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50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Proposed Designation of Critical Habitat for Southwestern Willow Flycatcher *(Empidonax traillii extimus)*; Proposed Rule

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RIN 1018–AI49

Endangered and Threatened Wildlife and Plants; Proposed Designation of Critical Habitat for Southwestern Willow Flycatcher (*Empidonax traillii extimus*)

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), propose to designate critical habitat for the federally endangered southwestern willow flycatcher (*Empidonax traillii extimus*) pursuant to the Endangered Species Act of 1973, as amended (Act). In developing this proposal, we evaluated those lands determined to be essential to the conservation of the southwestern willow flycatcher to ascertain if any specific areas are appropriate for exclusion from critical habitat pursuant to section 4(b)(2) of the Act. On the basis of our evaluation, we have determined that the benefits of excluding certain approved and pending Habitat Conservation Plans (HCPs) and lands owned and managed by the Department of Defense from critical habitat for the southwestern willow flycatcher outweighs the benefits of their inclusion, and have subsequently excluded those lands from this proposed designation of critical habitat for this species pursuant to section 4(b)(2) of the Act. As such, we propose to designate 376,095 acres (ac) (152,124 hectares (ha)) [including approximately 1,556 stream miles (2,508 stream kilometers)] of critical habitat which includes various stream segments and their associated riparian areas, not exceeding the 100-year floodplain or flood prone area, on a combination of Federal, State, Tribal, and private lands in southern California (CA), southern Nevada (NV), southwestern Utah (UT), south-central Colorado (CO), Arizona (AZ), and New Mexico (NM).

We hereby solicit data and comments from the public on all aspects of this proposal, including data on economic and other potential impacts of the designation. We are also specifically soliciting public comments on the appropriateness of excluding lands covered by certain approved and pending HCPs and Department of Defense lands pursuant to section 4(b)(2) of the Act from this designation.

In the development of our final designation, we will incorporate or address any new information received during the public comment periods, or from our evaluation of the potential economic impacts of this proposal. As such, we may revise this proposal to address new information and/or to either exclude additional areas that may warrant exclusion pursuant to section 4(b)(2) or to add in those areas determined to be essential to the species but excluded from this proposal.

DATES: We will accept comments until December 13, 2004. Public hearing requests must be received by November 26, 2004.

ADDRESSES: If you wish to comment, you may submit your comments and materials concerning this proposal by any one of several methods:

1. You may submit written comments and information to the Steve Spangle, Field Supervisor, U.S. Fish and Wildlife Service, AZ Ecological Services Office, 2321 West Royal Palm Road, Suite 103, Phoenix, AZ, 85021.

2. You may hand-deliver written comments and information to our AZ Ecological Services Office, or fax your comments to 602/242–2513.

3. You may send your comments by electronic mail (e-mail) to *wiflcomments@fws.gov.* For directions on how to submit electronic filing of comments, see the ''Public Comments Solicited'' section.

All comments and materials received, as well as supporting documentation used in preparation of this proposed rule, will be available for public inspection, by appointment, during normal business hours at the above address.

FOR FURTHER INFORMATION CONTACT: Steve Spangle, Field Supervisor, AZ Ecological Services Office (telephone 602/242–0210; facsimile 602/242–2513).

SUPPLEMENTARY INFORMATION:

Public Comments Solicited

Some of the lands we have identified as essential for the conservation of the southwestern willow flycatcher are not being proposed as critical habitat. The following areas essential to the conservation of the southwestern willow flycatcher are not being proposed as critical habitat: ''mission-critical'' training areas on Marine Corps Base, Camp Pendleton (Camp Pendleton), and Seal Beach Naval Weapons Station, Fallbrook Detachment; areas within San Diego Multiple Species Conservation Program (MSCP); areas in the Draft Western Riverside Multiple Species Habitat Conservation Plan (MSHCP); and areas within the Draft City of Carlsbad Habitat Management Plan (MHCP). These areas have been excluded because we believe the benefit of excluding these areas from critical habitat outweighs the benefit of including them. We are also proposing to exclude areas covered under the Roosevelt Lake Habitat Conservation Plan from the final designation of critical habitat. We specifically solicit comment on the inclusion or exclusion of such areas and: (a) Whether these areas are essential; (b) whether these areas warrant exclusion; and (c) the basis for not designating these areas as critical habitat (section 4(b)(2) of the Act);

It is our intent that any final action resulting from this proposal will be as accurate as possible. Therefore, we solicit comments or suggestions from the public, other concerned governmental agencies, the scientific community, industry, or any other interested party concerning this proposed rule. Maps of proposed critical habitat are available for viewing by appointment during regular business hours at the AZ Ecological Services Office (see **ADDRESSES** section) or on the Internet at *http://arizonaes.fws.gov.* On the basis of public comment, during the development of the final rule we may find that areas proposed are not essential, are appropriate for exclusion under section 4(b)(2), or not appropriate for exclusion, and in all of these cases, this information would be incorporated into the final designation. Final management plans that address the conservation of the southwestern willow flycatcher must be submitted to us during the public comment period so that we can take them into consideration when making our final critical habitat determination. We particularly seek comments concerning:

(1) The reasons why any areas should or should not be determined to be critical habitat as provided by section 4 of the Act, including whether the benefits of designation will outweigh the benefits of excluding areas from the designation;

(2) Specific information on the distribution and abundance of southwestern willow flycatchers and their habitat, and which habitat or habitat components are essential to the conservation of this species and why;

(3) Comments or information as to whether further clarity or specificity of the Primary Constituent Elements is necessary;

(4) Land-use designations and current or planned activities in or adjacent to the areas proposed and their possible impacts on proposed critical habitat;

(5) Any foreseeable economic or other potential impacts resulting from the proposed designation, including, any impacts on small entities;

(6) Some of the lands we have identified as essential for the conservation of the southwestern willow flycatcher are being considered for exclusion from the final designation of critical habitat or are not included in this proposed designation. We specifically solicit comment on the possible inclusion or exclusion of such areas and:

(a) Whether these areas are essential;

(b) whether these, or other areas proposed but not specifically addressed in this proposal, warrant exclusion; and

(c) relevant factors that should be considered by us when evaluating the basis for not designating these areas as critical habitat under section 4(b)(2) of the Act); and

(7) This rule proposes to designate only lands currently occupied by the southwestern willow flycatcher; are there unoccupied lands that should be included and if so, the basis for such an inclusion;

(8) Table 10 of the Southwestern Willow Flycatcher Recovery Plan (Chapter IV, page 86) provides a list of specific river reaches that the Technical Subgroup identified as having substantial recovery value and where recovery efforts should be focused. Are there river reaches identified within this list, not being proposed, but that should be considered for inclusion in the final designation of critical habitat and if so, the basis for such an inclusion;

(9) The focus of our proposal is to protect existing occupied habitat. We seek comment on the essential nature of also designating critical habitat in areas that are in proximity to existing breeding sites and the basis for such inclusion; and

(10) Whether our approach to designate critical habitat could be improved or modified in any way to provide for greater public participation and understanding, or to assist us in accommodating public concerns and comments.

If you wish to comment, you may submit your comments and materials concerning this proposal by any one of several methods. Please submit electronic comments in ASCII file format and avoid the use of special characters or any form of encryption. Please also include ''Attn: RIN 1018–AI–49'' in your e-mail subject header and your name and return address in the body of your message. If you do not receive a confirmation from the system that we have received your Internet message, contact us directly by calling our AZ Ecological Services at 602/242–0210. Please note that the e-mail address, *wiflcomments@fws.gov,* will be closed at the termination of the public comment period.

Our practice is to make comments, including names and addresses of respondents, available for public review during regular business hours. Individual respondents may request that we withhold their home addresses from the rulemaking record, which we will honor to the extent allowable by law. There also may be circumstances in which we would withhold from the rulemaking record a respondent's identity, as allowable by law. If you wish us to withhold your name and/or address, you must state this prominently at the beginning of your comments. However, we will not consider anonymous comments. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety. Comments and materials received will be available for public inspection, by appointment, during normal business hours at the above address.

Designation Of Critical Habitat Provides Little Additional Protection To Species

In 30 years of implementing the ESA, the Service has found that the designation of statutory critical habitat provides little additional protection to most listed species, while consuming significant amounts of conservation resources. The Service's present system for designating critical habitat is driven by litigation rather than biology, limits our ability to fully evaluate the science involved, consumes enormous agency resources, and imposes huge social and economic costs. The Service believes that additional agency discretion would allow our focus to return to those actions that provide the greatest benefit to the species most in need of protection.

Role of Critical Habitat in Actual Practice of Administering and Implementing the Act

While attention to and protection of habitat is paramount to successful conservation actions, we have consistently found that, in most circumstances, the designation of critical habitat is of little additional value for most listed species, yet it consumes large amounts of conservation resources. Sidle (1987) stated, ''Because the ESA can protect species with and without critical habitat designation, critical habitat designation may be redundant to the other consultation requirements of section 7.''

Currently, only 445 species, or 36 percent, of the 1,244 listed species in the (United States) U.S. under the jurisdiction of the Service have designated critical habitat. We address the habitat needs of all 1,244 listed species through conservation mechanisms such as listing, section 7 consultations, the section 4 recovery planning process, the section 9 protective prohibitions of unauthorized take, section 6 funding to the States, and the section 10 incidental take permit process. The Service believes that it is these measures that may make the difference between extinction and survival for many species.

We note, however, that a recent 9th Circuit judicial opinion, *Gifford Pinchot Task Force* v. *United State Fish and Wildlife Service,* has invalidated the Service's regulation defining destruction or adverse modification of critical habitat. We are currently reviewing the decision to determine what effect it may have on the outcome of consultations pursuant to section 7 of the Act.

Procedural and Resource Difficulties in Designating Critical Habitat

We have been inundated with lawsuits regarding critical habitat designation, and we face a growing number of lawsuits challenging critical habitat determinations once they are made. These lawsuits have subjected the Service to an ever-increasing series of court orders and court-approved settlement agreements, compliance with which now consumes nearly the entire listing program budget. This leaves the Service with little ability to prioritize its activities to direct scarce listing resources to the listing program actions with the most biologically urgent species conservation needs.

The consequence of the critical habitat litigation activity is that limited listing funds are used to defend active lawsuits and to comply with the growing number of adverse court orders. As a result, the Service's own proposals to undertake conservation actions based on biological priorities are significantly delayed.

The accelerated schedules of court ordered designations have left the Service with almost no ability to provide for meaningful additional public participation beyond those minimally required by the Administrative Procedures Act (APA), the Act, and the Service's implementing regulations, or to take additional time for review of comments and information to ensure the rule has addressed all the

pertinent issues before making decisions on listing and critical habitat proposals, due to the risks associated with noncompliance with judicially imposed deadlines. This in turn fosters a second round of litigation in which those who will suffer adverse impacts from these decisions challenge them. The cycle of litigation appears endless, is very expensive, and in the final analysis provides little additional protection to listed species.

The costs resulting from the designation include legal costs, the cost of preparation and publication of the designation, the analysis of the economic effects and the cost of requesting and responding to public comment, and in some cases the costs of compliance with the National Environmental Policy Act (NEPA); all are part of the cost of critical habitat designation. These costs result in minimal benefits to the species that are not already afforded by the protections of the Act enumerated earlier, and they directly reduce the funds available for direct and tangible conservation actions.

Status and Distribution

The southwestern willow flycatcher (*Empidonax traillii extimus*) is a small passerine bird, approximately 15 centimeters (5.75 inches) in length. The southwestern willow flycatcher is one of four subspecies of the willow flycatcher currently recognized (Hubbard 1987; Unitt 1987), though Browning (1993) suggests a possible fifth subspecies (*E. t. campestris*) in the central and midwestern U.S. The willow flycatcher subspecies are distinguished primarily by subtle differences in color and morphology, and by habitat use. Phillips (1948) described the southwestern subspecies *E. t. extimus,* and most authors have accepted its taxonomic status (Aldrich 1951; Bailey and Niedrach 1965; Behle and Higgins 1959; Hubbard 1987, Phillips *et al.* 1964; Oberholser 1974; Monson and Phillips 1981; Unitt 1987; Schlorff 1990; Browning 1993; USFWS 1995). Recent research (Paxton 2000) concluded that *E. t. extimus* is genetically distinct from the other willow flycatcher subspecies. The southwestern willow flycatcher is generally paler than other willow flycatcher subspecies, and also differs in morphology (*e.g.*, wing formula, bill length, and wing/tail ratio) (Unitt 1987 and 1997; Browning 1993). The willow flycatcher is an insectivore generalist (USFWS 2002: 26; Drost *et al.* 2003) taking a wide range of invertebrate prey including flying, and ground-, and vegetation-dwelling insect species of terrestrial and aquatic origins (Drost *et al.* 2003).

The historical breeding range of the southwestern willow flycatcher included southern CA, southern NV, southern UT, AZ, NM, western Texas, southwestern CO, and extreme northwestern Mexico (Hubbard 1987; Unitt 1987; Browning 1993). The flycatcher's current range is similar to the historical range, but the quantity of suitable habitat within that range is much reduced from historical levels (USFWS 2002: 7–10). At the end of 2002, 1,153 southwestern willow flycatcher territories were detected throughout southern CA, southern NV, southern UT, southern CO, AZ, and NM (Sogge *et al.* 2003). Rangewide totals do not exist yet for 2003, but the information that does exist from AZ (Smith *et al.* 2004) and NM (S.O. Williams, NMGFD, e-mail 2004) indicates that rangewide numbers have not changed much in distribution or abundance. Since 2002, the southwestern willow flycatcher has not been recently detected breeding in western Texas (USFWS 2002: 9). Recent genetic work by Paxton (2000) verified southwestern willow flycatcher genetic stock in south-central CO (*i.e.*, San Luis Valley) and southwestern UT (*e.g.*, Virgin River). The significance of this is that it confirms the northern extent of the range as *E. t. extimus.* Overall, Paxton (2000) showed that the northern boundary for southwestern willow flycatcher was generally consistent with that proposed by Unitt (1987) and Browning (1993). The current range described in the Recovery Plan (USFWS 2002: 8) adopts a range boundary that reflects these results.

The southwestern willow flycatcher is a neotropical migrant, spending time migrating and breeding in the U.S. from April into September. The flycatcher's wintering range includes southern Mexico, Central America, and probably South America (Stiles and Skutch 1989; Howell and Webb 1995; Ridgely and Gwynne 1989; Unitt 1997; Koronkiewicz *et al.* 1998; Unitt 1999). For an even more thorough discussion of the ecology, life history, and historical records of the southwestern willow flycatcher and most recent rangewide population estimates, see Chapter II of the Recovery Plan USFWS (2002) and Sogge *et al.* (2003).

The southwestern willow flycatcher currently breeds in relatively dense riparian habitats in all or parts of six southwestern states, from near sea level to over 2000 meters (m) (6100 feet (ft)) (USFWS 2002: D–1). The southwestern willow flycatcher breeds in riparian habitats along rivers, streams, or other wetlands, where relatively dense growths of trees and shrubs are established, near or adjacent to surface water or underlain by saturated soil. Habitat characteristics such as dominant plant species, size and shape of habitat patch, canopy structure, vegetation height, and vegetation density vary widely among sites. Southwestern willow flycatchers nest in thickets of trees and shrubs ranging in height from 2 m to 30 m (6 to 98 ft). Lower-stature thickets (2–4 m or 6–13 ft tall) tend to be found at higher elevation sites, with tall-stature habitats at middle and lower elevation riparian forests. Nest sites typically have dense foliage at least from the ground level up to approximately 4 m (13 ft) above ground, although dense foliage may exist only at the shrub level, or as a low dense canopy. Nest sites typically have a dense canopy. Some of the more common tree and shrub species currently known to comprise nesting habitat include Goodings willow (*Salix gooddingii*), coyote willow (*Salix exigua*) Geyers willow (*Salix geyerana*), arroyo willow (*Salix lasiolepis*), red willow (*Salix laevigata*), yewleaf willow (*Salix taxifolia*), boxelder (*Acer negundo*), tamarisk (aka saltcedar, *Tamarix ramosissima*), and Russian olive (*Eleagnus angustifolia*) (USFWS 2002: D–2). Generally, you would not find southwestern willow flycatchers nesting in an area without willows or tamarisk. A more detailed description of historical records by state and habitat characteristics (plant species, composition, structure, biotic vegetation classification, patch size and shape, water and hydrological conditions, importance of the different stages of flycatcher habitat, etc.) can be found in the Recovery Plan (USFWS 2002: 7–19). The Recovery Plan is available on our website at *http://arizonaes.fws.gov* or by contacting the AZ Ecological Services Office (see **ADDRESSES** section).

Southwestern willow flycatchers are believed to exist and interact as groups of metapopulations (Noon and Farnsworth 2000; Lamberson *et al.* 2000; and USFWS 2002: 72). A metapopulation is a group of spatially disjunct local willow flycatcher populations connected to each other by immigration and emigration (USFWS 2002: 72). The distribution of the southwestern willow flycatcher varies geographically and is most stable where many connected sites and/or large populations exist (Coastal CA, Gila, Rio Grande Recovery Units) (Lamberson *et al.* 2000 and USFWS 2002: 72). A site may encompass a discrete breeding location, or several (USFWS 2002: 72). A territory is defined as a territorial or singing male detected during field

surveys and generally equates to an area where both a male and female are present (Sogge *et al.* 1977). For more specific information on southwestern willow flycatcher presence/absence survey protocol, please see Sogge *et al.* (1997) and any subsequent updates at *http://arizonaes.fws.gov* or *http://www.usgs.nau.edu/swwf.* Metapopulation persistence or stability is more likely to increase by adding more sites rather than adding more territories to existing sites (Lamberson *et al.* 2000; USFWS 2002: 72; and USFWS 2003). This strategy distributes birds across a greater geographical range, minimizes risk of simultaneous catastrophic loss, and avoids genetic isolation (USFWS 2002: 72). In consideration of habitat that is dynamic and widely distributed, flycatcher metapopulation stability, population connectivity, and gene flow can be achieved through: Distributing birds throughout its range; having birds close enough to each other to allow for interaction; having large populations; having a matrix of smaller sites with high connectivity; and establishing habitat close to existing breeding sites, thereby increasing the chance of colonization (USFWS 2002: 75). As the population of a site increases, the potential to disperse and colonize increases; and an increase/decrease in one population affects other populations because populations are affected by the proximity, abundance, and reproductive productivity of neighboring populations (USFWS 2002: 75).

The breeding site and patch (a ''patch'' is defined as a discrete piece of southwestern willow flycatcher habitat) fidelity of adult, nestling, breeding, and non-breeding southwestern willow flycatchers are just beginning to be understood (Kenwood and Paxton 2001; Koronkiewicz and Sogge 2001; USFWS 2002: 17). In central AZ at Roosevelt Lake (made up of a collection of ''sites''), from 1997 through 2000, 66 to 78 percent of southwestern willow flycatchers known to have survived from one breeding season to the next returned to the same breeding site; conversely, 22 to 34 percent of returning birds moved to different sites (Luff *et al.* 2000). A large percentage (75 percent) of known surviving 2000 adults returned in 2001 to their same breeding site (Kenwood and Paxton 2001). All, but three surviving birds out of 28, that were banded at Roosevelt Lake returned to Roosevelt Lake (Kenwood and Paxton 2001).

Southwestern willow flycatchers have higher site fidelity than nest fidelity and can move among sites within drainages and between drainages (Kenwood and Paxton 2001). Within-drainage movements are more common than between-drainage movements (Kenwood and Paxton 2001). From nearly 300 band recoveries, within-drainage movements generally ranged from 1.6 to 29 kilometer (km) (1 to 18 miles (mi), but were as long as 40 km (25 mi) (E. Paxton, USGS, e-mail). Movements of birds between drainages are more rare, and the distances are more varied. Banding studies have recorded 25 between-drainage movements ranging from 40 km (25 mi) to a single movement of 443 km (275 mi) (average = 130 km or 81 mi) (E. Paxton, USGS, e-mail). Movements have occurred from the Basin and Mohave Recovery Unit to the Lower Colorado Recovery Unit and from the Lower Colorado Recovery Unit to the Gila Recovery Unit.

As a neotropical migrant, migration stopover areas for the southwestern willow flycatcher, even though not used for breeding, may be critically important, (*i.e.*, essential) resources affecting productivity and survival (Sogge *et al.* 1997b; Yong and Finch 1997; Johnson and O'Brien 1998; McKernan and Braden 1999; and USFWS 2002: E–3 and 19). Use of riparian habitats along major drainages in the Southwest during migration has been documented (Sogge *et al.* 1997; Yong and Finch 1997; Johnson and O'Brien 1998; McKernan and Braden 1999; Koronkiewicz *et al.* 2003). Many of the willow flycatchers found migrating through riparian areas are detected in riparian habitats or patches that would be unsuitable for breeding (*e.g.*, the vegetation structure is too short or sparse, or the patch is too small). On these drainages, migrating flycatchers use a variety of riparian habitats, including ones dominated by native or exotic plant species, or mixtures of both (USFWS 2002: E–3). Willow flycatchers, like most small passerine birds, require food-rich stopover areas in order to replenish energy reserves and continue their northward or southward migration (Finch *et al.* 2000; USFWS 2002: E–3 and 42).

The Recovery Plan for the southwestern willow flycatcher (USFWS 2002) was completed in 2002 and provides reasonable actions believed to be required to recover and protect the bird. The Recovery Plan (USFWS 2002: 105 to 136) provides the strategy for recovering the bird to threatened status and to the point where delisting is warranted. The Recovery Plan states that either one of two criteria can be met in order to downlist the species to threatened (USFWS 2002: 77–78). The first relies on reaching a total population of 1,500 territories strategically distributed among all Recovery Units and maintained for three years with habitat protections (USFWS 2002: 77–78). Habitat protections include a variety of options such as Habitat Conservation Plans, conservation easements, and Safe Harbor Agreements. The second criterion calls for reaching a population of 1,950 territories also strategically distributed among all Recovery and Management Units for five years without additional habitat protection (USFWS 2002: 77–78). For delisting, the Recovery Plan recommends a minimum of 1,950 territories must be strategically distributed among all Recovery and Management Units, and these habitats must be protected from threats and create/secure sufficient habitat to assure maintenance of these populations and/or habitat for the foreseeable future through development and implementation of conservation management agreements (USFWS 2002: 79–80). All of the delisting criteria must be accomplished and demonstrated their effectiveness for a period of 5 years (USFWS 2002: 79–80).

Threats

The reasons for the decline of the southwestern willow flycatcher and current threats it faces are numerous, complex, and interrelated (USFWS 1995 and 2002: 33; Marshall and Stoleson 2000). However, these factors vary in severity over the landscape, and at any given locale, several are likely present, with cumulative and combined effects (USFWS 2002: 33).

The primary cause of the flycatcher's decline is loss and modification of habitat (USFWS 2002: 33). Historically, these habitats have always been dynamic (*i.e.* habitat size and location evolve over time), due to natural disturbance and regeneration events such as floods, fire, and drought (USFWS 2002: 33–34). With increasing human populations and the related industrial, agricultural, and urban developments, these habitats have been further modified, reduced, and destroyed by various mechanisms (USFWS 2002: 34). Riparian ecosystems have declined from reductions in water flow, interruptions in natural hydrological events and cycles, physical modifications to streams, modification of native plant communities by invasion of exotic species, and direct removal of riparian vegetation (USFWS 2002: 34).

The major mechanisms causing loss and modification of riparian ecosystems, increases in exotic plant species, and quality of riparian habitat, are water-management and land-use practices such as dam operations, water

diversion and groundwater pumping, river channelization and bank stabilization, control of phreatophytes (plants whose roots are associated with the water table), livestock grazing, recreation, fire, agricultural development, urbanization, and changes in the riparian plant communities. (USFWS 2002: 33–42). Wintering habitat has also been lost and modified for this and other neotropical migratory birds (Finch 1991; Sherry and Holmes 1993) due to heavy agriculture uses and a decrease in lowland forest and wet areas (habitats in which southwestern willow flycatchers overwinter) (Koronkiewiez *et al.* 1998). A more detailed discussion of these threats can be found in the Recovery Plan (USFWS 2002: 33–42).

In a review of historical and contemporary records and survey data of southwestern willow flycatchers throughout its range, Unitt (1987) noted that the species has ''declined precipitously'' and that ''the population is clearly much smaller now than 50 years ago.'' He believed the total was ''well under'' 1,000 pairs, more likely 500 (Unitt 1987). When the southwestern willow flycatcher was listed as endangered in 1995, approximately 350 territories were known to exist (Sogge *et al.* 2001). At the end of the 2002 breeding season, the minimum known number of southwestern willow flycatcher territories was 1,153 (455 in AZ, 238 in CA, 60 in CO, 344 in NM, 51 in NV, and 5 in UT) (Sogge *et al.* 2003). This number reflects the results of the most recent survey data. This also does not include flycatchers likely to occur on some Tribal and private lands. Though much suitable habitat remains to be surveyed, the rate of discovery of new nesting pairs at new locations has leveled off (Sogge *et al.* 2001). Unitt (1987) estimated that the total flycatcher population may be 500 to 1000 pairs; thus, nearly a decade of intense survey efforts have found little more than slightly above the upper end of Unitt's 1987 estimate (USFWS 2002: 29). Moreover, survey results reveal a consistent pattern range wide; the southwestern willow flycatcher population as a whole is comprised of extremely small, widely separated breeding groups or unmated flycatchers (74 percent of the breeding sites have five or fewer territories) (Sogge *et al.* 2003).

The 1,153 southwestern willow flycatcher territories are distributed in a large number of very small breeding groups, and only a small number of relatively large breeding groups (USFWS 2002: 41). These isolated breeding groups are vulnerable to local extirpation from floods, fire, severe weather, disease, and shifts in birth/death rates and sex ratios (USFWS 2002: 41). Marshall and Stoleson (2000) noted, ''Even moderate variation in stochastic (random) factors (such as floods or fires) that might be sustained by larger populations can reduce a small population below a threshold level from which it cannot recover. The persistence of small populations depends in part on immigration from nearby populations, at least in some years (Stacey and Taper 1992). The small, isolated nature of current southwestern willow flycatcher populations exacerbates the risk of local extirpation by reducing the likelihood of immigration among populations.'' The vulnerability of the few relatively large populations makes the above threats particularly acute (USFWS 2002: 41).

Previous Federal Actions

On January 25, 1992, a coalition of conservation organizations petitioned the Service, requesting listing of the southwestern willow flycatcher (*E t. extimus*) as an endangered species, under the Act. The petitioners also appealed for emergency listing, and designation of critical habitat. On September 1, 1992, we published a finding that the petition presented substantial information indicating that listing may be warranted and requested public comments and biological data on the species (57 FR 39664). On July 23, 1993, we published a proposal to list southwestern willow flycatcher as endangered with critical habitat (58 FR 39495), and again requested public comments and biological data on the species. We published a final rule to list southwestern willow flycatcher as endangered on February 27, 1995 (60 FR 10694). We deferred the final designation of critical habitat for this endangered species until July 23, 1995, pursuant to 16 U.S.C. 1533(b)(6)(C), citing issues identified in public comments, new information, and the lack of the economic information necessary to perform an economic analysis.

Following the final listing, we took no immediate action on the proposal to designate critical habitat due to a listing moratorium and a series of rescissions of listing funds imposed by Congress from April 1995 to April 1996. On March 20, 1997, the U.S. District Court of Arizona, in response to a suit by the (Southwest) Center for Biological Diversity, ordered us to designate critical habitat for the southwestern willow flycatcher within 120 days. On July 22, 1997, we published a final critical habitat designation for southwestern willow flycatcher along 964 river km (599 river mi) in AZ, CA, and NM (62 FR 39129) (USFWS 1997a). We published a correction notice on August 20, 1997, on the lateral extent of critical habitat (62 FR 44228) (USFWS 1997b).

As a result of a suit from the New Mexico Cattlegrower's Association initiated in March 1998, on May 11, 2001, the 10th Circuit Court of Appeals vacated (*i.e.*, set aside) critical habitat, citing a faulty economic analysis, and instructed us to issue a new critical habitat designation. On September 30, 2003, in a complaint brought by the Center for Biological Diversity, the U.S. District Court of New Mexico instructed us to propose critical habitat by September 30, 2004, and publish a final rule by September 30, 2005. On January 21, 2004, we published a Notice of Intent to prepare an Environmental Assessment pursuant to NEPA and announced scoping meetings (69 FR 2940). We requested public comments on information about the flycatcher, management plans, and the scope of the environmental analysis, including alternatives that should be analyzed. We also held eight public scoping meetings in January and February, 2004, in Phoenix, AZ; Silver City and Albuquerque, NM; Alamosa, CO; Las Vegas, NV; and Lake Isabella, Chino, and Escondido, CA.

Critical Habitat

Section 3(5)(A) of the Act defines critical habitat as (i) the specific areas within the geographic area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features (I) essential to the conservation of the species and (II) that may require special management considerations or protection; and (ii) specific areas outside the geographic area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. ''Conservation'' means the use of all methods and procedures that are necessary to bring an endangered or a threatened species to the point at which listing under the Act is no longer necessary.

The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. It does not allow government or public access to private lands. Under section 7 of the Act, Federal agencies must consult with the Service on activities they undertake, fund, or permit that may affect critical habitat and lead to its destruction or adverse modification.

However, the Act prohibits unauthorized take of listed species and requires consultation for activities that may affect them, including habitat alterations, regardless of whether critical habitat has been designated.

To be included in a critical habitat designation, habitat must be either a specific area within the geographic area occupied by the species on which are found those physical or biological features essential to the conservation of the species (primary constituent elements, as defined at 50 CFR 424.12(b)) and which may require special management considerations or protection, or be specific areas outside of the geographic area occupied by the species which are determined to be essential to the conservation of the species. Section 3(5)(c) of the Act states that not all areas that can be occupied by a species should be designated as critical habitat unless the Secretary determines that all such areas are essential to the conservation of the species. Our regulations (50 CFR 424.12(e)) also state that, ''The Secretary shall designate as critical habitat areas outside the geographic area presently occupied by the species only when a designation limited to its present range would be inadequate to ensure the conservation of the species.''

Regulations at 50 CFR 424.02(j) define special management considerations or protection to mean any methods or procedures useful in protecting the physical and biological features of the environment for the conservation of listed species. When we designate critical habitat, we may not have the information necessary to identify all areas that are essential for the conservation of the species. Nevertheless, we are required to designate those areas we consider to be essential, using the best information available to us. Accordingly, we do not designate critical habitat in areas outside the geographic area occupied by the species unless the best available scientific and commercial data demonstrate that unoccupied areas are essential for the conservation needs of the species.

Section 4(b)(2) of the Act requires that we take into consideration the economic impact, effects to national security, and any other relevant impact, of specifying any particular area as critical habitat. We may exclude areas from critical habitat designation when the benefits of exclusion outweigh the benefits of including the areas within critical habitat, provided the exclusion will not result in extinction of the species.

The Service's Policy on Information Standards Under the Endangered Species Act, published in the **Federal Register** on July 1, 1994 (59 FR 34271), and Section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658) and the associated Information Quality Guidelines issued by the Service, provide criteria, establish procedures, and provide guidance to ensure that decisions we make represent the best scientific and commercial data available. They require our biologists, to the extent consistent with the Act and with the use of the best scientific and commercial data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat. When determining which areas are critical habitat, information may be obtained from the listing package, recovery plans, articles in peer-reviewed journals, conservation plans developed by States and counties or other entities that develop HCPs, scientific status surveys and studies, and biological assessments. In the absence of published data unpublished materials and expert opinion or personal knowledge is used.

Areas that support populations, but are outside the critical habitat designation, are still important to the species. Because of that they will continue to be subject to conservation actions implemented under section 7(a)(1) of the Act and to the regulatory protections afforded by the section 7(a)(2) jeopardy standard, as determined on the basis of the best available information at the time of the action. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans, or other species conservation planning efforts if new information available to these planning efforts calls for different approaches.

Methods

In determining areas that are essential to conserve the southwestern willow flycatcher, we used the best scientific and commercial data available. We have reviewed the overall approach to the conservation of the southwestern willow flycatcher compiled in the Recovery Plan (USFWS 2002) and undertaken by local, State, Federal, and Tribal agencies, and private and non-governmental organizations operating within the species' range since its listing in 1993.

We have also reviewed available information that pertains to the habitat requirements of this species. The material included data in reports submitted during section 7 consultations and by biologists holding section 10(a)(1)(A) recovery permits; research published in peer-reviewed articles, agency reports, and databases; and regional Geographic Information System (GIS) coverages and habitat models.

A variety of sources were used to determine territory site information and locations. The Recovery Plan (USFWS 2002), the U.S. Geological Survey (USGS 2003) southwestern willow flycatcher rangewide database, and 2002 rangewide status report of the flycatcher (Sogge *et al.* 2003) were the most authoritative and complete sources of information. The database maintained by USGS, Colorado Plateau Research Station, Flagstaff, AZ (2003), compiles the results of surveys conducted throughout the bird's range. We had compiled 2003 data from AZ (Smith *et al.* 2004) and NM (S.O. Williams, NMGFD, e-mail). AZ Game and Fish Department's Nongame Branch, in Phoenix, AZ, and SWCA, Inc. (Koronkiewicz *et al.* 2003; L. Dickerson, SWCA, Inc., e-mail) generated migration data for AZ. A summary of known historical breeding records can be found in the Recovery Plan (USFWS 2002: 8 to 10). For more detailed information regarding the threats to the southwestern willow flycatcher and its habitat see the Recovery Plan (USFWS 2002: 33 to 42) and the listing rule (February 27, 1995; 60 FR 10694).

In the development of the proposal of critical habitat for the southwestern willow flycatcher, we determined which lands are essential to the conservation of the species by defining the physical and biological features essential to the species' conservation and delineating the specific areas defined by them. We then evaluated those lands determined to be essential to ascertain if any specific areas are appropriate for exclusion from critical habitat pursuant to section 4(b)(2) of the Act. On the basis of our evaluation, we have determined that the benefits of excluding certain approved and pending HCPs and lands owned and managed by the Department of Defense from critical habitat for the southwestern willow flycatcher outweighs the benefits of their inclusion, and have subsequently excluded those lands from this proposed designation of critical habitat for this subspecies pursuant to section 4(b)(2) of the Act (refer to ''Exclusions

under Section 4(b)(2) of the Act'' section below). The resulting proposal includes a subset of lands essential to the conservation of the southwestern willow flycatcher.

