical habitat addition. Economic effects are measured as changes in National income, and regional jobs and household income.

Fourteen counties in three States are affected by the designation of critical habitat: Cochise, Pima, Pinal, Yavapai, Gila, Coconino, and Apache counties in Arizona; Kern, Riverside, San Bernardino, and San Diego counties in California; and Catron, Grant, and Hidalgo counties in New Mexico. In total, nearly 964 river km (599 miles) are being designated as critical for the southwestern willow flycatcher. The percent of total length of rivers in each State affected by critical habitat designation is relatively small: 12.4 percent for Arizona; 0.5 percent for California; and 6.6 percent for New Mexico. A high percentage of public access to rivers and streams exists in all three States.

By focusing attention on a certain area, designating critical habitat may result in minor economic benefits provided directly by the species and indirectly by its habitat, including aesthetic or scenic beauty, biodiversity, ecosystem and passive use (existence) values. Quantitative or monetary values for such benefits are not now possible due to data limitations.

The Forest Service, Bureau of Land Management, Bureau of Reclamation, Marine Corps, and Army Corps of Engineers manage areas of proposed critical habitat for the flycatcher. The Corps of Engineers and other Federal agencies that may be involved with funding or permits for projects in the critical habitat areas may also be affected. Because the Service believes that virtually all ''adverse modification'' calls would also result in ''jeopardy'' calls under section 7 of the Act, designation of critical habitat for the flycatcher is not expected to result in any incremental restrictions on agency activities. Critical habitat designation will, therefore, result in no additional protection for the flycatcher nor any additional economic effects beyond those that may have been caused by listing and by other statutes. Additionally, all previously completed biological opinions would not require reinitiation to reconsider any critical habitat designated in this rulemaking.

If no Federal agency is involved in management, funding, or by other means of non-Federal areas with critical habitat for the flycatcher, they are not subject to the section 7 consultation process for critical habitat.

Economic effects caused by the listing of the flycatcher as endangered and by other statutes are the baseline upon which critical habitat is imposed. The analysis examines the incremental economic and conservation effects of the critical habitat addition. Economic effects are measured as changes in national income, and regional jobs and household income. Of the 14 counties where critical habitat is proposed, 9 would qualify as small businesses. However, because critical habitat designation is not expected to cause additional habitat restrictions in any biological opinions issued under the Act, there are no incremental economic effects attributable to the designation. A copy of the economic analysis and description of the exclusion process with supporting documents are included in the Service's administrative record and may be obtained by contacting the Service (see **ADDRESSES** section).

The Service reviewed the proposal to designate critical habitat for the flycatcher and the assessment of associated benefits and costs. Because the economic analysis identified no economic benefits from excluding any of the areas, the Service has made a determination to designate all of the 18 areas as critical habitat for the southwestern willow flycatcher.

In addition, the Service has determined that this rulemaking would not have a significant effect on a substantial number of small entities in the area, such as businesses, organizations and governmental jurisdictions, under the Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*). This rulemaking was reviewed under Executive Order 12866.

Unfunded Mandates

The Service has determined and certifies pursuant to the Unfunded Mandates Act, 2 U.S.C. 1502 *et seq.*, that this rulemaking will not impose a cost of $100 million or more in any given year on local or State governments or private entities.

Civil Justice Reform

The Department has determined that these final regulations meet the applicable standards provided in Sections 3(a) and 3(b)(2) of Executive Order 12988.

National Environmental Policy Act Compliance

An Environmental Assessment (EA) and a draft Finding of No Significant Impact (FONSI) have been prepared for the final rule to designate critical habitat for the southwestern willow flycatcher (*Empidonax traillii extimus*), in accordance with 40 CFR 1501.3. The EA and FONSI are available upon request from the Field Supervisor, Arizona Ecological Services Field Office (see **ADDRESSES** above).

References Cited

A complete list of all references cited herein, as well as others, is available upon request from the Field Supervisor, Arizona Ecological Services Field Office (see **ADDRESSES** above).

Author: The primary author of this final rule is Sam Spiller, Arizona Ecological Services Office (see **ADDRESSES** above).

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Regulation Promulgation

Accordingly, part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations is amended as set forth below:

PART 17—[AMENDED]

1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201-4245; Pub. L. 99–625, 100 Stat. 3500; unless otherwise noted.

§ 17.11 [Amended]

2. Section 17.11 (h) is amended by revising the ''Critical habitat'' entry for ''Flycatcher, southwestern willow,'' under Birds, to read ''17.95(b)'.

3. Section 17.95(b) is amended by adding critical habitat for the Southwestern willow flycatcher (*Empidonax traillii extimus*), in the same alphabetical order as this species occurs in § 17.11(h).

§ 17.95 Critical habitat—fish and wildlife.

