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March 8, 2004

Mr. Steve Spangle  
Arizona Ecological Services Field Office  
U.S. Fish and Wildlife Service  
2321 W. Royal Palm Road, Suite 103  
Phoenix, AZ 85021-4951

**Re: *Comments of SRP on Preparation of Designation of Critical Habitat for the Southwestern Willow Flycatcher, Analysis of Economic and Other Relevant Impacts of the Designation, and Impact Analysis Required by the National Environmental Policy Act***

Dear Mr. Spangle:

The Salt River Valley Water Users' Association and the Salt River Project Agricultural Improvement and Power District ("SRP" or "Project") submit these comments on the methodologies and criteria to be used by the U.S. Fish and Wildlife Service ("FWS") in preparing the designation of critical habitat for the southwestern willow flycatcher ("flycatcher"), the analysis of economic and other relevant impacts of the designation required by the Endangered Species Act ("ESA"), 16 U.S.C. § 1533(b)(2), and the associated environmental impact analysis required by National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332(2)(C), (E). SRP also submits comments on the particular areas under consideration by FWS for inclusion in or exclusion from the flycatcher critical habitat designation. We appreciate the opportunity to comment on these materials, and we hope that these comments will be useful to the U.S. Fish and Wildlife Service ("FWS") in preparing the proposed rule and above-referenced impact analyses.<sup>1</sup>

<sup>1</sup> SRP's comments are submitted pursuant to FWS' invitation in its January 21, 2004, Notice of Scoping Meetings and Intent to Prepare an Environmental Assessment for the Proposed Critical Habitat Designation for the flycatcher (69 Fed. Reg. 2940-43).

**SRP's Interest in the Critical Habitat Designation  
for the Flycatcher**

SRP is a multi-purpose federal reclamation project authorized and constructed under the Reclamation Act of 1902, 43 U.S.C. § 371 *et seq.* Pursuant to various contracts with the United States, SRP operates the Project works, which include, among other things, six reservoirs and dams on the Salt and Verde rivers in central Arizona. Water is impounded in these reservoirs by SRP for subsequent delivery to municipal, industrial and agricultural water users in the Phoenix metropolitan area.

SRP also provides power to more than 775,000 customers in the Phoenix area, and in certain rural areas of the State. Some of this power is generated through the operations of SRP's reservoirs. The remainder is supplied primarily by coal-fired power plants either operated by SRP or in which SRP has an ownership interest. In connection with its power operations, SRP also constructs and operates transmission lines in various areas throughout the state, including portions of the flycatcher's range in Arizona.

SRP's comments on the flycatcher designation reflect two areas of concern. First, SRP is concerned about the methodologies and criteria being used by FWS to identify critical habitat, and ultimately exclude certain areas from the designation, based on economic or other considerations. As a member of the regulated community, whose activities encompass areas within the flycatcher's current and historical ranges, SRP is, of course, interested in FWS' full compliance with the requirements of ESA and NEPA, as construed by recent decisions of the United States Court of Appeals for the Tenth Circuit. *See* 16 U.S.C. § 1533(b)(2); 42 U.S.C. § 4332(2)(C), (E); *New Mexico Cattle Growers Ass'n v. U.S. Fish and Wildlife Service*, 248 F.3d 1277 (10<sup>th</sup> Cir. 2001).

Additionally, and of critical importance, SRP is concerned about the particular areas being considered by FWS for inclusion in the flycatcher critical habitat designation, which may affect the operation of several reservoirs within SRP's system. The designation of critical habitat for the flycatcher also has the potential to directly affect SRP in the event SRP elects to site power generation, transmission or distribution facilities, or other Project works, in areas designated as critical habitat for this species. Accordingly, SRP has a particularly strong interest in the content of the designation itself.

In February of 2003, FWS issued a permit to SRP for the incidental "take" of the flycatcher, among other species, in connection with SRP's continued operation of the largest of its reservoirs, Roosevelt Dam and Lake ("Roosevelt") on the Salt River. The Roosevelt Habitat Conservation Plan ("Roosevelt HCP" or "RHCP"), developed by SRP as a prerequisite to issuance of the permit, provides for the acquisition of lands to be managed in perpetuity as habitat for the flycatcher. SRP is also presently developing a habitat conservation plan and application for an incidental take permit for Horseshoe and Bartlett Reservoirs, on the Verde River, to address the effects of its operations of these reservoirs on the flycatcher and other species. In light of its ongoing efforts to conserve the flycatcher as part of the Roosevelt HCP, and obtain an incidental take permit ("ITP") for the species resulting from continued operation of Horseshoe and Bartlett, SRP is interested in the flycatcher critical habitat designation, as well as the processes utilized by FWS for completing the designation.

The habitat conservation plan for Horseshoe and Bartlett Reservoirs (“Horseshoe and Bartlett HCP”) may also address the effects of operation of these reservoirs on critical habitat for two upstream endangered fish, the spokedace and loach minnow. While a critical habitat designation for these species is still in effect, a recent suit has challenged the analysis of economic impacts of the designation, and it is likely that FWS will have to redo this designation in the near future. As the designation of critical habitat for the spokedace and loach minnow may affect the preparation of the HCP for Horseshoe and Bartlett Reservoirs, SRP again is strongly interested in the content of the designation, as well as the process employed by FWS to prepare the designation of critical habitat for this species.

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Accordingly, SRP’s comments on the designation of critical habitat for the flycatcher seek to accomplish two objectives. First, SRP suggests a methodology and specific criteria to be used by FWS in designating critical habitat for the flycatcher and, ultimately, in excluding certain areas from the designation. Applying that methodology and criteria, SRP also provides its assessment of certain areas under consideration by FWS as critical habitat for the flycatcher, and its views on whether these areas should be included in or excluded from the designation.

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**Comments on Preparation of the Designation of Critical Habitat for the Southwestern Willow Flycatcher**

**I. Applicable Standards for Identifying Critical Habitat and Excluding Lands from the Designation**

**A. Introduction**

Critical habitat is defined by Section 3 of the ESA to include, first, geographical areas occupied by the species, which are “essential to the conservation of the species” and which “may require special management consideration or protection.” 16 U.S.C. § 1532(5). Areas outside of the geographical areas occupied by the species also may be designated as critical habitat, but only if FWS finds that “a designation limited to [the species’] present range would be inadequate to ensure the conservation of the species.” 50 C.F.R. § 424.12(e). The ESA further requires that any unoccupied habitat included in the designation be “essential for the conservation of the species.” 16 U.S.C. § 1532(5).

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The designation of critical habitat must be based on “the best scientific data available.” 16 U.S.C. § 1533(b)(2). Further, FWS may designate critical habitat only “after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat.” *Id.* Regulations promulgated by FWS for implementation of the impact analysis set forth the process for determining the economic and other impacts of the designation as follows:

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The Secretary [of the Interior] shall identify any significant activities that would either affect an area considered for designation as critical habitat or be likely to be affected by the designation, and shall, *after proposing designation of such an area*, consider the probable impacts of the designation upon proposed or ongoing

activities. The Secretary may exclude any portion of such an area from the critical habitat if the benefits of such exclusion outweigh the benefits of specifying the area as part of the critical habitat. The Secretary shall not exclude any such area if, based on the best scientific data available, [s]he determines that the failure to designate that area as critical habitat will result in the extinction of the species concerned.

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50 C.F.R. § 424.19 (emphasis added). Thus, the designation of critical habitat requires a balancing of often widely disparate interests, which in turn requires public input in the collection and analysis of a broad scope of information. See 50 C.F.R. § 424.16 (requiring public comment on a critical habitat designation).

**B. Scope of Analysis of Economic, Environmental and Other Relevant Impacts of the Designation Required by the ESA and NEPA**

**Economic Analysis:** In designating critical habitat, the ESA requires FWS to consider “the economic impact, and any other relevant impact, of specifying any particular area as critical habitat.” 16 U.S.C. § 1533(b)(2); 50 C.F.R. § 424.12. At the outset, this undertaking entails the identification of “any significant activities that would either affect an area considered for designation as critical habitat or be likely to be affected by the designation.” 50 C.F.R. § 424.19. Once potentially affected activities have been identified, and “after proposing designation of such an area, [FWS must] consider the probable economic and other impacts of the designation upon proposed or ongoing activities.” *Id.* The product resulting from this effort is commonly referred to as the “economic analysis.” FWS may exclude an area from the critical habitat designation if, after conducting its economic analysis, it determines that benefits of excluding the area outweigh the benefits of including it. 16 U.S.C. § 1533(b)(2).

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The required scope of the economic analysis has been the subject of heated litigation in recent years, in the context of the critical habitat designation for the flycatcher itself. In *New Mexico Cattle Growers Ass’n v. U.S. Fish and Wildlife Service*, *supra*, the United States Court of Appeals for the Tenth Circuit held that, under Section 4 of the ESA, FWS must analyze “all of the economic impacts of a critical habitat designation, regardless of whether the impacts are attributable co-extensively to other causes.” The Court further concluded that FWS’ economic analysis of the impacts of the critical habitat designation for the flycatcher failed to meet this standard. 248 F.3d at 1285. See 16 U.S.C. § 1533(b). In reaching its holding, the court in *New Mexico Cattle Growers’ Association* also reiterated its earlier ruling in *Catron County v. United States Fish and Wildlife Service*, 75 F.3d 1429, 1436 (10<sup>th</sup> Cir. 1996), which required FWS to address the environmental impacts of a critical habitat designation through compliance with NEPA.