Maps included with this proposal illustrate lands essential to the conservation of the southwestern willow flycatcher, with lands proposed as critical habitat and lands excluded from this proposal delineated separately. More detailed maps show lands determined to be essential to the species, which are color coded to clearly show those lands proposed and those excluded from this proposal, and are available from the AZ Ecological Services Office (see **ADDRESSES** section) or from the Internet at *http://arizonaes.fws.gov.*

Primary Constituent Elements

In accordance with section 3(5)(A)(i) of the Act and regulations at 50 CFR 424.12, in determining which areas to propose as critical habitat, we consider those physical and biological features (primary constituent elements) that are essential to the conservation of the species and that may require special management considerations or protection. These features include but are not limited to: Space for individual and population growth and for normal behavior; food, water, air, light, minerals or other nutritional or physiological requirements; cover or shelter; sites for germination or seed dispersal; and habitats that are protected from disturbance or are representative of the historical, geographical, and ecological distributions of a species.

The areas proposed for designation as critical habitat are designed to provide sufficient riparian habitat for breeding, non-breeding, territorial, dispersing, and migrating, southwestern willow flycatchers and to sustain southwestern willow flycatchers across their range. Although no areas are being proposed as critical habitat solely because they serve as a migration corridor, rather areas proposed serve a variety of functions that may include use by southwestern willow flycatchers as migration habitat. The habitat components essential for conservation of the species were determined from studies of southwestern willow flycatcher behavior and habitat use throughout the birds range (see ''Background'' section above). Due to the natural history of this neotropical migrant and the dynamic nature of the riparian environments in which they are found (USFWS 2002: Chapter II), one or more of the primary constituent elements described below are found throughout each of the units that are being proposed as critical habitat.

In general, all the constituent elements of critical habitat for the southwestern willow flycatcher are found in the riparian ecosystem within the 100-year floodplain or flood prone area. Southwestern willow flycatchers use riparian habitat for feeding, sheltering, and cover while breeding and migrating. Because riparian vegetation is prone to periodic disturbance (*e.g.* flooding), flycatcher habitat is ephemeral and its distribution is dynamic in nature (USFWS 2002: 17). Flycatcher habitat may become unsuitable for breeding through maturation or disturbance, but suitable for migration or foraging (though this may be only temporary, and patches may cycle back into suitability for breeding) (USFWS 2002: 17). Therefore, it is not realistic to assume that any given breeding habitat patch will remain suitable over the long-term, or persist in the same location (USFWS 2002: 17). Over a five-year period, southwestern willow flycatcher habitat can, in optimum conditions, germinate, be used for migration or foraging, continue to grow, and eventually be used for nesting. Thus, habitat that is not currently suitable for nesting at a specific time, but useful for foraging and/or migration can be essential to the conservation of the flycatcher. Feeding sites and migration stopover areas are essential components of the flycatcher's survival, productivity, and health, and they can also be areas where new breeding habitat develops as nesting sites are lost or degraded (USFWS 2002: 42).

Based on our current knowledge of the life history and ecology of the southwestern willow flycatcher and the relationship of its essential life history functions to its habitat, as summarized in the ''Status and Threats'' sections above and in more detail in the Recovery Plan (USFWS 2002: Chapter II), it is important to recognize the combined nature of the primary constituent elements. Specifically, the relationships between river function, hydrology, floodplains, aquifers, and plant growth, form the environment essential to the conservation of the southwestern willow flycatcher.

The natural hydrologic regime and supply of (and interaction between) surface and subsurface water will be a driving factor in the maintenance, growth, recycling, and regeneration of southwestern willow flycatcher habitat (USFWS 2002: 16). As streams reach the lowlands, their gradients typically flatten and surrounding terrain open into broader floodplains (USFWS 2002: 32). Combine this setting with the integrity of stream flow frequency, magnitude, duration, and timing (Poff *et al.* 1997), and conditions will occur that provide for proper river channel configuration, sediment deposition, periodic inundation, recharged aquifers, lateral channel movement, and elevated groundwater tables throughout the floodplain that develop flycatcher habitat (USFWS 2002: 16). Maintaining existing river access to the floodplain when overbank flooding occurs is integral to allow deposition of fine moist soils, water, nutrients, and seeds that provide essential material for plant germination and growth. An abundance and distribution of fine sediments extending farther laterally across the floodplain and deeper underneath the surface retains much more subsurface water, which in turn supplies water for the development of flycatcher habitat and micro-habitat conditions (USFWS 2002: 16). The interconnected interaction between groundwater and surface water contributes to the quality of riparian community (structure and plant species), and will influence the germination, density, vigor, composition, and ability to regenerate and maintain itself (AZ Department of Water Resources 1994).

The specific biological and physical features, otherwise referred to as the primary constituent elements, essential to the conservation of the southwestern willow flycatcher are:

(1) Nesting habitat with trees and shrubs that include, but are not limited to, willow species and boxelder;

(2) Dense riparian vegetation with thickets of trees and shrubs ranging in height from 2 m to 30 m (6 to 98 ft) with lower-stature thickets of (2–4 m or 6–13 ft tall) found at higher elevation riparian forests and tall-stature thickets at found at middle- and lower-elevation riparian forests;

(3) Areas of dense riparian foliage at least from the ground level up to approximately 4 m (13 ft) above ground or dense foliage only at the shrub level, or as a low, dense tree canopy;

(4) Sites for nesting that contain a dense tree and/or shrub canopy (the amount of cover provided by tree and shrub branches measured from the ground) (*i.e.* a tree or shrub canopy with densities ranging from 50 percent to 100 percent);

(5) Dense patches of riparian forests that are interspersed with small openings of open water or marsh or shorter/sparser vegetation, that creates a mosaic that is not uniformly dense. Patch size may be as small as 0.1 ha (0.25 ac) or as large as 70 ha (175 ac); and

(6) A variety of insect prey populations, including but not limited to, wasps and bees (Hymenoptera); flies (Diptera); beetles (Coleoptera); butterflies/moths and caterpillars (Lepidoptera); and spittlebugs (Homoptera).

A description of the essential environment as it relates to the specific primary constituent elements required of the southwestern willow flycatcher is described below.

Space for Individual and Population Growth and Normal Behavior

Streams of lower gradient and/or more open valleys with a wide/broad floodplain are the geological settings that support willow flycatcher breeding habitat from near sea level to over 2000 m (6100 ft) in southern CA, southern NV, southern UT, southern CO, AZ, and NM (USFWS 2002: 7). Lands with moist conditions which support riparian plant communities are areas that provide habitat for the southwestern willow flycatcher. Conditions like these develop in lower floodplains as well as where streams enter impoundments, either natural (*e.g.*, beaver ponds) or human-made (reservoirs). Low-gradient stream conditions may also occur high in watersheds, as in the marshy mountain meadows supporting flycatchers in the headwaters of the Little Colorado River near Greer, AZ, or the flat-gradient portions of the upper Rio Grande in south-central CO and northern NM (USFWS 2002: 32). Sometimes, the low-gradient wider floodplain exists only at the habitat patch itself, on streams that are generally steeper when viewed on the large scale (*e.g.*, percent gradient over kilometers or miles) (USFWS 2002).

Relatively steep, confined streams can also support flycatcher habitats (USFWS 2002: D–13). The San Luis Rey River in CA supports a substantial flycatcher population, and stands out among flycatcher habitats as having a relatively high gradient and being confined in a fairly narrow, steep-sided valley (USFWS 2002: D–13). It is important to note that even a steep, confined canyon or mountain stream may present local conditions where just a portion of an acre (ac) or hectare (ha) of flycatcher habitat may develop (USFWS 2002; D–13). Such sites are important individually, and in aggregate (USFWS 2002: D–13). Flycatchers are known to occupy very small, isolated habitat patches, and may occur in fairly high densities within those patches.

Water

Flycatcher nesting habitat is largely associated with perennial or persistent stream flow that can support the expanse of vegetation characteristics needed by the flycatcher, but can persist on intermittent or ephemeral streams that retain local conditions favorable to riparian vegetation (USFWS 2002: D–12). The range and variety of stream flow conditions (frequency, magnitude, duration, and timing) (Poff *et al.* 1997) that will establish and maintain flycatcher habitat can arise in different types of both regulated and unregulated flow regimes throughout its range (USFWS 2002: D–12). Also, flow conditions that will establish and maintain flycatcher habitat can be achieved in regulated streams, depending on scale of operation and the interaction of the primary physical characteristics of the landscape (USFWS 2002: D–12).

In the southwest, natural hydrological conditions at a flycatcher breeding site can vary remarkably within a season and between years (USFWS 2002: D–12). At some locations, particularly during drier years, water or saturated soil is only present early in the breeding season (*i.e.*, May and part of June) (USFWS 2002: D–12). At other sites, vegetation may be immersed in standing water during a wet year, but be hundreds of meters from surface water in dry years (USFWS 2002: D–12). This is particularly true of reservoir sites such as the Kern River at Lake Isabella, CA, Tonto Creek and Salt River at Roosevelt Lake, AZ, and the Rio Grande near Elephant Butte Reservoir, NM (USFWS 2002: D–12). Similarly, where a river channel has changed naturally (Sferra *et al.* 1997), there may be a total absence of water or visibly saturated soil for several years. In such cases, the riparian vegetation and any flycatchers breeding within it may persist for several years (USFWS 2002: D–12).

In some areas, natural or managed hydrologic cycles can create temporary flycatcher habitat, but may not be able to support it for an extended amount of time, or may support varying amounts of habitat at different points in the cycle. Some dam operations create varied situations that allow different plant species to thrive when water is released below a dam, held in a lake, or removed from a lakebed, and consequently, varying degrees of flycatcher habitat are available as a result of dam operations (USFWS 2002: 33).

The riparian vegetation that constitutes southwestern willow flycatcher breeding habitat requires substantial water (USFWS 2002: D–12). Because southwestern willow flycatcher breeding habitat is often where there is slow moving or still water we speculate these slow and still water conditions may also be important in influencing the production of insect prey base for flycatcher food (USFWS 2002: D–12)

Sites for Germination or Seed Dispersal

Subsurface hydrologic conditions may, in some places (particularly at the more arid locations of the southwest), be equally important to surface water conditions in determining riparian vegetation patterns (Lichivar and Wakely 2004). Where groundwater levels are elevated to the point that riparian forest plants can directly access those waters it can be an area essential for nesting, foraging, migrating, nonbreeding, dispersing, or unmated southwestern willow flycatchers, and we speculate that these elevated groundwaters help create moist soil conditions believed to be important for micro-habitat nesting conditions and prey populations (USFWS 2002: 11).

Depth to groundwater plays an important part in the distribution of riparian vegetation (AZ Department of Water Resources 1994) and consequently, southwestern willow flycatcher habitat. The greater the depth to groundwater below the land surface, the less abundant the riparian vegetation (AZ Department of Water Resources 1994). Localized perched aquifers (*i.e.* a saturated area that sits above the main water table) can and do support some riparian habitat, but these systems are not extensive (AZ Department of Water Resources 1994).

The abundance and distribution of fine sediment deposited on floodplains is critical for the development, abundance, distribution, maintenance, and germination of flycatcher habitat, and possibly conditions for successful breeding (USFWS 2002: 16). In almost all cases, moist or saturated soil is present at or near breeding sites during wet or non-drought years (USFWS 2002: 11). Thus, fine sediments provide seeds beds for flycatcher habitat. The saturated soil and adjacent surface water may be present early in the breeding season, but only damp soil is present by late June or early July (Muiznieks *et al.* 1994; USFWS 2002: D–3). Microhabitat features such as temperature and humidity, facilitated by moist/saturated soil, are believed to play an important role where flycatchers are detected and nest, their breeding success, and availability/abundance of food resources (USFWS 2002). However, as in all natural systems the amount and duration of flooding is dependent on natural cycles.

Reproduction and Rearing of Offspring

Southwestern willow flycatchers nest in thickets of trees and shrubs ranging in height from 2 m to 30 m (6 to 98 ft) (USFWS 2002: D–3). Lower-stature thickets (2–4 m or 6–13 ft tall) tend to be found at higher elevation sites, with tall-stature habitats at middle- and lower-elevation riparian forests (USFWS 2002: D–2). Nest sites typically have dense foliage at least from the ground level up to approximately 4 m (13 ft) above ground, although dense foliage may exist only at the shrub level, or as a low, dense tree canopy (USFWS 2002: D–3).

Riparian habitat characteristics such as dominant plant species, size and shape of habitat patches, tree canopy structure, vegetation height, and vegetation density vary widely among sites, but are essential qualities of southwestern willow flycatcher breeding habitat (USFWS 2002: D–1). The accumulating knowledge of flycatcher breeding sites reveals important areas of similarity which constitute the basic concept of what is suitable breeding habitat (USFWS 2002: D–2). These habitat features are generally discussed below.

Regardless of the plant species composition or height, occupied breeding sites usually consist of dense vegetation in the patch interior, or an aggregate of dense patches interspersed with openings (USFWS 2002: 11). In most cases this dense vegetation occurs within the first 3–4 m (10–13 ft) above ground (USFWS 2002: 11). These dense patches are often interspersed with small openings, open water or marsh, or shorter/sparser vegetation, creating a mosaic that is not uniformly dense (USFWS 2002: 11).

Common tree and shrub species currently known to comprise nesting habitat include willow species, boxelder, tamarisk, and Russian olive (USFWS 2002: D–2, 11). Other plant species used for nesting have been buttonbush (*Cephalanthus occidentalis*), cottonwood, stinging nettle (*Urtica dioica*), alder (*Alnus rhombifolia*, *Alnus oblongifolia*, *Alnus tenuifolia*), velvet ash (*Fraxinus velutina*), poison hemlock (*Conium maculatum*), blackberry (*Rubus ursinus*), seep willow (*Baccharis salicifolia*, *Baccharis glutinosa*), oak (*Quercus agrifolia*, *Quercus chrysolepis*), rose (*Rosa californica*, *Rosa arizonica*, *Rosa multiflora*), sycamore (*Platinus wrightii*), giant reed (*Arundo donax*), false indigo (*Amorpha californica*), Pacific poison ivy (*Toxicodendron diversilobum*), grape (*Vitus arizonica*), Virginia creeper (*Parthenocissus quinquefolia*), Siberian elm (*Ulmus pumila*), and walnut (*Juglans hindsii*) (USFWS 2002: D–3, 5, and 9). Other species used by nesting southwestern willow flycatchers may become known over time as more studies and surveys occur.

Nest sites typically have a dense tree and/or shrub canopy (USFWS 2002: D–3). Canopy density (the amount of cover provided by tree and shrub branches measured from the ground) at various nest sites ranged from 50 percent to 100 percent.

Southwestern willow flycatcher breeding habitat can be generally organized into three broad habitat types—those dominated by native vegetation, by exotic vegetation, and those with mixed native and exotic plants. These broad habitat descriptors reflect the fact that southwestern willow flycatchers now inhabit riparian habitats dominated by both native and non-native plant species.

The riparian patches used by breeding flycatchers vary in size and shape (USFWS 2002: D–2). They may be relatively dense, linear, contiguous stands or irregularly-shaped mosaics of dense vegetation with open areas (USFWS 2002: D–2 and 11). Southwestern willow flycatchers have been recorded nesting in patches as small as 0.1 ha (0.25 ac) along the Rio Grande (Cooper 1997), and as large as 70 ha (175 ac) in the upper Gila River in NM (Cooper 1997). The mean reported size of flycatcher breeding patches was 8.6 ha (21.2 ac). The majority of sites were toward the smaller end, as evidenced by a median patch size of 1.8 ha (4.4 ac) (USFWS 2002: 17). Mean patch size of breeding sites supporting 10 or more flycatcher territories was 24.9 ha (62.2 ac). Aggregations of occupied patches within a breeding site may create a riparian mosaic as large as 200 ha (494 ac) or more, such as at the Kern River (Whitfield 2002), Roosevelt Lake (Paradzick *et al.* 1999) and Lake Mead (McKernan 1997). Based on the number of flycatcher territories reported in each patch, it required an average of 1.1 ha (2.7 ac) of dense riparian habitat for each territory in the patch (USFWS 2002: 81, D–11). Because breeding patches include areas that are not actively defended as territories, this does not equate to an average territory size.

Flycatchers often cluster their territories into small portions of riparian sites (Whitfield and Enos 1996; Paxton *et al.* 1997; Sferra *et al.* 1997; Sogge *et al.* 1997), and major portions of the site may be occupied irregularly or not at all. Recent habitat modeling based on remote sensing and GIS data has found that breeding site occupancy at reservoir sites in AZ is influenced by vegetation characteristics of habitat adjacent to the actual occupied portion of a breeding site (Hatten and Paradzick 2003); therefore, areas adjacent to breeding sites can be an important component of a breeding site. How size and shape of riparian patches relate to factors such as flycatcher site selection and fidelity, reproductive success, predation, and brood parasitism is unknown (USFWS 2002: D–11).

Flycatchers are generally not found nesting in confined floodplains (*i.e.* those bound within a canyon) (Hatten and Paradzick 2003) or where only a single narrow strip of riparian vegetation less than approximately 10 m (33 ft) wide develops (USFWS 2002: D–11). While riparian vegetation too mature, immature, or of lesser quality in abundance and breadth may not be used for nesting, it can be used by breeders for foraging (especially if it extends out from larger patches) or during migration for foraging, cover, and shelter (Sogge and Tibbitts 1994; Sogge and Marshall 2000).

Food

We speculate that willow flycatcher food availability may be largely influenced by the density and species of vegetation, proximity to and presence of water, saturated soil levels, and microclimate features such as temperature and humidity (USFWS 2002). Flycatchers forage within and above the canopy, along the patch edge, in openings within the territory, over water, and from tall trees as well as herbaceous ground cover (Bent 1960; McCabe 1991). Willow flycatchers employ a ''sit and wait'' foraging tactic, with foraging bouts interspersed with longer periods of perching (Prescott and Middleton 1988). The willow flycatcher is somewhat of an insect generalist (USFWS 2002: 26), taking a wide range of invertebrate prey including flying, and ground-, and vegetation-dwelling species of terrestrial and aquatic origins (Drost *et al.* 2003). Wasps and bees (Hymenoptera) are common food items, as are flies (Diptera), beetles (Coleoptera), butterflies/moths and caterpillars (Lepidoptera), and spittlebugs (Homoptera) (Beal 1912; McCabe 1991). Plant foods such as small fruits have been reported (Beal 1912; Roberts 1932; Imhof 1962), but are not a significant food during the breeding season (McCabe 1991). Diet studies of adult southwestern willow flycatchers (Drost *et al.* 1997; DeLay *et al.* 1999) found a wide range of prey taken. Major prey items were small (flying ants) to large (dragonflies) flying insects, with

Hymenoptera, Diptera, and Hemiptera (true bugs) comprising half of the prey items. Willow flycatchers also took non-flying species, particularly Lepidoptera larvae. From an analysis of southwestern willow flycatcher diet along the South Fork of the Kern River, CA (Drost *et al.* 2003), flycatchers consumed a variety of prey from 12 different insect groups. Willow flycatchers have been identified targeting seasonal hatchings of aquatic insects along the Salt River arm of Roosevelt Lake, AZ (E. Paxton, USGS, e-mail).

Primary Constituent Elements Summary

The discussion above outlines those physical and biological features essential to the southwestern willow flycatcher and presents our rationale as to why those features were selected. The primary constituent elements described above include the essential features of the dynamic riverine environment that germinates, develops, maintains, and regenerates the necessary riparian forest and provides food for nesting, foraging, non-breeding, unmated, and migrating southwestern willow flycatchers. These habitat features are essential for the flycatcher to maintain metapopulation stability, connectivity, gene flow, and protect against catastrophic loss for disjunct populations distributed across a large geographic and elevational range. All areas proposed as critical habitat for southwestern willow flycatcher are within the geographical area occupied by the species and contain enough of the primary constituent elements to allow for the biological functions that are essential for its conservation.

Criteria for Defining Essential Habitat

Restoring an endangered or threatened species to the point where it is recovered is a primary goal of our Endangered Species Program. To help guide the recovery effort, we are required to prepare and implement recovery plans for all of the listed species native to the United States. Recovery plans describe actions considered necessary for conservation of the species, establish criteria for downlisting or delisting them, and estimate time and cost for implementing the recovery measures needed. A final recovery plan formalizes the recovery strategy for a species, but is not a regulatory document (*i.e.*, recovery plans are advisory documents because there are no specific protections, prohibitions, or requirements afforded to a species based solely on a recovery plan). Critical habitat contributes to the overall recovery strategy for listed species, but does not by itself achieve recovery plan goals.

To identify areas that are essential to the conservation of the southwestern willow flycatcher, we first considered the Recovery Plan's strategy, rationale, and science behind the conservation of the flycatcher and removing the threat of extinction (USFWS 2002: 61–95). Because of the wide distribution of this bird and the dynamic nature of its habitat, we considered the southwestern willow flycatcher population assuming a metapopulation model, gene flow, ecological connectivity among disjunct populations, and prevention of catastrophic losses. In addition, information provided during the comment periods for this proposed rule and the draft economic and draft NEPA analyses will be evaluated and considered in the development of the final designation for southwestern willow flycatcher.

The Recovery Plan identifies important factors to consider in minimizing the likelihood of extinction: (1) The territory is the unit of measure; (2) populations should be distributed throughout the bird's range; (3) populations should be distributed close enough to each other to allow for movement among them; (4) large populations contribute most to metapopulation stability; smaller populations can contribute to metapopulation stability when arrayed in a matrix with high connectivity; (5) as the population of a site increases, the potential to disperse and colonize increases; (6) increase/decrease in one population affects other populations; (7) some Recovery/Management Units have stable metapopulations, others do not; (8) maintaining/augmenting existing populations is a greater priority than establishing new populations; and (9) establishing habitat close to existing breeding sites increases the chance of colonization.

The Recovery Plan (USFWS 2002) outlined a recommended recovery strategy for the southwestern willow flycatcher. We reviewed and considered the pertinent information contained in the Recovery Plan (USFWS 2002) in developing this proposed critical habitat designation because it represents a compilation of the best scientific data available to us. We are required to base listing and critical habitat decisions on the best scientific and commercial data available (16 U.S.C. 1533(b)(1)(A)). We may not delay making our determinations until more information is available, nor can we be required to gather more information before making our determination (*Southwest Center for Biological Diversity* v. *Babbitt*, 215 F. 3d 58 (D.C. Cir. 2000)). This proposed critical habitat designation focuses on those Recovery Plan recommendations that we believe are important in determining areas that are essential to the conservation of the species.

The focus of our proposal is on a conservation strategy of protecting large populations as well as small populations with high connectivity (USFWS 2002: 74 to 75). Large populations, centrally located, contribute the most to metapopulation stability, especially if other breeding populations are nearby (USFWS 2002: 74). Large populations persist longer than small ones, and produce more dispersers capable of emigrating to other populations or colonizing new areas (USFWS 2002: 74). Smaller populations in high connectivity can provide as much or more stability than a single isolated population with the same number of territories because of the potential to disperse colonizers throughout the network of sites (USFWS 2002: 75). The approach used to define critical habitat areas also supports other key central strategies tied to flycatcher conservation identified in the Recovery Plan (USFWS 2002: 74 to 76) such as: (1) Populations should be distributed close enough to each other to allow for movement, (2) maintaining/augmenting existing populations is a greater priority than establishing new populations, and (3) a population's increase improves the potential to disperse and colonize.

Because large populations, as well as small populations with high connectivity, contribute the most to metapopulation stability (USFWS 2002: 74), we identified these areas to help guide the delineation of areas essential to the conservation of the southwestern willow flycatcher, *i.e.*, critical habitat. This rule defines a large population as a single site or collection of smaller connected sites that support 10 or more territories. We chose the baseline survey period as the time from 1993 to 2003 (USFWS 2002: 23; Sogge *et al.* 2003; Smith *et al.* 2004; S.O. Williams, NMGFD, e-mail 2004; U.S. Geological Survey 2003). This includes all known reliable survey information that is available to us. We chose 10 or more territories to identify a large population area because the population viability analysis indicates a breeding site exhibits greatest long-term stability with at least 10 territories (Lamberson *et al.* 2000; USFWS 2002: 72).

We propose to designate stream ''segments'' (which in some places include exposed reservoir bottoms) as critical habitat for the southwestern willow flycatcher. The reaches designated provide sufficient critical

habitat to accommodate expected flycatcher habitat (nesting, foraging, migrating, regenerating, etc.) changes in locations or conditions from those that exist presently. . The actual riparian habitat in these areas is expected to expand, contract, or change as a result of flooding, drought, inundation, and changes in floodplains and river channels (USFWS 2002: 18, D–13 to 15) that result from current flow management practices and priorities. Stream segments include breeding sites in high connectivity and other essential flycatcher habitat components needed to conserve the subspecies. Those other essential components of flycatcher habitat (foraging habitat, habitat for non-breeding flycatchers, migratory habitat, regenerating habitat, streams, elevated groundwater tables, moist soils, flying insects, and other alluvial floodplain habitats, etc.) adjacent to or between sites, along with the dynamic process of riparian vegetation succession and river hydrology, provide current and future habitat for the flycatcher which is dependent upon vegetation succession. As a result, these segments represent the boundaries within which flycatcher habitat of all types is expected to persist over time. We used expert opinion, location of territories, habitat models, existing dam and river operations, and the physical and biological features essential to flycatcher conservation to determine the boundaries of each river segment that would be proposed as critical habitat for the subspecies.

In order to determine the degree of connectivity to assign populations, we examined the known between-year within-drainage movements of southwestern willow flycatchers (Luff *et al.* 2000; Kenwood and Paxton 2001; E. Paxton, USGS, e-mail). Through banding studies since 1997 in central AZ and the lower Colorado River in AZ, CA, and NV, scientists have re-sighted almost 300 banded southwestern willow flycatchers that, between years, moved within the same drainage (Luff *et al.* 2000; Kenwood and Paxton 2001; E. Paxton, USGS, e-mail). Most recorded between-year movements occurred within the same drainage from 1.6 to 29 km (1 and 18 mi), but movements as far as 40 km (25 mi) were recorded (Luff *et al.* 2000; Kenwood and Paxton 2001; E. Paxton, USGS, e-mail). However, we also recognize that birds move between drainages (USFWS 2002: 22). Therefore, as a result of the known movements of banded southwestern willow flycatchers and the ability of birds to move long distances between drainages, we chose a 29 km (18 mi) radius as the distance to identify where flycatcher territories and their essential habitat is found. As a result of defining the degree of connectivity to assign populations, we identified territories (with a minimum of 10 territories) and their essential habitat within a 29 km (18 mi) radius of each other to include as proposed critical habitat.

However, large populations or small populations with high connectivity did not exist throughout the entire range of the bird (USFWS 2002: 30–33; 84 (Table 9)). For example, in the Amargosa, Santa Cruz, Hassayampa/Agua Fria, San Juan, Lower Rio Grande, and Powell Flycatcher Management units there are no large sites with 10 or more territories, nor are any known territories in these Units in high connectivity (<40 km/25 mi) with a large population (≥10 territories). We are not proposing to designate these areas as critical habitat because the areas do not meet the criteria that we established for being essential to the conservation of the subspecies.

Therefore, we believe our criteria for determining what is essential to the conservation of the southwestern willow flycatcher represents the best approach toward identifying essential habitat, there were areas, due to the wide diversity and condition of habitat across the bird's range and complexity of the flycatchers' needs, where we believed it was necessary to consider other factors. These other factors included: (1) The unique nature of the Coastal CA Recovery Unit because of the high connectivity across the entire Recovery Unit and fragmented nature of the habitat; (2) management units where habitat is limited; and (3) key migratory habitat. As discussed below, in these instances we relied on Recovery Plan recommendations and conservation goals, habitat needs of the flycatcher, as well as expert opinion.

Unlike the other Recovery Units in the flycatcher's range, flycatcher populations in CA exist on a greater number of streams, and are almost all located in close proximity to one another. Because of this, we scrutinized our selection of stream segments in determining which areas identified provided those locations essential for the flycatcher and possessing the greatest degree of stability. In all four Management Units, we ensured that we selected the dominant streams with the greatest number of territories (Santa Ynez, Santa Ana, Santa Margarita and San Luis Rey Rivers) in addition to many other stream segments to allow for population connectivity, metapopulation stability, growth, dynamic river processes, and protection against catastrophic loss. We relied on expert opinion, habitat and conservation goal recommendations from the Recovery Plan, and proximity of habitats in order to provide river segments with large populations in high connectivity throughout the Recovery Unit. Consequently, there are stream segments in the Coastal CA Recovery Unit, specifically in the Santa Clara, Santa Ana, and San Diego Management units in CA, where lone territories exist that fall within the 29 km (18 mi) radius of each other, but are not being proposed as critical habitat because they, when considered within the entire range of habitats and stream segments selected in the Coastal CA Recovery Units, are not believed to be essential and/or provide the greatest stability for populations of the southwestern willow flycatcher. As noted in the ''Public Comments Solicited'' section above, we are seeking comments on whether we should consider these or other areas for inclusion in a final designation of critical habitat.

Lateral Extent

In order to determine the lateral extent of critical habitat for the flycatcher, we considered the variety of purposes riparian habitat serves the southwestern willow flycatcher, the dynamic nature of rivers and riparian habitat, the relationship between the location of rivers, flooding, and riparian habitat, and the expected boundaries, over time, of these habitats.

Southwestern willow flycatchers use riparian habitat in a variety of conditions for breeding, feeding, sheltering, cover, dispersal, and migration stopover areas. Riparian habitat is dependent on the location of river channels, floodplain soils, subsurface water, floodplain shape, and is driven by the wide variety of high, medium, and low flow events. Rivers can and do move from one side of the floodplain to the other. Flooding occurs at periodic frequencies that recharge aquifers and deposit and moisten fine floodplain soils that create seedbeds for riparian vegetation germination and growth within these boundaries.

Over time, flycatcher habitat is expected to change its location as a result of shifting river channels, flooding, drought, springs, seeps, and other factors such as agricultural run-off, diversions, and modifications of riverbeds. The methodology that we used to map the river channel and associated alluvial areas within the riparian zone is intended to provide the locations where dynamic river functions exist that create and maintain southwestern willow flycatcher habitat for nesting, feeding, sheltering, cover,

dispersal, and migration. In those areas where lakebeds were included in the proposed designation, we identified the lakebed using the high water mark.

In this proposal, we consider the riparian zone to be the area surrounding the select river segment, which is directly influenced by river functions. The boundaries of the lateral extent or riparian zone (i.e., the surrogate for the delineation of the lateral boundaries of proposed critical habitat) were derived by one of two methods. The area was either captured from existing digital data sources (listed below) or created through expert visual interpretation of remotely sensed data (aerial photographs and satellite imagery ''also listed below). Geographic Information System (GIS) technology was utilized throughout the lateral extent determination. ESRI, Inc. ArcInfo 8.3 was used to perform all mapping functions and image interpretation.

Pre-existing data sources used to assist in the process of delineating the lateral extent of the riparian zones for this proposal included: (1) National Wetlands Inventory (NWI) digital data from the mid 1980's, 2001, 2002; (2) Federal Emergency Management Agency (FEMA) 1995, Q3 100 year flood data; (3) U.S. Census Bureau Topologically Integrated Geographic Encoding and Referencing; and (4) (TIGER) 2000 digital data.

Where pre-exiting data may not have been available to readily define riparian zones, visual interpretation of remotely sensed data was used to define the lateral extent. Data sources used in this included: (1) Terraserver online Digital Orthophoto Quarter Quads (DOQQs), black & white, 1990's era and 2001 (3) U.S. Geological Survey (USGS) DOQQs 1997: (3) USGS aerial photographs, 1 meter, color-balanced, and true color, 2002; (4) Landsat 5 and Landsat 7 Thematic Mapper, bands 4, 2, 3, 1990–2000 (5) Emerge Corp, 1meter, true color imagery, 2001; (6) Local Agency Partnership, 2 foot, true color, 2000; and (7) National Wetlands Inventory aerial photographs, 2001–2002.

We refined all lateral extents for this proposed designation by creating electronic maps of the lateral extent and attributing them according to the following riparian sub-classifications. Riparian developed areas, as defined below, are not included in our proposed critical habitat designation since these areas do not contain the primary constituent elements (see ''Primary Constituent Elements'' section above) and, therefore, do not meet the definition of critical habitat.

(1) Riparian Vegetated: This class is used to describe areas still in a natural state, (i.e., riparian forest, vegetated and unvegetated wetlands, water bodies, any undeveloped or unmanaged lands within the approximate riparian zone).

(2) Riparian Developed: This class is used to describe all developed areas (i.e., urban/suburban development, agriculture, utilities, mining/extraction).

Special Management Considerations or Protection

As we undertake the process of designating critical habitat for a species, we first evaluate lands defined by those physical and biological features essential to the conservation of the species for inclusion in the designation pursuant to section 3(5)(A) of the Act. We then evaluate lands defined by those features to assess whether they may require special management considerations or protection. As discussed throughout this proposed rule, the southwestern willow flycatcher and its habitat are threatened by a multitude of threats such as loss and modification of habitat due to industrial, agricultural, and urban developments. A more detailed discussion of threats to the southwestern willow flycatcher and its habitat can be found in the final listing rule (60 FR 10694, February 27, 1995), the previous critical habitat designation (62 FR 39129, July 22, 1997), and the final recovery plan (August 2002).

The areas proposed for designation as critical habitat will require some level of management and/or protection to address the current and future threats to southwestern willow flycatchers and maintain the primary constituent elements essential to its conservation in order to ensure the overall conservation of the species. The designation of critical habitat does not imply that lands outside of critical habitat do not play an important role in the conservation of the flycatcher. Federal activities that may affect those unprotected areas (such as groundwater pumping, developments, watershed condition, etc.) outside of critical habitat are still subject to review under section 7 of the Act if they may affect the flycatcher. The prohibitions of section 9 (e.g., harm, harass, capture) also continue to apply both inside and outside of designated critical habitat.

Proposed Critical Habitat Designation

We are proposing stream segments in 21 Management Units found in 5 Recovery Units as critical habitat for the southwestern willow flycatcher. These stream segments occur in southern CA, southern NV, southwestern UT, AZ, NM, and south-central CO. The critical habitat areas described below constitute our best assessment at this time of the areas essential for the conservation of the southwestern willow flycatcher. In order to help further understand the location of these proposed stream segments, as well as those areas being excluded from this proposed designation, please see the associated maps found within this proposed rule or examine them at http://arizonaes.fws.gov. The 5 Recovery Units and associated stream segments are:

Coastal California Recovery Unit

(1) Santa Ynez Management Unit—Santa Ynez River.