* * * * *

(b) *Birds.*

* * * * *

Southwestern Willow Flycatcher
(Empidonax traillii extimus)

California: Areas of land and water as follows:

1. Santa Ana River, Riverside and San Bernardino Counties: from Rio Road (T2S, R5W, no surveyed section but at 34° 59′ 00″ North, 117° 25′ 15″ West) downstream to Prado Flood Control Basin Dam (T3S, R7W, Section 20). Approximately 25 km (16 miles). The boundaries include areas within the 100-year floodplain where thickets of riparian trees and shrubs occur or may become established as a result of natural floodplain processes or rehabilitation.

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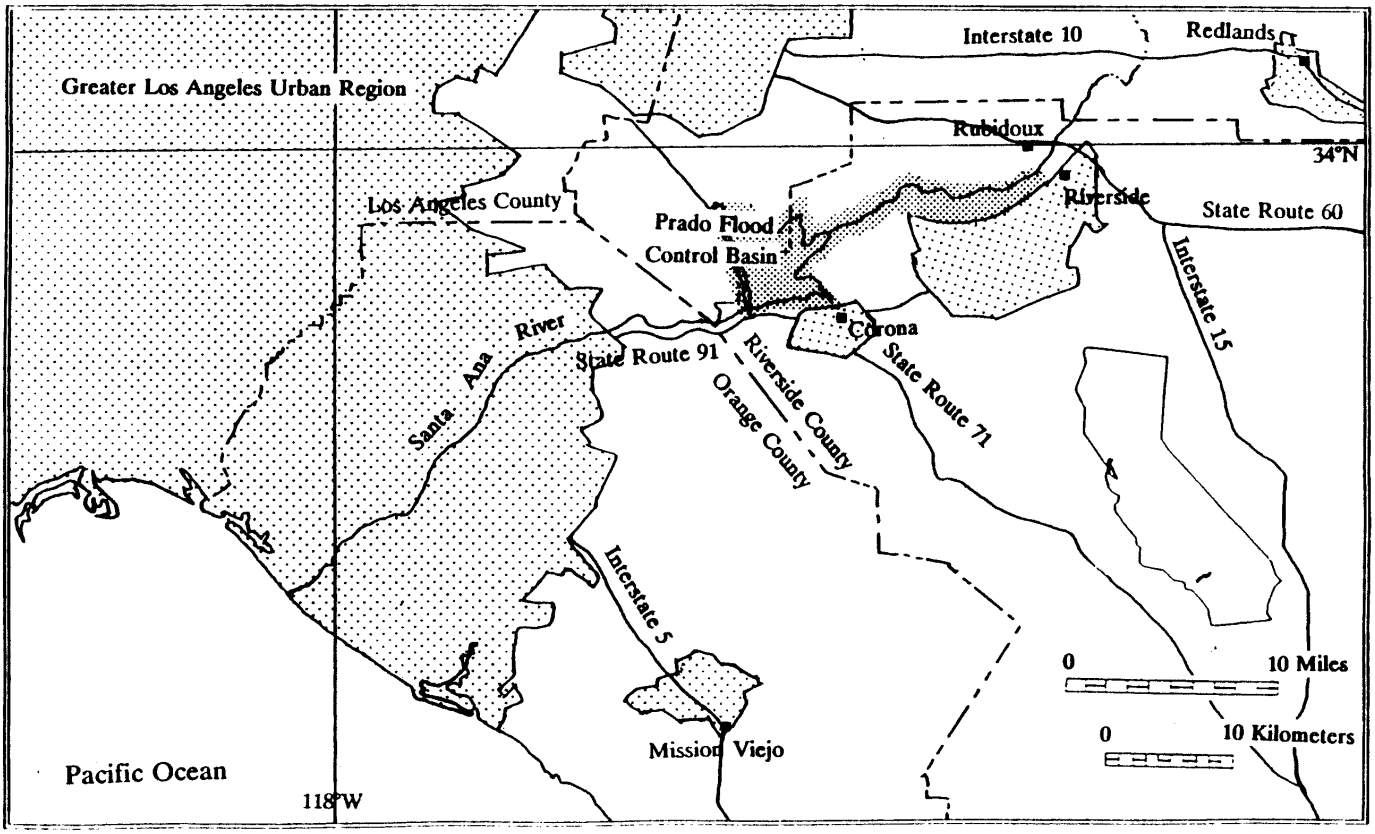
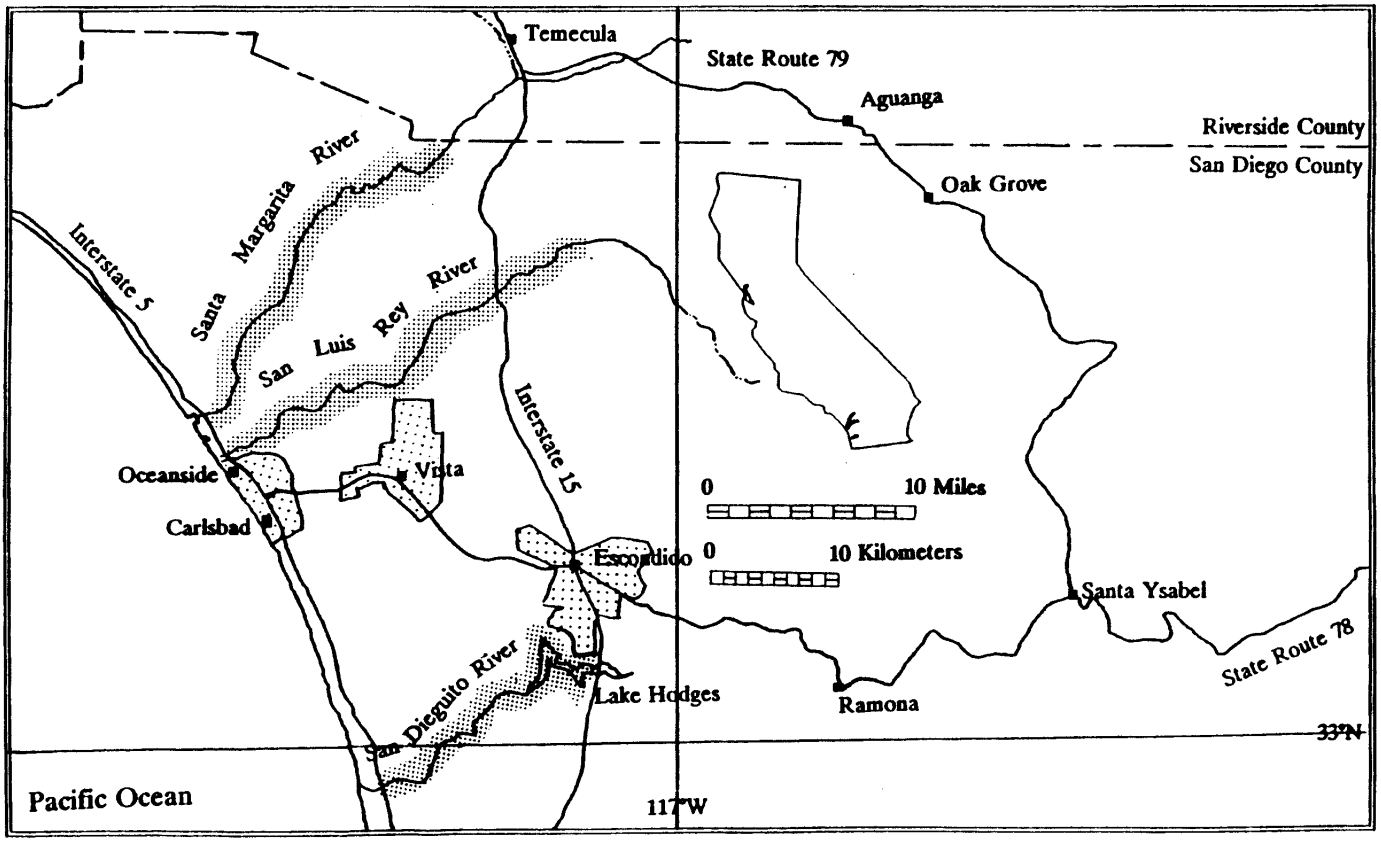


