

- *Mail*: Send written comments to Juiyu Hsieh, RCRA Waste Management and UST Section, Office of Site Remediation and Restoration (OSRR07-1), EPA New England—Region 1, 5 Post Office Square, Suite 100, Boston, MA 02109-3912

- *Hand Delivery or Courier*: Deliver your comments to: Juiyu Hsieh, RCRA Waste Management and UST Section, Office of Site Remediation and Restoration (OSRR07-1), EPA New England—Region 1, 5 Post Office Square, Suite 100, Boston, MA 02109-3912. Such deliveries are only accepted during the Office's normal hours of operation.

For detailed instructions on how to submit comments, please see the direct final rule which is located in the Rules section of this **Federal Register**.

**FOR FURTHER INFORMATION CONTACT:** Juiyu Hsieh at (617) 918-1646 or by email at [hsieh.juiyu@epa.gov](mailto:hsieh.juiyu@epa.gov).

**SUPPLEMENTARY INFORMATION:** In the Rules section of this **Federal Register**, EPA is approving Massachusetts's Research Development and Demonstration (RD&D) permit program through a direct final rule without prior proposal because the Agency views this as a noncontroversial action and anticipates no adverse comments to this action. Unless we get written adverse comments which oppose this approval during the comment period, the direct final rule will become effective on the date it establishes, and we will not take further action on this proposal. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule. EPA will not institute a second comment period on this action. Any parties interested in commenting on this action should do so at this time. For additional information, see the direct rule which is located in the Rules section of this **Federal Register**.

Dated: January 4, 2013.

**Ira W. Leighton,**

*Acting Regional Administrator, EPA New England, Region 1.*

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## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### 50 CFR Part 17

[Docket No. FWS-R2-ES-2013-0002; 4500030114]

RIN 1018-AZ23

#### Endangered and Threatened Wildlife and Plants; Proposed Designation of Critical Habitat for the Zuni Bluehead Sucker

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Proposed rule.

**SUMMARY:** We, the U.S. Fish and Wildlife Service, propose to designate critical habitat for the Zuni bluehead sucker. If we finalize this rule as proposed, it would extend the Act's protections to this subspecies' critical habitat. The effect of these regulations will be to protect the Zuni bluehead sucker's habitat under the Act.

**DATES:** We will accept comments received or postmarked on or before March 26, 2013. Comments submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES** section, below) must be received by 11:59 p.m. Eastern Time on the closing date. We must receive requests for public hearings, in writing, at the address shown in **FOR FURTHER INFORMATION CONTACT** by March 11, 2013.

**ADDRESSES:** You may submit comments by one of the following methods:

(1) *Electronically*: Go to the Federal eRulemaking Portal: <http://www.regulations.gov>. In the Search box, enter FWS-R2-ES-2013-0002, which is the docket number for this rulemaking. Then, in the Search panel on the left side of the screen, under the Document Type heading, click on the Proposed Rules link to locate this document. You may submit a comment by clicking on "Comment Now!"

(2) *By hard copy*: Submit by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS-R2-ES-2013-0002; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, MS 2042-PDM; Arlington, VA 22203.

We request that you send comments only by the methods described above. We will post all comments on <http://www.regulations.gov>. This generally means that we will post any personal information you provide us (see the Public Comments section below for more information).

The coordinates or plot points or both from which the critical habitat maps are generated are included in the administrative record for this rulemaking and are available at <http://www.fws.gov/southwest/es/NewMexico/>, <http://www.regulations.gov> at Docket No. FWS-R2-ES-2013-0002, and at the New Mexico Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**). Any additional tools or supporting information that we may develop for this rulemaking will also be available at the Fish and Wildlife Service Web site and Field Office set out above, and may also be included in the preamble and/or at [www.regulations.gov](http://www.regulations.gov).

**FOR FURTHER INFORMATION CONTACT:** Wally "J" Murphy, Field Supervisor, U.S. Fish and Wildlife Service, New Mexico Ecological Services Field Office, 2105 Osuna NE., Albuquerque, NM 87113, by telephone 505-346-2525 or by facsimile 505-346-2542. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800-877-8339.

#### SUPPLEMENTARY INFORMATION:

##### Executive Summary

Why we need to publish a rule. Under the Act, once a species is determined to be an endangered or threatened species throughout all or a significant portion of its range, we are required to promptly publish a proposal in the **Federal Register** and make a determination on our proposal within 1 year. Additionally, critical habitat shall be designated, to the maximum extent prudent and determinable, for any species determined to be an endangered or threatened species under the Act. Designations and revisions of critical habitat can only be completed by issuing a rule. Elsewhere in today's **Federal Register**, we propose to list the Zuni bluehead sucker as an endangered species under the Act.