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The Tenth Circuit’s decisions in *New Mexico Cattle Growers’ Association* and *Catron County* thus require FWS to adhere to a process for designating critical habitat that includes a more comprehensive analysis of economic impacts of the designation, as well as an analysis of the environmental impacts of the designation in compliance with NEPA. Taken together, the economic analysis and the NEPA analysis provide the underlying basis for decisions by FWS to include or exclude lands from the final designation based on an assessment of benefits and

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burdens. See 16 U.S.C. § 1533(b)(4). Accordingly, FWS' preparation of the economic analysis should be undertaken contemporaneously with the analysis of impacts under NEPA, and an opportunity afforded for public comment on these analyses before publication of the final rule.

**NEPA Analysis:** While the ESA is concerned primarily with a *result*, the protection of endangered and threatened species, NEPA is concerned with the *process* used in making a decision. *Catron County*, 75 F.3d at 1437. NEPA is intended to facilitate the dissemination of information to the public and interested parties that may be affected by the agency's decision. *Id.* NEPA requires federal agencies to take a "hard look" at the impacts of their decisions on the environment, especially where such decisions will significantly affect the quality of the human environment. 42 U.S.C. § 4332(2)(C); *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 385 (1989). An agency must consider both direct and indirect effects, whether detrimental or beneficial, including ecological, aesthetic, historic, cultural, economic, social and health effects. 40 C.F.R. § 1508.8.

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## II. Suggested Methodology to be Used in Preparation of the Flycatcher Critical Habitat Designation, Economic Analysis and Impact Analysis Under NEPA

Taking into account the applicable legal standards, summarized above, the following is a suggested methodology, set forth in five sequential steps, for preparation of the flycatcher critical habitat designation, economic analysis and NEPA analysis. Following each step is a detailed explanation of its implementation.

**Step 1: Determine the maximum area of available habitat in each Management Unit that could be designated as critical habitat, i.e., the currently and potentially suitable habitat described in the Recovery Plan that contains the primary constituent elements. Specify the primary constituent elements and address issues relative to the delineation of critical habitat adjacent to stream channels, using the best available science.**

### **Step 1.a.: Determine the maximum area of available habitat in each Management Unit**

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Overall, SRP views designation of critical habitat as a refinement process — beginning with a relatively broad array of possible habitat locations, followed by refinement of locations until the only areas left are those essential to the conservation of the species after consideration of economic and other relevant impacts. The first step in the process is to determine the maximum area of available habitat in each Management Unit based on key physical and biological components of flycatcher habitat (primary constituent elements). For flycatchers, Management Units should be used as the basic geographic areas of consideration because the Recovery Plan concludes that populations should be distributed broadly across the range of this species in order to achieve recovery and because conditions vary widely between Management Units. Flycatcher Recovery Plan (FWS 2002) (cited hereinafter as "RP"), pp. 61-65.

The Recovery Plan paints a broad picture of possible habitat, which essentially describes most watersheds and riparian ecosystems in the Southwest as potentially being important to recovery (RP, pp. 2, 3). However, the Recovery Plan begins the refinement process by

identifying long reaches of streams within a number of watersheds, which are “specific river reaches ... where recovery efforts should be focused” (RP, pp. 81, 86-92). These appear to be the river reaches delineated on the maps presented at the public scoping meetings.<sup>2</sup> These reaches are still too broad to comprise the area from which critical habitat should be designated because they encompass many areas that do not currently have and cannot provide the primary constituent elements of flycatcher habitat. Before continuing with the refinement process and describing specific reaches that should not be designated as critical habitat, it is essential to define the primary constituent elements appropriate for use in designation of flycatcher critical habitat.

### **Step 1.b.: Determine Primary Constituent Elements**

The 1997 final rule designating critical habitat describes the primary constituent elements of flycatcher habitat in very general terms, in part due to the time constraints imposed by a court order for completing the designation. 62 FR 39130 (July 22, 1997). After describing the regulatory list of general physical and biological factors to be considered, which are found at 50 C.F.R. §§ 424.12(b)(1)-(5), the rule states:

For all areas of critical habitat designated here, these physical and biological features 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 vegetation is not present, but may become established in the future.

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62 Fed. Reg. 39132 (July 22, 1997).

The 1997 rule designating flycatcher critical habitat continues with a general description of the attributes of riparian vegetation used as breeding habitat by flycatchers — species composition, vegetation structure, and patch size and shape. *Id.*

Although the prior rule generally describes the vegetation characteristics of flycatcher breeding habitat, SRP suggests that the primary constituent elements must be set forth more specifically in order to: a) designate only the habitat that is essential to the conservation of the species, and b) accurately assess the potential future destruction or adverse modification of critical habitat. A great deal of flycatcher research has been conducted since issuance of the 1997 rule, including development of the Recovery Plan and the Roosevelt HCP, which addresses the largest known current population of flycatchers. Information from this research constitutes the best available science to be used to specify the primary constituent elements of flycatcher critical habitat.

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<sup>2</sup> The river reaches are incorrectly identified as “Important Breeding Areas” on the map legends presented at the public meetings but are more appropriately described in the Federal Register notice as “areas identified as important stream reaches in the Southwestern Willow Flycatcher Recovery Plan.” 69 FR 2941 (January 21 2004).

SRP's discussion and suggested specifications of the primary constituent elements of flycatcher critical habitat are derived from several sources including:

1. The Flycatcher Recovery Plan ("RP");
2. The Nature Conservancy's Rangeland Assessment of Habitat Acquisition Priorities for the Southwestern Willow Flycatcher (TNC 1999);
3. Arizona Game and Fish Department ("AGFD") annual reports;
4. The AGFD model of flycatcher breeding habitat (Hatten and Paradzick 2003); and
5. The Roosevelt Habitat Conservation Plan (SRP 2002; citations in text are "RHCP") and biological opinion (FWS 2003).

The primary constituent elements of flycatcher critical habitat should focus on breeding habitat because: a) this component of habitat is essential to the recovery of the species; and b) the specific characteristics of flycatcher breeding habitat are relatively unique in the Southwest, and thus comprise the limiting factor for flycatcher populations. RP (see generally). Appropriately, breeding habitat also was the focus of the 1997 rule and is one of the required considerations by FWS. 62 FR 39132, 39133 (July 22, 1997); 50 C.F.R. § 424.12(b)(4). Although flycatchers sometimes use adjacent riparian and upland areas for feeding and other activities, these areas, which are integral to breeding, are always found in conjunction with breeding habitat, and thus do not require separate consideration.

As set forth in the 1997 designation of flycatcher critical habitat, areas currently or potentially suitable for flycatcher breeding have (or are capable of having) relatively wide, dense, tall stands of riparian shrubs or trees ("tall woody vegetation" in these comments). RP, p. 11. These stands of tall woody vegetation may be comprised of native and/or exotic species of riparian trees and shrubs. *Id.*, p. 11. More specifically, the tall woody vegetation used by flycatchers typically ranges in height from 2 to 4 m (6 to 13 ft) at elevations above about 1,525 m (5,000 ft) and 3 to 30 m (10 to 98 ft) at lower elevations. *Id.*, pp. 11, 12. Usually, dense vegetation occurs within the first 3 to 4 m (10 to 13 ft) above ground in these stands. *Id.*, p. 11. Tall woody vegetation used as breeding habitat for flycatchers varies in size and shape but the width of patches is usually greater than 10 m (33 ft). *Id.*, p. 17. Where such tall woody vegetation is not currently present, recent or historical information should be used to confirm that appropriate conditions are present to support such habitat (e.g., reports, photos, topographic maps, interviews and other data). TNC, p. 2. PR-7

Flycatcher breeding habitat occurs near perennial, still or slow-moving water. RP, p. 18; TNC, p.2; Smith et al., 2002. Important geomorphological characteristics of breeding sites include a relatively broad low floodplain without stream entrenchment. RP, pp. 16, 18; TNC, p.2. These geomorphological characteristics promote restoration, maintenance and recycling of tall woody vegetation through scouring floods, sediment deposition, periodic partial inundation, and shallow ground water tables. RP, pp. 16, 18. The portion of the floodplain having a ground water table within 1.5 m (5 ft) of the surface is the area having the hydrological and geomorphological conditions that support tall woody vegetation used by flycatchers. RHCP, p. 124; FWS 2003, p. 49. The minimum width of the floodplain with these hydrological and geomorphological conditions should be about 300 m (1,000 ft) based on field observations of

flycatcher habitat in central Arizona and New Mexico. These field observations correspond well with the 360 m (1,200 ft) diameter of the 41 ha (101 ac) floodplain “neighborhood” in which most breeding sites were found at four large study sites in central Arizona. Hatten and Paradzick, 2003. In addition to on-site characteristics, watershed characteristics and conditions that favor maintenance of these hydrological and geomorphological conditions also should be considered in selecting critical habitat reaches. TNC, pp. 2, 3. The consideration of potential land and water use impacts on flycatcher habitat is discussed more fully in the next paragraph.

One of the requirements of critical habitat is that these areas should be “protected from disturbance or are representative of the historic geographical and ecological distributions of a species.” 50 C.F.R. §§ 424.12(b)(1)-(5). In other words, if suitable locations are available elsewhere, it does not make sense to designate critical habitat along stream reaches that are already impacted by land or water use activities or will soon be impacted by those activities. Examples of locations that are already impacted or are unlikely to be protected from impacts include stream reaches through urbanizing areas and the conservation pools of water storage reservoirs. These locations are unlikely to reliably provide breeding habitat for flycatchers over the long term.