(2) Santa Ana Management Unit—Bear Creek, Mill Creek, Oak Glen Creek/Yucaipa Creek/Wilson Creek/San Timoteo Wash, Santa Ana River, and Waterman Canyon.

(3) San Diego Management Unit—Las Flores Creek/Las Pulgas Creek, San Mateo Creek, Christianitos Creek, and San Onofre Creek; Santa Margarita River and DeLuz Creek; San Luis Rey River and Pilgrim Creek; Agua Hedionda Creek and Agua Hedionda Lagoon; San Dieguito River, Lake Hodges, San Ysabel River and Temescal Creek; Temecula Creek; Cuyamaca Reservoir; and San Diego River.

Basin and Mohave Recovery Unit in California

(4) Owens Management Unit—Owens River.

(5) Kern Management Unit—South Fork Kern River (including upper Lake Isabella).

(6) Mohave Management Unit—Deep Creek, Holcomb Creek, Mohave River.

(7) Salton Management Unit—San Filipe Creek.

Lower Colorado Recovery Unit—Nevada, California/Arizona border, Arizona, Utah

(8) Little Colorado Management Unit—Little Colorado River, West/East/and South Forks of the Little Colorado River, AZ.

(9) Virgin Management Unit—Virgin River, NV/AZ/UT.

(10) Middle Colorado Management Unit—Colorado River, AZ.

(11) Pahranagat Management Unit—Pahranagat River, Muddy River, NV.

(12) Bill Williams Management Unit—Big Sandy River, Bill Williams River, Santa Maria River (including upper Alamo Lake), AZ.

(13) Hoover to Parker Management Unit—Colorado River, CA/AZ.

(14) Parker to Southerly International Border Management Unit—Colorado River, CA/AZ.

Gila Recovery Unit in Arizona and New Mexico

(15) Verde Management Unit—Verde River (including Horseshoe Lake), AZ.

(16) Roosevelt Management Unit—Salt River and Tonto Creek (including Roosevelt Lake), and Pinto Creek, AZ.

(17) Middle Gila/San Pedro Management Unit—Gila River, San Pedro River, AZ.

(18) Upper Gila Management Unit—San Carlos River in AZ and Gila River in AZ/NM.

Rio Grande Recovery Unit in New Mexico and Colorado

(19) San Luis Valley Management Unit—Conejos River, Rio Grande, CO.

(20) Upper Rio Grande Management Unit—Coyote Creek, Rio Grande, Upper Rio Grande del Rancho, NM.

(21) Middle Rio Grande Management Unit—Rio Grande, NM.

Tables 1 through 3 show the lands being excluded from proposed critical habitat pursuant to section 4(b)(2) of the Act (Table 1), a summary of area determined to be essential to the southwestern willow, area excluded, and area proposed as critical habitat by State, and the approximate area proposed as critical habitat for the southwestern willow flycatcher by land ownership and State (Table 3).

Table 1. Approximate area ac (ha)/mi (km) excluded by activity from proposed critical habitat for the southwestern willow flycatcher pursuant to section 4(b)(2) of the Act.

	AZ	CA	CO, NM, NV, UT
Habitat Conservation Plans: (Western Riverside County Multiple Species Habitat Conservation Plan; San Diego Multiple Species Conservation Program; Draft City of Carlsbad Habitat Management Plan; Roosevelt Lake HCP).	19,525 (7,901)/24 (39).	6,893 (2792)/73 (116)	None.
Department of Defense Lands: (The Marine Corps Base, Camp Pendleton; Seal Beach Naval Weapons Station, Fallbrook Detachment).	None	4,020 (1626)/41 (69)	None.

Table 2. Approximate essential area, excluded area, and proposed critical habitat area for the southwestern willow flycatcher [ac (ha)/mi (km)].

	Essential area	Excluded area	Total proposed
AZ	138,140 (55,875)/496 (801)	19,525 (7,901)/24 (39)	157,665 (63,776)/520 (840)
AZ–CA*	/134 (214)	/0 (0)	/134 (214)
CA	60,359 (24,406)/340 (550)	10,913 (4,418)/114 (185)	71,272 (28,824)/454 (735)
CO	68,430 (27,694)/116 (185)	0 (0)/0 (0)	68,430 (27,694)/116 (185)
NM	63,804 (25,791)/257 (414)	0 (0)/0 (0)	63,804 (25,791)/257 (414)
NV	11,948 (4,834)/46 (74)	0 (0)/0 (0)	11,948 (4,834)/46 (74)
UT	2,976 (1,205)/28 (44)	0 (0)/0 (0)	2,976 (1,205)/28 (44)
Total	345,657 (139,805)/1,417 (2,282)	30,438 (12,319)/138 (224)	376,095 (152,124)/1,555 (2,506)

* Due to the fact that the Lower Colorado River acts as the border between the States of AZ and CO we have created a separate table entry in order to avoid a duplication of stream mi/km in this area. Additionally, we were not able to provide approximate figures for the size of this area, only for the stream length.

Table 3. Critical habitat proposed for the southwestern willow flycatcher by land ownership and State in ac (ha).

	Federal	State	Private	Other
AZ	96,615 (39,082)	10,640 (4,304)	50,410 (20,390)	0 (0)
CA	17,876 (7,224)	11,759 (4,757)	0 (0)	41,637 (16,843)
CO	7,969 (3,224)	1,425 (579)	59,036 (23,891)	0 (0)
NM	24,119 (9,751)	246 (99)	39,439 (15,941)	0 (0)
NV	5,680 (2,298)	160 (66)	4,090 (1,653)	2,018 (817)
UT	482 (196)	25 (10)	2,469 (999)	0 (0)
Totals	15,2741 (61,775)	24,255 (9,815)	155,444 (62,874)	43,655 (17,660)

We provide here general descriptions of the essential nature of these areas that are consistent and shared by each stream segment. There are proposed critical habitat river segments in 21 of the 29 Management Units and 5 of the 6 Recovery Units defined in the recovery plan for the southwestern willow flycatcher (USFWS 2002: 84 to 85). Placed in the context of the subspecies' wide geographic distribution, the disjunct nature of the populations, the dynamic aspects of its habitat, its endangered status, and its recovery goals, each segment is essential for the conservation of the southwestern willow flycatcher (USFWS 2002). Segments are distributed throughout a

large portion of the subspecies' range in order to help avoid catastrophic losses and to provide metapopulation stability, gene flow, and connectivity. Each segment is essential because it contains one or more of the primary constituent elements, and as a result, provides flycatcher habitat for breeding, feeding, sheltering, and migration that subsequently provide metapopulation stability, gene flow of the subspecies, and connectivity between neighboring Management Units and Recovery Units (USFWS 2002: 74 to 75 and 86 to 92). Each segment contributes habitat in order to help provide for the numerical and habitat-related goals identified in the Recovery Plan (USFWS 2002: 77 to 92). Each segment was identified in the Recovery Plan as an area that sustains flycatcher habitat (USFWS 2002: D–12 to 15). The distribution and abundance of territories and habitat within each segment are expected to shift over time as a result of natural disturbance events such as flooding that reshape floodplains, river channels, and riparian habitat (USFWS 2002: 18, D–11 to 13, D–15).

In the development of the proposal of critical habitat for the southwestern willow flycatcher, we determined which lands are essential to the conservation of the species by defining the physical and biological features essential to the species' conservation and delineating the specific areas defined by them. We then evaluated those lands determined to be essential to ascertain if any specific areas are appropriate for exclusion from critical habitat pursuant to section 4(b)(2) of the Act. On the basis of our evaluation, we have determined that the benefits of excluding certain approved and pending HCPs and lands owned and managed by the Department of Defense from critical habitat for the southwestern willow flycatcher outweighs the benefits of their inclusion, and have subsequently excluded those lands from this proposed designation of critical habitat for this subspecies pursuant to section 4(b)(2) of the Act (refer to ''Exclusions under Section 4(b)(2) of the Act'' section below). The resulting proposal includes a subset of lands essential to the conservation of the southwestern willow flycatcher. A description of all areas determined essential to the conservation of the southwestern willow flycatcher follows.

Coastal California Recovery Unit

This unit stretches along the coast of southern CA from just north of Point Conception south to the Mexico border. In 2002, there were a total of 167 known flycatcher territories in this Recovery Unit (14 percent of the rangewide total) (Sogge *et al.* 2003). A total of 130 territories (based on 2002 results) have been determined to be essential and considered in this proposal. In 2001, territories were distributed along 15 relatively small watersheds, mostly in the southern third of the Recovery Unit (USFWS 2002: 64). In 2001, most breeding sites were small (less than five territories); the largest populations are along the San Luis Rey, Santa Margarita, and Santa Ynez Rivers (USFWS 2002: 64). In 2001, all territories occurred in native or native-dominated habitats; over 60 percent are on government-managed lands (Federal, State, and/or local) (USFWS 2002: 64). This Recovery Unit contains the Santa Ynez, Santa Ana, and San Diego Management units. The stream segments proposed as critical habitat are described below in their appropriate Management Units.

Santa Ynez Management Unit

We are proposing a 39 km (24 mi) Santa Ynez River segment in Santa Barbara County, CA. This is the only stream in the Santa Ynez Management Unit to have nesting southwestern willow flycatchers and is northernmost along coastal CA. While a total of three sites are known along the length of the Santa Ynez River, our selected stream segment holds two breeding sites. A high of 28 territories were detected on our selected segment in 2000. In 2002, four territories were known at one of two sites along our selected river segment. Southwestern willow flycatchers have been detected nesting on the Santa Ynez River since 1991.

Santa Ana Management Unit

The Santa Ana River is the single largest river system in southern CA with flycatchers distributed throughout the stream from its headwaters and tributaries in the San Bernardino Mountains in San Bernardino County, CA. We are proposing a 84 km (52 mi) segment of the Santa Ana River in San Bernardino and Riverside Counties and other segments with high connectivity near its headwaters. In San Bernardino County we are proposing 15 km (9 mi) of Bear Creek, 30 km (19 mi) of Mill Creek, 4 km (3 mi) of Waterman Creek, 5 km (3 mi) of Wilson Creek, and 12 km (8 mi) of Oak Glen Creek. Streams that we are proposing that cross both San Bernardino and Riverside Counties are 13 km (8 mi) of San Timoteo Wash and 6 km (4 mi) of Yucaipa Creek. Seven breeding sites along the Santa Ana River segment had 15 territories in 2002. In 2002, there was one breeding site on Bear Creek (three territories), three sites on Mill Creek (seven territories), one site on Waterman Creek (no territories in 2002, but a single territory from 1999 to 2000), one site on Oak Glen Creek (three territories), one site on San Timoteo Creek (two territories), and no sites on Yucaipa or Wilson Creek (Yucaipa and Wilson Creeks connect San Timoteo and Oak Glen Creeks). In 2002, these locations together totaled 30 territories.

As discussed throughout this rule, portions of the Santa Ana Watershed, including the Santa Ana River, Yucaipa Creek, and Temecula Creek containing essential habitat for the southwestern willow flycatcher that lie within the boundaries of the Western Riverside MSHCP are being excluded from proposed critical habitat pursuant to section 4(b)(2) of the Act.

San Diego Management Unit

The longest two stream segments we are proposing (San Luis Rey and Santa Margarita Rivers) also contain the largest numbers of flycatcher territories in the San Diego Management Unit. In addition to these two streams, we are proposing a collection of smaller streams within the Unit that have fewer numbers of territories, but are in high connectivity with each other, and portions of unoccupied stream segments to provide population stability, growth, and connectivity for these populations. In 2002, a total of 94 territories were detected along the segments proposed for critical habitat.

We are proposing an 8 km (6 mi) segment of San Mateo Creek, a 7 km (3 mi) of Christianitos Creek, a 6 km (4 mi) segment of San Onofre Creek, and an 8 km (5 mi) segment of Las Flores Creek along with a short connecting 3 km (2 mi) segment of Las Pulgas Creek in northern San Diego County, CA. Two territories were detected at Las Flores/Las Pulgas Creek in 1995, and two territories were detected at San Mateo Creek in 1997. No territories have been detected on San Onofre or Christianitos Creeks. While no territories are known from these segments they are determined to be essential to the conservation of the southwestern willow flycatcher because these segments fall within a 29 km/18 mi radius of a large southwestern willow flycatcher population (as explained in the ''Criteria for Defining Essential Habitat'' section above).

We are proposing a 42 km (24 mi) segment of the Santa Margarita River and 10 km (6 mi) segment of DeLuz Creek in San Diego County, CA, at Camp Pendleton. Territories have been detected on the Santa Magarita River at Camp Pendleton since 1994. A high of 22 territories in 2002 were detected at

the two known breeding sites on the Santa Margarita River. No territories are known from DeLuz Creek. While no territories are known from this segment it is determined to be essential to the conservation of the southwestern willow flycatcher because these segments fall within a 29 km/18 mi radius of a large southwestern willow flycatcher population (as explained in the ''Criteria for Defining Essential Habitat'' section above).

We are proposing an 81 km (50 mile) segment of the San Luis Rey River and the lowest 10 km (6 mi) segment of Pilgrim Creek in San Diego County, CA. Territories have been detected since 1994. A total of seven breeding sites exist on the San Luis Rey River throughout the selected segment. A high of 60 territories were detected at 6 of the 7 breeding sites in 2002 (a single location on the upper San Luis Rey River held 50 territories). A single breeding site exists on Pilgrim Creek where 1 to 2 territories were detected in 1994, 1995, and 1999.

We are proposing a small 13 km (9 mi) isolated portion of the Agua Hedionada Creek/Lagoon in San Diego County, CA. A single territory was detected from 1998 to 2000. No territories were detected in 2001 or 2002.

We are proposing joining segments of Santa Ysabel River (25 km/14 mi), and San Dieguito River (31 km/19 mi), which also includes a connecting 11 km (7 mi) section of Lake Hodges and a 15 km (9 mi) segment of Temescal Creek in San Diego County, CA. Three breeding sites are known along this connected stretch of stream (two on Santa Ysabel Creek and a single site on the San Dieguito River) with a total of four territories in 2002 and a high of five detected in 1997. Territories have been detected since 1996. No territories are known from Lake Hodges or Temescal Creek. While no territories are known from these segments they are determined to be essential to the conservation of the southwestern willow flycatcher because these segments fall within a 29 km/18 mi radius of a large southwestern willow flycatcher population (as explained in the ''Criteria for Defining Essential Habitat'' section above).

We are proposing a 30 km (18 mi) segment of Temecula Creek in San Diego and Riverside Counties, CA. Two breeding sites are known within this segment. A total of four territories were detected in 2002. Territories were first detected in 1997.

We are proposing two distinct segments of the Sweetwater River, and a single segment of the San Diego River in San Diego County, CA. A 4 km (2 mi) segment of the upper Sweetwater River at Cuyamaca Reservoir has had two flycatcher territories each time it has been surveyed in 1997, 1998, and 2002. We are also proposing a 26 km (17 mi) segment of the San Diego River where no territories have been detected. While no territories are known from these segments they are determined to be essential to the conservation of the southwestern willow flycatcher because these segments fall within a 29 km/18 mi radius of a large southwestern willow flycatcher population (as explained in the ''Criteria for Defining Essential Habitat'' section above).

As discussed throughout this rule, portions of lands noted above within the boundaries of the San Diego Multiple MSCP contain essential habitat for the southwestern willow flycatcher, including areas along portions of the San Dieguito and San Diego that are being excluded from proposed critical habitat pursuant to section 4(b)(2) of the Act.

Essential habitat for the southwestern willow flycatcher within the boundaries of the Marine Corps Base, Camp Pendleton occurs along portions of Christianitos (7 km/3 mi), San Mateo (8 km/6 mi), San Onofre (6 km/4 mi), Los Flores (8 km/5 mi) Las Pulgas (3 km/2 mi), and DeLuz Creeks (10 km/6 mi), and the Santa Margarita River (42 km/24 mi); however, these areas are being excluded from proposed critical habitat pursuant to section 4(b)(2) of the Act. Essential habitat for the southwestern willow flycatcher occurs on portions of the Santa Margarita River located within the boundaries of the Seal Beach Naval Weapons Station, Fallbrook Detachment; however, these areas are being excluded from proposed critical habitat pursuant to section 4(b)(2) of the Act.

Basin and Mohave Recovery Unit

This unit is comprised of a broad geographic area including the arid interior lands of southern CA and a small portion of extreme southwestern NV. In 2002, there were a total of 69 known flycatcher territories (7 percent of the rangewide total) distributed among five widely separated drainages (Sogge *et al.* 2003); 66 of those territories are found in this proposal. Almost all sites have less than five territories; the largest populations occur in the Kern and Owens River drainages (USFWS 2002: 64). As of 2002, all territories were in native or native-dominated riparian habitats, and approximately 70 percent are on privately owned lands (USFWS 2002: 64). The Recovery Unit contains the Owens, Kern, Mohave, Salton, and Amargosa Management units. The stream segments proposed as critical habitat are described below in their appropriate Management Units.

Owens Management Unit

We are proposing a 110 km (69 mi) Owens River segment in Inyo and Mono Counties, CA. This is the only stream in the Owens Management Unit known to have nesting southwestern willow flycatchers and most northernmost in the Basin and Mohave Recovery Unit and in California. Southwestern willow flycatchers have been detected nesting at five sites along this reach of the Owens River since 1999. In 2002, a high of 28 territories at all 5 sites were detected within this stream segment.

Kern Management Unit

We are proposing a 20 km (13 mi) segment of the South Fork of the Kern River in Kern County, CA, including the upper portion of Lake Isabella. This is the only stream segment in the Kern Management Unit known to have nesting southwestern willow flycatchers. Southwestern willow flycatchers have been detected nesting at two sites along this reach of the Kern River since 1993. In 1997, a high of 37 territories were detected at a single location. In 2002, 23 territories at both sites were detected within this stream segment.

Mohave Management Unit

We are proposing a 17 km (10 mi) portion of the Mojave River (including Mohave River Forks Reservoir), 20 km (12 mile) section of Holcomb Creek, and 21 km (12 mile) section of Deep Creek in San Bernardino County, CA, near the Town of Victorville. These stream segments, within the Mohave Management Unit, are known to have nesting southwestern willow flycatchers. Southwestern willow flycatchers have been detected nesting at three sites along this reach of the Mojave River, one site on Holcomb Creek, and no sites on Deep Creek since 1995. Deep Creek connects Holcomb Creek with the Mohave Forks Reservoir. In 2002, a high of 13 territories were detected at all 5 sites within these segments.

Salton Management Unit

We are proposing an 11 km (7 mi) portion of San Filipe Creek in San Bernardino County, CA. This is the only stream in the Salton Management Unit known to have nesting southwestern willow flycatchers. Southwestern willow flycatchers have been detected nesting at a single site since 1998. In 1998 and 1999, a high of four territories

were detected on this stream segment. In 2002, two territories were detected at this site. This stream and the territories on it have high connectivity with other smaller populations in the adjacent San Luis Rey Management Unit in the Coastal CA Recovery Unit raising the collective population above 10 territories.

Lower Colorado Recovery Unit

This is a geographically large and ecologically diverse Recovery Unit, encompassing the Colorado River and its major tributaries from the high elevation streams in White Mountains of East/Central Arizona to the main stem Colorado River through the Grand Canyon downstream through the arid lands along the lower Colorado River downstream to the Mexico border (USFWS 2002: 64). In 2002, despite its size, the Unit had only 127 known flycatcher territories (11 percent of the rangewide total), most of which occur away from the main-stem Colorado River (Sogge *et al.* 2003). One-hundred eighteen territories recorded from the most recent data in 2002 and 2003 are within the proposed river segments. In 2001, most sites included less than 5 territories; the largest populations (most of which are less than 10 territories) are found on the Bill Williams, Virgin, and Pahranagat River drainages (USFWS 2002: 64). Approximately 69 percent of territories are found on government-managed lands, and 8 percent are on Tribal lands (USFWS 2002: 64). Habitat characteristics range from purely native (including high-elevation and low-elevation willow) to exotic (primarily tamarisk) dominated stands (USFWS 2002: 64). This Recovery Unit contains the Little Colorado, Middle Colorado, Virgin, Pahranagat, Bill Williams, Hoover to Parker, and Parker to Southerly International Border Management units.

Little Colorado Management Unit

We are proposing a segment of the Little Colorado River and portions of the East, West, and South Forks of the Little Colorado River. The 17 km (10 mi) segment of the Little Colorado River segment occurs in Apache County, near the Town of Greer. The 7 km (4 mi) segment of the South Fork of the Little Colorado River extends from Joe Baca Draw downstream to its confluence with the Little Colorado River. The 11 km (8 mi) segment of the East Fork of the Little Colorado River extends from Forest Service Road 113 to its confluence with the West Fork of the Little Colorado River. The 7 km (5 mi) section of the West Fork of the Little Colorado goes from Forest Service Road 113 downstream to the Diversion Ditch. Each segment is in Apache County, AZ. Southwestern willow flycatchers have been detected nesting at single sites on both the Little Colorado and West Fork of the Little Colorado since 1993. In 1996, a high of 11 territories were detected at both locations on the West Fork and Little Colorado Rivers. In 2003, two territories were detected on these segments. No territories have been detected on the South or East Forks of the Little Colorado River. While no territories are known from these segments they are determined to be essential to the conservation of the southwestern willow flycatcher because these segments fall within a 29 km/18 mi radius of a large southwestern willow flycatcher population (as explained in the ''Criteria for Defining Essential Habitat'' section above).

Middle Colorado Management Unit

We determined that the 57 km (35 mi) Colorado River segment in Mohave County, AZ, above Lake Mead including a 2 km (1 mi) portion of Lake Mead is essential to the conservation of the southwestern willow flycatcher. This segment extends from Colorado River Mile 243 downstream to River Mile 280 at Pierce Ferry, including a small portion of upper Lake Mead. Southwestern willow flycatchers have been detected nesting at 14 sites along this reach of the Colorado River since 1993. In 1998, a high of 15 territories at 8 breeding sites were detected within this segment. In 2003, no territories were detected on this stream segment.

Virgin Management Unit

We are proposing a contiguous segment of the Virgin River in UT, AZ, and NV, plus a single detached segment of the Virgin River in UT. The larger segment extends for 147 km (92 mi) from the Washington Field Diversion Impoundment in Washington County, UT, downstream through the Town of Littlefield, AZ, and into Nevada to Colorado River mile 280 at the upper end of Lake Mead in Clark County, NV. This larger segment exists for 44 km (28 mi) in UT, approximately 56 km (35 mi) through AZ, and 47 km (29 mi) in NV. The Virgin River is the only stream within this Management Unit known to have nesting southwestern willow flycatchers. Southwestern willow flycatchers have been detected nesting in 1995 at three sites in NV segment, a single site in AZ since 2001, and two sites in UT since 1995. In 2001, a high of 40 territories were detected at 5 of the 6 sites within the proposed designation (36 in NV, 1 in AZ, and 3 in UT). In 2002, 20 territories total were detected at 4 of the 6 sites.

Pahranagat Management Unit

We are proposing two segments along the Pahranagat River in Lincoln County, NV, which include the Pahranagat National Wildlife Area and the Key Pittman Wildlife Area, and a segment of the Muddy River in Clark County, NV, on the Overton Wildlife Area. The two segments of the Pahranagat River are 6 km (3 mi) and 18 km (12 mi) long, while the Muddy River segment is 3 km (2 mi) long. The boundaries for each segment are the Pahranagat National Wildlife Refuge, the Key Pittman State Wildlife Area, and the Overton State Wildlife Area. Southwestern willow flycatchers have been detected nesting since 1997 at a single location on each Pahranagat River segment and the Muddy River segment. The Muddy River segment is in high connectivity to the Virgin River segment in the Virgin Management Unit. In 2001, a high of 28 territories were detected at the three breeding sites on the proposed segments; 19 territories were detected at the same three sites in 2002.

Bill Williams Management Unit

We are proposing a lower Bill Williams River segment, a segment on upper Alamo Lake (includes the Big Sandy, Santa Maria, Bill Williams River confluence), and a section of the Big Sandy River through the Town of Wikieup (including a small segment of Trout Creek). We are proposing the lowest 21 km (13 mi) of the Bill Williams River from the upper end of Planet Ranch downstream through the Bill Williams National Wildlife Refuge to the confluence with Lake Havasu at the Colorado River in Mohave/La Paz County, AZ. We are proposing a 22 km (15 mi) segment of the Bill Williams, Santa Maria and Big Sandy Rivers at their confluence at upper Alamo Lake in La Paz County, AZ. We are proposing a 61 km (38 mi) segment of the Big Sandy River from Cove Sor Wash confluence downstream through the Town of Wikieup to Groom Peak Wash. Southwestern willow flycatchers have been detected nesting on the lower Bill Williams and Big Sandy Rivers since 1994, and on upper Alamo Lake since 1996. In 2003, a high of 53 territories were detected at 6 sites with 32 being within the high water mark of Alamo Lake.

Hoover to Parker Management Unit

We are proposing a 107 km (67 mi) segment along the Colorado River from Davis Dam to Parker Dam, including Lake Havasu and Topock Marsh of The

Havasu National Wildlife Refuge in Mohave and La Paz County, AZ, and San Bernardino County, CA. A total of six breeding sites have been detected along this stretch of river since 1995. The largest and most consistent breeding site is at Topock Marsh, where since 1997, 12 to 20 territories have been detected. The 21 territories detected in this Management Unit in 2002 (20 at Topock Marsh) is the greatest number of territories detected during a single year. The other five breeding sites have mostly held one to three territories in the late 1990s. In 2003, 244 migrant willow flycatchers were detected between Davis Dam and the Southerly International Border (Koronkiewicz *et al.* 2003). These lower Colorado River segments are the most heavily used known locations for migrating southwestern willow flycatchers.

Parker to Southerly International Border

We are proposing two segments along the Colorado River. One segment is approximately 27 km (17 mi) in La Paz and San Bernardino Counties, California, and the second segment is approximately 80 km (50 mi) in La Paz and Yuma, Counties, Arizona, and Imperial California. A total of 13 breeding sites have been detected along this stretch of river since 1995. In 2003, 244 migrant willow flycatchers were detected between Davis Dam and the Southerly International Border (Koronkiewicz *et al.* 2003), and as of May 28, 2004, approximately 240 migrant willow flycatchers were detected, mostly in this portion of the Colorado River (L. Dickerson, SWCA Inc., e-mail). While migrant willow flycatchers have been detected on many streams (USFWS 2002: 19 and ES 2 to 3), and migrations habitat is an essential component of each proposed segment, the lower Colorado River segment is one of the most heavily known used migratory corridors, and a result, this segment has additional value. A high of 13 territories at 10 sites were detected in 1996. In 2002, a total of three territories at two sites were detected, and in 2003, two territories at two sites were found.

Gila Recovery Unit

This unit includes the Gila River watershed, from its headwaters in southwestern NM downstream to near the confluence with the Colorado River (USFWS 2002: 65). In 2002, the 588 known flycatcher territories (51 percent of the rangewide total) were distributed primarily on the Gila and lower San Pedro Rivers (Sogge *et al.* 2003). A total of 505 territories were detected in 2003 within the segments proposed in this Management Unit. Many sites are small (less than 5 territories), but sections of the upper Gila River, and lower San Pedro River (including its confluence with the Gila River), and the Tonto Creek and Salt River inflows within the high water mark of Roosevelt Lake support the largest sites known within the subspecies' range. In 2001, private lands hosted 50 percent of the territories, including one of the largest known flycatcher populations, in the Cliff-Gila Valley, NM (USFWS 2002: 65). Approximately 50 percent of the territories are on government-managed lands (USFWS 2002: 65). Although in 2001, 58 percent of territories were in native-dominated habitats, flycatchers in this Recovery Unit make extensive use of exotic (77 territories) or exotic-dominated (108 territories) habitats (primarily tamarisk). This Recovery Unit contains the Verde, Hassayampa/Agua Fria, Roosevelt, San Francisco, Upper Gila, Middle Gila/San Pedro, and Santa Cruz Management units.

Verde Management Unit

We are proposing three different segments of the Verde River totaling 129 km (80 mi). The upper 58 km (36 mi) Verde River segment occurs throughout the Verde Valley in Yavapai County, AZ. The 63 km (39 mi) middle Verde River segment begins at the East Verde/Verde River confluence in Yavapai County on the Tonto National Forest and extends downstream to the USGS gauging station located 7 km (4.5 mi) below Horseshoe Dam in Maricopa County. The lower 8 km (5 mi) segment of the Verde River is located in Maricopa County, Arizona. Southwestern willow flycatchers have been detected at six breeding sites on the upper two segments since 1993. In 2003, a high of 13 territories were detected at 2 sites within the Middle Verde River section (11 were found at Horseshoe Reservoir). In 1997, 10 territories were the highest recorded on the upper Verde River segment. While no territories are known from these segments they are determined to be essential to the conservation of the southwestern willow flycatcher because these segments fall within a 29 km/18 mi radius of a large southwestern willow flycatcher population (as explained in the ''Criteria for Defining Essential Habitat'' section above).

Roosevelt Management Unit

We are proposing a contiguous segment of lower Tonto Creek, Roosevelt Lake, and the Salt River, and a segment of Pinto Creek in Gila and Pinal Counties, AZ. A 34 km (21 mi) segment of Tonto Creek begins at the confluence of Tonto Creek and Rye Creek and extends to the high water mark of Roosevelt Lake in Gila County, AZ. The 33 km (20 mi) segment of the Salt River extends from the Cherry Creek confluence on the Tonto National Forest and travels downstream to the high water mark of Roosevelt Lake in Gila County AZ. Joining the Tonto Creek and Salt River segments is the 39 km (24 mi) lakebed at Roosevelt Lake (comprised of the Tonto Creek and Salt River confluence) in Gila County, AZ. Additionally, we are proposing a segment of Pinto Creek that extends for 34 km (21 mi) from its confluence with Haunted Canyon downstream to Roosevelt Lake in Gila and Pinal Counties, AZ. Flycatchers have been detected nesting at Roosevelt Lake, along the Tonto Creek and Salt River inflows since 1993. In 2002, a high of 146 territories from 5 sites were detected on the stream segments proposed within this Management Unit. In 2003, 133 territories from 6 sites were detected in this Management Unit; all but 1 territory was in the habitat between the lake and high water mark of Roosevelt Lake. The number of territories found at Roosevelt Lake represents one of the highest concentrations of southwestern willow flycatchers known and over 10 percent of the entire subspecies. Flycatcher habitat is expected to follow the lake's edge as water recedes or increases. No territories have been detected yet on Pinto Creek. While no territories are known from this segment it is determined to be essential to the conservation of the southwestern willow flycatcher because these segments fall within a 29 km/18 mi radius of a large southwestern willow flycatcher population (as explained in the ''Criteria for Defining Essential Habitat'' section above).

Incidental take expected to result from the operation of Roosevelt Dam is covered under a 10(a)(1)(B) permit and an operative HCP. Dam operations are expected to inundate habitat periodically, but over time, operations are expected to allow varying amounts of flycatcher habitat to persist (USFWS 2003). ERO (2002) estimated that an average of 121 to 162 ha (300 to 400 ac) of suitable habitat (thus about 61 to 81 ha/150 to 200 ac of occupied habitat) would be present during full operation of the dam over the next 50 years. These 61 to 81 ha (150 to 200 ac) would support 45 to 90 southwestern willow flycatcher territories (USFWS 2003). Although short-term impacts from inundation could be severe, the

Flycatcher Recovery Team believed that such events were compatible with recovery, and the target number of territories and acres of suitable habitat recommended for reclassification could still be achieved in most years despite continued full operation of Roosevelt Dam (USFWS 2003). This is the only Management Unit where recovery goals were established smaller than existing numbers due to expected increase in lake elevation. As discussed in the ''Relationship of Critical Habitat to Approved Habitat Conservation Plans (HCPs)'' section of this rule, we are proposing to exclude Roosevelt Lake from the final designation of critical habitat.

Middle Gila/San Pedro Management Unit

We are proposing a segment of the middle and lower San Pedro River, and a segment of the Gila River near the San Pedro/Gila River confluence in Pinal, Pima, and Cochise Counties, AZ. The middle/lower San Pedro River segment extends for 110 km (68 mi) to the Gila River. The Gila River segment begins at Dripping Springs Wash and extends for 80 km (50 mi) downstream past the San Pedro/Gila confluence and Towns of Winkleman and Kelvin to Ashehurst Hayden Diversion Dam near the Town of Cochran in Gila and Pinal Counties, AZ. Flycatchers have been detected nesting along these segments since 1993. In 2003, a high of 167 territories from 19 sites (12 on San Pedro and 7 on the Gila) were detected on the stream segments we are proposing within this Management Unit. Degradation of habitat quality has dropped the number of territories on the Gila River segment from 68 in 1999 to 26 in 2003. This collection of territories along these two streams, along with territories found in the Roosevelt Management Unit (n=300), comprise about 25 percent of the entire subspecies.

Upper Gila Management Unit

We are proposing three segments of the upper Gila River in NM and AZ. The upper 119 km (74 mi) segment of the Gila River extends from Turkey Creek on the Gila National Forest downstream through the Cliff/Gila Valley and Hidalgo and Grant Counties, NM to the Town of Duncan in Greenlee County, AZ. The second segment extends from the upper end of Earven Flat in AZ above the Town of Safford and extends for 102 km (63 mi) through the Gila, Graham, and Pinal Counties, the Safford Valley, and into the San Carlos Apache Indian Reservation. We are also proposing a 6 km (3 mi) segment of the San Carlos Reservoir from approximately 1.3 mi west of the Pinal/Graham County line to Coolidge Dam.

Southwestern willow flycatchers have been detected nesting along these stream segments in the Upper Gila Management Unit since 1993. A total of 16 breeding sites (7 in NM, and 9 in AZ) are known in the Gila Management Unit. In 1999, a high of 262 territories at 8 sites were detected. A single site, the U-Bar ranch in the Cliff/Gila Valley, had 209 territories. In 2003, 191 territories at 8 sites were detected on the Gila River stream segments we are proposing within this Management Unit. The U-Bar ranch had 123 of these territories in 2003, but many are found outside of the flood-prone area, off-channel in habitat along irrigated ditches. The single site in the Cliff/Gila Valley, along with Roosevelt Lake, and the collection of territories in the Middle Gila/San Pedro Management Unit, comprise nearly 40 percent of the entire subspecies.