2. Santa Margarita River, San Diego County: from the unnamed trail at T8S, R3W, Section 34) downstream to northbound Interstate 5 (T11S, R5W, Section 19). Approximately 33 km (20 miles). The boundaries include areas within the 100-year floodplain where thickets of riparian trees and shrubs occur or may become established as a result of natural floodplain processes or rehabilitation.

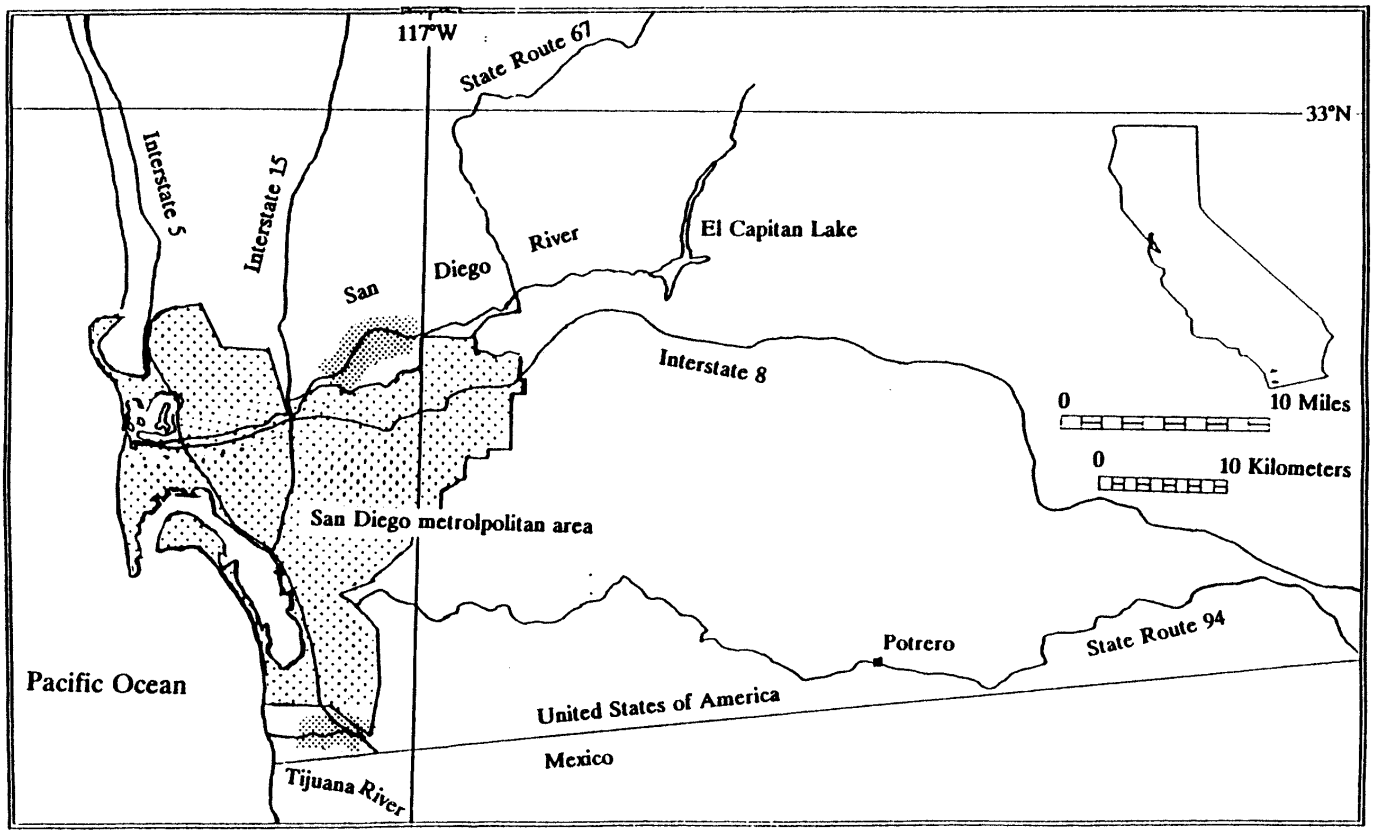
3. San Luis Rey River, San Diego County: from Mission Road (T9S, R2W, Section 27) downstream to northbound Interstate 5 (T11S, R5W, Section 22). Approximately 39 km (24 miles). The boundaries include areas within the 100-year floodplain where thickets of riparian trees and shrubs occur or may become established as a result of natural floodplain processes or rehabilitation.

4. San Diegito River, San Diego County: from southbound Interstate 15 (T13S, R2W, no section surveyed, but at 33° 3′ 45″ North, 117° 4′ 00″ West) downstream to northbound Interstate 5 (T14S, R4W, Section 12). Approximately 24 km (15 miles). The boundaries include areas within the 100-year floodplain where thickets of riparian trees and shrubs occur or may become established as a result of natural floodplain processes or rehabilitation.