The Recovery Plan also lists other important components of breeding habitat, some of which should be incorporated into the list of primary constituent elements. RP, p. 18. Many of these components are not well enough understood to specifically define as part of the primary constituent elements (e.g., micro-climate and prey availability). *Id.* However, several of these factors should be used by FWS to define primary constituent elements — i.e., small patches should not be isolated, suitable habitat should be in proximity to currently occupied habitat, and there should not be an abundance of predators or parasites. *Id.*

In terms of isolated small patches of current or potential flycatcher habitat, it does not make sense to designate these as “critical” because: a) they are not “connected” to other habitat due to their isolation, b) tall woody vegetation is unlikely to be present at all times in those locations due to scouring or other losses, and c) small, isolated patches are unlikely to be able to support a self-sustaining local population of flycatchers. RP, pp. 74, 75. An isolated small patch should be defined as a patch smaller than 8 ha (20 ac), which is more than 30 km (19 miles) from other suitable patches. RP, pp. 17, 22. Similarly, suitable habitat should be located in proximity to occupied habitat because of the strong site fidelity of flycatchers and higher colonization potential for nearby sites, and because close, connected populations promote genetic exchange and metapopulation stability. RP, pp. 74, 75. Suitable patches designated as “critical” should be within 100 km (60 miles) of occupied habitat to facilitate colonization. RP, p. 25. Finally, habitat with an abundance of predators or parasites (e.g., domestic cats or cowbirds) should not be designated where control of those biotic factors is unlikely. Examples of such stream reaches with uncontrollable predator or parasite problems include locations in or near urbanizing areas or within private and public lands where grazing occurs.

In summary, the primary constituent elements of flycatcher critical habitat should be defined as listed below. The order of the list is arranged to promote relatively quick screening of potential habitat areas.

1. The stream reach is perennial, with still or slow-moving water.
2. The stream reach is not entrenched.
3. The stream reach has an active floodplain of a minimum width of 300 m (1,000 ft) with a depth to ground water of 1.5 m (5 ft) or less.
4. The stream reach is free from significant impacts by current or imminent land and water use activities.
5. The stream reach has watershed characteristics and conditions favorable for maintenance of current hydrological and geomorphological conditions that support tall woody vegetation.
6. The active floodplain along the stream reach currently has or will support tall woody vegetation with a height of 2 to 4 m (6 to 13 ft) at elevations above about 1,525 m (5,000 ft) and 3 to 30 m (10 to 98 ft) at elevations below about 1,525 m (5,000 ft); dense vegetation within the first 3 to 4 m (10 to 13 ft) above ground; and a stand width greater than 10 m (33 ft).
7. The stream reach is within 100 km (62 miles) of occupied habitat.
8. The stream reach will support a patch of tall woody vegetation larger than 8 ha (20 ac) if it is farther than 30 km (19 miles) to another suitable patch.
9. The stream reach does not have the presence of uncontrollable numbers of predators or parasites.

#### **Step 1.c.: Delineation of Habitat Adjacent to Stream Channels**

The 1997 rule designating flycatcher critical habitat included all land within the 100-year floodplain along the identified stream reaches. 62 FR 39132 (July 22, 1997). The Scoping Notice indicates that FWS believes that designating the 100-year floodplain for the lateral extent of critical habitat may again be appropriate "due to the dynamic nature of riparian habitat." 69 FR 2941 (January 21, 2004). Use of the entire width of the 100-year floodplain as the lateral extent of critical habitat is clearly inappropriate. SRP is not aware of any scientific evidence that the entire width of the 100-year floodplain has been able or will ever be able to support riparian vegetation suitable for flycatcher habitat. Moreover, as the result of discussions with FWS representatives during preparation of the Roosevelt Habitat Conservation Plan, the *FWS representatives themselves* consistently took the position that the 100-year floodplain is *not* an appropriate yardstick for estimating flycatcher habitat because many of the lands have depths to groundwater too deep to produce or maintain riparian habitat suitable for flycatchers even with periodic channel movements and reworking of the floodplain in response to flooding events. In the Roosevelt HCP and accompanying biological opinion, lands with a maximum depth to ground water of 1.5 m (5 feet) on the active floodplain were determined to be the maximum extent of the area where flycatcher habitat currently exists or may exist in the future.<sup>3</sup> Although the river may move laterally in response to flood events, most of the lateral movement will occur

<sup>3</sup> Depth to ground water must generally be less than 1 m (3 ft) for establishment of new cottonwoods and willows (Stromberg et al. 1991; Stromberg et al. 1996). However, once established, cottonwood-willow habitat can be sustained by ground water within 3 m (10 ft) or more from the surface. The 1.5 m (5 ft) criterion reflects that cottonwoods and willows will become established and can be sustained over this portion of the floodplain as the channel migrates across this portion of the floodplain (*Id.*; Springer et al. 1999).

within the active portion of the floodplain where ground water levels are within 1.5 m (5 feet) of the surface. In the future, if the stream moved significantly outside of the area designated in the final rule, FWS could amend the rule to incorporate the additional area if necessary.

SRP believes that FWS can quickly and accurately delineate critical habitat using the criterion of a maximum depth to ground water of 1.5 m (5 ft) using readily available information including GIS technology (digital elevation models and stream features), aerial photographs, topographic maps, field observations, reports, and interviews with local biologists and hydrologists. PR 7

SRP supports designating flycatcher critical habitat using specific stream reaches, the same approach used in the 1997 rule. 62 FR 39138-39146. For example, specific reaches along the Salt, Verde, and San Pedro rivers are suggested later in these comments.

**Step 1.d.: Delineation of Suitable Habitat** ] PR

The Scoping Notice states that FWS intends “to utilize those areas identified as important stream reaches in the Southwestern Willow Flycatcher Recovery Plan as a starting point in identifying areas that may meet the definition of critical habitat.” 69 FR 2941 (January 21 2004). Below, each of those stream reaches along the Verde, Salt, and San Pedro rivers is addressed. For each river, stream reaches are listed that meet the primary constituent elements of flycatcher critical habitat. Where stream reaches identified in the Recovery Plan are not listed, the reasons for elimination are provided. } LO28

**Salt River**

- 1) West Fork of the Black River from the boundary of Townships 4 and 5 North downstream to the west boundary of Section 10 T4N R28E consisting of approximately 3.2 km (2.0 mi) of stream reach and 97 ha (240 ac) of existing and potential habitat. This area is unoccupied. The quality of the primary constituent elements in this area is low to moderate, primarily because it is unoccupied and is located relatively far from currently occupied habitat.

The Recovery Plan also identifies additional potential habitat a short distance upstream and downstream along the West Fork of the Black River from the reach identified above. However, the floodplains along these reaches are too narrow to reliably support flycatcher habitat. LO28

In addition, the Recovery Plan also identifies the East Fork of the Black River from Deer Creek to Buffalo Crossing as potential habitat. However, this entire reach is too narrow to reliably support flycatcher habitat.

- 2) Burro Creek and its tributaries in Sections 25 and 36 T6N R27E consisting of approximately 1.6 km (1.0 mi) of stream reaches and 49 ha (120 ac) of existing and potential habitat. This area is unoccupied. The quality of the primary constituent elements in this area is low to moderate, primarily because it is unoccupied and is located relatively far from currently occupied habitat.

The Recovery Plan identifies this area as the "West Fork of the Black River near Thompson Ranch, Sections 25, 26 and 36 T6N R27E." However, the floodplains along the lower reach of Burro Creek and the reach of the West Fork of the Black River in Section 26 are too narrow to reliably support flycatcher habitat.

- 3) Salt River from the old Diversion Dam just above Roosevelt Lake downstream to elevation 655.6 m (2,151 ft) consisting of approximately 3.2 km (2.0 mi) of stream reach and 97 ha (240 ac) of existing and potential habitat. This area is unoccupied. The quality of the primary constituent elements in this area is low to moderate primarily because it is unoccupied, the alluvial sediments are very coarse, or the tall woody vegetation is decadent. The stream reach described includes areas having special management protection as part of the Roosevelt HCP.

The Recovery Plan lists all of Roosevelt Lake as providing potential habitat. However, extended inundation of the reservoir bed will prevent flycatcher habitat from being reliably available.

- 4) Tonto Creek from the north boundary of Section 36 T6N R10E downstream to elevation 655.6 m (2,151 ft) at the upper edge of Roosevelt Lake consisting of approximately 3.2 km (3.5 mi) of stream reach and 344 ha (850 ac) of existing and potential habitat. Portions of this area are currently occupied. The quality of the primary constituent elements in this area is moderate to high. Some of the habitat is of moderate quality primarily because of impacts from upstream diversions of water and the impact of nearby land uses. The areas described include areas having special management protection as part of the Roosevelt HCP.
- 5) Tonto Creek from the USGS stream gage near Gisela (just below The Narrows) downstream to the upper end of The Box consisting of approximately 6.4 km (4.0 mi) of stream reach and 196 ha (485 ac) of existing and potential habitat. This area is unoccupied. The quality of the primary constituent elements in this area is moderate, primarily because it is unoccupied and nearby land uses will impact potential habitat.