Rio Grande Recovery Unit

This unit encompasses the Rio Grande watershed from its headwaters in southwestern CO downstream to the Pecos River confluence in southwestern Texas, although no flycatcher breeding sites are currently known along the Rio Grande in Texas. Also included is the Pecos River watershed in NM and Texas (where no breeding sites are known) and one site on Coyote Creek, in the upper Canadian River watershed. In 2002, the majority of the 197 territories (17 percent of the rangewide total) were found along the Rio Grande itself (Sogge *et al.* 2003). From 2002 totals, 162 territories were found within the proposed river segments. In 2001, only three sites contained more than 5 territories (USFWS 2002: 65). Most sites are in native-dominated habitats; exotic-dominated sites include primarily tamarisk or Russian olive (USFWS 2002: 65). In 2001, of 56 nests that have been described in the middle and lower Rio Grande in NM, 43 (77 percent) used tamarisk as the nest substrate (USFWS 2002: 65). In 2001, government-managed lands accounted for 63 percent of the territories in this unit; Tribal lands supported an additional 23 percent (USFWS 2002). This Recovery Unit contains the San Luis Valley, Upper Rio Grande, Middle Rio Grande, and Lower Rio Grande Management Units.

San Luis Valley Management Unit

We are proposing a segment of the upper Rio Grande in Costilla, Conejos, Alamosa, and Rio Grande Counties, CO, and a segment of the Conejos River in Conejos, County, CO. The 139 km (87 mi) segment of the upper Rio Grande extends from the confluence with San Francisco Creek downstream through the Alamosa National Wildlife Refuge to the Lobatos Bridge. The 46 km (29 mi) segment of the Conejos River begins where State Highway 285 crosses the River and extends downstream to its confluence with the Rio Grande. Flycatchers have been detected nesting along these segments since 1997. In 2002, a high of 34 territories from 3 total sites (1 on Conejos River and 3 on the Rio Grande) were detected on the stream segments we are proposing within this Management Unit.

Upper Rio Grande Management Unit

We are proposing single segments of the upper Rio Grande in Taos, Rio Arriba, and Santa Fe Counties, NM, the Rio Grande del Rancho in Taos County, NM, and Coyote Creek in Mora County, NM. The upper Rio Grande segment extends for 75 km (46 mi) from the Taos Junction Bridge (State route 520) downstream to the Otowi Bridge (State Route 502). The 11 km (7 mi) of the Rio Grande del Rancho extends from Sarco Canyon downstream to the Arroyo Miranda confluence. The 10 km (6 mi) Coyote Creek segment travels from about 2 km/1 mi above Coyote Creek State Park downstream to the second bridge on State Route 518, upstream from Los Cocas. Flycatchers have been detected nesting along these segments since 1993. Eleven breeding sites are known to exist on these segments (seven on Rio Grande, one on Rio Grande del Rancho, and three on Coyote Creek). On the Rio Grande in 2002, 16 territories were detected at a single site. On the Rio Grande del Rancho in 2003, a high of six territories were detected at a single site. On Coyote Creek in 2000, a high of 17 territories at 3 sites were detected, however only 3 territories (from 2 sites) were detected in 2002, and no surveys occurred in 2003.

Middle Rio Grande Management Unit

We are proposing a 207km (129 mi) segment of the middle Rio Grande in Bernalillo, Valencia, and Soccoro Counties, NM, from 4.2 mi north of the intersection of Interstate Highways 25 and 40 downstream to the overhead powerline near Milligan Gulch at the northern end of Elephant Butte State Park. Southwestern willow flycatcher territories have been detected on these selected stream segments since 1993. On the Middle Rio Grande in 2003, a high of 107 territories at 6 of 7 different breeding sites were detected. In 2002, 98 territories at these same 7 sites were detected. A total of 85 territories were detected at the San Marcial site in 2003. Similar to the lower Colorado River

segments, the middle Rio Grande has been determined to be of additional significance due to its heavy use as a migratory corridor for the southwestern willow flycatcher (Yong and Finch 1997, 2002).

Exclusions Under Section 4(b)(2) of the Act

Section 4(b)(2) of the Act states that critical habitat shall be designated, and revised, on the basis of the best available scientific data available after taking into consideration the economic impact, impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. An area may be excluded from critical habitat if it is determined that the benefits of such exclusion outweigh the benefits of specifying a particular area as critical habitat, unless the failure to designate such area as critical habitat will result in the extinction of the species. Consequently, we may exclude an area from critical habitat based on economic impacts, impacts on national security, or other relevant impacts such as preservation of conservation partnerships, if we determine the benefits of excluding an area from critical habitat outweigh the benefits of including the area in critical habitat, provided the action of excluding the area will not result in the extinction of the species.

In our critical habitat designation we use the provisions outlined in section 4(b)(2) of the Act to evaluate those specific areas essential to the conservation of the species to determine which areas to propose and subsequently finalize (*i.e.*, designate) as critical habitat. On the basis of our evaluation, we have determined that the benefits of excluding certain lands from the designation of critical habitat for the southwestern willow flycatcher outweighs the benefits of their inclusion, and have subsequently excluded those lands from this proposed designation pursuant to section 4(b)(2) of the Act as discussed below. We note that additional areas may also be considered for exclusion in the final rule and that any exclusions made in the final rule will be the result of a consideration of new information received, including consideration of all comments received and the findings of the economic and NEPA analyses.

Areas considered for exclusion pursuant to section 4(b)(2) may include, but are not limited to, those covered by: (1) Legally operative HCPs that cover the species and provide assurances that the conservation measures for the species will be implemented and effective; (2) draft HCPs that cover the species, have undergone public review and comment, and provide assurances that the conservation measures for the species will be implemented and effective (*i.e.*, pending HCPs); (3) Tribal conservation plans that cover the species and provide assurances that the conservation measures for the species will be implemented and effective; (4) State conservation plans that provide assurances that the conservation measures for the species will be implemented and effective; and (5) National Wildlife Refuge System Comprehensive Conservation Plans (CCPs) that provide assurances that the conservation measures for the species will be implemented and effective. The relationship of critical habitat to these types of areas is discussed in detail in the following paragraphs.

Within the essential habitat for southwestern willow flycatcher across six states there are Tribal lands, lands owned by DOD, National Wildlife Refuges, private lands with legally operative HCPs or draft HCPs, State lands with conservation plans, and other lands with management plans in place for the southwestern willow flycatcher.

Relationship of Critical Habitat to Approved Habitat Conservation Plans (HCPs)

As described above, section 4(b)(2) of the Act requires us to consider other relevant impacts, in addition to economic and national security impacts, when designating critical habitat. Section 10(a)(1)(B) of the Act authorizes us to issue permits for the take of listed wildlife species incidental to otherwise lawful activities. Development of an HCP is a prerequisite for the issuance of an incidental take permit pursuant to section 10(a)(1)(B) of the Act. An incidental take permit application must be supported by an HCP that identifies conservation measures that the permittee agrees to implement for the species to minimize and mitigate the impacts of the permitted incidental take.

HCPs vary in size and may provide for incidental take coverage and conservation management for one or many federally listed species. Additionally, more than one applicant may participate in the development and implementation of an HCP. The areas occupied by and determined to be essential to the southwestern willow flycatcher include approved HCPs that address multiple species, cover large areas, and have many participating permittees. Large regional HCPs expand upon the basic requirements set forth in section 10(a)(1)(B) of the Act because they reflect a voluntary, cooperative approach to large-scale habitat and species conservation planning. Many of the large regional HCPs in southern CA have been, or are being developed to provide for the conservation needs of numerous federally listed species and unlisted sensitive species and the habitat that provides for their biological needs. These HCPs address impacts in a planning area and create a preserve design within the planning area. Over time, areas in the planning area are developed according to the HCP and the area within the preserve is acquired, managed, and monitored. These HCPs are designed to implement conservation actions to address future projects that are anticipated to occur within the planning area of the HCP in order to reduce delays in the permitting process.

In the case of approved regional HCPs (*e.g.*, those sponsored by cities, counties, or other local jurisdictions) wherein the southwestern willow flycatcher is a covered species, a primary goal is to provide for the protection and management of habitat essential for the conservation of the species while directing development to non-essential areas. The regional HCP development process provides an opportunity for more intensive data collection and analysis regarding the use of particular habitat areas by the flycatcher. The process also enables us construct a habitat preserve system that provides for the biological needs and long-term conservation of the species.

Completed HCPs and their accompanying Implementing Agreements (IA) contain management measures and protections for identified preserve areas that protect, restore, and enhance the value of these lands as habitat for southwestern willow flycatchers. These measures include explicit standards to minimize any impacts to the covered species and its habitat. In general, HCPs are designed to ensure that the value of the conservation lands are maintained, expanded, and improved for the species that they cover.

For HCPs that have been already approved, we have provided assurances to permit holders that once the protection and management required under the plans are in place and for as long as the permit holders are fulfilling their obligations under the plans, no additional mitigation in the form of land or financial compensation will be required of the permit holders and, in some cases, specified third parties.

A discussion of completed HCPs or State of California's Natural Community Conservation Plan Act of 1992 (NCCP)/ HCPs that we identified as having areas determined to be essential to the

conservation of the southwestern willow flycatcher follows.

Santa Ana Management Unit, CA

Western Riverside County Multiple Species Habitat Conservation Plan (MSHCP)

The Western Riverside MSHCP was approved on June 22, 2004. Participants in this HCP include 14 cities, the County of Riverside, including the County Flood Control and Water Conservation District, County Waste Department; the California Department of Transportation, and the California Department of Parks and Recreation. The Western Riverside MSHCP is also a subregional plan under the State's NCCP and was developed in cooperation with CDFG. Within the 1.26 million-ac (510,000 ha) planning area of the MSHCP, approximately 153,000 ac (62,000 ha) of diverse habitats are identified for conservation. The conservation of 153,000 ac (62,000 ha) will complement other, existing natural and open space areas that are already conserved through other means (*e.g.*, State Parks, USFS, and County Park lands). An important objective of the MSHCP is to implement measures, including monitoring and management, necessary to conserve important habitat for the southwestern willow flycatcher that occurs within the plan's boundaries. The MSHCP aims to conserve 100 percent of occupied habitat for the southwestern willow flycatcher, including landscape areas 100 m (328 ft) adjacent to occupied areas. In addition, the MSHCP requires compliance with a Riparian/Riverine Areas and Vernal Pool policy that contains provisions requiring 100 percent avoidance and long-term management and protection of occupied areas not included in the conservation areas, unless a Biologically Equivalent or Superior Preservation Determination can demonstrate that a proposed alternative will provide equal or greater conservation benefits than avoidance. We completed an internal consultation on the effects of the plan on the southwestern willow flycatcher and its essential habitat that is found within the plan boundaries, and determined that implementation of the plan is provides for the conservation of the species.

On the basis of the conservation benefits afforded the flycatcher from the measure of the Western Riverside MSHCP and the provisions of section 4(b)(2) of the Act, portions of the Santa Ana Watershed, including the Santa Ana River, Yucaipa Creek, and Temecula Creek containing essential habitat for the southwestern willow flycatcher that lie within the boundaries of the Western Riverside MSHCP are excluded from proposed critical habitat. We have further determined that the exclusion of these areas from critical habitat would not result in the extinction of the flycatcher. The rationale for this determination is detailed below.

San Diego Management Unit

San Diego Multiple Species Conservation Program (MSCP)

In southwestern San Diego County, the MSCP effort encompasses more than 236,000 ha (582,000 ac) and involves the participation of the County of San Diego and 11 cities, including the City of San Diego. This regional HCP is also a regional subarea plan under the NCCP program and is being developed in cooperation with California Department of Fish and Game. The MSCP provides for the establishment of approximately 69,573 ha (171,000 ac) of preserve areas to provide conservation benefits for 85 federally listed and sensitive species over the life of the permit (50 years), including the southwestern willow flycatcher. We have determined that portions of lands within the boundaries of the San Diego Multiple MSCP contain essential habitat for the southwestern willow flycatcher, including areas along portions of the San Dieguito, San Diego, and Sweetwater Rivers. These particular areas lie within the boundaries of approved subarea plans.

On the basis of the conservation benefits afforded the flycatcher from the measures of the approved subarea plans of the MSCP and the provisions of section 4(b)(2) of the Act, we have excluded from proposed critical habitat those lands determined to be essential to the conservation of the flycatcher that are within the boundaries of the approved subareas of the MSCP. We have further determined that the exclusion of these areas from critical habitat would not result in the extinction of the flycatcher. The rationale for this determination is detailed below.

Following is our analysis of the benefits of including lands within approved HCPs versus excluding such lands from this critical habitat designation.

(1) Benefits of Inclusion

The benefits of including approved HCPs or NCCP/HCPs in critical habitat are normally small. The principal benefit of any designated critical habitat is that federally funded or authorized activities in such habitat that may affect it require consultation under section 7 of the Act. Such consultation would ensure that adequate protection is provided to avoid adverse modification of critical habitat. Where HCPs are in place, our experience indicates that this benefit is small or non-existent. Currently approved and permitted HCPs and NCCP/HCPs are crafted to ensure the long-term survival and conservation of covered species and protection of their essential habitat within the plan area. Where we have approved HCPs or NCCP/HCPs, lands that we ordinarily would define as critical habitat for covered species will normally be protected in reserves or through other conservation methods by the terms of the HCPs or NCCP/HCPs and their Implementing Agreements (IAs). These HCPs or NCCP/HCPs and IAs include management measures and protections for conservation lands designed to protect, restore, and enhance their value as habitat for covered species.

Another possible benefit to including these lands is that the designation of critical habitat can serve to educate landowners and the public regarding the potential conservation value of an area. This may focus and contribute to conservation efforts by other parties by clearly delineating areas of high conservation value for certain species. However, through the HCP development process, which typically involves extensive outreach and opportunity for public review and typically results in formal protection of essential habitat areas, the public is well informed and educated about conservation value of essential habitat lands.

(2) Benefits of Exclusion

The benefits of excluding HCPs or NCCP/HCPs include relieving landowners, communities and counties of any additional regulatory burden that might be imposed by critical habitat. This benefit is particularly compelling because we have made the determination that once an HCP or NCCP/HCP is negotiated and approved by us after public comment, activities consistent with the plan will satisfy the requirements of the Act. Many HCPs or NCCP/HCPs, particularly large regional HCPs or NCCP/HCPs, take many years to develop and, upon completion, become regional conservation plans that are consistent with the conservation of covered species. Imposing an additional regulatory review after HCP or NCCP/HCP completion may jeopardize conservation efforts and partnerships in many areas, and could be viewed as a disincentive to those developing HCPs or NCCP/HCPs. Excluding HCPs or NCCP/HCPs provides us an opportunity to streamline regulatory compliance,

and provides regulatory certainty for HCP and NCCP/HCP participants.

Another benefit of excluding HCPs or NCCP/HCPs is that it would encourage the continued development of partnerships with HCP or NCCP/HCPs participants, including States, local governments, conservation organizations, and private landowners, that together can implement conservation actions we would be unable to accomplish. By excluding areas covered by HCPs or NCCP/HCPs from critical habitat designation, we clearly maintain our commitments, preserve these partnerships, and, we believe, set the stage for more effective conservation actions in the future.

In addition, an HCP or NCCP/HCP application must undergo consultation pursuant to section 7 of the Act. While this consultation will not include a formal evaluation of the plan's potential to adversely modify critical habitat unless critical habitat has already been designated within the proposed plan area, it will carefully analyze the effects of the plan on essential habitat areas as part of its jeopardy analysis under section 7 of the Act and as part of its evaluation of the adequacy of the plan under section 10 of the Act. Because virtually all HCPs or NCCP/HCPs, particularly large regional HCPs or NCCP/HCPs are developed to minimize and mitigate the impacts of take (as defined in the Act) of covered species resulting from habitat loss within the plan area, a fundamental goal of these plans is to identify and protect habitat essential to the covered species while directing development to non-habitat or lower quality habitat areas. Thus, the plan's effectiveness in protecting essential habitat within the plan boundaries and habitat issues within the plan boundaries will have been thoroughly addressed in the HCP or NCCP/HCP and consulted upon. Future Federal actions that may affect listed species would continue to require consultation under section 7 of the Act.

Further, HCPs and NCCP/HCPs typically provide for greater conservation benefits to a covered species than consultations pursuant to section 7 of the Act because HCPs and NCCP/HCPs assure the long-term protection and management of a covered species and its habitat, and funding for such management through the standards found in the 5 Point Policy for HCPs (64 FR 35242) and the HCP No Surprises regulation (63 FR 8859). Such assurances are typically not provided by consultations under section 7 of the Act that, in contrast to HCPs, often do not commit the project proponent to long-term special management or protections. Thus, a consultation typically does not accord the lands it covers the extensive benefits an HCP or NCCP/HCP provides. The development and implementation of an HCP or NCCP/HCP provide other important conservation benefits, including the development of biological information to guide conservation efforts and assist in species conservation, and the creation of innovative solutions to conserve species while allowing for development.

(3) The Benefits of Exclusion Outweigh the Benefits of Inclusion

In general, we find that the benefits of critical habitat designation for the southwestern willow flycatcher on lands within approved HCPs that cover this subspecies are small while the benefits of excluding such lands from designation of critical habitat are substantial. After weighing the small benefits of including these lands against the much greater benefits derived from exclusion, including encouraging the pursuit of additional conservation partnerships, we are excluding lands within the approved and legally operative Western Riverside County MSHCP and subareas of the San Diego MSCP from proposed critical habitat for the southwestern willow flycatcher.

We find that the MSCHP and the MSCP adequately protect essential southwestern willow flycatcher habitat within their boundaries and provide appropriate management to maintain and enhance the long term value of such habitat. The education benefits of critical habitat designation have been achieved through the public outreach, and notice and comment procedures required prior to approval of these plans. For these reasons, then, we find that designation of critical habitat has little benefit in areas covered by these HCPs and that such benefits are outweighed by the benefits of maintaining proactive partnerships with plan participants and encouraging additional conservation partnerships that will result from exclusion of essential habitat in these plan areas. We also find that the exclusion of these lands from proposed critical habitat will not result in the extinction of the southwestern willow flycatcher, nor hinder its recovery because these HCPs have already been evaluated under section 7 of the Act to ensure that their implementation will not jeopardize the continued existence of the subspecies.

A discussion of pending HCPs or NCCP/HCPs that we identified as having areas determined to be essential to the conservation of the southwestern willow flycatcher follows.

San Diego Management Unit

The City of Carlsbad's Habitat Management Plan (HMP) has been in development for several years. This plan is one of seven subarea plans being developed under the umbrella of the North County Multiple Habitat Conservation Plan (MHCP) in northern San Diego County. Participants in this regional conservation planning effort include the cities of Carlsbad, Encinitas, Escondido, Oceanside, San Marcos, Solana Beach, and Vista. The subarea plans in development are also proposed as subregional plans under the State's NCCP and are being developed in cooperation with the California Department of Fish and Game (CDFG). We have determined that portions of lands within the boundaries of the HMP contain essential habitat for the southwestern willow flycatcher, including all of Agua Hedionda Lagoon and a portion of Agua Hedionda Creek.

In developing critical habitat designations, we have analyzed habitat conservation planning efforts to determine if the benefits of excluding them from critical habitat outweigh the benefits of including them in designated critical habitat. In reviewing HCPs, we have assessed the potential impacts of critical habitat designation on lands covered by HCPs on future partnerships, the status of HCP efforts and progress made in developing and implementing such plans, and their relationship to the conservation of species. We have determined that an HCP not yet completed may be considered for exclusion from critical habitat designation pursuant to the section 4(b)(2) of the Act.

Approximately 24,570 ac (9,943 ha) of land are within the Carlsbad HMP planning area, with about 8,800 ac (3,561 ha) remaining as natural habitat for species covered under the plan. Of this remaining habitat, the Carlsbad HMP proposes to establish a preserve system for approximately 6,786 ac (2,746 ha).

The City of Carlsbad has demonstrated a sustained commitment to develop its HMP to comply with the section 10(a)(1)(B) of the Act, the California Endangered Species Act, and the State's NCCP program. On June 4, 2004, we published a Notice of Availability of a Final Environmental Impact Statement/Environmental Impact Report (EIS/EIR) for the North County MHCP, and the City of Carlsbad's HMP, draft Urgency Ordinance and Implementing Agreement. Public comment on these documents was accepted until July 6, 2004.

Although not yet completed and implemented, the City of Carlsbad has made significant progress in the development of its HMP to meet the requirements outlined in section 10(a)(1)(B) of the Act. In light of our confidence that the City of Carlsbad will reach a successful conclusion to its HMP development process, we are excluding lands within their jurisdiction from the critical habitat designation for the southwestern willow flycatcher.

Benefits of Inclusion

As stated previously, the benefits of designating critical habitat on lands within the boundaries of approved HCPs are normally small. Where HCPs are in place that include coverage for the southwestern willow flycatcher, our experience has shown that the HCPs and their Implementing Agreements include management measures and protections designed to protect, restore, enhance, manage, and monitor habitat to benefit the conservation of species. The principal benefit of designating critical habitat is that projects carried out, authorized, or funded by Federal agencies that may affect a listed species require the action agency to consult with us to ensure such activities do not destroy or adversely modify designated critical habitat. In the case of the City of Carlsbad, their HMP will be analyzed by us to determine the effects of the plan on the species for which the participants are seeking incidental take permits. The HMP currently under review by us reflects revisions made to the plan based on comments and input from us, CDFG, and the California Coastal Commission.

Benefits of Exclusion

Excluding lands within the City of Carlsbad's HMP area from critical habitat designation will enhance our ability to work with the City in the spirit of cooperation and partnership. Additionally, other participating jurisdictions in the MHCP will likely continue working with us in a positive, cooperative effort to complete their respective subarea plans to conserve species and their habitat within the MHCP area. A more detailed discussion concerning our rationale for excluding HCPs from critical habitat designation is outlined under the previous section regarding the exclusion of approved HCPs. Further, we believe the analysis conducted to evaluate the benefits of excluding approved HCPs from critical habitat designation is applicable and appropriate to apply to the City of Carlsbad's HMP. We also find that the exclusion of the lands within the City of Carlsbad's HMP planning area from proposed critical habitat will not result in the extinction of the southwestern willow flycatcher, nor hinder its recovery because we have conducted a preliminary analysis to ensure that the implementation of the HMP will not jeopardize the continued existence of the subspecies.

Relationship of Critical Habitat to Military Lands

Santa Ynez Management Unit, CA

San Diego Management Unit, CA

Marine Corps Base, Camp Pendleton (MCBCP)

The Marine Corps Base, Camp Pendleton (MCBCP) is an amphibious training base that promotes combat readiness for military forces and is the only Marine Corps facility on the West Coast where amphibious operations can be combined with air, sea, and ground assault training activities year-round.

Essential habitat for the southwestern willow flycatcher within the boundaries of MCBCP occurs along portions of Cristianitos (6 km/4 mi), San Mateo (5 km/3 mi), San Onofre (6 km/4 mi), Los Flores (8 km/5 mi), Las Pulgas (2 km/1 mi), and DeLuz Creeks (10 km/6 mi), and the Santa Margarita River (45 km/28 mi); however, as discussed below, these areas are being excluded from proposed critical habitat for the flycatcher. In 1995 we completed a section 7 consultation for a Riparian and Estuarine Programmatic Conservation Plan (Conservation Plan) that addresses six federally listed species, including the southwestern willow flycatcher, occurring within the riparian and estuarine/beach areas of MCBCP. We determined in our biological opinion resulting from that section 7 consultation that ongoing training and maintenance activities within riparian/estuarine/beach areas on MCBCP would not jeopardize the continued existence of the southwestern willow flycatcher.

The Conservation Plan is designed to maintain and enhance the biological diversity of the riparian ecosystem on MCBCP and includes promoting the growth of sensitive species, including the southwestern willow flycatcher. Actions to assist in promoting conservation of the southwestern willow flycatcher on MCBCP include maintaining connectivity of riparian habitats; eradicating exotic plant communities to further establishment of successional stages of riparian scrub and riparian woodland habitat; and continuing to implement brown-headed cowbird management. The terms and conditions of the biological opinion for the Conservation Plan form the basis for portions of MCBCP's INRMP that was completed in 2001.

(1) *Benefits of Inclusion*

The primary effect of designating any particular area as critical habitat is the requirement for Federal agencies to consult with us pursuant to section 7 of the Act to ensure actions they carry out, authorize, or fund do not destroy or adversely modify designated critical habitat. Absent critical habitat designation, Federal agencies remain obligated under section 7 to consult with us on actions that may affect a federally listed species to ensure such actions do not jeopardize the species' continued existence. The Marine Corps routinely consults with us for activities on MCBCP that may affect federally listed species to ensure that the continued existence of such species are not jeopardized.

Designation of critical habitat may also provide educational benefits by informing land managers of areas essential to the conservation of the southwestern willow flycatcher. In the case of MCBCP there is no appreciable educational benefit because the installation has already demonstrated its knowledge and understanding of essential habitat for the species through the ongoing programmatic consultation, implementation of ''programmatic instructions'' and incorporation of southwestern willow flycatcher locations into MCBCP's geographic information system (Department of the Navy; June 23, 2003 letter).

(2) *Benefits of Exclusion*

The Marine Corps Base, Camp Pendleton (MCBCP) is an amphibious training base that promotes combat readiness for military forces and is the only Marine Corps facility on the West Coast where amphibious operations can be combined with air, sea, and ground assault training activities year-round. Designation of critical habitat in mission-essential training areas would trigger a requirement for the Marine Corps to consult on activities that may affect designated critical habitat and to reinitiate consultation on activities for which a consultation may have already been completed that assessed the effects to a federally listed species on MCBCP. The requirement to undertake additional consultations or revisit already completed consultations specifically to address the effects of activities on designated critical habitat could delay or impair the Marine Corps' ability to train marines and sailors for combat in support of continuous, global deployment to the western Pacific and southwest Asia (Department of the Navy; 2003 letter).

(3) *Benefits of Exclusion Outweigh the Benefits of Inclusion*

Based on the impact to national security and the Marine Corps' need to maintain a high level of military readiness and combat capability, we determine that the benefits of excluding mission-essential training areas from proposed critical habitat for the southwestern willow flycatcher outweigh the benefits of including them in such designation. We, in conducting this analysis pursuant to section 4(b)(2) of the Act, determined that the exclusion of these lands from critical habitat will not result in the extinction of the southwestern willow flycatcher. Although these lands are not included in designated critical habitat, the Marine Corps will still be required to consult with us on activities that may affect the southwestern willow flycatcher, to ensure such activities do not jeopardize the continued existence of the species. Based on our analysis above, we are excluding these lands from proposed critical habitat for the flycatcher pursuant to section 4(b)(2) of the Act based on the potential impacts on national security.

Seal Beach Naval Weapons Station, Fallbrook Detachment

Naval Weapons Station, Fallbrook (Fallbrook NWS) supports combat readiness for the U.S. Navy, Air Force, and Marine Corps. Fallbrook NWS, together with Naval Weapons Station Seal Beach and Detachment San Diego, functions as a major ordnance storage, maintenance, production and distribution facility for the western United States. Fallbrook NWS stores over 3,000 tons of ordnance and is the primary supply point for amphibious assault ships and Marine Corps training ammunition on the west coast and provides crucial support for mission-essential training activities on MCBCP. In light of the installation's function as a weapons storage area, significant parts of Fallbrook NWS remain free of infrastructure due to safety concerns. This has resulted in minimal affects to surrounding habitat, including portions of the Santa Margarita River. The Fallbrook NWS has provided private researchers and the general public with opportunities for scientific and educational pursuits on the installation while controlling access to sensitive habitat areas to avoid causing inadvertent harm to species, including the southwestern willow flycatcher.

Currently, Fallbrook NWS is working cooperatively with us to develop a INRMP that is proposed to address the conservation needs of the southwestern willow flycatcher. A Fire Management Plan (FMP) for Fallbrook NWS was completed in 2003 and is a primary component of the installation's effort to develop and implement an INRMP. Based on information provided in the FMP, breeding and/or territorial flycatchers have not been detected on Fallbrook NWS since the listing of the flycatcher under the Act, with all recent sightings determined to be transient birds. Measures to offset, avoid or minimize affects to the least Bell's vireo—another riparian dependent species—as described in our biological opinion on the FMP are also adequate to avoid effects on transient southwestern willow flycatchers. Additionally, Fallbrook NWS has agreed to provide information to us regarding any future sightings of southwestern willow flycatchers and will conduct follow-up surveys to determine their breeding status. If breeding or territorial flycatchers are detected on the Fallbrook NWS, the U.S. Navy and we will cooperate to determine whether additional measures to avoid and minimize the effects of fire management activities on the southwestern willow flycatcher are necessary.

(1) *Benefits of Inclusion*

The primary benefit of critical habitat with regard to activities that require consultation pursuant to section 7 of the Act is to ensure that an activity does not destroy or adversely modify designated critical habitat. Benefits associated with proposing critical habitat on mission-essential training lands on Fallbrook NWS are limited.

Designation of critical habitat on portions of the Santa Margarita River that lie within the boundaries of the Fallbrook NWS would require the U.S. Navy to consult with us on proposed activities to ensure they will not adversely modify or destroy critical habitat. Since no military training activities occur on Fallbrook NWS and given the fact we have completed a consultation with the installation for a fire management plan that will serve as a principle component of the installation's INRMP, there is likely little additional benefit from designating critical habitat on Fallbrook NWS.

The educational benefits of critical habitat designation include informing the U.S. Marine Corps and U.S. Navy of areas that are essential to the conservation of the southwestern willow flycatcher. This information has already been provided to the Marine Corps and the Navy through the completion of consultations pursuant to section 7 of the Act.

(2) *Benefits of Exclusion*

Designation of critical habitat for the southwestern willow flycatcher on Fallbrook NWS would require reinitiation of consultation on the FMP that was completed in 2003, possibly leading to additional delays in the completion of the INRMP.

(3) *Benefits of Exclusion Outweigh Benefits of Inclusion*

Given the low impact use that occurs on Fallbrook NWS and the ongoing cooperation between us and the Navy to complete the INRMP, the requirement to consult on critical habitat would potentially require Fallbrook NWS to expend time to reinitiate consultation on its FMP before moving forward with work on the INRMP. We believe that, when completed and adopted, the Fallbrook NWS INRMP will provide an equal or greater benefit to southwestern willow flycatchers than a critical habitat designation. Based on our analysis above, we are excluding these lands from proposed critical habitat for the flycatcher pursuant to section 4(b)(2) of the Act based on the potential impacts on national security. We also find that the exclusion of lands within Fallbrook NWS from proposed critical habitat will not result in the extinction of the southwestern willow flycatcher, nor hinder its recovery because the FMP has already been evaluated under section 7 of the Act to ensure that its implementation will not jeopardize the continued existence of the subspecies.

Roosevelt, Middle Gila/San Pedro, and Verde Management Units, AZ

Roosevelt Lake HCP

An HCP for Salt River Project (SRP) was completed for the operation of Roosevelt Dam in Gila and Maricopa Counties, which included as the action area the perimeter of Roosevelt Lake's high water mark (ERO 2002). The Record of Decision for the HCP was dated February 27, 2003. The land within the Roosevelt Lake perimeter is Federal land withdrawn by the U.S. Bureau of Reclamation and managed by the U.S. Forest Service. The flycatcher population at Roosevelt Lake, depending on the year, can be the largest population of nesting southwestern willow flycatchers across the subspecies range (approximately 150 territories, plus an unknown number of unmated floating/non-breeding flycatchers and fledglings). Operation of Roosevelt Dam during low water years can yield as much as 506 ha (1,250 ac) of occupied flycatcher habitat within the perimeter of the high water mark. Annually, the total available habitat varies as reservoir levels fluctuate depending on annual precipitation with dry years yielding proportionally more habitat. We anticipated that creation

and loss of habitat would occur over the life of the HCP. Flycatcher habitat at Roosevelt Lake varies depending on how and when the lake recedes as a result of water in-flow and subsequent storage capacity and delivery needs. As the lake recedes, flat-gradient, fine moist soils are exposed which provide seed beds for riparian vegetation. The size of Roosevelt Lake, and therefore the amount and location of flycatcher habitat, can vary greatly due to dam operations, floods, and drought. However, even in the expected high-water years, we determined that some flycatcher habitat would persist at Roosevelt Lake providing a net benefit to the bird.

The HCP covers Roosevelt Dam operations for 50 years and involves the conservation of a minimum of 607 ha (1,500 ac) of flycatcher habitat off site, outside of the Roosevelt Management Unit, on the San Pedro, Verde, and/or Gila rivers, and possibly other streams in Arizona, and implementation of conservation measures to protect up to an additional 304 ha (750 ac) of flycatcher habitat. Measures in the HCP included having the Forest Service hire a Forest Service employee to patrol and improve protection of flycatcher habitat in the Roosevelt lakebed from adverse recreation activities.

Currently, within our proposed critical habitat areas, habitat has been acquired at three properties (Adobe Preserve, Spirit Hollow, and Gilleland) along the lower San Pedro River (Middle Gila/San Pedro Management Unit), and a single property along the Verde River (Verde Management Unit) (Beta Ventures). The riparian area for each property is 22 ha (54 ac) for Adobe, 32 ha (80 ac) for Spirit Hollow, 16 ha (40 ac) for Gilleland, and approximately 40 ha (100 ac) for Beta Ventures/Superior. More habitat acquisition is needed to complete the mitigation requirements of the HCP and permit.

The conclusion provided in the biological opinion required in order to issue the HCP permit, was based upon the persistence of varying degrees of occupied southwestern willow flycatcher habitat that, at a minimum, could possibly reach the numerical (50 territories) and distribution goals (within Roosevelt Management Unit) established in the Recovery Plan, under full operation of Roosevelt Dam with an HCP. The permittee (ERO 2002) estimated that an average of 121 to 162 ha (300 to 400 ac) of suitable habitat (thus about 60 to 81 ha/150 to 200 ac of occupied habitat) would be present during the life of the permit, which could support 45 to 90 territories. Even in a worse case flood event, 15 to 30 territories are expected to persist. Under more favorable habitat conditions, the area between the existing pool and the high water mark has supported the largest local population of flycatchers throughout the subspecies range (approximately 150 pairs). The basis for the full-time USFS employee is to minimize the effects of on-the-ground actions (livestock grazing, recreation, fire, habitat clearing, development, roads, fencing, boating, gravel collection, off-highway vehicles, etc.), not at the discretion or under the control of SRP. While it is not possible to fully protect these areas with an on-the-ground officer, the HCP provides an additional level of protection that would not otherwise be available to the habitat.