This rule consists of: A proposed rule for designation of critical habitat for the Zuni bluehead sucker. The Zuni bluehead sucker has been proposed for listing under the Act. This rule proposes designation of critical habitat necessary for the conservation of the species.

The basis for our action. Under the Act, when a species is proposed for listing, to the maximum extent prudent and determinable, we must designate critical habitat for the species. The species has been proposed for listing as endangered, and therefore, we also propose to designate approximately 472 km (293 mi) of stream habitat as critical habitat in Apache County, Arizona, and

Cibola, McKinley, and San Juan Counties, New Mexico, and on the Navajo Indian Reservation.

We will seek peer review. We are seeking comments from knowledgeable individuals with scientific expertise to review our analysis of the best available science and application of that science and to provide any additional scientific information to improve this proposed rule. Because we will consider all comments and information received during the comment period, our final determinations may differ from this proposal.

#### Information Requested

We intend that any final action resulting from this proposed rule will be based on the best scientific and commercial data available and be as accurate and as effective as possible. Therefore, we request comments or information from the public, other concerned governmental agencies, Native American tribes, the scientific community, industry, or any other interested parties concerning this proposed rule. We particularly seek comments concerning:

(1) The reasons why we should or should not designate habitat as “critical habitat” under section 4 of the Act (16 U.S.C. 1531 *et seq.*), including whether there are threats to the species from human activity, the degree of which can be expected to increase due to the designation, and whether that increase in threats outweighs the benefit of designation such that the designation of critical habitat is not prudent.

(2) Specific information on:

(a) The amount and distribution of the Zuni bluehead sucker and its habitat;

(b) What may constitute “physical or biological features essential to the conservation of the species,” within the geographical range currently occupied by the species;

(c) Where these features are currently found;

(d) Whether any of these features may require special management considerations or protection;

(e) What areas, that were occupied at the time of listing (or are currently occupied) and that contain features essential to the conservation of the species, should be included in the designation and why; and

(f) What areas not occupied at the time of listing are essential for the conservation of the species and why.

(3) Land use designations and current or planned activities in the areas occupied by the species or proposed to be designated as critical habitat, and possible impacts of these activities on

this species and proposed critical habitat.

(4) Information on the projected and reasonably likely impacts of climate change on the Zuni bluehead sucker and proposed critical habitat.

(5) Any foreseeable economic, national security, or other relevant impacts that may result from designating any area that may be included in the final designation. We are particularly interested in any impacts on small entities, and the benefits of including or excluding areas from the proposed designation that are subject to these impacts.

(6) Whether our approach to designating 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.

(7) The likelihood of adverse social reactions to the designation of critical habitat and how the consequences of such reactions, if likely to occur, would relate to the conservation and regulatory benefits of the proposed critical habitat designation.

Please include sufficient information with your submission (such as scientific journal articles or other publications) to allow us to verify any scientific or commercial information you include.

Please note that submissions merely stating support for or opposition to the action under consideration without providing supporting information, although noted, will not be considered in making a determination, as section 4(b)(1)(A) of the Act directs that determinations as to whether any species is a threatened or endangered species must be made “solely on the basis of the best scientific and commercial data available.”

You may submit your comments and materials concerning this proposed rule by one of the methods listed in the **ADDRESSES** section. We request that you send comments only by the methods described in the **ADDRESSES** section.

If you submit information via <http://www.regulations.gov>, your entire submission—including any personal identifying information—will be posted on the Web site. If your submission is made via a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on <http://www.regulations.gov>. Please include sufficient information with your comments to allow us to verify any

scientific or commercial information you include.

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on <http://www.regulations.gov>, or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, New Mexico Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

#### Previous Federal Actions

All previous Federal actions are described in the proposal to list the Zuni bluehead sucker as an endangered species under the Act published elsewhere in today’s **Federal Register**.