The Recovery Plan also identifies the reach between The Box and the north boundary of Section 36 T6N R10E as potential habitat. However, the floodplain of Tonto Creek in that reach cannot reliably support flycatcher habitat because it is too narrow, too steep, or too impacted by adjacent land uses.

The five stream reaches listed above contain approximately 783 ha (1,935 ac) of existing and potential flycatcher habitat. The Recovery Plan identifies a minimum of 50 territories in the Roosevelt Management Unit for down-listing and de-listing, which would require about 50 ha (120 acres) of existing and potential habitat (multiplying 50 territories by 0.5 ha (1.2 ac) per territory, and doubling that amount to offset periodic losses).

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## Verde River

The Recovery Plan identifies the entire Verde River from Sycamore Canyon to the confluence with the Salt River as potential habitat. Except for the reaches listed below, the floodplain of the Verde River cannot reliably support flycatcher habitat because it is either too narrow, too steep, too impacted by adjacent land uses, or the river is incised.

- 1) Verde River from the confluence of Sycamore Canyon downstream 0.6 km (0.4 mi), Sections 7, 8, 17 and 18 T17N R3E consisting of approximately 0.6 km (0.4 mi) of stream reach and 19 ha (48 ac) of existing and potential habitat. This area is unoccupied. The quality of the primary constituent elements in this area is moderate, primarily because it is currently unoccupied and is located relatively far from currently occupied habitat.
- 2) Verde River from the Tuzigoot Bridge downstream to the south boundary of Section 22 T 16N R3E consisting of approximately 2.4 km (1.5 mi) of stream reach and 74 ha (182 ac) of existing and potential habitat. Portions of this area have been previously occupied. The quality of the primary constituent elements in this area is moderate, primarily because it is unoccupied, it is located relatively far from currently occupied habitat, and nearby land uses are likely to impact the area.
- 3) Verde River from the west boundary of Deadhorse Ranch State Park downstream to the south boundary of Section 26 T 16N R3E consisting of approximately 2.7 km (1.7 mi) of stream reach and 83 ha (206 ac) of existing and potential habitat. This area is unoccupied. The quality of the primary constituent elements in this area is moderate, primarily because it is unoccupied and is located relatively far from currently occupied habitat.
- 4) Verde River from the north boundary of Section 24 T14N R 4E downstream to the Montezuma Castle (Black) Bridge consisting of approximately 4.8 km (3.0 mi) of stream reach and 147 ha (364 ac) of existing and potential habitat. Portions of this area are currently occupied. The quality of the primary constituent elements in this area is moderate to high. Some of the habitat is of moderate quality primarily because nearby land uses may impact the habitat. The areas described include areas having special management protection as part of the Roosevelt HCP.
- 5) Verde River from the north boundary of Section 20 T 13N R 5E downstream to the confluence with West Clear Creek and the lower 0.8 km (0.5 mi) of West Clear Creek consisting of approximately 4.8 km (3 mi) of stream reach and 147 ha (364 ac) of existing and potential habitat. This area is unoccupied. The quality of the primary constituent elements in this area is moderate, primarily because it is unoccupied and nearby land uses may impact the habitat.
- 6) Verde River from the USGS gage near Tangle Creek downstream to elevation 617.5 m (2,026 ft) at the upper edge of Horseshoe Reservoir consisting of approximately 4.8 km (3.0 mi) of stream reach and 147 ha (364 ac) of existing and potential habitat. Portions of this area have been previously occupied. The quality of the primary constituent elements in this area is moderate because highly variable hydrology and very coarse sediment limit the

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establishment and maintenance of habitat.

The Recovery Plan includes Horseshoe and Bartlett Reservoirs as providing potential habitat. However, periodic inundation of the reservoir beds prevent those areas from reliably supporting flycatcher habitat.

- 7) Verde River from 0.8 km (0.5 mi) below Horseshoe Dam downstream for 2.4 km consisting of approximately 2.4 km (1.5 mi) of stream reach and 74 ha (182 ac) of existing and potential habitat. Portions of this area are currently occupied. The quality of the primary constituent elements in this area is moderate, primarily because nearby land uses may impact the habitat.

The seven stream reaches listed above contain approximately 690 ha (1,705 ac) of existing and potential flycatcher habitat. The Recovery Plan identifies a minimum of 50 territories in the Verde Management Unit for down-listing and de-listing, which would require about 50 ha (120 acres) of existing and potential habitat (multiplying 50 territories by 0.5 ha (1.2 ac) per territory, and doubling that amount to offset periodic losses).

### San Pedro/Middle Gila Rivers

The Recovery Plan identifies the entire San Pedro from border of Mexico to the confluence with the Gila River as potential habitat. Except for the reaches listed below, the floodplain of the San Pedro River cannot reliably support flycatcher habitat because it is too narrow, too steep, too impacted by adjacent land uses, or the river is incised.

- 1) San Pedro River from the south boundary of Section 4 T13S R19E downstream to the USGS gage near Redington consisting of approximately 7.2 km (4.5 mi) of stream reach and 220 ha (545 ac) of existing and potential habitat. Portions of this area are currently occupied. The quality of the primary constituent elements in this area is moderate to high. Some of the habitat is of moderate quality primarily because nearby land uses may impact the habitat. The areas described include areas having special management protection by federal agencies for the benefit of flycatchers and other wildlife.
- 2) San Pedro River from the south boundary of Section 27 T11S R18E downstream to the north boundary of Section 31 T9S R18E consisting of approximately 21.7 km (13.5 mi) of stream reach and 662 ha (1,636 ac) of existing and potential habitat. Portions of this area are currently occupied. The quality of the primary constituent elements in this area is moderate to high. Some of the habitat is of moderate quality primarily because nearby land uses may impact the habitat. The areas described include areas having special management protection as part of the Roosevelt HCP.
- 3) San Pedro River from the south boundary of Section 1 T8S R16E downstream to the confluence with the Gila River consisting of approximately 14.5 km (9.0 mi) of stream reach and 441 ha (1,090 ac) of existing and potential habitat. Portions of this area are currently occupied. The quality of the primary constituent elements in this area is moderate to high. Some of the habitat is of moderate quality primarily because nearby land uses may impact the habitat. The areas described include areas having special management protection by

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federal agencies conservation organizations for the benefit of flycatchers and other wildlife, and as part of the Roosevelt HCP.

- 4) Gila River from east boundary of Section 23 T5S R15E downstream to the south boundary of Section 17 T4S R14E consisting of approximately 19.3 km (12.0 mi) of stream reach and 589 ha (1,455 ac) of existing and potential habitat. Portions of this area are currently occupied. The quality of the primary constituent elements in this area is moderate to high. Some of the habitat is of moderate quality primarily because nearby land uses may impact the habitat.

The Recovery Plan identifies the middle Gila River downstream from the reach listed above downstream to the Kelvin Bridge as potential habitat. However, the Gila River floodplain in that reach cannot reliably support flycatcher habitat because it is too narrow.

The four stream reaches listed above contain approximately 1,912 ha (4,725 ac) of existing and potential flycatcher habitat. The Recovery Plan identifies a minimum of 150 territories in the San Pedro/Middle Gila Management Unit for down-listing and de-listing, which would require about 150 ha (360 acres) of existing and potential habitat (multiplying 150 territories by 0.5 ha (1.2 ac) per territory, and doubling that amount to offset periodic losses).

**Step 2: Classify available habitat in Step 1 as occupied or unoccupied. Determine if all occupied habitat needs to be designated in order to ensure the conservation of the species, i.e., to meet the minimum number of territories in each Management Unit as specified in the Recovery Plan. If the amount of occupied habitat is insufficient, make this finding expressly and determine the amount of additional unoccupied habitat that needs to be designated.**

**Step 2.a.: Classify Available Habitat as Occupied or Unoccupied**

Classification of available habitat as occupied or unoccupied is a relatively simple task that should be based on the most recent survey results. If desired, previously unoccupied habitat could be separately identified by FWS. The delineation of occupied habitat should represent the stream reaches occupied by flycatchers using the 4.5 ha (11.1 ac) estimate derived for the Roosevelt HCP, which is equivalent to a radius of 120 m (396 ft) from the center of a territory. RHCP, p. 86; FWS 2003, p. 39. In other words, the stream reach delineated as occupied should extend 20 m (396 ft) above the most upstream territory to that same distance below the most downstream territory, where territories overlap.

**Step 2.b.: Determine If All Occupied Habitat Needs to be Designated as Critical**

The Recovery Plan identifies the minimum number of territories that must persist in each Management Unit in order for recovery (down-listing and de-listing) of the species to occur. RP, pp. 77-85. The total amount of breeding habitat required by this number of territories should be multiplied by the average amount of 0.5 ha (1.2 ac) required per territory to estimate the base amount of habitat necessary to support those flycatchers. RP, p. 22. As noted in the Recovery Plan, the dynamic nature of riparian habitat in the Southwest necessitates that more habitat than needed at any one time should be available in order to offset the periodic recycling by flooding and re-growth required to sustain this type of habitat. RP, p. 80. The Recovery Plan specifies

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this amount as double the amount of habitat needed at any one time to recover the species. *Id.* This amount is referred to in these comments as that “essential to conservation of the species,” which is necessary to achieve recovery. *See* 16 U.S.C. § 1532(5)(A).