We are proposing to exclude this HCP from critical habitat designation because it is already managed to protect the primary constituent elements and also because under section 4(b)(2) of the Act, we find the benefits of exclusion exceed the benefits of inclusion. Our determination under section 4(b)(2) is based on two factors, first HCPs typically provide for greater conservation benefits to a covered species than consultations pursuant to section 7 of the Act because HCPs assure the long-term protection and management of a covered species and its habitat, and funding for such management through the standards found in the 5 Point Policy for HCPs (64 FR 35242) and the HCP No Surprises regulation (63 FR 8859). Such assurances are typically not provided by consultations under section 7 of the Act that, in contrast to HCPs, often do not commit the project proponent to long-term special management or protections. Thus, a consultation typically does not accord the lands it covers the extensive benefits an HCP provides. The development and implementation of an HCP provides other important conservation benefits, including the development of biological information to guide conservation efforts and assist in species conservation, and the creation of innovative solutions to conserve species while allowing for development. Secondly, a designation of the reservoir bottom would potentially affect the ability of the reservoir to provide water supply and flood control protection downstream with potentially catastrophic health and safety consequences for the population below the dam. There may be additional economic consequences to designation that we have not identified at this point but which will be addressed in the economic analysis that will be conducted on this proposed designation. For the abovementioned reasons, we are proposing to exclude Roosevelt dam and its perimeter areas from designation of critical habitat.

Areas Proposed as Critical Habitat That May Be Considered for Exclusion From the Final Designation

Below we discuss areas identified as having habitat that is essential to the southwestern willow flycatcher including, State Wildlife Areas, National Wildlife Refuge lands, and Tribal and Pueblo lands that are included in this proposal, but that we may consider for exclusion from the final designation of critical habitat based upon further analysis and public comment.

Relationship of Critical Habitat to State Conservation Plans

Pahranagat Management Unit, NV

Key Pittman State Wildlife Area

The Key Pittman Wildlife Area is located in Lincoln County, NV, and contains a wide diversity of habitats within its 539 ha (1,332 ac). The Pahranagat River travels through portion of the Key Pittman Wildlife Area, including Nesbitt Lake, an impounded area along the river. The State of Nevada's Department of Wildlife owns and manages this property. The Nevada Fish and Game Commission purchased portions of the area in 1962 and 1966, primarily for waterfowl hunting, and as a secondary goal, habitat for other wetland species. A draft management plan was completed in November 2003 and provides the framework for the next 10 years. The plan went through stakeholder meetings and public review.

We determined that the entire stretch of the Pahranagat River, through this Wildlife Area, is essential to the conservation of the southwestern willow flycatcher. A total of 4 to 10 southwestern willow flycatcher territories have been detected since 1999, 9 were detected in 2002. The State of Nevada fences the known flycatcher habitat in order to protect it from livestock grazing, manages water to maintain habitat, monitors the status of flycatchers, and is actively planting riparian plants to improve the distribution of riparian habitat. While the plan has not been finalized, the area has been under management for wildlife since the 1960s, targets waterfowl, wetland species, and specifically the southwestern willow flycatcher. At this time we are not excluding or proposing to exclude this area from critical habitat for the flycatcher, but we may exclude it from the final designation after further analysis and public comment.

Overton State Wildlife Area

The Overton Wildlife Area is located in Clark County, NV, and contains a wide diversity of habitats within its 7146 ha (17,657 ac). The Muddy River travels through a small portion of the State Wildlife Management Area near Lake Mead. The State of Nevada's Department of Wildlife owns and manages this property. A management plan was completed in December 2000 and provides the framework for the next 10 years. The plan went through stakeholder meetings and public review.

We determined that the entire 3 km (2 mi) stretch of the Muddy River through the Overton Wildlife Area is essential to the conservation of the southwestern willow flycatcher. A total of one to two southwestern willow flycatcher territories have been detected within the Overton Wildlife Area on the Muddy River since 1997. Riparian habitat is being enhanced and protected for neotropical migratory birds including southwestern willow flycatchers. A minimum of a quarter-acre willow patch and varying amount of cottonwood, mesquite, and hackberry will be planted annually in locations able to support native riparian trees, and water is being managed to improve and maintain riparian habitat. Riparian habitat is protected from livestock grazing, because no grazing occurs in the Wildlife Area. This Wildlife Area was developed for wetland habitat and waterfowl activities (including hunting). As a result, flycatcher-related riparian habitat maintenance activities described in the management plan are consistent with the management goals of the Wildlife Area. At this time we are not excluding or proposing to exclude this area from critical habitat for the flycatcher, but we may exclude it from the final designation after further analysis and public comment.

Relationship of Critical Habitat to National Wildlife Refuge Lands

We have determined that areas essential to the conservation of the southwestern willow flycatcher include the following National Wildlife Refuges (NWR): Bill Williams NWR, Parker, AZ; Cibola NWR, Blythe, AZ; Imperial NWR, Yuma, AZ; Havasu NWR, Needles, CA; Alamosa/Monte Vista NWR, Alamosa, CO; Bosque del Apache and Sevilleta NWRs, Socorro, NM; and Pahranagat NWR, Alamo, NV. All of these refuges will be developing or in some cases (Sevilleta and Alamosa NWRs) have developed comprehensive resource management plans that will provide for protection and management of all trust resources, including federally listed species and sensitive natural habitats. These plans, and many of the management actions undertaken to implement them, will have to undergo consultation under section 7 of the Act and be evaluated for their consistency with the conservation needs of listed species. We believe that there is minimal benefit from designating critical habitat for the southwestern willow flycatcher within NWR lands because these lands are already managed for the conservation of wildlife. At this time we are not excluding or proposing to exclude NWRs, but may exclude them from the final designation after further analysis and public comment.

Relationship of Critical Habitat to Tribal Lands

In accordance with the Secretarial Order 3206, ''American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act'' (June 5, 1997); the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments'' (59 FR 22951); Executive Order 13175; and the relevant provision of the Departmental Manual of the Department of the Interior (512 DM 2), we believe that fish, wildlife, and other natural resources on tribal lands are better managed under tribal authorities, policies, and programs than through Federal regulation wherever possible and practicable. Based on this philosophy, we believe that, in many cases, designation of tribal lands as critical habitat provides very little additional benefit to threatened and endangered species. Conversely, such designation is often viewed by tribes as an unwanted intrusion into tribal self governance, thus compromising the government-to-government relationship essential to achieving our mutual goals of managing for healthy ecosystems upon which the viability of threatened and endangered species populations depend.

We have determined that the following tribes and pueblos have lands essential to the conservation of the southwestern willow flycatcher: Camp Verde, Chemehuevi, Colorado River, Fort Mojave, Fort Yuma, Hualapai, Isleta, La Jolla, Pala, Rincon, San Carlos, San Illdefonso, San Juan, Santa Clara, Santa Ysabel, and Yavapai Apache. In making our final decision with regard to tribal lands, we will be considering several factors including our relationship with the Tribe or Pueblo and whether a management plan has been developed for the conservation of the southwestern willow flycatcher on their lands. At this time, we have received draft management plans from the Colorado River Indian Tribes and the Hualapai Tribe, as discussed below, and we expect that additional management plans will be received during the public comment period. In addition, the Pueblo of Santa Ana has entered into a Safe Harbor Agreement with us that details the conservation measures to be implemented on their lands as further discussed below. We will continue to work with the Tribes and Pueblos during the comment period on the development of management plans for their lands. We note that additional areas will likely be considered for exclusion in the final rule and that any exclusions made in the final rule will be the result of a reanalysis of any new information received, including consideration of all comments received and the findings of the economic and NEPA analyses.

Parker to Southerly International Border Management Unit, AZ

Hualapai Tribe

The Hualapai Tribe sits alongside a segment of essential southwestern willow flycatcher habitat along the Colorado River on the south side of the channel. The Hualapai Tribe had no known southwestern willow flycatcher territories in 2003, but has eight sites where territories have previously been. The Hualapai Tribe has been active in conducting annual flycatcher surveys.

The Hualapai Tribe has submitted a draft Southwestern Willow Flycatcher Management Plan, which describes the protections and assurances for the flycatcher. The Hualapai Department of Natural Resources Division, and other cooperators assure long-term protection of southwestern willow flycatcher habitat, while maintaining a recreational and tourist industry and traditional values. If a final Management Plan is received from the Hualapai Nation that meets the conservation needs of the species and assurances for implementation and success, we anticipate that the Hualapai Nation may be excluded from the final designation.

Colorado Indian Tribes

We determined that the Colorado Indian Tribes have areas that are essential to the conservation of the southwestern willow flycatcher along the Colorado River. The Colorado River Indian Tribes have no known southwestern willow flycatcher territories, but have been active in riparian restoration within tribal boundaries. The Colorado River Indian Tribes have submitted a draft

Southwestern Willow Flycatcher Management Plan, which describes the protections and assurances for the flycatcher. If a final Management Plan is received from the Colorado River Indian Tribes that meets the conservation needs of the species and assurances for implementation and success, we anticipate that lands within the tribal boundaries of the Colorado River Indian Nations may be excluded from the final designation.

San Carlos Apache Tribe

The San Carlos Apache Tribe is currently drafting a conservation plan for the southwestern willow flycatcher. It is our understanding that the plan is tentatively scheduled for completion in early 2005. We intend to work with the Tribe to assist in this process and to help ensure that the final conservation plan is submitted to us during the public comment period so that we can consider it in our final critical habitat determination.

The Tribe highly values its wildlife and natural resources which it is charged to preserve and protect under the Tribal Constitution. Consequently, the Tribe has long worked to manage the habitat of wildlife on its tribal lands, including the habitat of endangered and threatened species. We understand that it is the Tribe's position that a designation of critical habitat on its lands improperly infringes upon their tribal sovereignty and the right to self-government.

We also evaluated the following HCPs during the development of this proposed rule and determined that, at this time, we do not have adequate justification to exclude these area under section 4(b)(2) of the Act. As noted above, we will evaluate all comments received and the findings of the economic and NEPA analyses which may lead us to consider excluding these areas from the final critical habitat designation based upon new information.

Virgin Management Unit, NV

Clark County Multiple Species Habitat Conservation Plan (MSHCP)

The Clark County MSHCP, permitted in early 2001, included 78 species, 2 of which are federally listed (desert tortoise and southwestern willow flycatcher). Six of the 78 species are riparian dependent birds. The permit was conditioned so that incidental take of southwestern willow flycatchers and the other riparian birds would not be authorized until certain obligations were met by the permittees. Those obligations include: (1) The permittees are required to acquire private lands in desert riparian habitats along the Muddy and Virgin Rivers, and Meadow Valley Wash; and (2) the permittees are required to develop conservation management strategies for the Virgin River, Muddy River, and Meadow Valley Wash, within which the total number and locations of acres of riparian habitat to be acquired within each watershed will be identified. While planning for the Virgin River watershed is underway, neither of these two required planning efforts are developed enough in order to provide assurances and protections for the southwestern willow flycatcher. As a result, we are not excluding any essential habitat along the Virgin River from proposed critical habitat for the southwestern willow flycatcher on the basis of the Clark County MSHCP.

Hoover to Parker, Parker to Southerly International Border, Middle Colorado, Virgin, and Pahranagat Management units, AZ

Lower Colorado River Multi-Species Conservation Plan

The Lower Colorado River Multi-Species Conservation Plan (LCR MSCP) is being developed for areas along the lower Colorado River along the borders of Arizona, California, and Nevada, from Lake Mead to Mexico. The Management Units primarily encompassed in the LCR MSCP are the Hoover to Parker and Parker to Southerly International Border Management units along the Arizona/California border. Streams in the Middle Colorado (Colorado River), Virgin (Virgin River), and Pahranagat (Muddy River) Management units in Arizona, Utah, and Nevada, are only briefly represented where they surround Lake Mead, and may or may not be locations where protection and mitigation occurs. The southwestern willow flycatcher is a key species in the LCR MSCP and the intention of the permittee is to create and maintain 1,639 ha (4,050 ac) of flycatcher habitat over the 50-year life of the permit. A draft HCP was released to the public in June 2004. If we determine that the LCR MSCP adequately addresses the conservation needs of the subspecies, we will consider excluding lands of the LCR MSCP represented within the lower Colorado River from the final designation of critical habitat for the southwestern willow flycatcher. The basis for this decision is as follows: We anticipate the LCR MSCP will result in increasing important southwestern willow flycatcher habitat as a result of restoration projects during the 50-year life of the project; the LCR MSCP has been released as a draft, as noted above, with sufficient budget commitments to assure successful implementation; and compliance performance criteria require that these restoration projects which have been identified in the LCR MSCP have to be met for projects to be compliant with the terms of the permit.

Section 7 Consultation

The regulatory effects of a critical habitat designation under the Act are triggered through the provisions of section 7, which applies only to activities conducted, authorized, or funded by a Federal agency (Federal actions). Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR 402. Individuals, organizations, States, local governments, and other non-Federal entities are affected by the designation of critical habitat only if their actions occur on Federal lands, require a Federal permit, license, or other authorization, or involve Federal funding.

Section 7(a)(2) of the Act requires Federal agencies, including us, to insure that their actions are not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of designated critical habitat. This requirement is met through section 7 consultation under the Act. Our regulations define ''jeopardize the continued existence of'' as to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species (50 CFR 402.02). ''Destruction or adverse modification of designated critical habitat'' for this species would include habitat alterations that appreciably diminish the value of critical habitat by significantly affecting any of those physical or biological features that were the basis for determining the habitat to be critical. We are currently reviewing the regulatory definition of adverse modification in relation to the conservation of the species.

Section 7(a)(4) of the Act requires Federal agencies to confer with us on any action that is likely to jeopardize the continued existence of a proposed species or result in destruction or adverse modification of proposed critical habitat. Conference reports provide conservation recommendations to assist Federal agencies in eliminating conflicts that may be caused by their proposed actions. The conservation measures in a conference report are advisory.

We may issue a formal conference report, if requested by the Federal action agency. Formal conference reports include an opinion that is prepared according to 50 CFR 402.14, as if the species was listed or critical habitat designated. We may adopt the formal conference report as the biological opinion when the species is listed or critical habitat designated, if no substantial new information or changes in the action alter the content of the opinion (50 CFR 402.10(d)).

If a species is listed or critical habitat is designated, section 7(a)(2) of the Act requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of such a species or to destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. Through this consultation, the Federal action agency would ensure that the permitted actions do not destroy or adversely modify critical habitat.

If we issue a biological opinion concluding that a project is likely to result in the destruction or adverse modification of critical habitat, we also provide ''reasonable and prudent alternatives'' to the project, if any are identifiable. Reasonable and prudent alternatives are defined at 50 CFR 402.02 as alternative actions identified during consultation that can be implemented in a manner consistent with the intended purpose of the action, that are consistent with the scope of the Federal agency's legal authority and jurisdiction, that are economically and technologically feasible, and that the Service's Regional Director believes would avoid the likelihood of jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat. Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 require Federal agencies to reinitiate consultation on previously reviewed actions under certain circumstances, including instances where critical habitat is subsequently designated and the Federal agency has retained discretionary involvement or control over the action or such discretionary involvement or control is authorized by law. Consequently, some Federal agencies may request reinitiation of consultation or conference with us on actions for which formal consultation has been completed, if those actions may affect designated critical habitat, or adversely modify or destroy proposed critical habitat.

Federal activities that may affect southwestern willow flycatcher or its critical habitat will require consultation under section 7. Activities on private, State, or county lands, or lands under local jurisdictions requiring a permit from a Federal agency, such as Federal Highway Administration or Federal Emergency Management Act funding, or a permit from the Corps under section 404 of the Clean Water Act, will continue to be subject to the section 7 consultation process. Federal actions not affecting listed species or critical habitat, and actions on non-Federal lands that are not federally funded, authorized, or permitted, do not require section 7 consultations.

Section 4(b)(8) of the Act requires us to evaluate briefly and describe, in any proposed or final regulation that designates critical habitat, those activities involving a Federal action that may adversely modify such habitat or that may be affected by such designation. Activities that may destroy or adversely modify critical habitat include those that alter the primary constituent elements to an extent that the value of critical habitat for both the survival and recovery of southwestern willow flycatcher is appreciably reduced. We note that such activities may also jeopardize the continued existence of the species. Activities that, when carried out, funded, or authorized by a Federal agency that may affect the southwestern willow flycatcher and which may require consultation under section 7 of the Act to determine if they adversely modify critical habitat include, but are not limited to:

(1) Removing, thinning, or destroying riparian vegetation without a riparian restoration plan to cause habitat to become of equal or better quality in abundance and extent. Activities that remove, thin, or destroy riparian vegetation, by mechanical, chemical (herbicides or burning), or biological (grazing, biocontrol agents) means reduce constituent elements for southwestern willow flycatcher sheltering, feeding, breeding, and migrating.

(2) Activities that appreciably diminish habitat value or quality through direct or indirect effects (*e.g.*, degradation of watershed and soil characteristics, diminishing surface and subsurface flow, altering flow regimes, introduction of exotic plants, animals, or insects, or fragmentation of habitat);

(3) Alteration of current surface water diversion or impoundment, groundwater pumping, dam operation, or any other activity which changes the frequency, magnitude, duration, timing or abundance of surface flow (Poff *et al.* 1997), and/or quantity/quality of subsurface water flow in a manner which permanently reduces available riparian habitats by reducing food availability, or the general suitability, quality, structure, abundance, longevity, vigor, micro-habitat components, and distribution of riparian habitat for nesting or migrating.

(4) Permanent destruction/alteration of the species habitat by discharge of fill material, draining, ditching, tiling, pond construction, and stream channelization (*i.e.*, due to roads, construction of bridges, impoundments, discharge pipes, stormwater detention basins, dikes, levees, etc.).

(5) Management of livestock in a manner that reduces the volume and composition of riparian vegetation, physically disturbs nests, alters floodplain dynamics such that regeneration of riparian habitat is impaired or precluded, facilitates brood parasitism by brown-headed cowbirds, alters watershed and soil characteristics, alters stream morphology , and facilitates abundance and extent of exotic species.

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

In general, activities that do not remove or appreciably degrade constituent elements of habitat for southwestern willow flycatchers are not likely to destroy or adversely modify critical habitat. For example, certain dam operations, like Roosevelt Dam in central AZ, allow water to significantly increase and decrease in the conservation space depending on availability and demand. This fluctuation results in the exposure of fine/moist soils in the flat/broad floodplain of the exposed ground and has led to the development of hundreds of acres of flycatcher habitat. The same operating regime that creates the habitat will also inundate and cause loss of habitat; at this particular location, habitat is expected to persist on the perimeter and over time will increase and decrease (USFWS 2003). It is this very process of the ebb and flow of the conservation pool that ensures persistence of habitat over time, although that habitat will vary spatially and temporally, as does flycatcher habitat in natural settings. As a result, the dry conservation space would not be adversely modified when inundated as long as the action is covered by an operative HCP. Riparian restoration can also cause a temporary loss of habitat. However, if it is combined with positive

site-specific evaluation (through an analysis of on the ground features such as groundwater elevation, etc.) and an implementation/restoration plan (USFWS 2002) that together are expected to cause habitat to become of the same quality or better for the flycatcher, it would be expected that those types of restoration activities would not destroy or adversely modify critical habitat. Each proposed action will be examined pursuant to section 7 of the Act in relation to its site-specific impacts.

All lands proposed as critical habitat are within the geographical area occupied by the species and are essential for the conservation of southwestern willow flycatcher. Federal agencies already consult with us on actions that may affect southwestern willow flycatcher to ensure that their actions do not jeopardize the continued existence of the species. Thus, we do not anticipate substantial additional regulatory protection will result from critical habitat designation.

If you have questions regarding whether specific activities will constitute destruction or adverse modification of critical habitat, contact the Supervisor of the appropriate Fish and Wildlife Service Ecological Services Office (see list below). In NM and AZ requests for copies of the regulations on listed wildlife and plants and inquiries about prohibitions and permits may be addressed to the U.S. Fish and Wildlife Service, Branch of Endangered Species, Post Office Box 1306, Albuquerque, NM 87103–1306 (telephone (505) 248–6920; facsimile (505) 248–6922).

Area/state	Address	Phone No.
So. California	2730 Locker Avenue West, Carlsbad, CA 92009	(760) 431–9440
Central Coastal CA	2493 Portola Road, Suite B, Ventura, CA 93003	(805) 644–1766
Central California	2800 Cottage Way, Sacramento, CA 95821	(916) 414–6600
Nevada	1510 Decatur, Las Vegas, NV 89108	(702) 515–5230
Utah	2369 West Orton Circle, West Valley City, UT 84119	(801) 975–3330
Colorado	764 Horizon Dr. S. Annex A–Bldg. B, Grand Junction, CO 81506	(970) 243–2788
AZ	2321 W. Royal Palm Road Ste. 103, Phoenix, AZ 85021	(602) 242–0210
NM	2105 Osuna Rd. NE., Albuquerque, NM 87113	(505) 761–4718

Economic Analysis

Section 4(b)(2) of the Act requires us to designate critical habitat on the basis of the best scientific and commercial data available and to consider the economic impact, impact on national security, and other relevant impacts of designating a particular area as critical habitat. We may exclude areas from critical habitat upon a determination that the benefits of such exclusions outweigh the benefits of specifying such areas as critical habitat. We cannot exclude such areas from critical habitat when such exclusion will result in the extinction of the species.

An analysis of the economic impacts of proposing critical habitat for southwestern willow flycatcher is being prepared. We will announce the availability of the draft economic analysis as soon as it is completed, at which time we will seek public review and comment. At that time, copies of the draft economic analysis will be available for downloading from the Internet at *http://arizonaes.fws.gov*, or by contacting the AZ Ecological Services Fish and Wildlife Office directly (see **ADDRESSES** section).

Peer Review

In accordance with our policy published on July 1, 1994 (59 FR 34270), we will solicit the expert opinions of at least three appropriate and independent specialists regarding this proposed rule. The purpose of such review is to ensure that our critical habitat designation is based on scientifically sound data, assumptions, and analyses. We will send these peer reviewers copies of this proposed rule immediately following publication in the **Federal Register**. We will invite these peer reviewers to comment, during the public comment period, on the specific assumptions and conclusions regarding the proposed designation of critical habitat.

We will consider all comments and information received during the 60-day comment period on this proposed rule as we prepare our final rulemaking. Accordingly, the final designation may differ from this proposal.

Public Hearings

Section 4(b)(5)(E) of the Act provides for one or more public hearings on this proposal, if requested. Requests must be received within 45 days of the date of publication of the proposal in the **Federal Register**. Such requests must be made in writing and be addressed to the Field Supervisor (see **ADDRESSES** section). We will schedule public hearings on this proposal, if any are requested, and announce the dates, times, and places of those hearings in the **Federal Register** and local newspapers at least 15 days prior to the first hearing.

Clarity of the Rule

Executive Order 12866 requires each agency to write regulations and notices that are easy to understand. We invite your comments on how to make this proposed rule easier to understand, including answers to questions such as the following: (1) Are the requirements in the proposed rule clearly stated? (2) Does the proposed rule contain technical jargon that interferes with the clarity? (3) Does the format of the proposed rule (grouping and order of the sections, use of headings, paragraphing, etc.) aid or reduce its clarity? (4) Is the description of the notice in the **SUPPLEMENTARY INFORMATION** section of the preamble helpful in understanding the proposed rule? (5) What else could we do to make this proposed rule easier to understand? Send a copy of any comments on how we could make this proposed rule easier to understand to: Office of Regulatory Affairs, Department of the Interior, Room 7229, 1849 C Street, NW., Washington, DC 20240. You may e-mail your comments to this address: *Exsec@ios.doi.gov.*

Required Determinations

Regulatory Planning and Review

In accordance with Executive Order 12866, this document is a significant rule in that it may raise novel legal and policy issues, but it is not anticipated to have an annual effect on the economy of $100 million or more or adversely affect the economy in a material way. Due to the timeline for publication in the **Federal Register**, the Office of Management and Budget (OMB) has not formally reviewed this rule. We are preparing a draft economic analysis of this proposed action. We will use this analysis to meet the requirement of section 4(b)(2) of the Act to determine the economic consequences of designating the specific areas as critical

habitat. This economic analysis also will be used to determine compliance with Executive Order 12866, Regulatory Flexibility Act, Small Business Regulatory Enforcement Fairness Act, and Executive Order 12630.

This draft economic analysis will be made available for public review and comment before we finalize this designation. At that time, copies of the analysis will be available for downloading from the AZ Ecological Services Fish and Wildlife Service Office's Internet website at *http://arizonaes.fws.gov* or by contacting the AZ Ecological Services Office directly (see **ADDRESSES** section).

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.,* as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (*i.e.,* small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the Regulatory Flexibility Act (RFA) to require Federal agencies to provide a statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities.

At this time, we lack the available economic information necessary to provide an adequate factual basis for the required RFA finding. Therefore, the RFA finding is deferred until completion of the draft economic analysis prepared pursuant to section 4(b)(2) of the Act and E.O. 12866. This draft economic analysis will provide the required factual basis for the RFA finding. Upon completion of the draft economic analysis, we will publish a notice of availability of the draft economic analysis of the proposed designation and reopen the public comment period for the proposed designation for an additional 60 days. We will include with the notice of availability, as appropriate, an initial regulatory flexibility analysis or a certification that the rule will not have a significant economic impact on a substantial number of small entities accompanied by the factual basis for that determination. We have concluded that deferring the RFA finding until completion of the draft economic analysis is necessary to meet the purposes and requirements of the RFA. Deferring the RFA finding in this manner will ensure that we make a sufficiently informed determination based on adequate economic information and provides the necessary opportunity for public comment.

Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 802(2))

In the draft economic analysis, we will determine whether designation of critical habitat will cause (a) any effect on the economy of $100 million or more; (b) any increases in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (c) any significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

Executive Order 13211

On May 18, 2001, the President issued an Executive Order (E.O. 13211) on regulations that significantly affect energy supply, distribution, and use. Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This proposed rule to designate critical habitat for the southwestern willow flycatcher is considered a significant regulatory action under Executive Order 12866 as it may raise novel legal and policy issues. However, this designation is not expected to significantly affect energy supplies, distribution, or use because there are no pipelines, distribution facilities, power grid stations, etc. within the boundaries of proposed critical habitat. Therefore, this action is not a significant energy action and no Statement of Energy Effects is required. We will, however, further evaluate this issue as we conduct our economic analysis and, as appropriate, review and revise this assessment as warranted.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501), the Service makes the following findings:

(a) This rule will not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute or regulation that would impose an enforceable duty upon State, local, tribal governments, or the private sector and includes both ''Federal intergovernmental mandates'' and ''Federal private sector mandates.'' These terms are defined in 2 U.S.C. 658(5)–(7). ''Federal intergovernmental mandate'' includes a regulation that ''would impose an enforceable duty upon State, local, or tribal governments'' with two exceptions. It excludes ''a condition of federal assistance.'' It also excludes ''a duty arising from participation in a voluntary Federal program,'' unless the regulation ''relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and tribal governments under entitlement authority,'' if the provision would ''increase the stringency of conditions of assistance'' or ''place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding'' and the State, local, or tribal governments ''lack authority'' to adjust accordingly. (At the time of enactment, these entitlement programs were: Medicaid; AFDC work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement.) ''Federal private sector mandate'' includes a regulation that ''would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance; or (ii) a duty arising from participation in a voluntary Federal program.''

The designation of critical habitat does not impose a legally binding duty on non-Federal government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7. While non-Federal entities who receive Federal funding, assistance, or permits or who otherwise require approval or authorization from a Federal agency for an action may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply; nor would critical habitat shift the costs of the large entitlement programs listed above on to State governments.

(b) We do not believe that this rule will significantly or uniquely affect small governments. As such, Small Government Agency Plan is not

required. We will, however, further evaluate this issue as we conduct our economic analysis and, as appropriate, review and revise this assessment as warranted.

Takings

In accordance with Executive Order 12630 (''Government Actions and Interference with Constitutionally Protected Private Property Rights''), this rule is not anticipated to have significant takings implications. A takings implication assessment is not required. As discussed above, the designation of critical habitat affects only Federal actions. Although private parties that receive Federal funding, assistance, or require approval or authorization from a Federal agency for an action may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Due to current public knowledge of the species protections and the prohibition against take of the species both within and outside of the proposed areas we do not anticipate that property values will be affected by the critical habitat designation. However, we have not yet completed the economic analysis for this proposed rule. Once the economic analysis is available, we will review and revise this preliminary assessment as warranted.

Federalism

In accordance with Executive Order 13132, this rule does not have significant Federalism effects. A Federalism assessment is not required. In keeping with Department of the Interior policies, we requested information from and coordinated development of this proposed critical habitat designation with appropriate State resource agencies in all affected states.

The proposed designation of critical habitat in areas currently occupied by southwestern willow flycatcher imposes no additional significant restrictions beyond those currently in place and, therefore, has little incremental impact on State and local governments and their activities. The proposed designation of critical habitat may have some benefit to the State and local resource agencies in that the areas essential to the conservation of this species are more clearly defined, and the primary constituent elements of the habitat necessary to the conservation of this species are specifically identified. While this definition and identification does not alter where and what federally sponsored activities may occur, it may assist local governments in long-range planning (rather than waiting for case-by-case section 7 consultations to occur).

Civil Justice Reform

In accordance with Executive Order 12988, the Department of the Interior's Office of the Solicitor has determined that this rule does not unduly burden the judicial system and does meet the requirements of sections 3(a) and 3(b)(2) of the Order. We are proposing to designate critical habitat in accordance with the provisions of the Act. The rule uses standard property descriptions and identifies the primary constituent elements within the designated areas to assist the public in understanding the habitat needs of southwestern willow flycatcher.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)

This proposed rule does not contain new or revised information collection for which OMB approval is required under the Paperwork Reduction Act. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act (NEPA)

It is our position that, outside the Tenth Circuit, we do not need to prepare environmental analyses as defined by the NEPA in connection with designating critical habitat under the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This assertion was upheld in the courts of the Ninth Circuit (*Douglas County* v. *Babbitt,* 48 F.3d 1495 (9th Cir. Ore. 1995), cert. denied 116 S. Ct. 698 (1996). However, when the range of the species includes States within the Tenth Circuit, such as that of the southwestern willow flycatcher, pursuant to the Tenth Circuit ruling in *Catron County Board of Commissioners* v. *U.S. Fish and Wildlife Service,* 75 F.3d 1429 (10th Cir. 1996), we will undertake a NEPA analysis for critical habitat designation and notify the public of the availability of the draft environmental assessment for this proposal when it is finished.

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments'' (59 FR 22951), Executive Order 13175, and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. We have determined that there are Tribal lands essential for the conservation of southwestern willow flycatcher and have sought government-to-government consultation with these Tribes during the scoping process under the NEPA compliance portion of this process. We will continue to seek consultation during the development of the final critical habitat designation.

References Cited

A complete list of all references cited herein, as well as others, is available upon request from the AZ Ecological Services Fish and Wildlife Service Office (see **ADDRESSES** section).

Author

The primary authors of this notice are the AZ Ecological Services Office staff (see **ADDRESSES** section).

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and record keeping requirements, Transportation.

Proposed Regulation Promulgation

Accordingly, we propose to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations as set forth below:

PART 17—[AMENDED]

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

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

2. Amend § 17.95(b), by revising critical habitat for the southwestern willow flycatcher (*Empidonax trailli extimus*) in the same alphabetical order as the species occurs in 17.11(h) to read as follows:

§ 17.95 Critical habitat—Birds.

* * * * *

(b) Birds.

* * * * *

Southwestern Willow Flycatcher

(1) Critical habitat units are depicted for (add counties, states) on the maps and as described below.

(2) The primary constituent elements of critical habitat for southwestern willow flycatcher are:

(i) Nesting habitat with trees and shrubs that include, but are not limited to, willow species and boxelder;

(ii) Dense riparian vegetation with thickets of trees and shrubs ranging in height from 2 m to 30 m (6 to 98 ft) with lower-stature thickets of (2–4 m or 6–13 ft tall) found at higher elevation riparian forests and tall-stature thickets found at middle- and lower-elevation riparian forests;

(iii) Areas of dense riparian foliage at least from the ground level up to approximately 4 m (13 ft) above ground or dense foliage only at the shrub level, or as a low, dense tree canopy;

(iv) Sites for nesting that contain a dense tree and/or shrub canopy (the amount of cover provided by tree and shrub branches measured from the ground) (*i.e.,* a tree or shrub canopy with densities ranging from 50 percent to 100 percent);

(v) Dense patches of riparian forests that are interspersed with small openings of open water or marsh or shorter/sparser vegetation, that creates a mosaic that is not uniformly dense. Patch size may be as small as 0.1 ha (0.25 ac) or as large as 70 ha (175 ac); and

(vi) A variety of insect prey populations, including but not limited to, wasps and bees (Hymenoptera); flies (Diptera); beetles (Coleoptera); butterflies/moths and caterpillars (Lepidoptera); and spittlebugs (Homoptera).