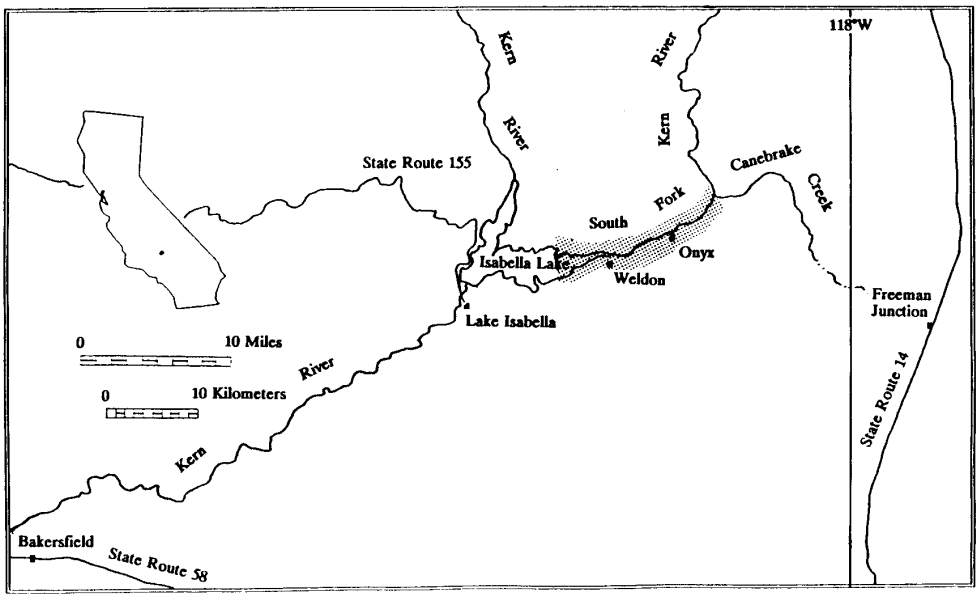


5. San Diego River, San Diego County: from Carlton Hills Boulevard (T15S, R1W, no section surveyed, but at 32° 50′ 45″ North, 117° 59′ 30″ West) downstream to the Second San Diego Aqueduct T15S, R2W, no section surveyed, but at 32° 49′ 30″ North, 117° 3′ 45″ West). Approximately 8 km (5.5 miles). The boundaries include areas within the 100-year floodplain where thickets of riparian trees and shrubs occur or may become established as a result of natural floodplain processes or rehabilitation.

6. Tijuana River, San Diego County: from Larsen Field (T19S, R2W, Section 1) downstream to the windmill at T19S, R2W, Section 4. Approximately 5.5 km (3.3 miles). The boundaries include areas within the 100-year floodplain where thickets of riparian trees and shrubs occur or may become established as a result of natural floodplain processes or rehabilitation.



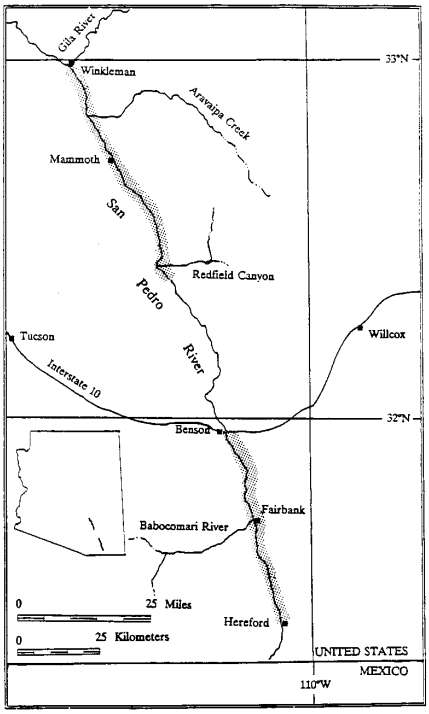
7. South Fork of the Kern River, Kern County: from the confluence of Canebrake Creek (T25S, R36E, Section 30) downstream to a line running north-south between Lyme Dyke and Lime Point encompassing the South Fork Wildlife Area at the eastern end of Lake Isabella (T26S, R34E, Sections 13 and 14). Approximately 26 km (16 miles). The boundaries include areas within the 100-year floodplain where thickets of riparian trees and shrubs occur or may become established as a result of natural floodplain processes or rehabilitation.



Arizona: Areas of land and water as follows:

1. San Pedro River, Cochise County: from the Hereford Bridge (T23S, R22E, Section 9), downstream to eastbound Interstate 10 bridge at Benson (T17S R20E, Section 11). Approximately 87 km (54 miles). The boundaries include areas within the 100-year floodplain where thickets of riparian trees and shrubs occur or may become established as a result of natural floodplain processes or rehabilitation.

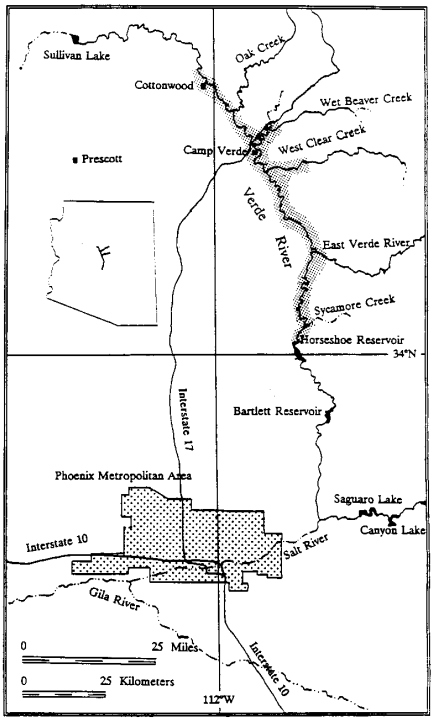
2. San Pedro River, Cochise, Pima and Pinal Counties: from the Gaging Station near Aguaja Canyon (T12S, R18E, Section 19), downstream to the confluence with the Gila River (T5S, R15E, Section 23). Approximately 106 km (66 miles). The boundaries include areas within the 100-year floodplain where thickets of riparian trees and shrubs occur or may become established as a result of natural floodplain processes or rehabilitation.