Although there are presently not enough identified territories to achieve recovery in some Management Units, it does not automatically follow that unoccupied habitat would need to be designated, in addition to the occupied habitat identified in Step 2.a. The reason that currently occupied habitat may be sufficient to achieve recovery in certain Management Units is because flycatcher density typically increases as the population increases, creating “infill” of presently occupied habitat. RHCP, pp. 49, 87. In other Management Units, the amount of occupied habitat may be insufficient to support the minimum number of territories specified in the Recovery Plan plus a doubling of that habitat.

However, in the Salt, Verde, and San Pedro/Middle Gila watersheds, sufficient habitat is available along occupied reaches to support the minimum number of territories specified in the Recovery Plan plus a doubling of that habitat. In the Salt River watershed, Area 4 identified in Step 1.d. (Lower Tonto Creek) contains more than enough occupied and adjacent habitat (approximately 344 ha or 546 acres) to satisfy the minimum requirements in the Recovery Plan (50 ha or 120 acres). Thus, this is the only area that should be proposed for critical habitat and Area 4 could be substantially reduced in Steps 4 and 5 to reflect potential economic or other impacts to adjacent land uses.

In the Verde River watershed, Areas 4 and 7 identified in Step 1.d contain more than enough occupied and adjacent habitat (approximately 221 ha or 850 acres) to satisfy the minimum requirements in the Recovery Plan (50 ha or 120 acres). Thus, these are the only areas that should be proposed for critical habitat and Areas 4 and 7 could be substantially reduced in Steps 4 and 5 to reflect potential economic or other impacts to adjacent land uses.

In the San Pedro/Middle Gila River watersheds, all four of the areas identified in Step 1.d are occupied and contain more than enough occupied and adjacent habitat (approximately 1,912 ha or 4,725 acres) to satisfy the minimum requirements in the Recovery Plan (150 ha or 360 acres). Thus, these areas could be substantially reduced in Steps 4 and 5 to reflect potential economic or other impacts to adjacent land uses.

**Step 3: Using the best available science, rank the available habitat identified in Steps 1 and 2 in terms of the quality of primary constituent elements. Publish the proposed rule designating the portion of available suitable habitat necessary to achieve recovery, as well as alternative suitable habitat.**

As a final step before the issuance of the proposed rule, FWS would rank the available habitat identified in Steps 1 and 2, to determine which areas possess the highest quality of primary constituent elements. Examples of the relative ranking of primary constituent elements are included in the descriptions of reaches along the Salt, Verde, and San Pedro rivers in Step 1.d.. Consistent with the Recovery Plan, to ensure adequate distribution of habitat, this ranking should be conducted within each Management Unit. Based on this ranking, FWS would then publish the proposed rule, designating the portions of available suitable habitat needed to achieve

recovery goals for each Management Unit. Areas proposed to be included in the designation would be described by Management Unit, in the manner suggested by Steps 1 and 2. The proposed rule would also describe areas of available suitable habitat identified by FWS pursuant to Steps 1 and 2, but not included in the proposed rule. The proposed rule would provide the scientific basis for FWS' decision to exclude these areas, while including others. PR 7

**Step 4: After publication of the proposed rule and consideration of public comments, complete the draft analysis of economic and other impacts required by the ESA and NEPA. Consider special management plans and the effect of the designation on federal/tribal relationships. Analyze alternatives to the proposed rule and the economic and other impacts of those alternatives. Publish drafts of the economic analysis and NEPA documents and solicit public comment.**

**Step 4.a.: Complete Economic Analysis**

We anticipate that SRP will submit additional detailed comments on the economic analysis, once it has been made available for public comment. In the interim, the following general suggestions are offered with respect to the content of the economic analysis, taking into consideration the decision of the Tenth Circuit in *New Mexico Cattle Growers' Association, supra*.

**Economic impacts should be calculated for the estimated time until recovery.**

In recent critical habitat designations, FWS has evaluated the economic impacts of the proposed rule based on a 10-year time period. SRP does not believe that 10 years is a reasonable time period for forecasting the impacts of the flycatcher critical habitat designation. Typically, economic impacts are estimated for periods of 20 or 30 years or more.<sup>4</sup> That is particularly true of analyses considering the economic impact of implementing major regulations. Given the significant, wide-ranging interests likely to be affected by the flycatcher designation, spanning populous areas throughout the west and southwest, the designation should be treated as a major regulation for purposes of evaluating impacts. E 33

For critical habitat designations, including the current flycatcher designation, SRP recommends that economic impacts be calculated and other impacts be considered for the estimated time until recovery. Although the flycatcher recovery plan does not provide a specific timeline to recovery, it will undoubtedly take more than 10 years to meet the recovery criteria suggested in the plan. Also, a period longer than 10 years has been used in other economic analyses of critical habitat, such as those for California vernal pool species and the Rio Grande

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<sup>4</sup> See, for example many of the reports listed on the website of FWS' frequent economics contractor, Industrial Economics, Incorporated, including Economic Analysis for Hydropower Relicensing: Guidance and Alternative Methods, October 1998.

silvery minnow.<sup>5</sup> Thus, economic impacts should be estimated for 25 years or more, at least until discounting of future impacts becomes less significant over time.

**The economic analysis should consider all relevant costs, and the impacts should be evaluated at the margin.**

The decision of the court in *New Mexico Cattle Growers' Association, supra*, struck down FWS' reliance on the "baseline" approach of attributing virtually all impacts to listing of the species. Accordingly, the evaluation of impacts must include all costs attributable to the designation of critical habitat, without regard to whether some of those costs might also be "attributable coextensively to other causes." 248 F.3d at 1285.

Further, the economic impacts of the proposed designation should be evaluated at the margin. The economic analysis should compare the costs of critical habitat to net income in the affected economic sectors by geographic area. As described in the EPA's Guidelines for Preparing Economic Analyses,<sup>6</sup> developed in part by FWS' contractor for the cactus ferruginous pygmy owl study, economic analysis of environmental regulation is concerned with efficiency and distribution of benefits and costs, i.e. "gainers and losers." It is the incremental or marginal costs to particular economic sectors or to specific geographic areas that define the gainers and losers, and are of concern to decision-makers, not the impacts relative to gross economic activity in the region.

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**The economic analysis should include impacts attributable to designation associated with Section 10 permits.**

The discussion of economic effects in the 1997 flycatcher critical habitat designation down-played effects on private and State lands and did not explicitly consider impacts associated with permits obtained under Section 10 of the ESA. 62 FR 39137 (July 22, 1997). Private lands and activities were essentially assumed to be unaffected by the designation. However, to the extent that private lands are considered in the revised designation or private activities on federal land are affected under Section 9, there would be a federal nexus if the land or activity became the subject of an application for an incidental take permit under Section 10 of the ESA.

Consideration by FWS of whether to grant an application for an ITP triggers the formal consultation requirements of Section 7 of the ESA. Where the activity sought to be authorized by the ITP application affects the critical habitat of a listed species, these effects must be considered by FWS as part of the formal consultation process. If effects on critical habitat are present, the mitigation costs of the HCP required for issuance of the Section 10 permit will likely increase. These mitigation costs, while incurred in connection with the Section 10 ITP application, clearly are "impacts" of the designation, and should be evaluated as part of the economic impact analysis.

<sup>5</sup> Draft Economic Analysis of Critical Habitat Designation for Vernal Pool Species, October 28, 2002; Final Draft Economic Analysis of Critical Habitat Designation for the Rio Grande Silvery Minnow, May 2002.

<sup>6</sup> EPA, Guidelines for Preparing Economic Analyses, EPA 240-R-00-003, September 2000.

**Step 4.b.: Consider Special Management Plans and the Effect of the Designation on Federal Relationships With Tribes and Others**

**The Role of Special Management Plans:** Recent court precedent in Arizona establishes that FWS may not exclude from critical habitat areas that are “essential to the conservation of the species” merely by concluding that existing management of these areas is “adequate,” and that, therefore, these areas do not “require special management consideration or protection.” See 16 U.S.C. § 1532(5). Rather, the exclusion of particular areas from a critical habitat designation *must be based on a balancing of benefits and burdens and can only occur after the FWS has issued a proposed designation.* 50 C.F.R. § 424.19. CH 58

In *Center for Biological Diversity v. Norton*, 240 F.Supp.2d 1090 (D. Ariz. 2003), the United States District Court for the District of Arizona struck down FWS’ exclusion of Forest Service and tribal lands from the 2001 final rule designating critical habitat for the Mexican spotted owl, holding that FWS could not exclude lands from the critical habitat designation merely by concluding that existing management of these lands was already adequate. *Id.* See 16 U.S.C. § 1532(5). According to the court, a “habitat would not be subject to special management and protection if it were not essential to the conservation of the species.” *Id.* at 1099. Thus, the court concluded, the “fact that a habitat is already under some sort of management for its conservation is absolute proof that such habitat is ‘critical.’ ” *Id.* PR 78

The court in *Norton* unequivocally rejected FWS’ practice of excluding lands from critical habitat designations based on the rationale that “[a]dditional special management is not required if adequate management or protection is in place.” See Final Designation of Critical Habitat for Mexican Spotted Owl, 66 Fed. Reg. 8530, 8543 (quoted in *Norton*). Special management plans can be considered, however, by FWS after publication of the proposed rule, in the context of its analysis of whether the benefits of including certain lands within the flycatcher critical habitat designation outweigh the benefits of excluding those lands from the final rule. PR 78

Step 1.d., *supra*, proposes certain stream reaches that, in SRP’s judgment, satisfy the primary constituent elements of flycatcher critical habitat. Consistent with the decision in *Norton*, the proposed stream reaches include multiple areas with special management protections already in place. Among these reaches are mitigation properties, which are subject to permanent special management and protection for flycatchers as part of the Roosevelt HCP. In the event an HCP is finalized for operation of Horseshoe and Bartlett Reservoirs, and an incidental take permit is issued by FWS, any mitigation properties acquired for flycatchers pursuant to the Horseshoe and Bartlett HCP would also be appropriate for consideration as critical habitat. LD 29

**Consideration of Impacts on Federal Relationships With Tribes and Others:** As part of its analysis of the economic and other relevant impacts of the flycatcher critical habitat designation, FWS is permitted to take into account the impacts on current working relationships between the agency and an Indian tribe or other entity potentially resulting from the inclusion of tribal or other lands in the designation. See *Norton, supra* (consideration of the impacts of a critical habitat designation on working relationships is permissible under Section 4(b) of the ESA). Nevertheless, such impacts should not be given weight over all other considerations, 5 18

thereby amounting to a de facto exemption of tribes or particular entities from the ESA's critical habitat provisions. Where an area is essential to the conservation of the species, adverse impacts on working relationships, by themselves, are insufficient bases for exclusion of the lands from the critical habitat designation.