(4) Index map for southwestern willow flycatcher critical habitat follows:

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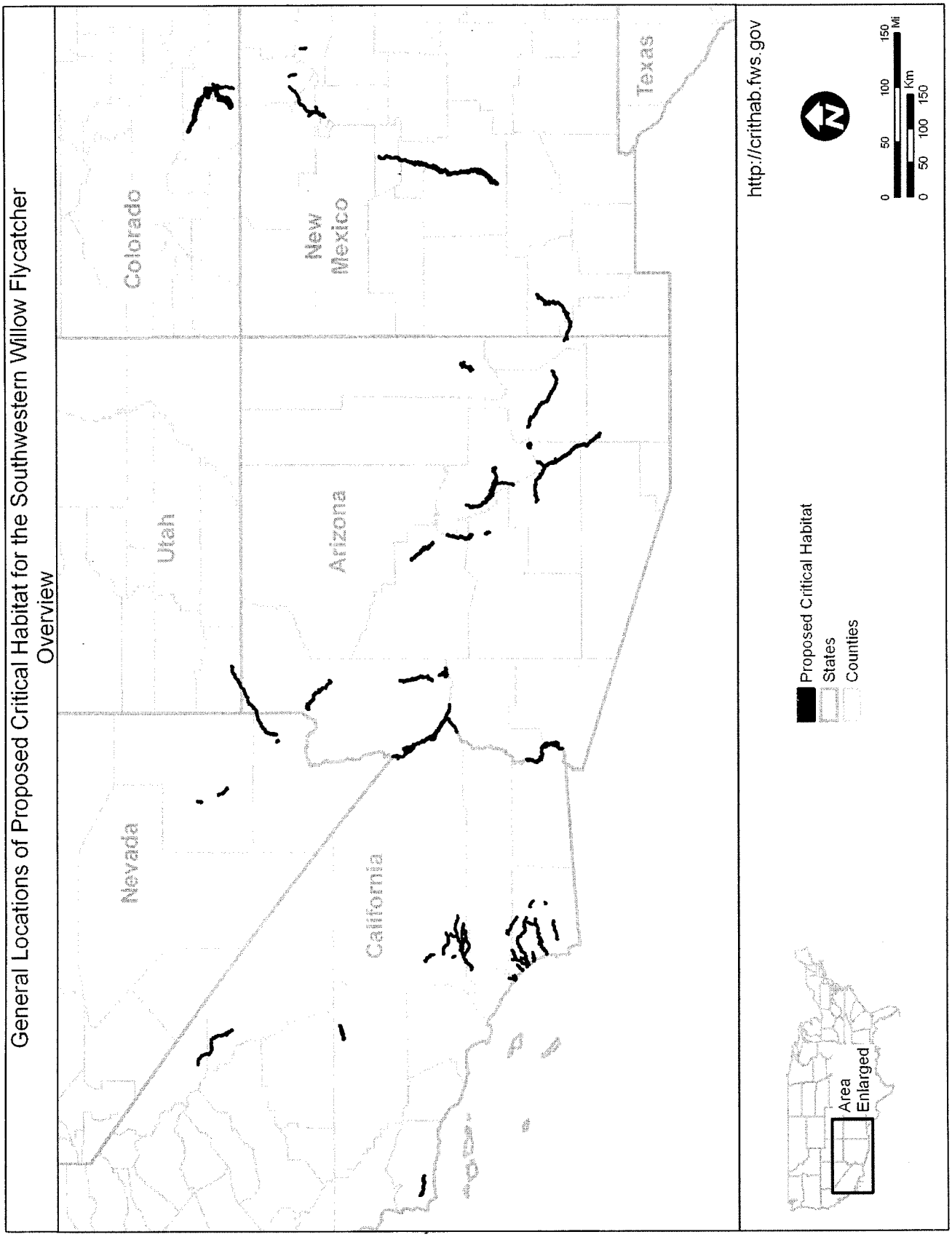
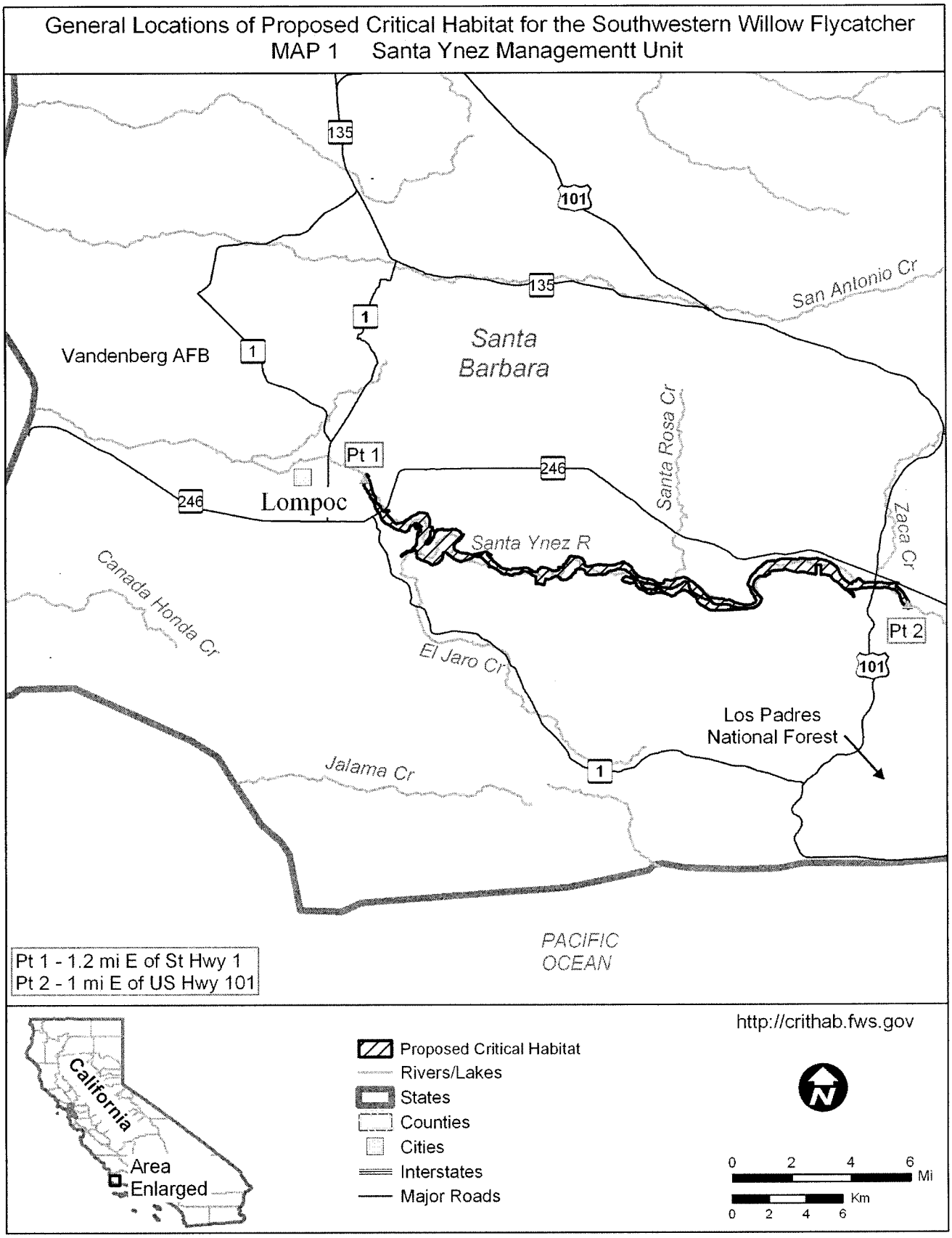


(5) Santa Ynez Management Unit.

(i)

River	Start latitude	Start longitude	End latitude	End longitude
Santa Ynez River	34.5972867	−120.1744120	34.6596711	−120.4394929

(ii) Map 1—Santa Ynez Management Unit follows:

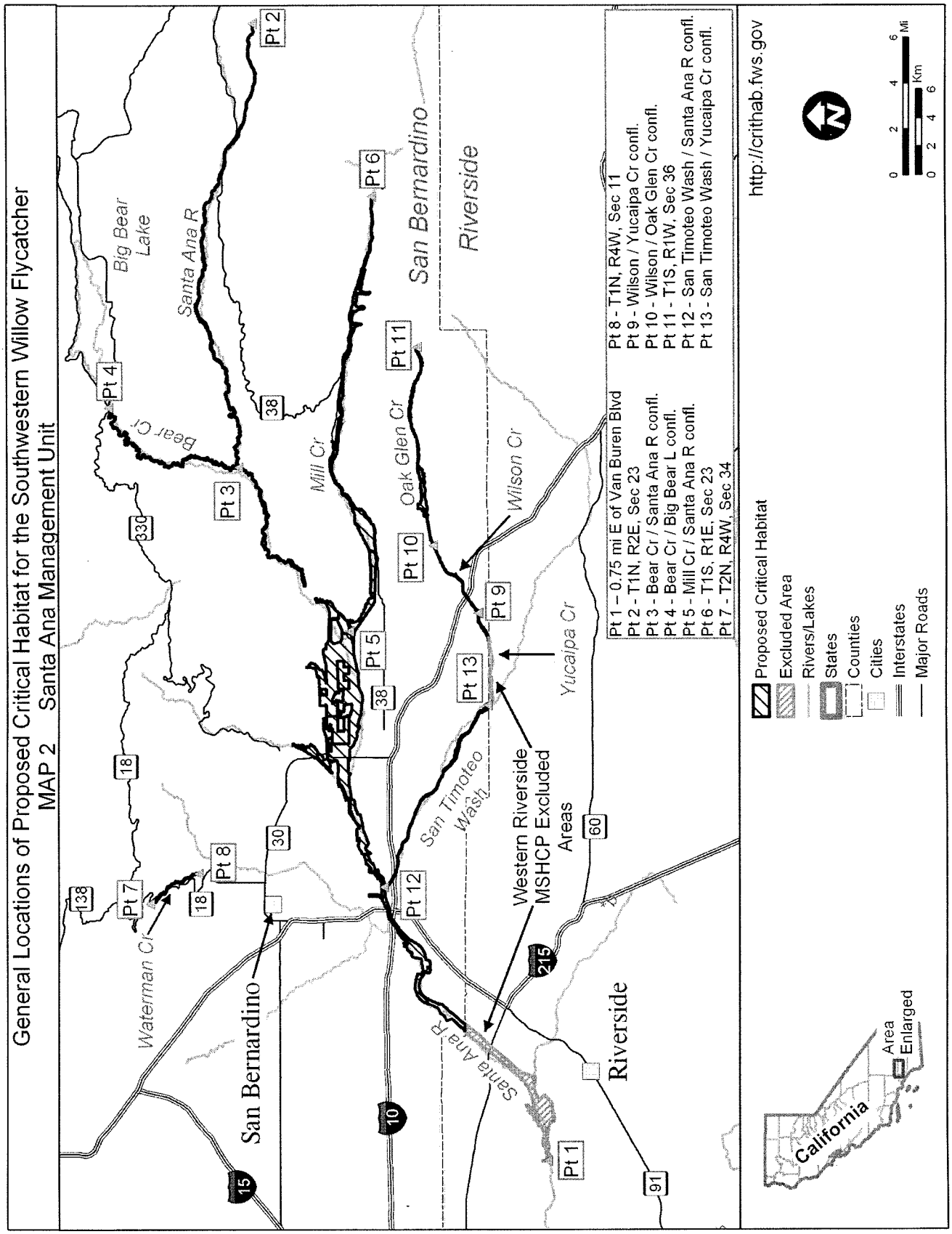


(6) Santa Ana Management Unit.

(i)

River	Start latitude	Start longitude	End latitude	End longitude
Bear Creek	34.1609938	−117.0159635	34.2422368	−116.9781483
Mill Creek	34.0766808	−116.8452498	34.0911325	−117.1197798
Oak Glen Creek	34.0386537	−117.0654996	34.0483711	−116.9403286
San Timoteo Wash	34.0044332	−117.1665810	34.0696755	−117.2814779
Santa Ana River	34.1513289	−116.7359315	33.9673435	−117.4534886
Waterman Creek	34.2170016	−117.2918024	34.1863762	−117.2729851
Wilson Creek	34.0102978	−117.1083328	34.0386336	−117.0654804
Yucaipa Creek	34.0103220	−117.1083693	34.0044334	−117.1665346

(ii) Map 2—Santa Ana Management Unit follows:

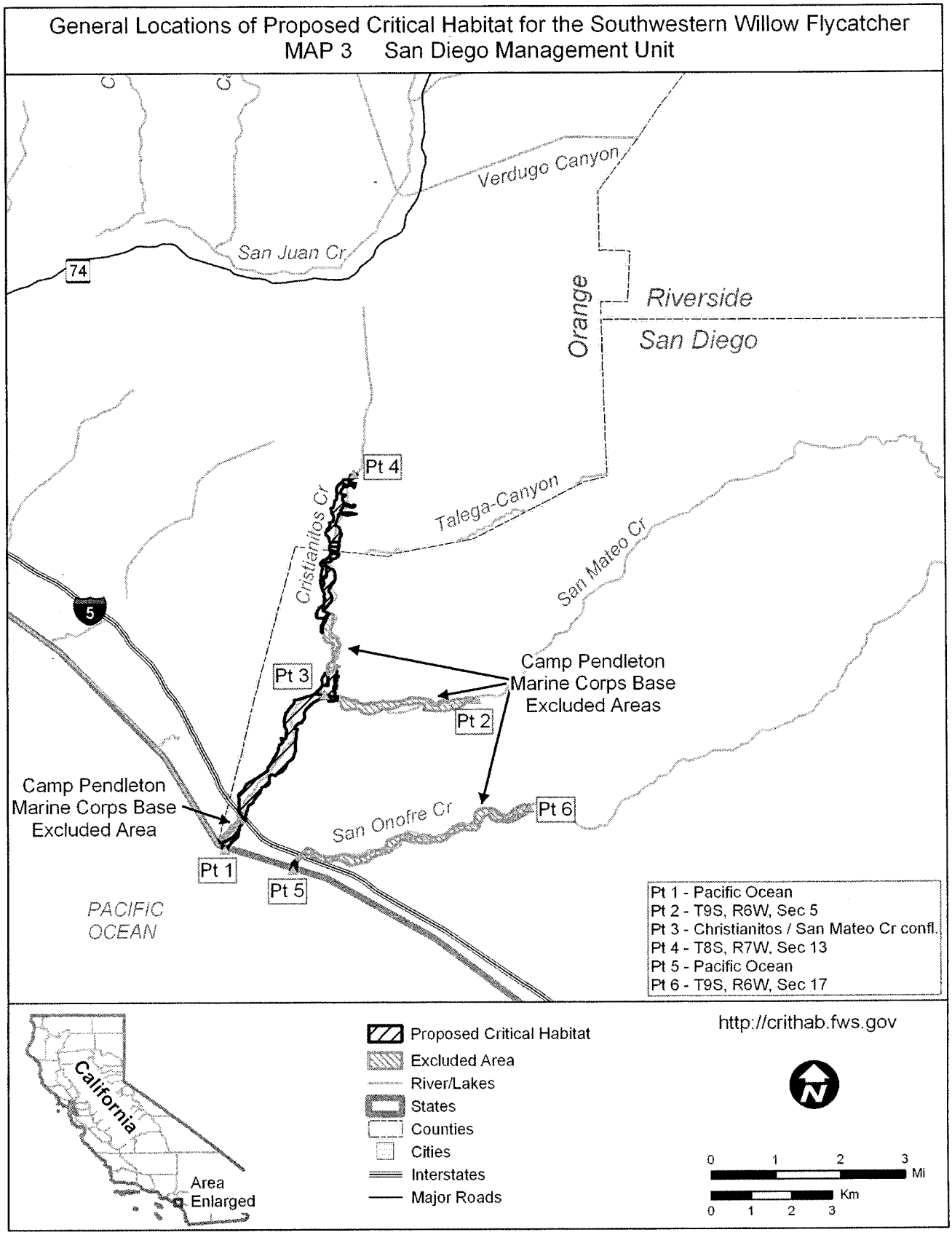


(7) San Diego Management Unit.

(i)

River	Start latitude	Start longitude	End latitude	End longitude
Christianitos Creek	33.4202584	−117.5720194	33.4703241	−117.5652620
San Mateo Creek	33.4193353	−117.5378243	33.3854992	−117.5943532
San Onofre Creek	33.3947909	−117.5262105	33.3808217	−117.5792417

(ii) Map 3—San Diego Management Unit follows:

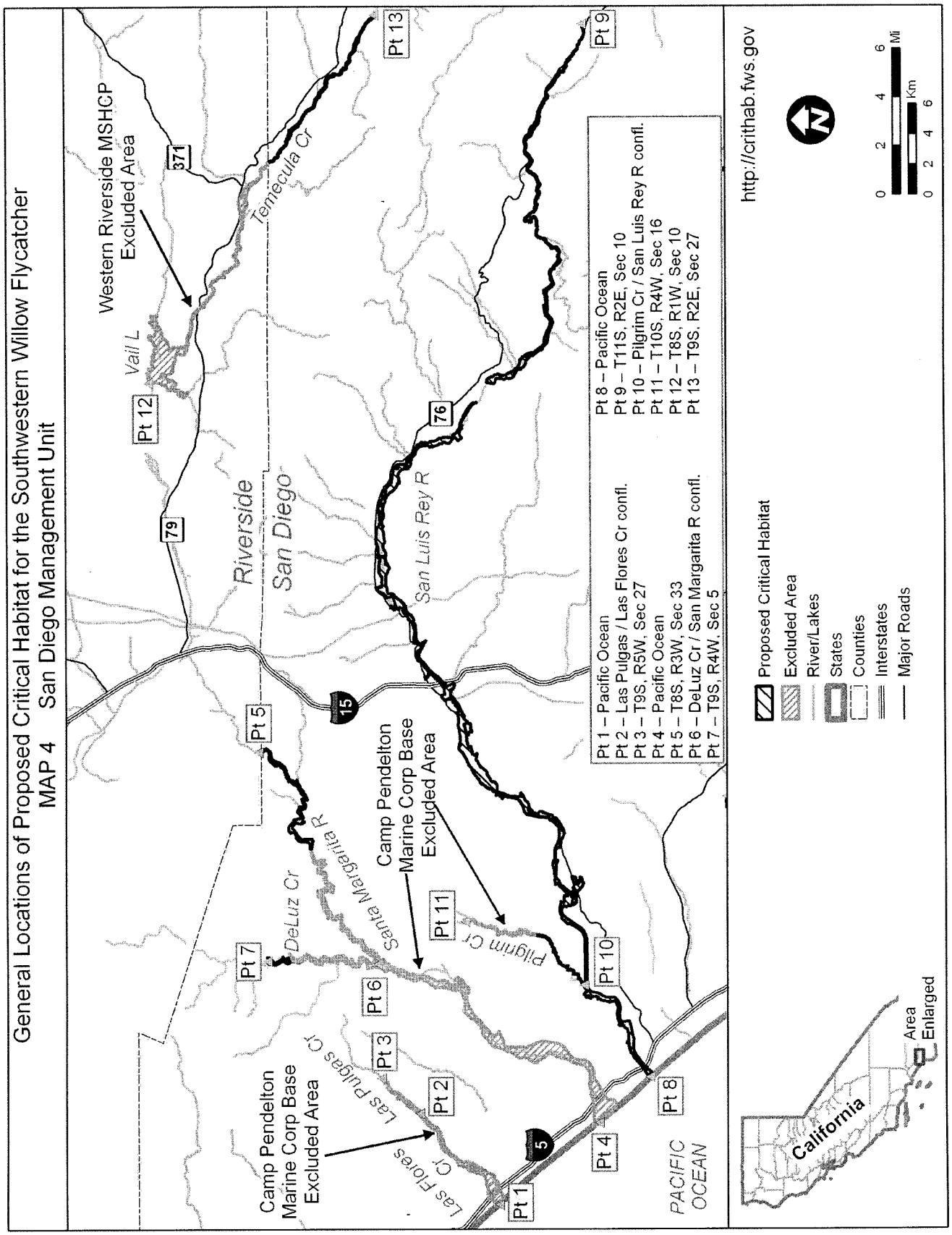


(8) San Diego Management Unit.

(i)

River	Start latitude	Start longitude	End latitude	End longitude
Deluz Creek	33.3631922	−117.3242455	33.4284196	−117.3223795
Las Flores Creek	33.3387002	−117.4124815	33.2918772	−117.4668791
Las Pulgas Creek	33.3612402	−117.3914457	33.3386642	−117.4124221
Pilgrim Creek	33.2412706	−117.3367781	33.3115967	−117.2990787
San Luis Rey River	33.2026402	−117.3910088	33.2408399	−116.7655497
Santa Margarita River	33.4331379	−117.1985136	33.2327182	−117.4180318
Temecula Creek	33.4982611	−116.9782596	33.3637516	−116.7600635

(ii) Map 4—San Diego Management Unit follows:

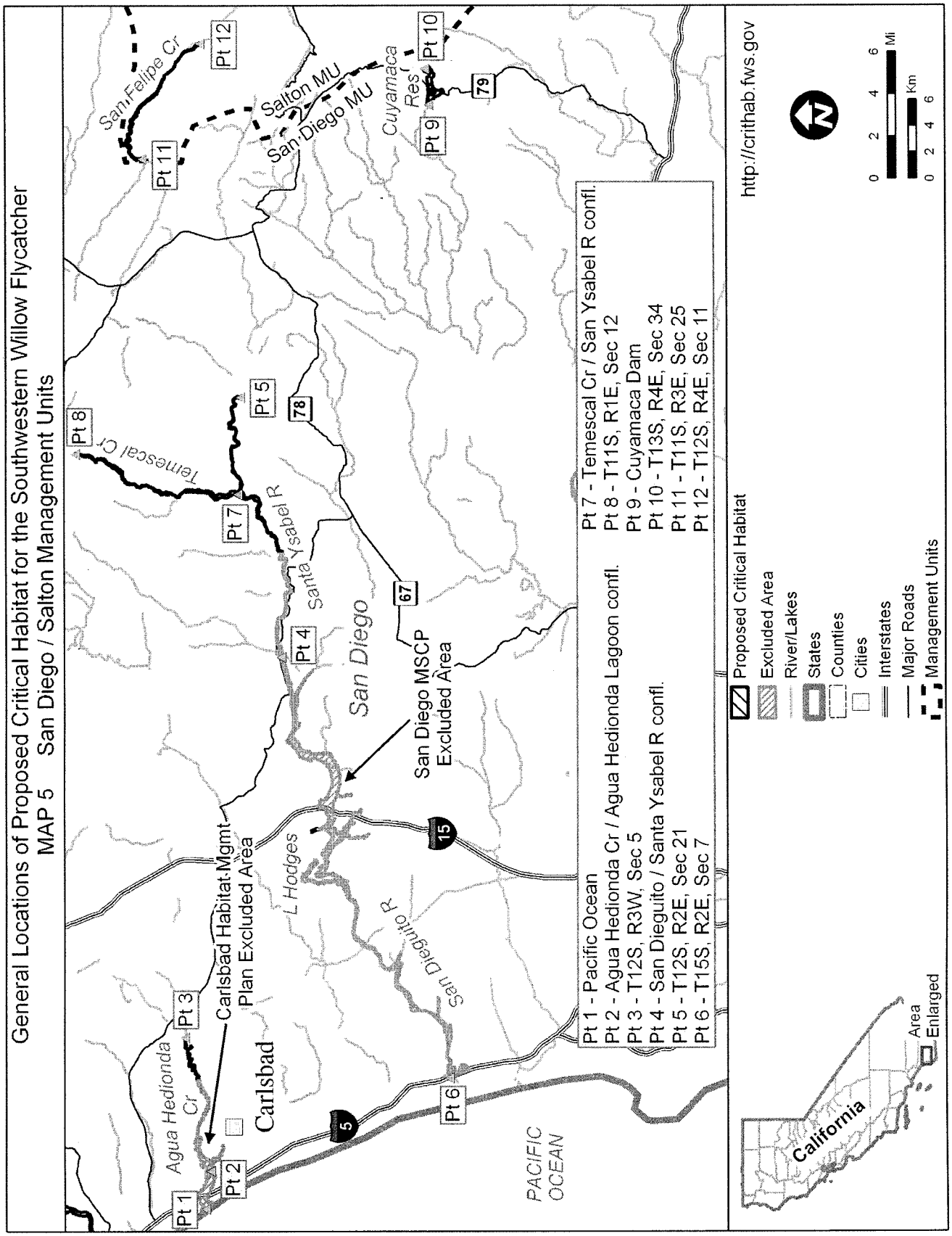


(9) San Diego/Salton Management Units.

(i)

River	Start latitude	Start longitude	End latitude	End longitude
Agua Hedionda Creek	33.1568410	−117.2250596	33.1394750	−117.3159212
Agua Hedionda Lagoon	33.1397064	−117.3159478	33.1426752	−117.3419973
Cuyamaca Reservoir	32.9898162	−116.5879651	32.9922747	−116.5634781
San Dieguito River	32.9767440	−117.2526692	33.0908002	−116.9654719
San Felipe Creek	33.1455448	−116.5456904	33.1848494	−116.6246895
Santa Ysabel River	33.1185131	−116.7874089	33.0909698	−116.9655281
emescal Creek	33.2308658	−116.8260437	33.1203488	−116.8536884

(ii) Map 5—San Diego/Salton Management Units.

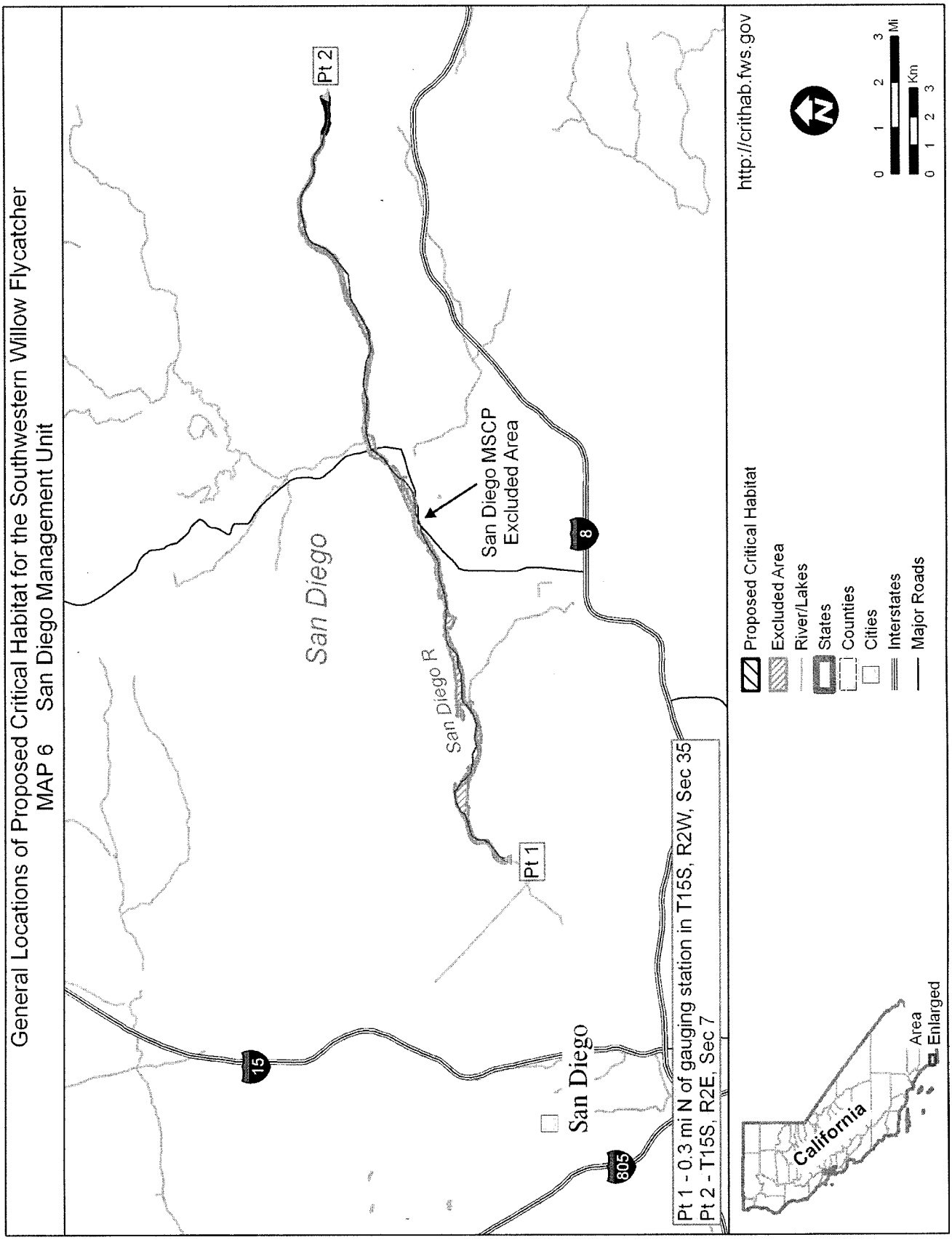


(10) San Diego Management Unit.

(i)

River	Start latitude	Start longitude	End latitude	End longitude
San Diego River	32.8847561	−116.8120723	32.8281786	−117.0527488

(ii) Map 6—San Diego Management Unit follows:

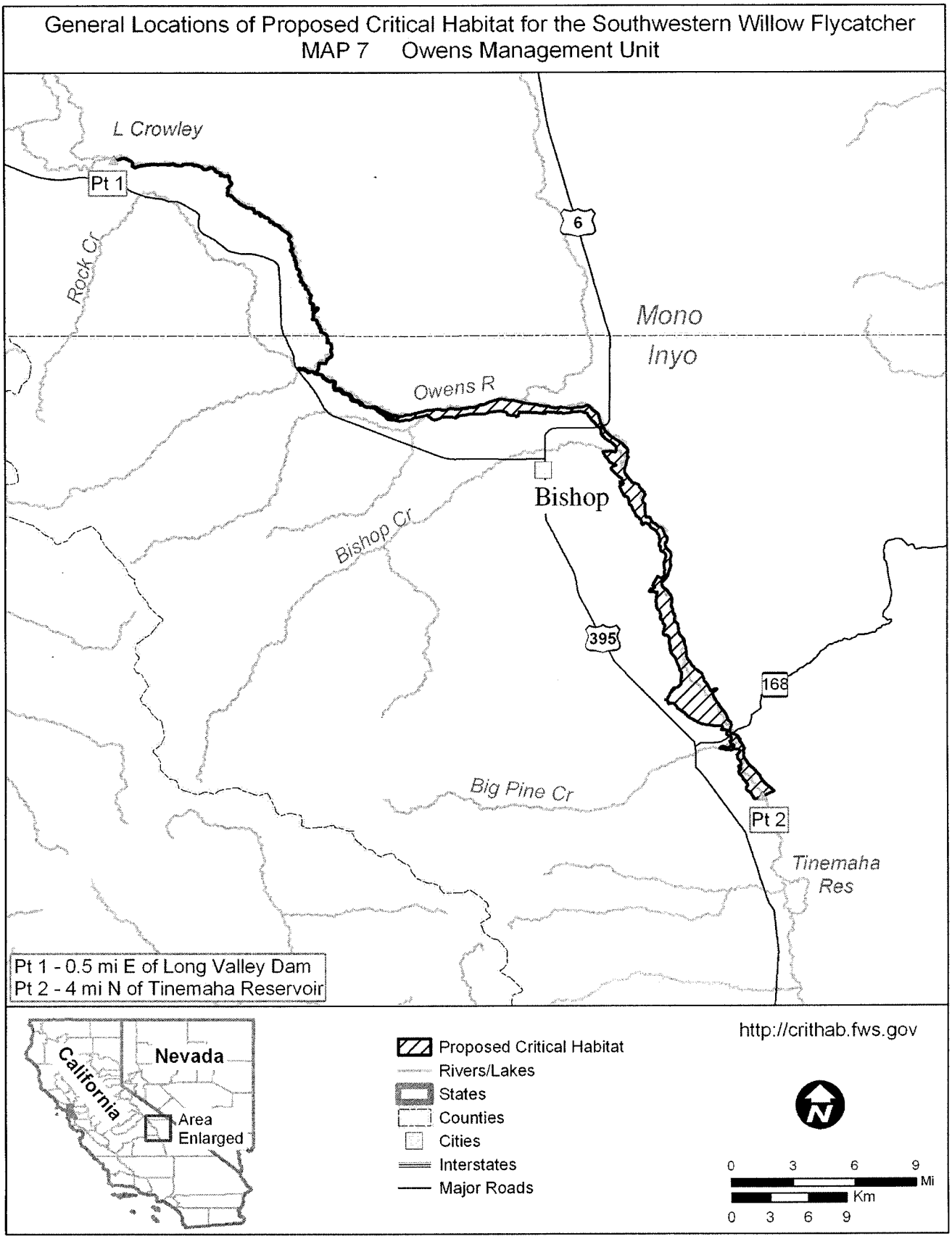


(11) Owens Management Unit.

(i)

River	Start latitude	Start longitude	End latitude	End longitude
Owens River	37.5877424	−118.6992268	37.1354380	−118.2419417

(ii) Map 7—Owens Management Unit follows:

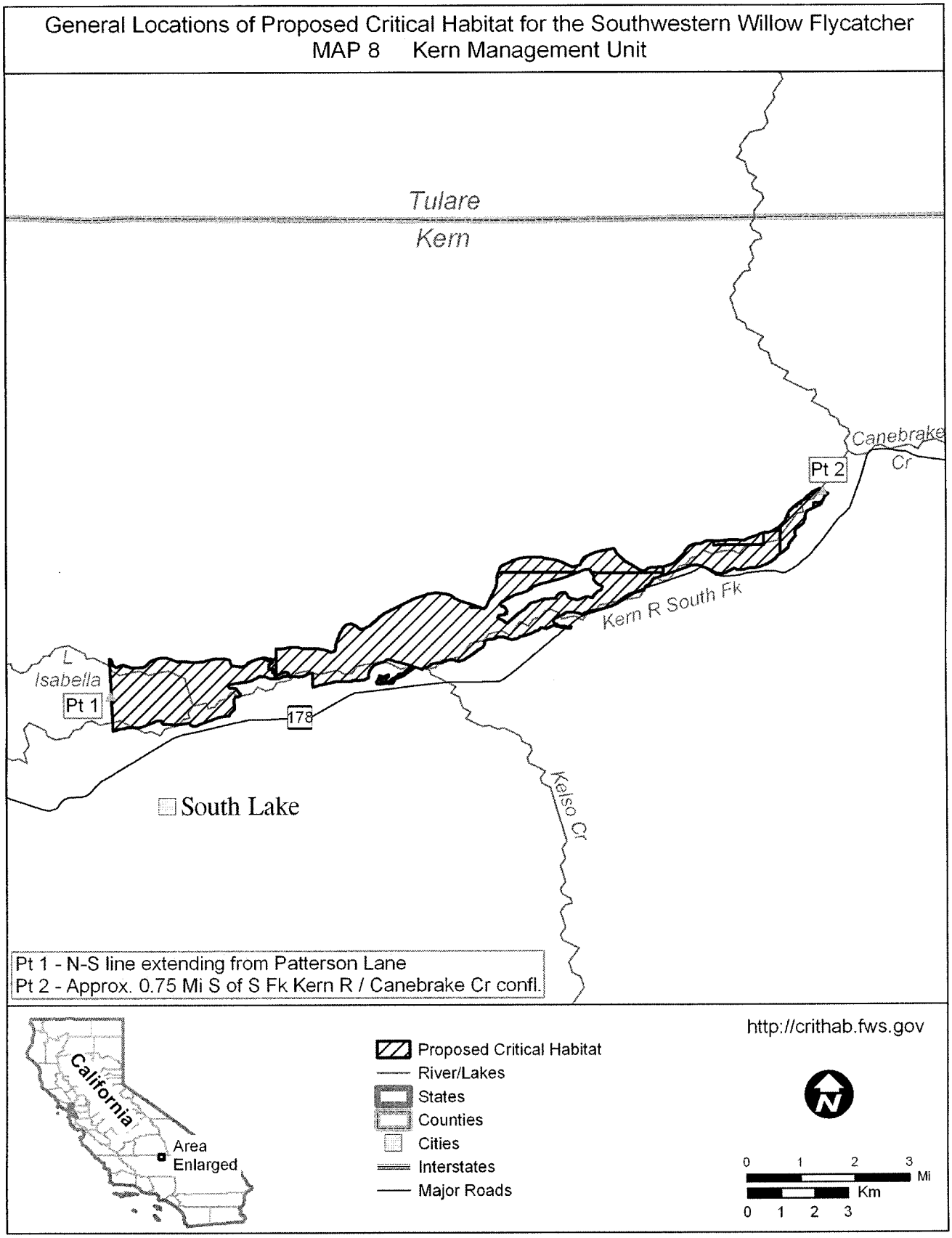


(12) Kern Management Unit.