#### Critical Habitat Designation for the Zuni Bluehead Sucker

##### Background

Critical habitat is defined in section 3 of the Act as:

(1) The specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the Act, on which are found those physical or biological features:

(a) Essential to the conservation of the species, and

(b) Which may require special management considerations or protection; and

(2) Specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Conservation, as defined under section 3 of the Act, means to use and the use of all methods and procedures that are necessary to bring an endangered or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

Critical habitat receives protection under section 7 of the Act through the requirement that Federal agencies ensure, in consultation with the Service, that any action they authorize, fund, or carry out is not likely to result in the destruction or adverse modification of

critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation does not allow the government or public to access private lands. Such designation does not require implementation of restoration, recovery, or enhancement measures by non-Federal landowners. Where a landowner requests Federal agency funding or authorization for an action that may affect a listed species or critical habitat, the consultation requirements of section 7(a)(2) of the Act would apply, but even in the event of a destruction or adverse modification finding, the obligation of the Federal action agency and the landowner is not to restore or recover the species, but to implement reasonable and prudent alternatives to avoid destruction or adverse modification of critical habitat.

Under the first prong of the Act's definition of critical habitat, areas within the geographical area occupied by the species at the time it was listed are included in a critical habitat designation if they contain physical or biological features (1) essential to the conservation of the species, and (2) which may require special management considerations or protection. For these areas, critical habitat designations identify, to the extent known using the best scientific and commercial data available, those physical or biological features essential to the conservation of the species (such as space, food, cover, and protected habitat). In identifying those physical or biological features within an area, we focus on the principal biological or physical constituent elements (primary constituent elements such as roost sites, nesting grounds, seasonal wetlands, water quality, tide, soil type) that are essential to the conservation of the species. Primary constituent elements are those specific elements of the physical or biological features that provide for a species' life-history processes and are essential to the conservation of the species.

Under the second prong of the Act's definition of critical habitat, we can designate critical habitat in areas outside the geographic area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. For example, an area currently occupied by the species but that was not occupied at the time of listing may be essential to the conservation of the species and may be included in the critical habitat designation. We designate critical habitat in areas

outside the geographic area occupied by a species only when a designation limited to its range would be inadequate to ensure the conservation of the species.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific data available. Further, our Policy on Information Standards Under the Endangered Species Act (published in the **Federal Register** on July 1, 1994 (59 FR 34271)), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106-554; H.R. 5658)), and our associated Information Quality Guidelines, provide criteria, establish procedures, and provide guidance to ensure that our decisions are based on the best scientific data available. They require our biologists, to the extent consistent with the Act and with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat.

When we are determining which areas should be designated as critical habitat, our primary source of information is generally the information developed during the listing process for the species. Additional information sources may include the recovery plan for the species, articles in peer-reviewed journals, conservation plans developed by States and counties, scientific status surveys and studies, biological assessments, other unpublished materials, or experts' opinions or personal knowledge.

Habitat is dynamic, and species may move from one area to another over time. Climate change will be a particular challenge for biodiversity because the interaction of additional stressors associated with climate change and current stressors may push species beyond their ability to survive (Lovejoy 2005, pp. 325-326). The synergistic implications of climate change and habitat fragmentation are the most threatening facet of climate change for biodiversity (Hannah and Lovejoy 2005, p. 4). Current climate change predictions for terrestrial areas in the Northern Hemisphere indicate warmer air temperatures, more intense precipitation events, and increased summer continental drying (Field *et al.* 1999, pp. 1-3; Hayhoe *et al.* 2004, p. 12422; Cayan *et al.* 2005, p. 6; Intergovernmental Panel on Climate Change (IPCC) 2007, p. 1181). Climate change may lead to increased frequency and duration of severe storms and droughts (Golladay *et al.* 2004, p. 504;

McLaughlin *et al.* 2002, p. 6074; Cook *et al.* 2004, p. 1015).

We recognize that critical habitat designated at a particular point in time may not include all of the habitat areas that we may later determine are necessary for the recovery of the species. For these reasons, a critical habitat designation does not signal that habitat outside the designated area is unimportant or may not be needed for recovery of the species. Areas that are important to the conservation of the species, both inside and outside the critical habitat designation, will continue to be subject to: (1) Conservation actions implemented under section 7(a)(1) of the Act, (2) regulatory protections afforded by the requirement in section 7(a)(2) of the Act for Federal agencies to ensure their actions are not likely to jeopardize the continued existence of any endangered or threatened species, and (3) section 9 of the Act's prohibitions on taking any individual of the species, including taking caused by actions that affect habitat. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. These protections and conservation tools will continue to contribute to recovery of this species. 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 (HCPs), or other species conservation planning efforts if new information available at the time of these planning efforts calls for a different outcome.