The maps distributed by FWS at the scoping meeting, which apparently are derived from the flycatcher recovery plan, reflect some inconsistency in FWS' consideration of Indian Reservation lands as potential critical habitat for the flycatcher. Based on these maps, it appears FWS is considering the inclusion of portions of the Salt River Pima-Maricopa and Fort McDowell Reservations along the Lower Verde River watershed, although these lands do not now support habitat for flycatchers, and, in our view, do not meet the minimum standards for the primary constituent elements of critical habitat for the flycatcher. By contrast, areas of the San Carlos Reservation upstream from Coolidge Dam, which are currently occupied by flycatchers, are not designated as possible flycatcher habitat on the FWS map. It is not clear why these areas, which already support flycatcher habitat, would be excluded from further consideration, while the Fort McDowell and Salt River Pima-Maricopa Reservations, which do not currently support such habitat, are being considered. 518

In completing Steps 1, 2 and 3, if areas on the San Carlos Reservation, or any other Indian reservation or area managed by a specific entity, satisfy the primary constituent elements of flycatcher habitat, FWS should consider these areas for inclusion in the proposed designation. After publication of the proposed rule, FWS may then conduct its analysis of the benefits and burdens of the rule on Indian tribes and others, in the manner discussed in Step 4.a. above.

#### **Step 4.c.: Complete NEPA Analysis**

If the original flycatcher critical habitat designation is any indication, it is likely that hundreds of thousands of acres of private, state, federal and tribal land throughout the Southwest, and potentially millions of people and thousands of companies, local governments and other entities could be impacted by the final rule. *Middle Rio Grande Conservancy Dist. v. Babbitt*, 206 F.Supp.2d 1156, 1179-81 (D.N.M. 2000) (discussing impacts of critical habitat designations on water resources and economies in affected areas). The sweeping geographic scope of the designation, the need for public participation in the process, and the multitude of factors FWS must consider under the ESA and NEPA combine to form a complex decision-making process. Under these circumstances, SRP strongly believes that NEPA mandates the preparation of a formal environmental impact statement ("EIS"), rather than the less formal environmental assessment ("EA"), to evaluate the impacts of the flycatcher critical habitat designation. PR32

#### **Role of the NEPA Analysis**

Typically, the first step in NEPA compliance is the preparation of an EA. An EA, which is intended to be more concise and less formal than an EIS, serves three purposes: (1) to "[b]riefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact;" (2) to aid an agency's compliance with NEPA when no EIS is required; and (3) to "[f]acilitate preparation of a statement when one is necessary." 40 C.F.R. § 1508.9(a). In many cases, an EA is prepared in order to aid an agency in deciding whether an action may significantly affect the quality of the

human environment, thus necessitating the preparation of an EIS. However, an agency may decide to prepare an EIS without first completing an EA. 40 C.F.R. § 1501.3(a).

SRP does not believe that preparation of an EA is either necessary or useful in this case. The potential designation of hundreds of miles of streams and riparian areas across several states in the arid Southwest will have significant impacts on the human environment that mandate preparation of an EIS. Indeed, the federal courts have recognized that “circumstances in the Tenth Circuit which would relieve the Secretary of the Interior from the duty to prepare an EIS when designating critical habitat will be unquestionably rare.” *Middle Rio Grande*, 206 F.Supp.2d at 1193.

SRP participated as an intervenor-defendant in *Center for Biological Diversity v. Norton*, No. CV 02-1067, in which the United States District Court for the District of New Mexico remanded the 1997 flycatcher designation to FWS for revision by September 30, 2005. In that case, SRP strongly urged the court to give FWS a full 24 months from the date of its order for the redesignation of critical habitat. SRP made this request based largely on the significance of the impacts of the flycatcher designation, which SRP urged necessitated the preparation of an EIS. In agreeing to the two-year schedule requested by SRP, the district court specifically commented on the importance of “giving full consideration to the issues presented by SRP” regarding the “scope of inquiry upon remand.” Memorandum Opinion dated September 30, 2003, at 8. The schedule imposed by the district court provides ample time for FWS to fully consider the impacts of the flycatcher critical habitat designation through the preparation of an EIS. SRP therefore strongly urges FWS to prepare an EIS, rather than the less formal EA. Preparation of an EA where an EIS is so clearly needed would invite litigation, cause pointless delay, and waste FWS’ time and scarce resources.

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### **Content of the Environmental Impact Statement**

The primary purpose of an EIS is “to serve as an action-forcing device to insure that the policies and goals defined in [NEPA] are infused into the ongoing programs and actions of the Federal Government.” 40 C.F.R. § 1502.1. The EIS is meant to be more than a mere environmental impact disclosure statement; it is meant to be a major tool used by agencies along with other materials to plan and make decisions. Its content should serve to “provide full and fair discussion of significant environmental impacts” and to inform the public and other agencies of alternatives that would avoid or mitigate the impacts involved. *Id.*

The EIS for the flycatcher critical habitat designation must consider the ecological, aesthetic, historic, cultural, economic, social and health effects of the designation, as well as alternatives to the designation. 40 C.F.R. § 1508.8. SRP suggests the consideration of the following three alternatives: (1) a broad alternative designating all occupied habitat identified in Step 2, or if the occupied habitat is insufficient in a particular watershed, designating the suitable habitat necessary to achieve the minimum recovery goals;<sup>7</sup> (2) the preferred alternative, designating only that portion of the habitat “essential to the conservation of the species,” after

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<sup>7</sup> Under the approach to designating critical habitat suggested by these comments, Alternative #1 would be the proposed rule published by FWS pursuant to Step 3.

consideration of economic and other impacts required under the ESA and NEPA;<sup>8</sup> and (3) a no action alternative. The impacts of each alternative should be separately considered. In evaluating the impacts of each alternative, for purposes of determining whether lands should be excluded from the final designation, the EIS should initially consider areas of relatively low quality habitat with high impacts resulting from the designation, progressing to higher quality areas with lower impacts.

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**Step 5: If FWS determines that the benefits of excluding certain proposed areas within the final designation are outweighed by the benefits of including these areas, such areas should be excluded, so long as extinction of the species would not result. Other available suitable habitat, identified in Steps 1 and 2 but not included in the proposed rule, would then be substituted for the excluded areas in order to ensure that the final designation satisfies the recovery targets established in Step 2. FWS would then publish the final designation, final analysis of economic and other relevant impacts and final NEPA analysis.**

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After conducting the impact analyses described in Step 4, FWS may determine that the benefits of excluding certain areas included in the proposed rule outweigh the benefits of designating these areas. Such areas should be excluded from the final designation, unless FWS determines that their inclusion is required in order to avoid extinction of the species. 16 U.S.C. § 1533(b)(2). To the extent that such areas are excluded, however, FWS must identify additional habitat, not included in the proposed rule, which can then be substituted for these areas in the final designation.

Substitution of additional habitat for areas excluded from the final designation is necessary in order to ensure that the final designation continues to meet the habitat targets identified in Step 2 as “essential to the conservation of the species.” 16 U.S.C. § 1532(5)(A). Where possible, substitute habitat should be in the same Management Unit as the habitat to be excluded. In identifying substitute habitat, FWS should first consider areas of relatively high quality in terms of primary constituent elements, taking into account the degree of economic and other relevant impacts of including these areas in the final designation. As necessary, areas of relatively lower quality habitat also may be considered, in order to ensure habitat targets are fully met.<sup>9</sup>

### III. Specific Comments on Areas We Believe Should Be Excluded From the Designation

#### A. Concerns with Possible Designation of Horseshoe and Bartlett Reservoirs as Critical Habitat

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<sup>8</sup> Alternative #2, the preferred alternative, would be the anticipated final designation, published by FWS after completion of the impact analyses and revisions to the proposed rule pursuant to Steps 4 and 5.

<sup>9</sup> The identification of substitute habitat and the consideration of the impacts of including such habitat in the final designation is an iterative process, which essentially requires the weighing of all of the factors outlined in Steps 1-5.