(i)

River	Start latitude	Start longitude	End latitude	End longitude
Kern River—South Fork	35.7176912	−118.1808882	35.6629518	−118.3705422

(ii) Map 8—Kern Management Unit follows:

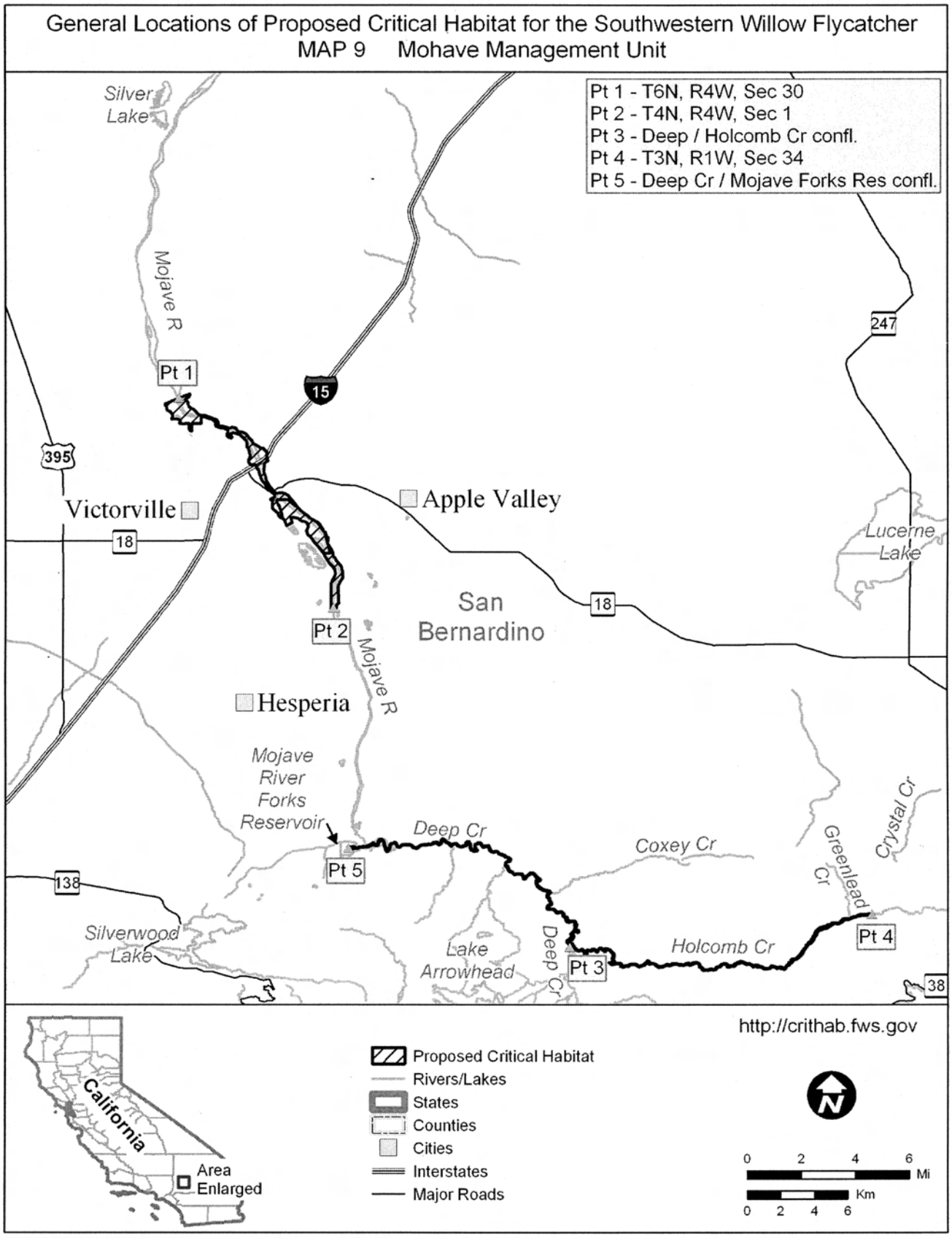


(13) Mohave Management Unit.

(i)

River	Start latitude	Start longitude	End latitude	End longitude
Deep Creek	34.2871507	−117.1278400	34.3404367	−117.2465670
Holcomb Creek	34.2870806	−117.1278675	34.3049507	−116.9655144
Mojave River	34.4701947	−117.2546695	34.5838662	−117.3374023

(ii) Map 9—Mohave Management Unit follows:

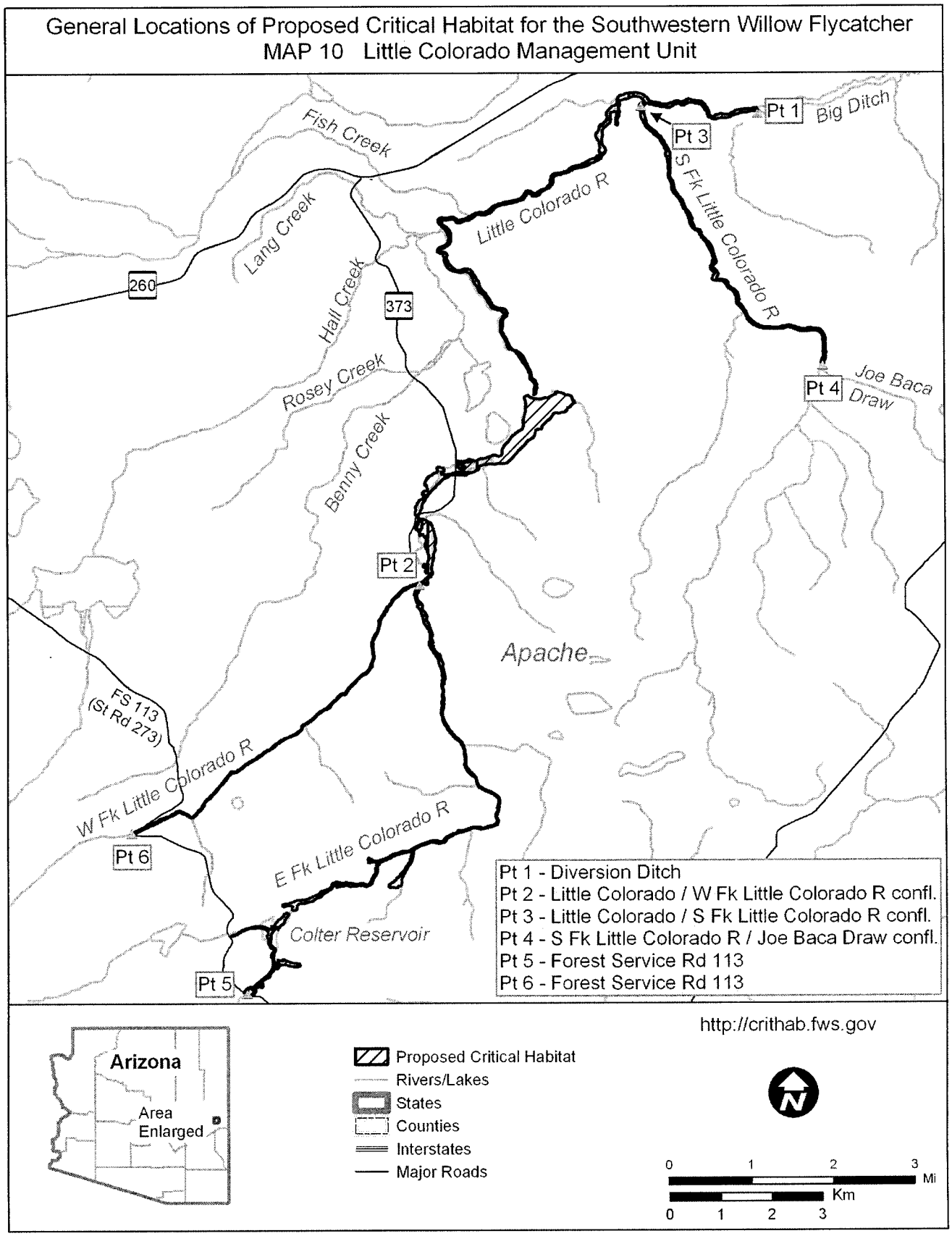


(14) Little Colorado Management Unit.

(i)

River	Start latitude	Start longitude	End latitude	End longitude
Little Colorado River—East Fork	34.0035647	−109.4568366	33.9313670	−109.4872878
Little Colorado River—South Fork	34.0881263	−109.4174754	34.0423434	−109.3856370
Little Colorado River—West Fork	34.0868020	−109.3970042	33.9596767	−109.5075668

(ii) Map 10—Little Colorado Management Unit follows:

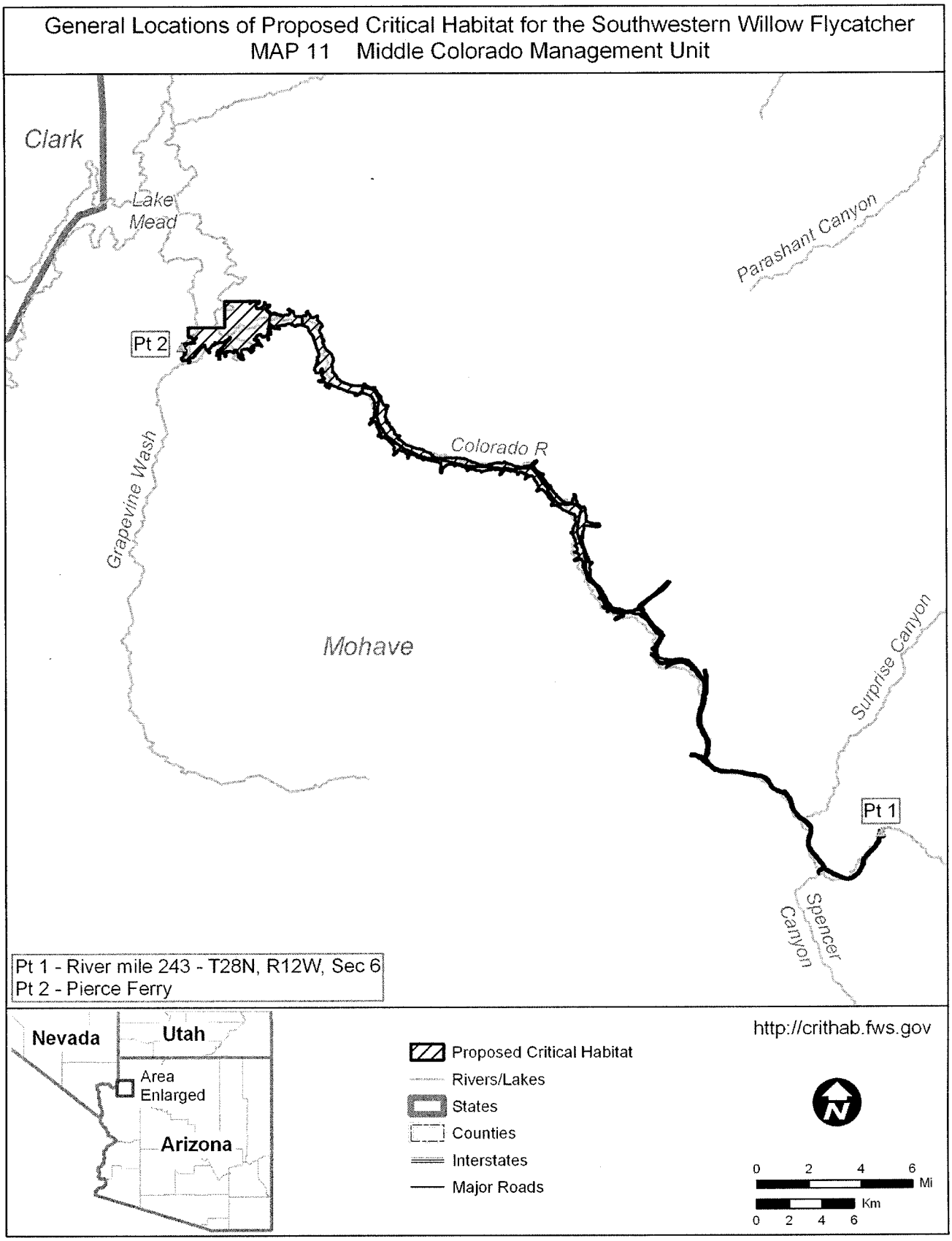


(15) Middle Colorado Management Unit.

(i)

River	Start latitude	Start longitude	End latitude	End longitude
Colorado River	35.8443526	−113.6159408	36.1159593	−114.0033871

(ii) Map 11—Middle Colorado Management Unit follows:

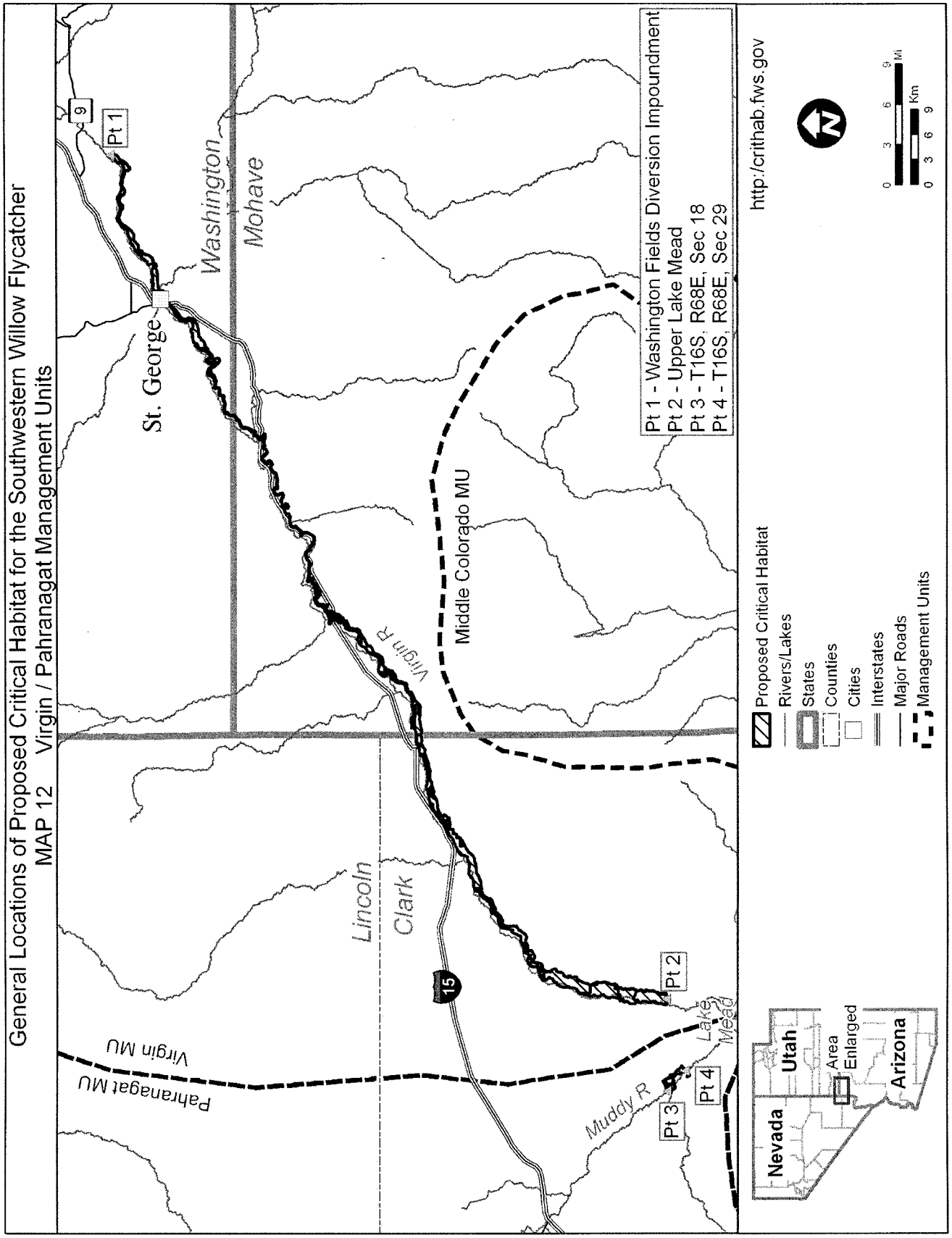


(16) Virgin/Pahranagat Management Units.

(i)

River	Start latitude	Start longitude	End latitude	End longitude
Muddy River	36.5140075	−114.4123629	36.5336836	−114.4343674
Virgin River—West	37.1329239	−113.4229921	36.5346429	−114.3354008

(ii) Map 12—Virgin/Pahranagat Management Units follows:

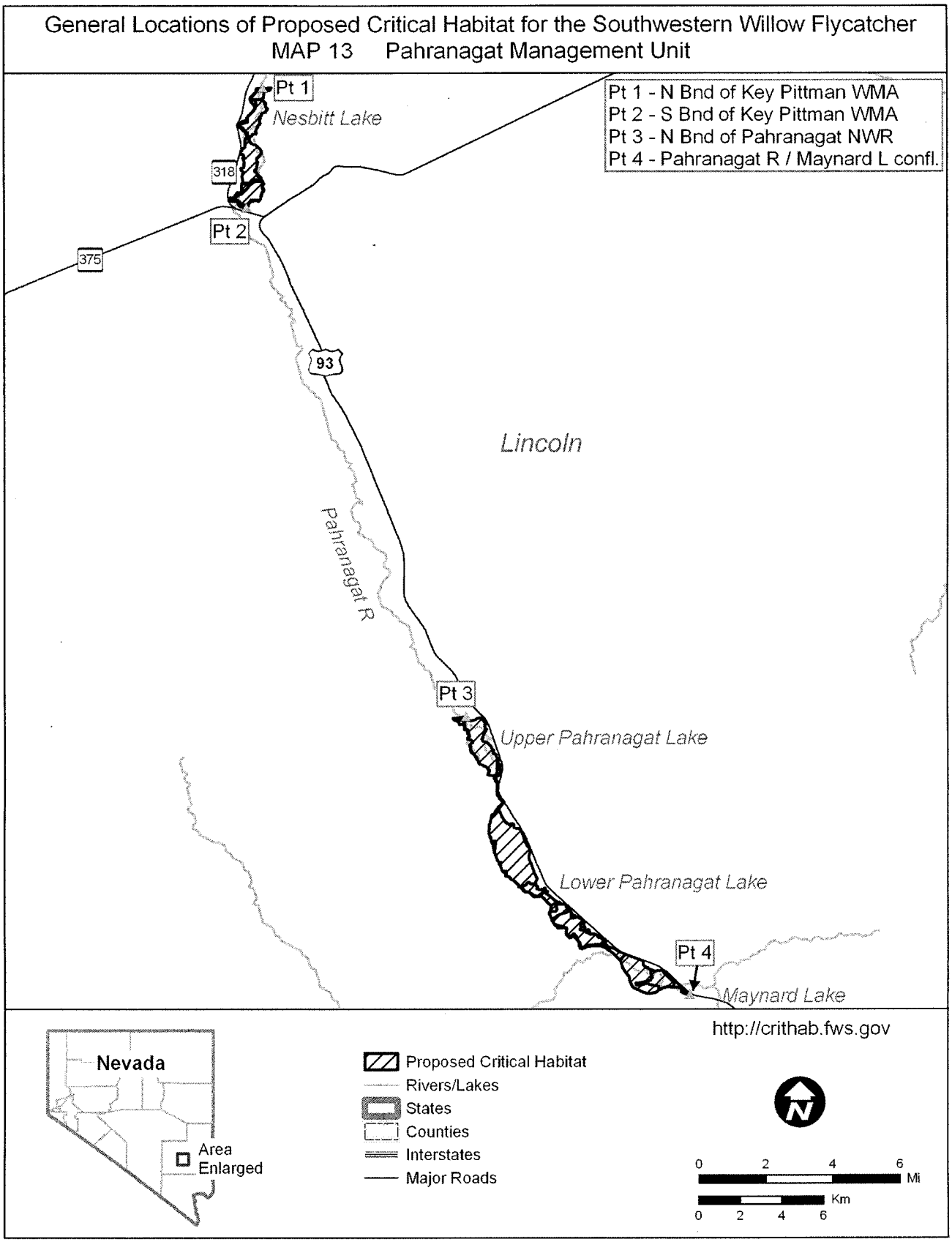


(17) Pahranagat Management Unit.

(i)

River	Start latitude	Start longitude	End latitude	End longitude
Pahranagat River—Lower	37.3124639	−115.1330109	37.1922659	−115.0364699
Pahranagat River—Upper	37.5845160	−115.2202901	37.5328633	−115.2273109

(ii) Map 13—Pahranagat Management Unit follows:



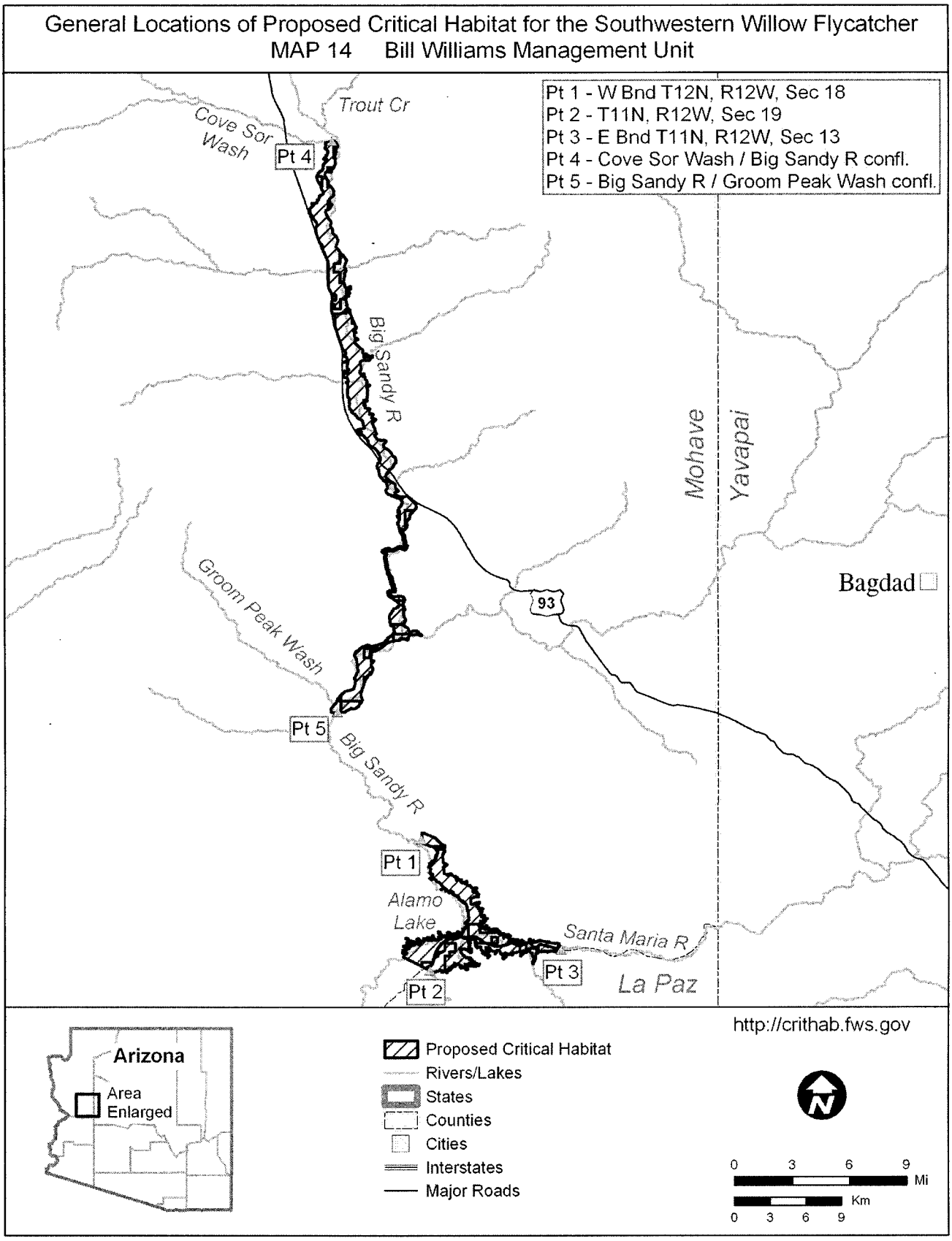
(18) Bill Williams Management Unit.

(i)

River	Start latitude	Start longitude	End latitude	End longitude
Upper Alamo Lake*	34.3829524	−113.5559941	34.2842321	−113.5495648
Upper Alamo Lake*			34.2998343	−113.4512025
Upper Big Sandy River	34.4796522	−113.6186975	34.9112373	−113.6225226

* Upper Alamo Lake is a Y-shaped complex.

(ii) Map 14—Bill Williams Management Unit follows:

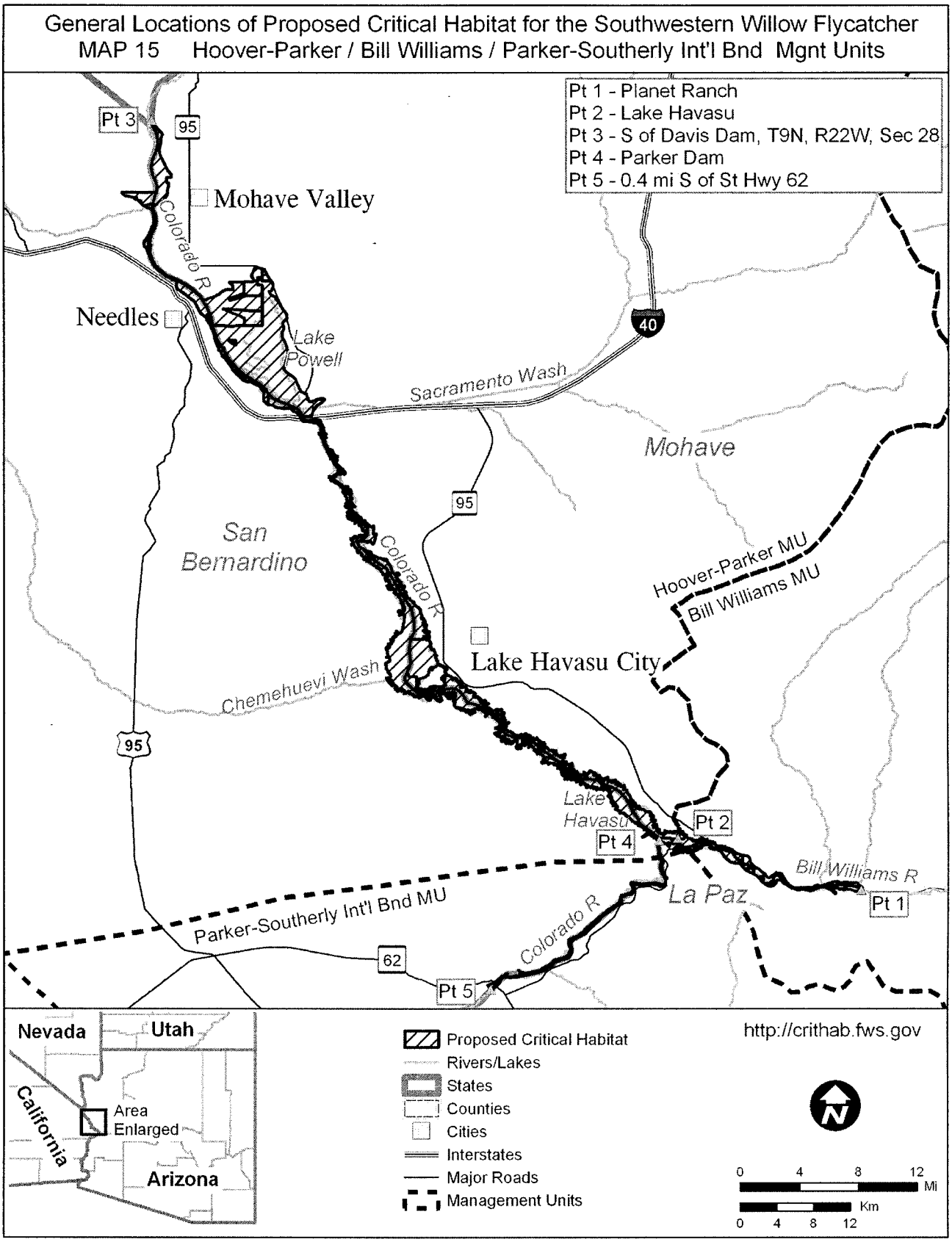

General Locations of Proposed Critical Habitat for the Southwestern Willow Flycatcher
MAP 14 Bill Williams Management Unit
Pt 1 - W Bnd T12N, R12W, Sec 18
Pt 2 - T11N, R12W, Sec 19
Pt 3 - E Bnd T11N, R12W, Sec 13
Pt 4 - Cove Sor Wash / Big Sandy R confl.
Pt 5 - Big Sandy R / Groom Peak Wash confl.
Trout Cr
Cove Sor Wash
Pt 4
Big Sandy R
Mohave
Yavapai
Bagdad
93
Groom Peak Wash
Pt 5
Big Sandy R
Pt 1
Alamo Lake
Santa Maria R
Pt 3
Pt 2
La Paz
http://crithab.fws.gov
Arizona
Area Enlarged
Proposed Critical Habitat
Rivers/Lakes
States
Counties
Cities
Interstates
Major Roads
0 3 6 9 Mi
0 3 6 9 Km

(19) Hoover-Parker/Bill Williams/Parker-Southerly International Boundary Management Unit.

(i)

River	Start latitude	Start longitude	End latitude	End longitude
Bill Williams River	34.2526452	−113.9402190	34.3034350	−114.1201040
Lower Colorado River—North	35.0091810	−114.6338947	34.3011066	−114.1382349
Lower Colorado River—South (upper)	34.3010813	−114.1381195	34.1552145	−114.3033009

(ii) Map 15—Hoover-Parker/Bill Williams/Parker-Southerly International Boundary Management Units follows:

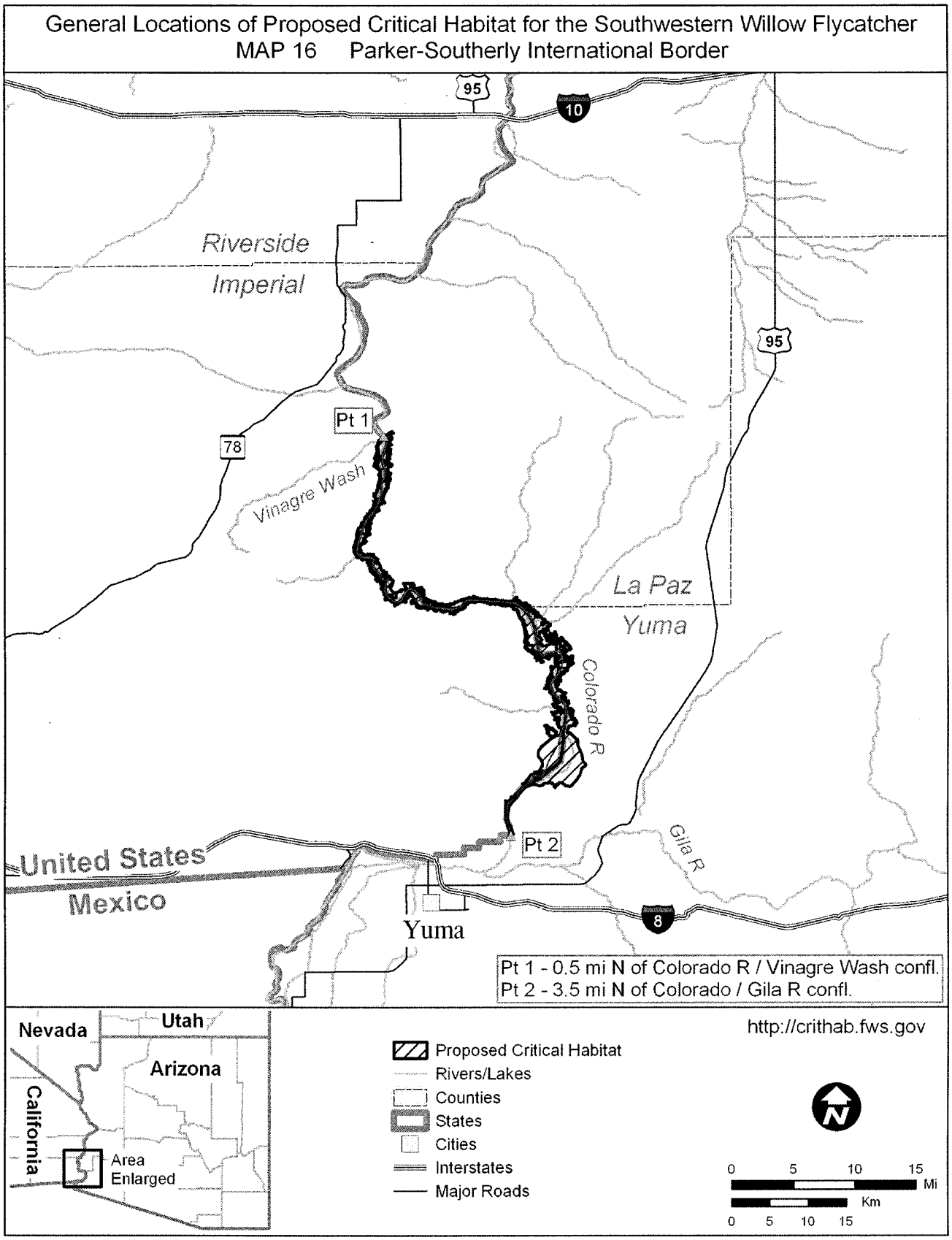


(20) Parker-Southerly International Border.