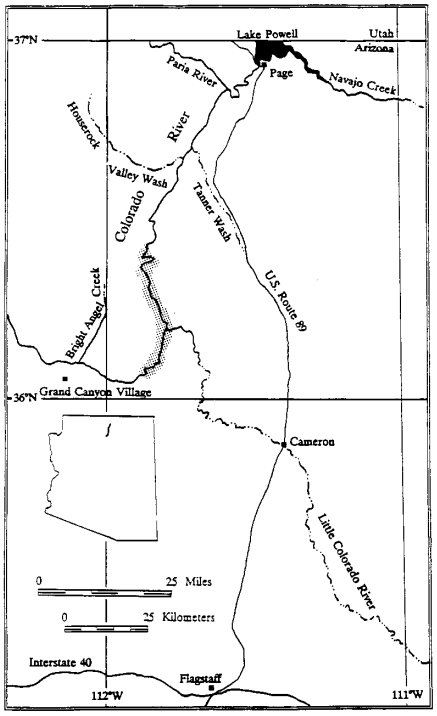
3. Verde River, Yavapai and Gila Counties: from Sob Canyon (T17N, R3E, Section 29) to its inflow into Horseshoe Reservoir (T8N, R6E, Section 15), including Tavasci Marsh and Ister Flat. Approximately 145 km (90 miles). The boundaries include areas within the 100-year floodplain where thickets of riparian trees and shrubs occur or may become established as a result of natural floodplain processes or rehabilitation.

4. Wet Beaver Creek, Yavapai County: from the gauging station upstream of the Beaver Creek Ranger Station (T15N, R6E, Section 24), downstream to the confluence of Beaver Creek and the Verde River (T14N, R5E, Section 30). Approximately 32 km (20 miles). The boundaries include areas within the 100-year floodplain where thickets of riparian trees and shrubs occur or may become established as a result of natural floodplain processes or rehabilitation.

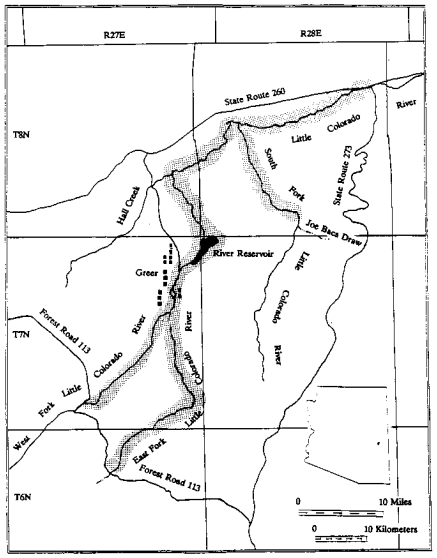
5. West Clear Creek, Yavapai County: from the section line dividing sections 18 and 17 in T13N, R6E downstream to the confluence with the Verde River (T13N, R5E, Section 17). Approximately 14 km (9 miles). The boundaries include areas within the 100-year floodplain where thickets of riparian trees and shrubs occur or may become established as a result of natural floodplain processes or rehabilitation.



6. Colorado River, Coconino County: from river mile 39 (T35N, R5E, Section 16) downstream to river mile 71.5 (T31N, R5E Section 8). (River mile 0 = Lee's Ferry). Approximately 52 km (32 miles). The boundaries include areas within the 100-year floodplain where thicketts of riparian trees and shrubs occur or may become established as a result of natural floodplain processes or rehabilitation.

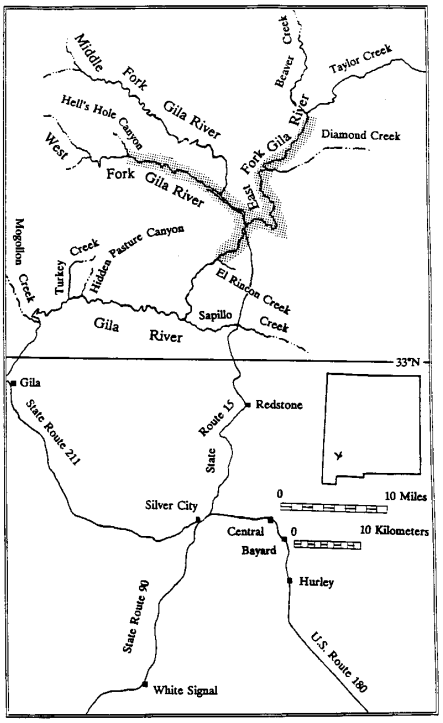


7. Little Colorado River, and the West, East, and South Forks of the Little Colorado River, Apache County: from the diversion ditch at T8N, R28E, Section 16, upstream to Forest Road 113 on the West Fork (T7N, R27E, Section 33), upstream to Forest Road 113 on the East Fork (T6N, R27E, Section 10), and upstream to Joe Baca Draw on the South Fork (T8N, R28E, Section 34). Approximately 48 km (30 miles). The boundaries include areas within the 100-year floodplain where thicketts of riparian trees and shrubs occur or may become established as a result of natural floodplain processes or rehabilitation.