**Horseshoe Reservoir** — Flycatchers have recently been found in Horseshoe Reservoir occupying trees with base elevations of approximately 605 m (1,985 ft) to 612 m (2,008 ft). Even though flycatchers typically nest 3 to 6 m (10 to 20 ft) off the ground in central Arizona, those trees would be mostly or entirely inundated at the full reservoir elevation of 617.5 m (2,026 ft). The occupied habitat on the bed of Horseshoe Reservoir has developed because of the extended drought being experienced in Arizona for the past 9 years, which has allowed trees to establish and grow in areas normally inundated by the reservoir for part of the year. However, when the drought ends, this habitat is likely to be inundated for at least the early portion of the breeding season in average and above-average runoff years. Also, regardless of reservoir operations, nests built below the spillway elevation of 609.6 m (2,000 ft) could be subject to inundation during the summer monsoon season because inflow could exceed outlet capacity, which would cause the reservoir to fill uncontrollably.

Due to the likelihood of inundation, the lakebed of Horseshoe Reservoir is not suitable for designation as critical habitat. Trees growing on the bed of the reservoir may be affected by reservoir operation and would not be available for breeding. In other words, the bed of Horseshoe Reservoir will lack at least one of the primary constituent elements of critical habitat.

SRP is preparing an HCP to address the effect on flycatchers and their habitat from continued reservoir operations on the Verde River. In the event that the HCP were approved, off-site riparian lands would be acquired to mitigate any flycatcher habitat losses that would not be minimized by modifying dam operations. These mitigation lands would be appropriately designated as critical habitat at that time. .

Other, more appropriate, habitat is available nearby for flycatchers. In particular, habitat immediately below Horseshoe Dam is currently occupied (see discussion of potential habitat along the Verde River under Step 1.d.).

In addition to the absence of primary constituent elements in Horseshoe Reservoir, the benefit of excluding critical habitat on the bed of the reservoir would likely exceed the benefit of including this area due to the adverse economic impacts on water users of such a designation compared to the limited benefits to the flycatcher. Water stored in Horseshoe is an important component of the water supply for SRP shareholders, residents of the City of Phoenix, and other contractors, including the Salt River Pima-Maricopa Indian Community and Fort McDowell Yavapai Indian Nation, which have rights to and depend on water stored in Horseshoe Reservoir. Thus, designation of critical habit in Horseshoe Reservoir might have significant adverse socioeconomic impacts if water storage were curtailed as a result of potential adverse modification of critical habitat. The benefits of designating Horseshoe as critical habitat are limited because the habitat may not always available for breeding and nesting, and there is a risk of inundating active nests.

**Bartlett Reservoir** — There is absolutely no basis to designate Bartlett Reservoir as critical habitat for the flycatcher. No existing habitat exists in or around the reservoir and there is no potential for habitat to develop. The shore of Bartlett Reservoir is steep and rocky, which prohibits development of broad areas of tall woody vegetation. In addition, storage in Bartlett

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Reservoir is maintained at a relatively high level in order to meet the downstream water demands of SRP shareholders and contractors, including the Salt River Pima-Maricopa Indian Community and Fort McDowell Yavapai Nation, which have rights to and depend on water stored in Bartlett Reservoir. Relatively high reservoir levels further preclude the establishment and development of tall woody vegetation.

### **B. Concerns With Possible Designation of Roosevelt Lake as Critical Habitat**

The Roosevelt HCP and supporting technical documents anticipate the periodic creation and loss of flycatcher habitat at Roosevelt Lake throughout the life of the permit. As noted in the RHCP:

[I]mpacts [to flycatchers] are primarily expected through habitat modification or loss caused by periodic inundation or drying. These occasional impacts will vary over time and, in many years, continued reservoir operation is not expected to adversely impact any flycatcher habitat at all or will benefit habitat by stimulating the growth of riparian vegetation.... Under current and future operation, the amount of flycatcher habitat around Roosevelt is expected to wax and wane similar to many riparian ecosystems. However, in some years, operation of Roosevelt will result in the degradation and modification of some flycatcher habitat.

RHCP, p. 84. See FWS 2003 Biological Opinion for the Proposed Roosevelt Lake Habitat Conservation Plan, p. 42 ("Riparian habitat at Roosevelt will be periodically created and destroyed as a result of fluctuating water levels resulting from runoff and dam operation.").<sup>10</sup> To offset these anticipated habitat losses, and resulting adverse effects to the flycatcher, the RHCP requires the acquisition and management of suitable flycatcher habitat in an amount double that anticipated to be lost at Roosevelt, along with the implementation of additional habitat conservation measures. RHCP, pp. 121-130.

In these comments, SRP has proposed that lands acquired and managed as part of the Roosevelt HCP be included in the flycatcher critical habitat designation. Inclusion of these lands, which are specifically managed for the conservation of the species in perpetuity, is appropriate in light of the presumed periodic loss of existing flycatcher habitat within the conservation space at Roosevelt. Inclusion of these lands in the designation is also consistent, we believe, with the federal district court's recent decision in *Center for Biological Diversity v. Norton*, discussed in relation to Step 4.b., *supra*.

While including the Roosevelt HCP mitigation lands, the flycatcher critical habitat designation should not include areas within the Roosevelt Lake conservation space, which are encompassed by the take authorization set forth in the Roosevelt ITP. Inclusion of these areas is not appropriate for several reasons. First, the area behind Roosevelt Dam, which is operated for

<sup>10</sup> The Recovery Plan likewise notes that the habitat at Roosevelt is "subject to inundation and possible destruction when reservoir levels are raised." RP, p. 31.

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water conservation purposes, does not provide habitat that is “essential to the conservation of the species” as defined in Steps 1 and 2 of these comments. The dynamic system created by Roosevelt Dam operations, including wide fluctuations in water elevations from year to year, will inevitably result in periodic but unpredictable habitat losses at Roosevelt. Even if temporary, these losses will have adverse effects on the stability of the population of flycatchers breeding at Roosevelt. By contrast, the RHCP mitigation sites will be actively managed, in perpetuity, for the purpose of conserving the species. These sites, which are being acquired and managed by SRP in substitution for the habitat to be lost at Roosevelt, will provide more suitable, reliable habitat for the species than the variable, and periodically unsuitable conditions present at Roosevelt.<sup>11</sup>

Because the overriding purpose of Roosevelt Lake is water conservation, and, secondarily, hydropower generation, the designation of Roosevelt as critical habitat for the flycatcher has the potential to affect the vested rights of those relying upon the availability of water stored at Roosevelt for municipal, industrial, irrigation and other beneficial purposes. Among those whose rights could be affected are two Indian tribes, the Salt River Pima-Maricopa Indian Community and the Fort McDowell Yavapai Indian Nation. Pursuant to congressionally approved Indian water settlements with SRP and others, these tribes receive water from SRP in an annual amount dependent upon the amount of water in storage behind SRP’s reservoirs, including Roosevelt. When less water is stored behind Roosevelt, which accounts for over 70% of the storage capacity of SRP’s reservoirs, these tribes receive less water from SRP. Additionally, also pursuant to its settlement with SRP and others, the Salt River Pima-Maricopa Indian Community has an entitlement to a portion of the water to be stored behind the new conservation space added to Roosevelt Dam in the mid-1990s. The Indian Community’s entitlement to the water that could be stored in the new conservation space could likewise be affected by the designation of Roosevelt as flycatcher critical habitat. *See also* Comments of the Salt River Pima-Maricopa Indian Community to the Roosevelt HCP, raising the issue of FWS’ lack of authority to take actions limiting the amount of storage behind Roosevelt Dam, in possible violation of the Salt River Pima-Maricopa Indian Community Water Rights Settlement Act.<sup>12</sup>

The impacts of designating the Roosevelt conservation space, both on the tribes and other water users relying upon stored water from Roosevelt, are appropriately considered by FWS as

<sup>11</sup> Also, unlike the existing habitat at Roosevelt, in which large numbers of birds are heavily concentrated in one area, the Roosevelt HCP mitigation lands, while individually supporting smaller patches of flycatchers, are distributed more widely throughout the Arizona portion of the bird’s range. As documented by the Recovery Plan, smaller, more well-distributed sites are ultimately more beneficial to the recovery of the species than larger sites with larger populations. RP, p. 72. Very large flycatcher populations, such as that at Roosevelt are also more susceptible to threats from floods, fire, severe weather, disease and shifts in birth and death rates of the species. *Id.*, p. 41. *See also* 2003 Biological Opinion for Roosevelt HCP, p. 50 (“SRP’s mitigation is likely to complement and add to riparian conservation populations in different locales as opposed to having most or all birds and habitat at one site.”)

<sup>12</sup> Comments and Responses: Draft Roosevelt Habitat Conservation Plan and Draft Environmental Impact Statement Gila and Maricopa Counties, Arizona. Available at <<http://arizonaes.fws.gov/>>.

economic and other relevant impacts pursuant to Step 4.a. of these comments. As part of these comments, SRP incorporates by reference the analysis of impacts of the "No Permit" and "Reoperation" Alternatives for Operation of Roosevelt Dam, prepared by FWS in the EIS for the Roosevelt HCP. Roosevelt EIS (FWS 2003), p. 200-208. The "No Permit" Alternative would have required SRP to take all actions necessary to avoid take of flycatchers at Roosevelt by preventing, to the extent possible, the inundation of existing habitat. The economic impacts of this alternative, fully evaluated in the EIS, amounted to hundreds of millions of dollars. The "Reoperation" Alternative, which would have required SRP to maintain lower than historical levels of water storage in the reservoir, while allowing some take, also would have significant economic impacts totaling hundreds of millions of dollars. These analyses, which did not address impacts in the event critical habitat was designated at Roosevelt, nevertheless are indicative of the value of water stored, as well as hydropower generated, at Roosevelt, and the severity of the financial losses that would result from any action taken by FWS requiring a change in Roosevelt operations designed to preserve flycatcher habitat.