(i)

River	Start latitude	Start longitude	End latitude	End longitude
Lower Colorado River—South (lower)	33.2285723	−114.6765900	32.7561894	−114.5267206

(ii) Map 16—Parker-Southerly International Border follows:

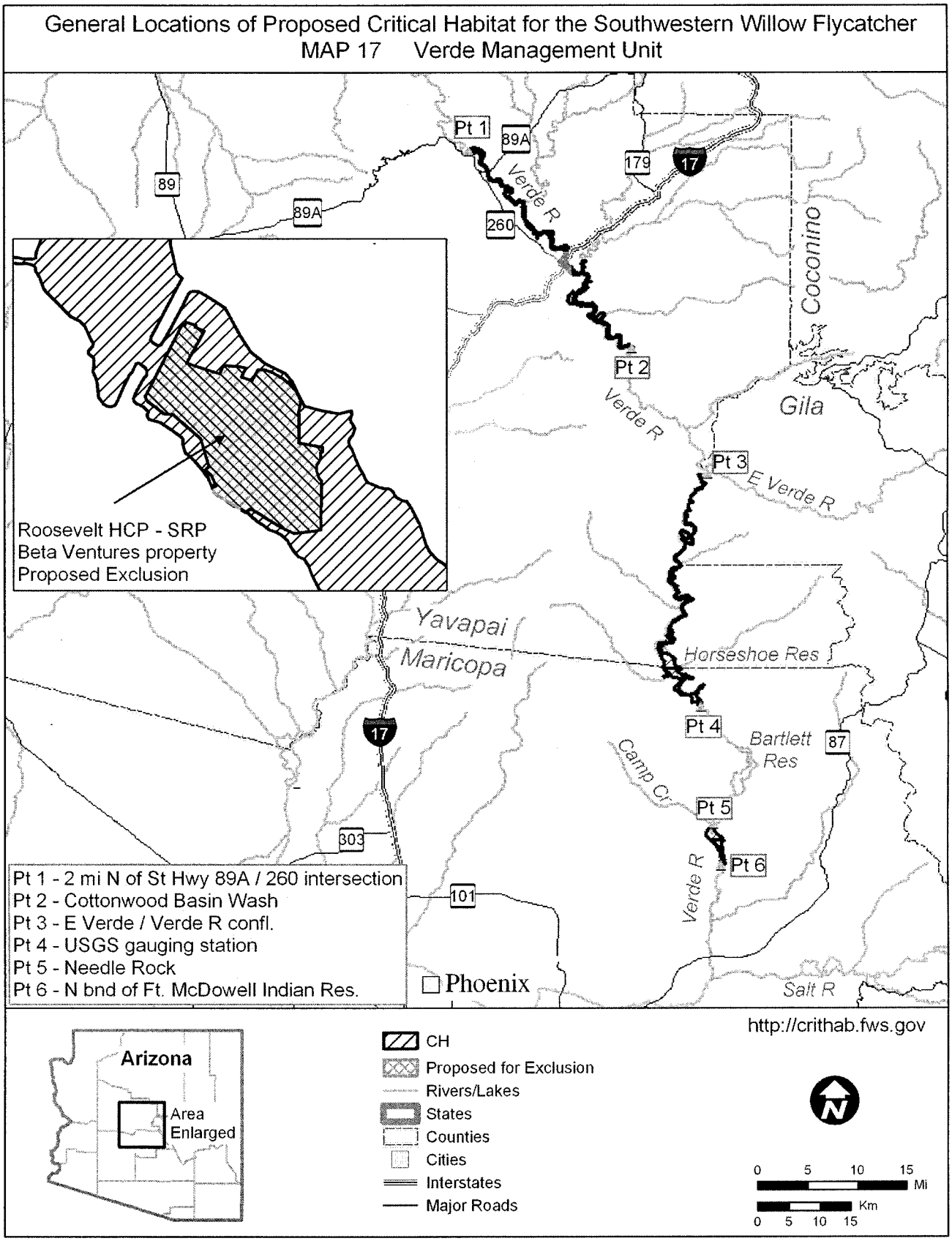


(21) Verde Management Unit.

(i)

River	Start latitude	Start longitude	End latitude	End longitude
Verde—Lower	33.7743970	−111.6633289	33.7142058	−111.6531705
Verde—Middle	34.2843094	−111.6725753	33.9448968	−111.6823831
Verde—Upper	34.4659344	−111.7813345	34.7507638	−112.0175752

(ii) Map 17—Verde Management Unit follows:

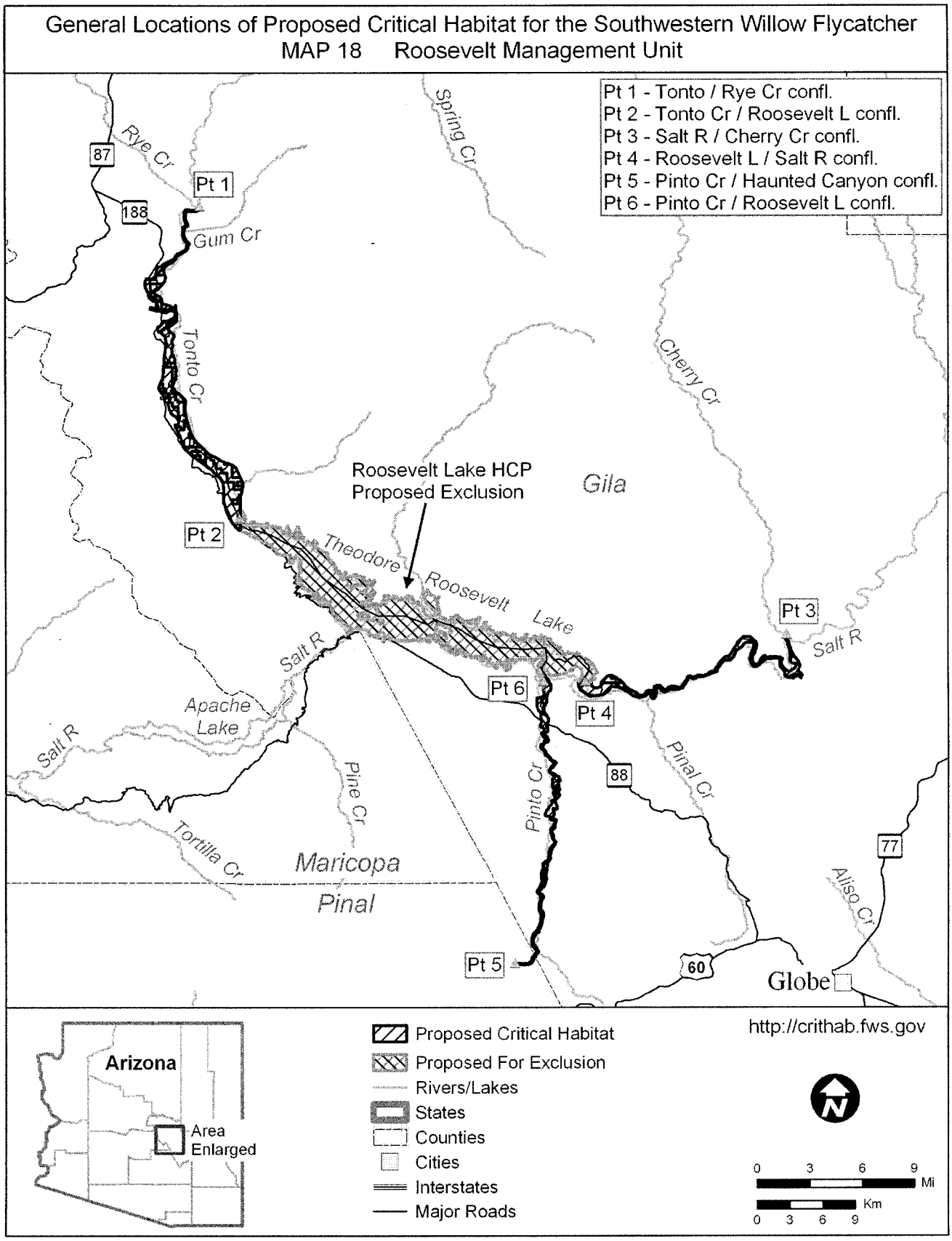


(22) Roosevelt Management Unit.

(i)

River	Start latitude	Start longitude	End latitude	End longitude
Pinto Creek	33.6319457	−111.0001427	33.3993235	−111.0238060
Roosevelt Lake	33.7665032	−111.2500069	33.6318096	−110.9665008
Salt River	33.6709319	−110.8009912	33.6317484	−110.9653018
Tonto Creek	33.7672729	−111.2499979	34.0240732	−111.2823461

(ii) Map 18—Roosevelt Management Unit follows:

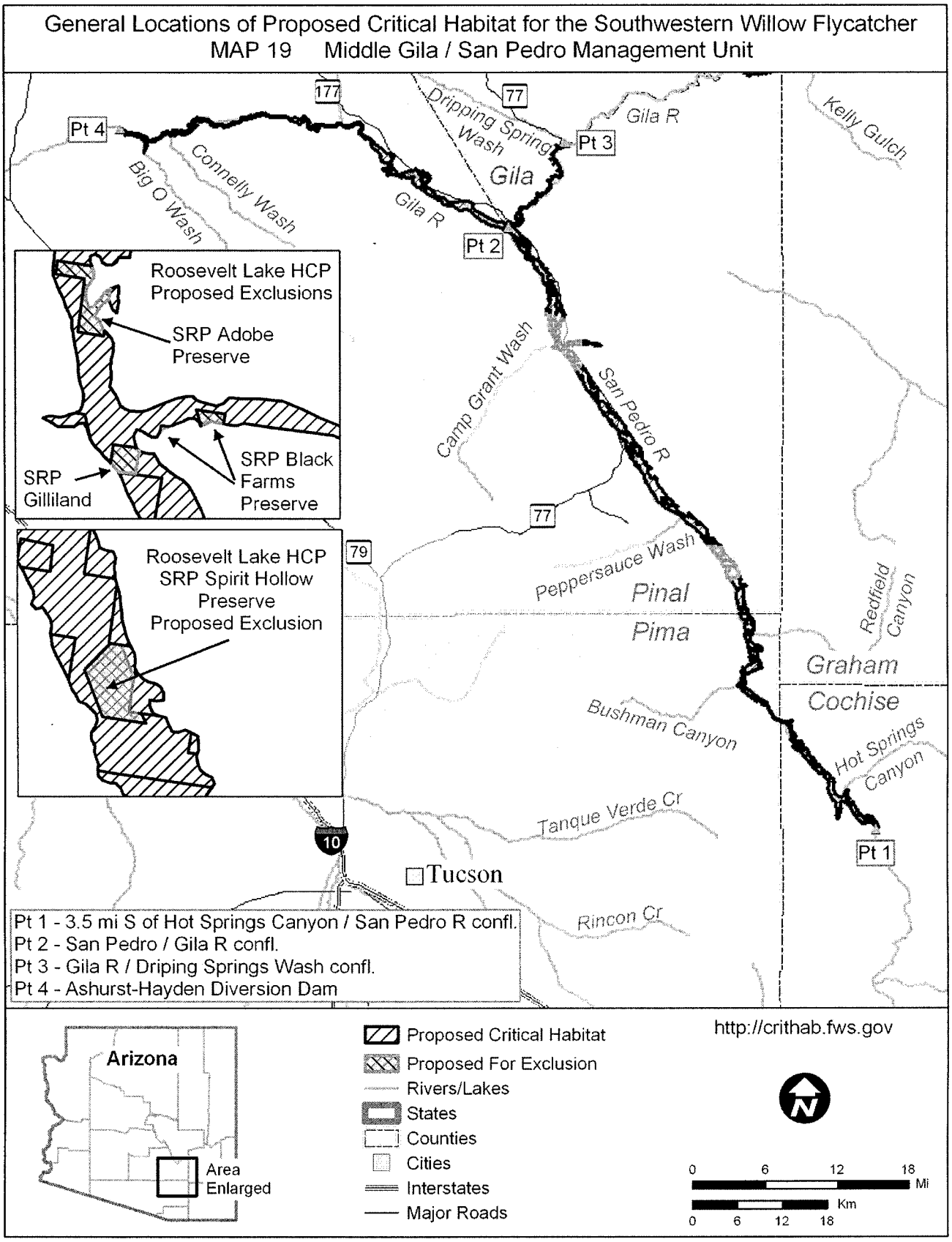


(23) Middle Gila/San Pedro Management Unit.

(i)

River	Start latitude	Start longitude	End latitude	End longitude
Middle and Lower San Pedro River	32.9813209	−110.7787941	32.2524908	−110.3351882
Middle Gila River	33.0828336	−110.7093399	33.0999487	−111.2463066

(ii) Map 19—Middle Gila/San Pedro Management Unit follows:

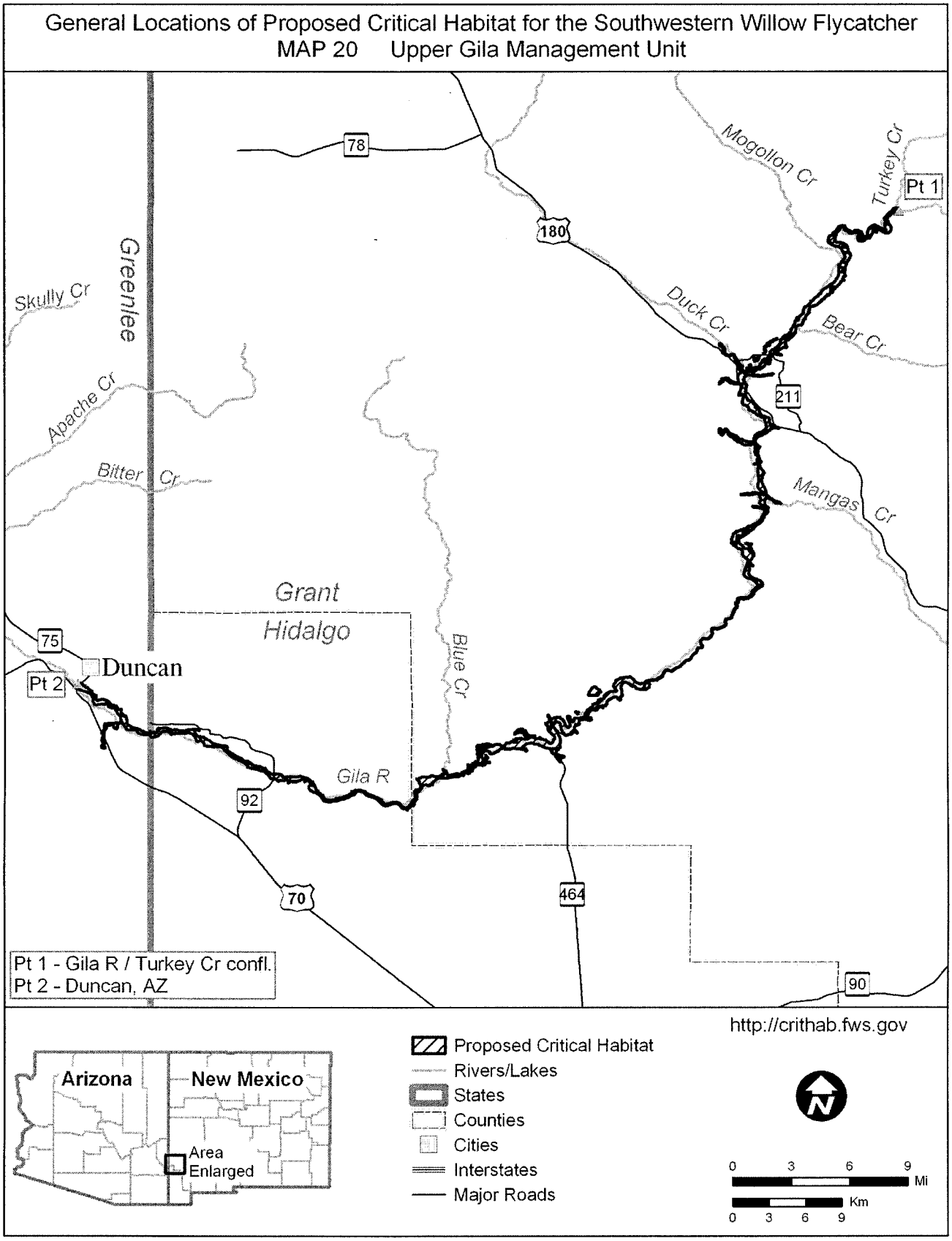


(24) Upper Gila Management Unit.

(i)

River	Start latitude	Start longitude	End latitude	End longitude
Upper Gila River	33.0767407	−108.4911633	32.7238876	−109.1012460

(ii) Map 20—Upper Gila Management Unit follows:

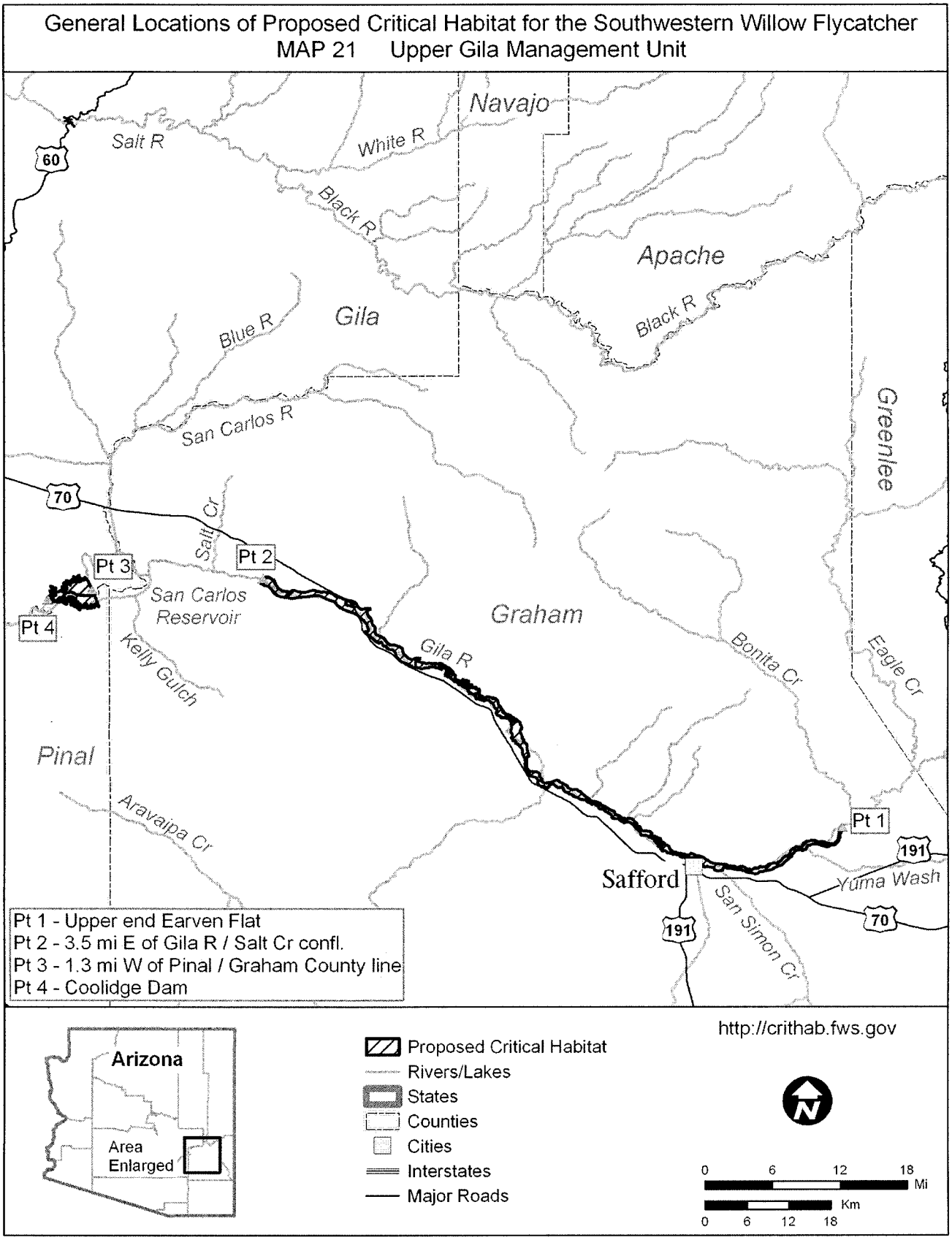


(25) Upper Gila Management Unit.

(i)

River	Start latitude	Start longitude	End latitude	End longitude
Gila River—East	32.8823856	−109.5068860	33.2039473	−110.2520317
Gila River—West	33.1770897	−110.5285400	33.1894940	−110.4710587

(ii) Map 21—Upper Gila Management Unit follows:

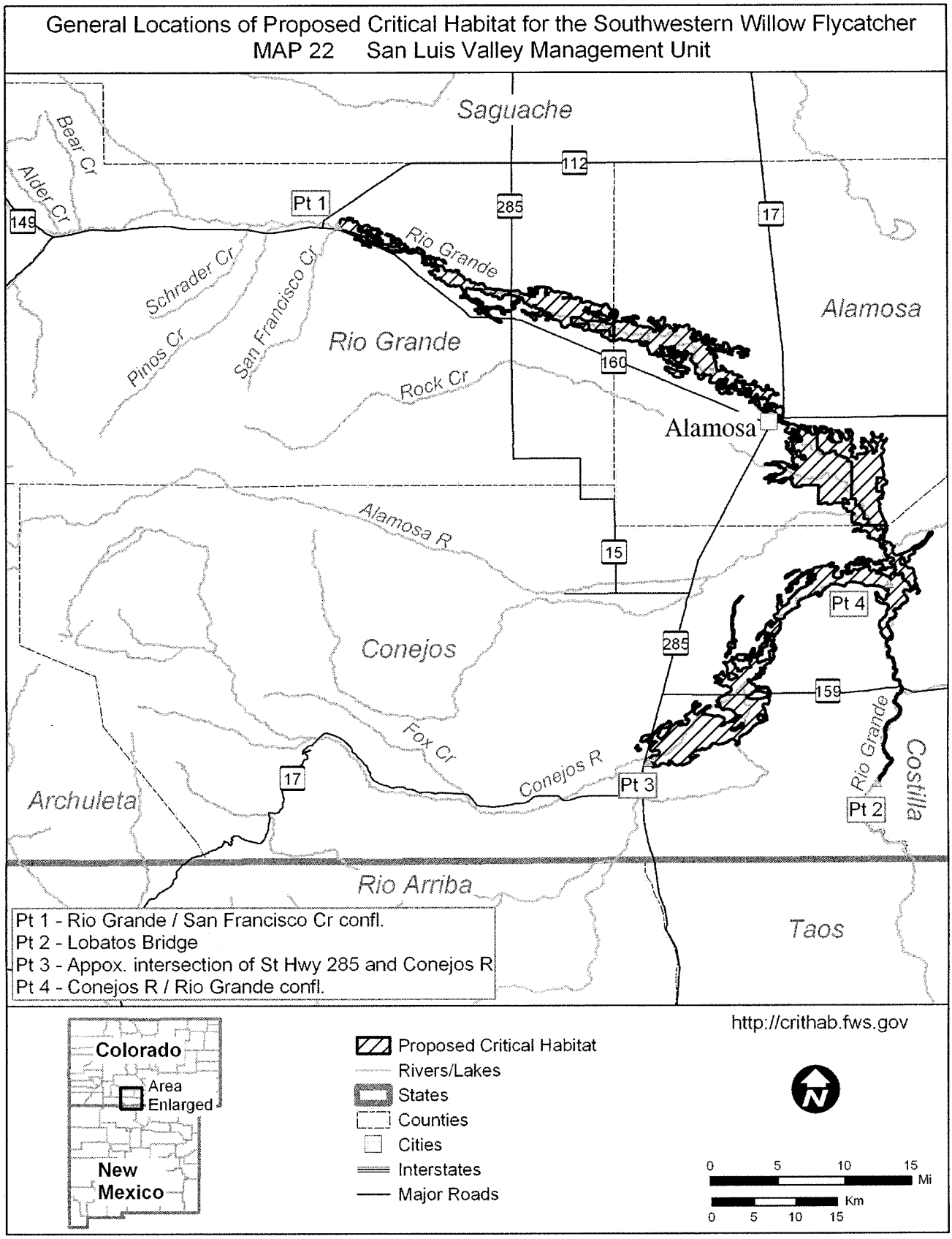


(26) San Luis Valley Management Unit.

(i)

River	Start latitude	Start longitude	End latitude	End longitude
Conejos River	37.2938417	−105.7433505	37.1009161	−106.0030246
Rio Grande—Upper	37.0784038	−105.7565938	37.6808883	−106.3352071

(ii) Map 22—San Luis Valley Management Unit follows:

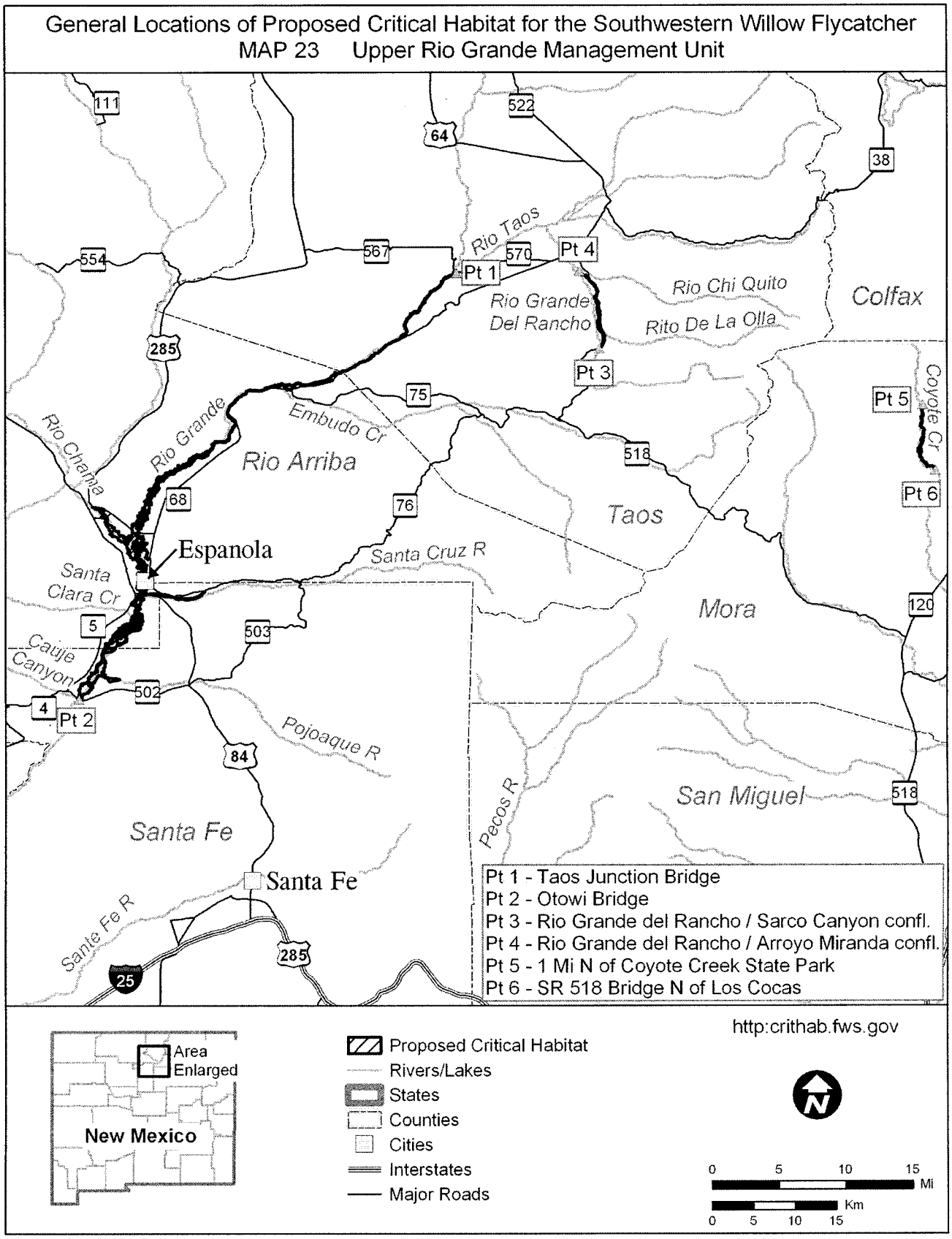


(27) Upper Rio Grande Management Unit.

(i)

River	Start latitude	Start longitude	End latitude	End longitude
Coyote Creek	36.1939559	−105.2308813	36.1229132	−105.2175662
Rio Grande—Middle	35.8746413	−106.1405919	36.3361484	−105.7338054
Rio Grande del Rancho	36.2547823	−105.5796721	36.3386111	−105.6010574

(ii) Map 23—Upper Rio Grande Management Unit follows:

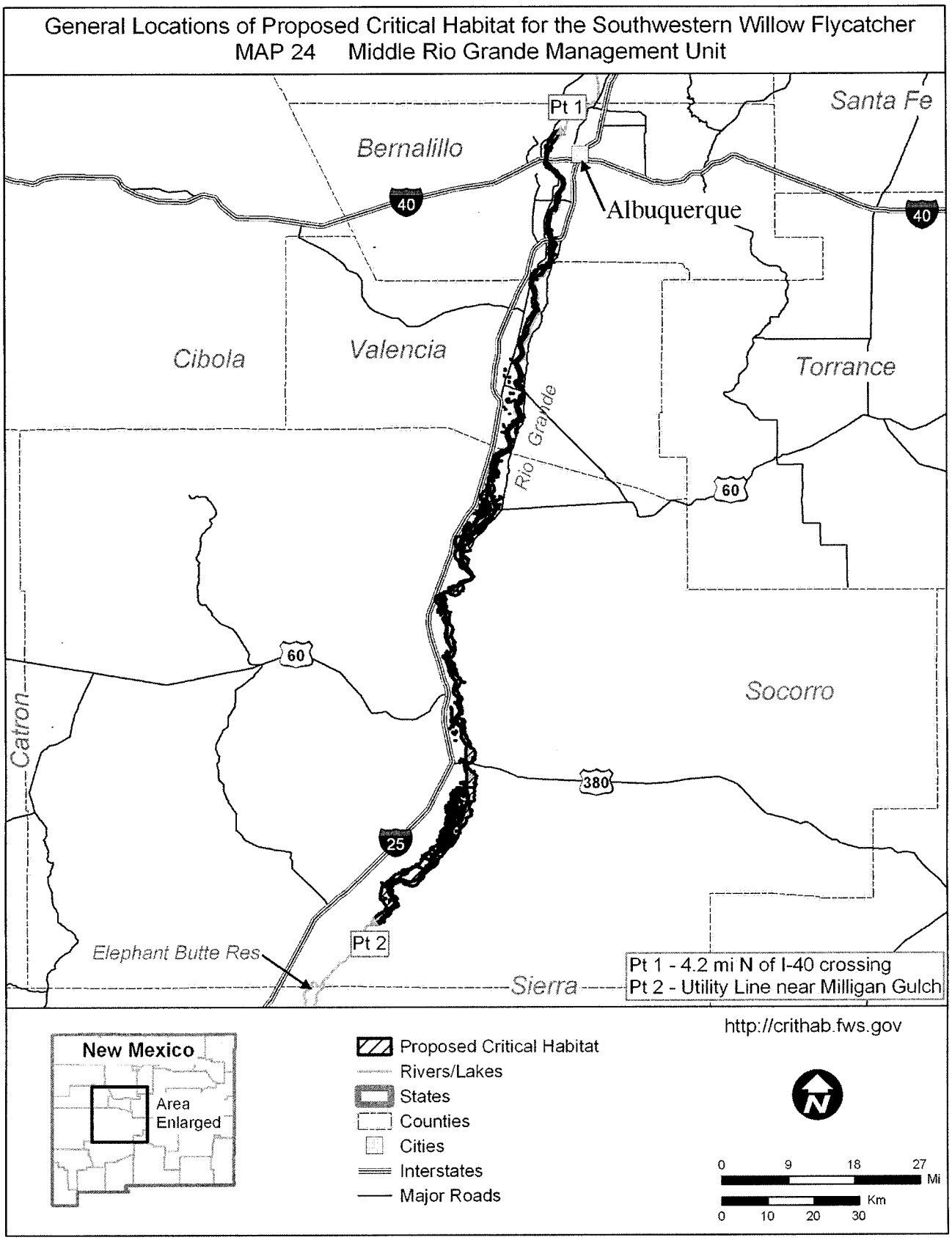


(28) Middle Rio Grande Management Unit.

(i)

River	Start latitude	Start longitude	End latitude	End longitude
Rio Grande—Lower	33.6064073	−107.0328265	35.1641318	−106.6627928

(ii) Map 24—Middle Rio Grande Management Unit follows:


General Locations of Proposed Critical Habitat for the Southwestern Willow Flycatcher
MAP 24 Middle Rio Grande Management Unit
Pt 1
Santa Fe
Bernalillo
Albuquerque
40
40
Cibola
Valencia
Torrance
Rio Grande
60
60
Socorro
Catron
380
25
Pt 2
Elephant Butte Res
Sierra
Pt 1 - 4.2 mi N of I-40 crossing
Pt 2 - Utility Line near Milligan Gulch
http://crithab.fws.gov
New Mexico
Area Enlarged
Proposed Critical Habitat
Rivers/Lakes
States
Counties
Cities
Interstates
Major Roads
N
0 9 18 27 Mi
0 10 20 30 Km

Dated: September 30, 2004.

Julie MacDonald,

Acting Assistant Secretary for Fish and Wildlife and Parks.

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