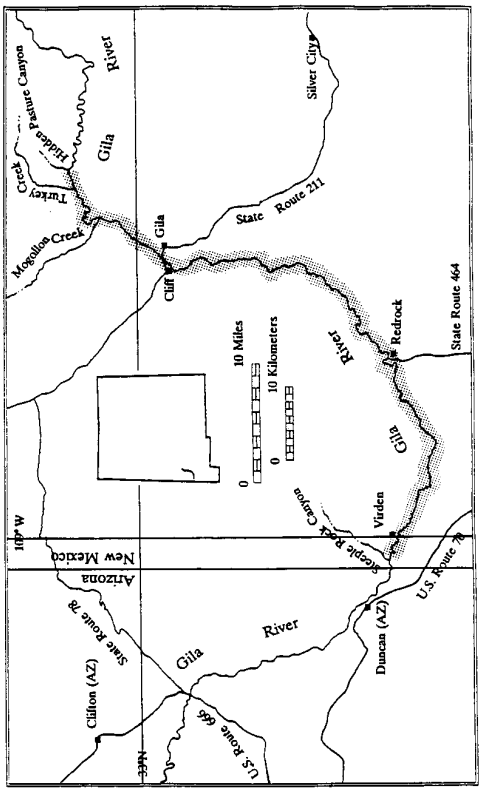


New Mexico: Areas of land and water as follows:

1. Gila River and the East and West Forks of the Gila River, Catron and Grant Counties: from El Rincon on the Gila River (T13S, R14W, S36) upstream to Hell's Hole Canyon on the West Fork of the Gila River T12S, R15W, S4), and upstream to the confluence of Taylor Creek and Beaver Creek on the East Fork of the Gila River (T11S, R12W, S17). Approximately 63 km (39 miles). The boundaries include areas within the 100-year floodplain where thickets of riparian trees and shrubs occur or may become established as a result of natural floodplain processes or rehabilitation.

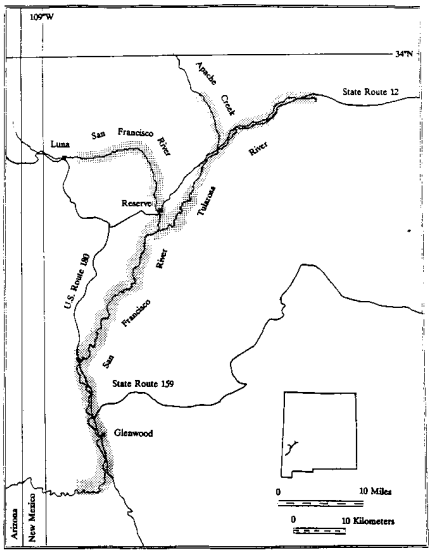


2. Gila River, Grant and Hidalgo Counties: from the confluence of Hidden Pasture Canyon (T14S, R16W, Section 14) downstream to the confluence of Steeple Rock Canyon (T18S, R21W, Section 33). Approximately 90 km (56 miles). The boundaries include areas within the 100-year floodplain where thickets of riparian trees and shrubs occur or may become established as a result of natural floodplain processes or rehabilitation.



3. San Francisco River, Catron County: from the confluence of Trail Canyon (T6S, R20W, Section 4) downstream to San Francisco Hot Springs, near the confluence with Box Canyon (T12S, R20W, Section 23). Approximately 105 km (65 miles). The boundaries include areas within the 100-year floodplain where thickets of riparian trees and shrubs occur or may become established as a result of natural floodplain processes or rehabilitation.

4. Tularosa River and Apache Creek, Catron County: from the confluence of the Tularosa and San Francisco Rivers (T7S, R19W, Section 23) upstream, to the source of the Tularosa River near the continental divide (T4S, R15W, Section 33), and upstream on Apache Creek to the confluence with Whiskey Creek (T4S, R18W, Section 25). Approximately 60 km (37 miles). The boundaries include areas within the 100-year floodplain where thickets of riparian trees and shrubs occur or may become established as a result of natural floodplain processes or rehabilitation.



Dated: July 16, 1997.

Joseph E. Doddridge,

Acting Deputy Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 97–19209 Filed 7–21–97; 8:45 am]

BILLING CODE 4310–55–C

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018–AC61

Endangered and Threatened Wildlife and Plants; Final Rule To Extend Endangered Status for the Jaguar in the United States

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: The Fish and Wildlife Service (Service) extends endangered status to the jaguar (*Panthera onca*) throughout its range under the authority of the Endangered Species Act of 1973, as amended. With this rule, the jaguar is now also listed as endangered in the United States, as well as in Mexico and Central and South America. In the United States, a primary threat to this species is illegal shooting. A minimum of 64 jaguars were killed in Arizona since 1900. The most recent individual killed in Arizona was in 1986.

Loss and modification of the jaguar's habitat are likely to have contributed to its decline. While only a few individuals are known to survive in the United States (Arizona and New Mexico), the presence of the species in the United States is believed to be dependent on the status of the jaguar in northern Mexico. Documented observations are as recent as 1996. Critical habitat was found to not be prudent and therefore is not being designated.