For all of these reasons, we believe that inclusion in the designation of the conservation space at Roosevelt Dam, covered by the Roosevelt ITP, is neither necessary<sup>13</sup> nor advisable. Should you need further information regarding the issues discussed here with respect to Roosevelt, we would be happy to provide it to you.

#### C. Concerns with Inclusion of Areas Within the Lower Verde Watershed in the Designation

SRP has already referred to particular areas of the Lower Verde watershed, which, we believe, have limited potential to develop the characteristics of flycatcher habitat discussed in Steps 1 and 2 of these comments. See description of habitat sites, Step 1.d; discussion of sites under consideration by FWS on the Fort McDowell Indian Reservation, Step 4.b. The primary limits on the potential of this area for flycatcher habitat concern the competing use of resources by livestock and recreation users. The nature and extent of these uses, and their effects on riparian vegetation along the Lower Verde River are documented in the Biological Opinion for the RHCP, 76-78. In the absence of a reduction or curtailment of these activities, it is unlikely that the quality of the habitat along this reach of the Verde River will improve significantly. For these reasons, we have not proposed that these areas be included in the proposed designation.

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#### IV. Other Concerns

**Definition of adverse modification of critical habitat:** In order to be consistent with the ESA, FWS must revise the definition of adverse modification of critical habitat. Once the correct definition is established, FWS must consistently apply that definition in designating critical habitat.

The definition of "destruction or adverse modification" of critical habitat used in the Proposed Rule is found at 50 C.F.R. § 402.02 — "a direct or indirect alteration that appreciably

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<sup>13</sup> The Recovery Plan itself notes that the recovery target of 50 territories for the Roosevelt Management Unit is achievable without consideration of any of the existing habitat in the Roosevelt conservation space. RP, App. O, p. O-19.

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diminishes the value of critical habitat for both the survival and recovery of a listed species.” In 2001, the United States Court of Appeals for the Fifth Circuit held this definition invalid, because it conflicts with the provision of the ESA defining critical habitat as areas essential to the “conservation” of the species. *Sierra Club v. U.S. Fish and Wildlife Service*, 245 F.3d 434 (5<sup>th</sup> Cir. 2001).

Based on the *Sierra Club* decision and the recent designation of critical habitat for the species involved in that case (Gulf Sturgeon), SRP suggests that FWS employ the following definition pending further rulemaking:

Adverse modification or destruction of critical habitat results from an action that appreciably reduces or impairs the value of a primary constituent element (68 FR 13370, 13399-13400; March 19, 2003).

Further, SRP suggests that this definition of destruction or adverse modification of critical habitat be used to describe those activities that may modify the habitat or may be affected by the designation, as required by Section 4(b)(8) of the ESA.

#### IV. Conclusion

SRP appreciates the opportunity to present these comments in response to FWS' January 21, 2004 scoping notice. We hope they will be useful to FWS in preparing the proposed rule, economic analysis and NEPA analysis. If you have any questions or need further information regarding any of the matters discussed in these comments, please feel free to call.

Sincerely,

Paul A. Cherrington, Manager

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Suggested methodology to be used in preparation of the flycatcher critical habitat designation, Economic Analysis and Impact Analysis Under NEPA

Taking into account the applicable legal standards, the following is a suggested methodology, set forth in five sequential steps, for preparation of the flycatcher critical habitat designation, economic analysis and NEPA analysis. Following each step is a detailed explanation of its implementation. Please refer to letter G-004R1 for detailed explanation.

**Step 1: Determine the maximum area of available habitat in each Management Unit that could be designated as critical habitat, i.e., the currently and potentially suitable habitat described in the Recovery Plan that contains the primary constituent elements. Specify the primary constituent elements and address issues relative to the delineation of critical habitat adjacent to stream channels, using the best available science.**

**Step 1a: Determine the maximum area of available habitat in each Management Unit based on key physical and biological components of SWWF habitat. Management Units should be used as the basic geographic areas of consideration because the Recovery Plan concludes that populations should be distributed broadly across the range of this species in order to achieve recovery and because conditions vary widely between Management Units.**

**Step 1b: Determine Primary Constituent Elements; Although the prior rule generally describes the vegetation characteristics of flycatcher breeding habitat, SRP suggests that the primary constituent elements must be set forth more specifically in order to: a) designate only the habitat that is essential to the conservation of the species, and b) accurately assess the potential future destruction or adverse modification of critical habitat. A great deal of flycatcher research has been conducted since issuance of the 1997 rule, including development of the Recovery Plan and the Roosevelt HCP, which addresses the largest known current population of flycatchers. Information from this research constitutes the best available science to be used to specify the primary constituent elements of flycatcher critical habitat.**

**Step 1c: Delineation of Habitat Adjacent to Stream Channels; Use of the entire width of the 100-year floodplain as the lateral extent of critical habitat is clearly inappropriate. SRP is not aware of any scientific evidence that the entire width of the 100-year floodplain has been able or will ever be able to support riparian vegetation suitable for flycatcher habitat. Moreover, as the result of discussions with FWS representatives during preparation of the Roosevelt Habitat Conservation Plan, the FWS representatives themselves consistently took the position that the 100-year floodplain is not an appropriate yardstick for estimating flycatcher habitat because many of the lands have depths to groundwater too deep to produce or maintain riparian habitat suitable for flycatchers even with periodic channel movements and reworking of the floodplain in response to flooding events. SRP believes that FWS can quickly and accurately delineate critical habitat using the criterion of a maximum depth to ground water of 1.5 m (5 ft) using readily available information including GIS technology (digital elevation models and stream features), aerial photographs, topographic maps, field observations, reports, and interviews with local biologists and hydrologists.**

**Step 1d: Delineation of Suitable Habitat**

**Step 2: Classify available habitat in Step 1 as occupied or unoccupied. Determine if all occupied habitat needs to be designated in order to ensure the conservation of the species,**

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i.e., to meet the minimum number of territories in each Management Unit as specified in the Recovery Plan. If the amount of occupied habitat is insufficient, make this finding expressly and determine the amount of additional unoccupied habitat that needs to be designated.

Step 2a: Classify available habitat as occupied or unoccupied based on the most recent survey results.

Step 2b: Determine If All Occupied Habitat Needs to be Designated as Critical; The Recovery Plan identifies the minimum number of territories that must persist in each Management Unit in order for recovery (down-listing and de-listing) of the species to occur.

Step 3: Using the best available science, rank the available habitat identified in Steps 1 and 2 in terms of the quality of primary constituent elements. Publish the proposed rule designating the portion of available suitable habitat necessary to achieve recovery, as well as alternative suitable habitat.

Step 4: After publication of the proposed rule and consideration of public comments, complete the draft analysis of economic and other impacts required by the ESA and NEPA. Consider special management plans and the effect of the designation on federal/tribal relationships. Analyze alternatives to the proposed rule and the economic and other impacts of those alternatives. Publish drafts of the economic analysis and NEPA documents and solicit public comment.

Step 4a: Complete Economic Analysis; Economic impacts should be calculated for the estimated time until recovery. In recent critical habitat designations, FWS has evaluated the economic impacts of the proposed rule based on a 10-year time period. SRP does not believe that 10 years is a reasonable time period for forecasting the impacts of the flycatcher critical habitat designation. Typically, economic impacts are estimated for periods of 20 or 30 years or more. The economic analysis should consider all relevant costs, and the impacts should be evaluated at the margin. The analysis should include impacts attributable to designation associated with Section 10 permits. The discussion of economic effects in the 1997 flycatcher critical habitat designation down-played effects on private and State lands and did not explicitly consider impacts associated with permits obtained under Section 10 of the ESA. Private lands and activities were essentially assumed to be unaffected by the designation. However, to the extent that private lands are considered in the revised designation or private activities on federal land are affected under Section 9, there would be a federal nexus if the land or activity became the subject of an application for an incidental take permit under Section 10 of the ESA.

Consideration by FWS of whether to grant an application for an ITP triggers the formal consultation requirements of Section 7 of the ESA. Where the activity sought to be authorized by the ITP application affects the critical habitat of a listed species, these effects must be considered by FWS as part of the formal consultation process. If effects on critical habitat are present, the mitigation costs of the HCP required for issuance of the Section 10 permit will likely increase. These mitigation costs, while incurred in connection with the Section 10 ITP application, clearly are "impacts" of the designation, and should be evaluated as part of the economic impact analysis.

Step 4b: Consider Special Management Plans and the effect of the designation on federal relationships with Tribes and others

Step 4c: Complete NEPA Analysis;

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Step 5: If FWS determines that the benefits of excluding certain proposed areas within the final designation are outweighed by the benefits of including these areas, such areas should be excluded, so long as extinction of the species would not result. Other available suitable habitat, identified in Steps 1 and 2 but not included in the proposed rule, would then be substituted for the excluded areas in order to ensure that the final designation satisfies the recovery targets established in Step 2. FWS would then publish the final designation, final analysis of economic and other relevant impacts and final NEPA A analysis.