DATES: Effective August 21, 1997.

ADDRESSES: The complete file for this rule is available for inspection, by appointment, during normal business hours at the Fish and Wildlife Service, Arizona Ecological Services Field Office, 2321 West Royal Palm Road, Suite 103, Phoenix, Arizona 85021.

FOR FURTHER INFORMATION CONTACT: Sam Spiller, Field Supervisor, Arizona Ecological Services Field Office (see **ADDRESSES** section) (telephone 602/640–2720; facsimile 602/640–2730).

SUPPLEMENTARY INFORMATION:

Background

The jaguar (*Panthera onca*) is the largest species of cat native to the Western Hemisphere. Jaguars are muscular cats with relatively short, massive limbs and a deep-chested body. They are cinnamon–buff in color with many black spots; melanistic forms are also known, primarily from the southern part of the range. Its range in North America includes Mexico and portions of the southwestern United States (Hall 1981). A number of jaguar records are known from Arizona, New Mexico, and Texas. Additional reports exist for California and Louisiana. Records of the jaguar in Arizona and New Mexico have been attributed to the subspecies *Panthera onca arizonensis.* The type specimen of this subspecies was collected in Navajo County, Arizona, in 1924 (Goldman 1932). Nelson and Goldman (1933) described the distribution of this subspecies as the mountainous parts of eastern Arizona north to the Grand Canyon, the southern half of western New Mexico, northeastern Sonora, and, formerly, southeastern California. The records for Texas have been attributed to *Panthera onca veraecrucis.* Nelson and Goldman (1933) described the distribution of this subspecies as the Gulf slope of eastern and southeastern Mexico from the coast region of Tabasco, north through Vera Cruz and Tamaulipas, to central Texas.

Swank and Teer (1989) indicate that the historical range of the jaguar includes portions of the States of Arizona, New Mexico, Texas and Louisiana. These authors consider the current range to occur from central Mexico through Central America and into South America as far as northern Argentina. They state that the United States no longer contains established breeding populations, which probably disappeared in the 1960's. They also maintain that the jaguar prefers a warm, tropical climate, is usually associated with water, and is only rarely found in extensive arid areas.

Brown (1983) presented an analysis suggesting there was a resident breeding population of jaguars in the southwestern United States at least into the 20th century. The Service (U.S. Fish and Wildlife Service 1990) recognizes that the jaguar continues to occur in the American Southwest, at least as an occasional wanderer from Mexico.

The life history of the jaguar has been summarized by Nowak (1991) and Seymour (1989), among others. Jaguars breed year-round range-wide, but at the southern and northern ends of their range there is evidence for a spring breeding season. Gestation is about 100 days; litters range from one to four cubs (usually two). Cubs remain with their mother for nearly 2 years. Females begin sexual activity at 3 years of age, males at 4. Studies have documented few wild jaguars more than 11 years old.

The list of prey taken by jaguars range-wide includes more than 85 species (Seymour 1989), such as peccaries (javelina), capybaras, pacas, armadillos, caimans, turtles, and various birds and fish. Javelina and deer are presumably mainstays in the diet of jaguars in the United States and Mexico borderlands.

Jaguars are known from a variety of habitats (Nowak 1991, Seymour 1989). They show a high affinity to lowland wet habitats, typically swampy savannas or tropical rain forests. However, they also occur, or once did, in upland habitats in warmer regions of North and South America.

Within the United States, jaguars have been recorded most commonly from Arizona, but there are also records from California, New Mexico, and Texas, and reports from Louisiana. Currently there is no known resident population of jaguars in the United States, though they still occur in northern Mexico.

Arizona

Goldman (1932) believed the jaguar was a regular, but not abundant, resident in southeastern Arizona. Hoffmeister (1986) considered the jaguar an uncommon resident species in Arizona. He concluded that the reports of jaguars between 1885 and 1965 indicated that a small but resident population once occurred in southeastern Arizona. Brown (1983) suggested that the jaguar in Arizona ranged widely throughout a variety of habitats from Sonoran desert scrub upward through subalpine conifer forest. Most of the records were from Madrean evergreen-woodland, shrub-invaded semidesert grassland, and along rivers (Girmandonk 1994).

The most recent records of a jaguar in the United States are from the New Mexico/Arizona border area and in southcentral Arizona, both in 1996, and confirmed through photographs. In 1971, a jaguar was taken east of Nogales, Arizona, and, in 1986, one was taken from the Dos Cabezas Mountains in Arizona. The latter individual reportedly had been in the area for about a year before it was killed (Ron Nowak, Fish and Wildlife Service, pers. comm., 1992).

The Arizona Game and Fish Department (1988) cited two recent reports of jaguars in Arizona. The individuals were considered to be transients from Mexico. One of the reports was from 1987 from an undisclosed location. The other report was from 1988, when tracks were observed for several days prior to the