#### *Prudence Determination*

Section 4(a)(3) of the Act, as amended, and implementing regulations (50 CFR 424.12), require that, to the maximum extent prudent and determinable, the Secretary designate critical habitat at the time the species is determined to be an endangered or threatened species. Our regulations (50 CFR 424.12(a)(1)) state that the designation of critical habitat is not prudent when one or both of the following situations exist: (1) The species is threatened by taking or other human activity, and identification of critical habitat can be expected to increase the degree of threat to the species, or (2) such designation of critical habitat would not be beneficial to the species.

There is currently no immediate threat of take attributed to collection or vandalism under Factor B for this species, and identification and mapping

of critical habitat is not expected to initiate any such threat. In the absence of finding that the designation of critical habitat would increase threats to a species, if there are any benefits to a critical habitat designation, then a prudent finding is warranted. Here, the potential benefits of designation include: (1) Triggering consultation under section 7 of the Act, in new areas for actions in which there may be a Federal nexus where it would not otherwise occur because, for example, it is or has become unoccupied or the occupancy is in question; (2) focusing conservation activities on the most essential features and areas; (3) providing educational benefits to State or county governments or private entities; and (4) preventing people from causing inadvertent harm to the species. Therefore, because we have determined that the designation of critical habitat will not likely increase the degree of threat to the species and may provide some measure of benefit, we find that designation of critical habitat is prudent for the Zuni bluehead sucker.

#### Critical Habitat Determinability

Having determined that designation is prudent, under section 4(a)(3) of the Act, we must find whether critical habitat for the Zuni bluehead sucker is determinable. Our regulations at 50 CFR 424.12(a)(2) state that critical habitat is not determinable when one or both of the following situations exist:

- (i) Information sufficient to perform required analyses of the impacts of the designation is lacking, or
- (ii) The biological needs of the species are not sufficiently well known to permit identification of an area as critical habitat.

When critical habitat is not determinable, the Act allows the Service an additional year to publish a critical habitat designation (16 U.S.C. 1533(b)(6)(C)(ii)).

We reviewed the available information pertaining to the biological needs of the species and habitat characteristics where the species is located. This and other information represent the best scientific data available and led us to conclude that the designation of critical habitat is determinable for the Zuni bluehead sucker.

#### Physical or Biological Features

In accordance with section 3(5)(A)(i) and 4(b)(1)(A) of the Act and regulations at 50 CFR 424.12, in determining which areas within the geographic area occupied by the species at the time of listing to designate as critical habitat, we consider the physical or biological

features that are essential to the conservation of the species and which may require special management considerations or protection. These include, but are not limited to:

- (1) Space for individual and population growth and for normal behavior;
- (2) Food, water, air, light, minerals, or other nutritional or physiological requirements;
- (3) Cover or shelter;
- (4) Sites for breeding, reproduction, or rearing (or development) of offspring; and
- (5) Habitats that are protected from disturbance or are representative of the historical, geographic, and ecological distributions of a species.

We derive the specific physical or biological features required for the Zuni bluehead sucker from studies of this species' habitat, ecology, and life history as described below. Habitat needs for specific life stages for Zuni bluehead sucker have not been described; therefore, when necessary we will rely on information available for the bluehead sucker, which is closely related to the Zuni bluehead sucker.

#### Space for Individual and Population Growth and for Normal Behavior

Zuni bluehead sucker occur in stream habitats with abundant shade from overhanging vegetation and boulders, in pools, runs, and riffles with water velocities ranging from 0 to 0.35 m/sec (1.15 ft/sec) or less and ranging in depth from 0.2–2.0 m (7.9–78.7 in) (Hanson 1980, pp. 34, 42; Propst and Hobbes 1996, pp. 13, 16; Gilbert and Carmen 2011, pp. 8–10). Shade provided by the overhanging vegetation curtails water temperature fluctuations in small, headwater streams, such as those occupied by Zuni bluehead sucker (Whitledge *et al.* 2006, p. 1461). Substrate in Zuni bluehead sucker habitat ranges from silt and pebbles to cobbles, boulders, and bedrock (Hanson 1980, pp. 34, 42; Propst and Hobbes 1996, pp. 13, 16; Gilbert and Carmen 2011, pp. 8–10; NMDGF 2012). Clean substrate, such as gravel and coarse sand, free of silt, is necessary for spawning and egg development (Maddux and Kepner 1988, p. 364). Excessive levels of silt can inhibit egg and juvenile fish development through the clogging of the small spaces between substrate particles, which prevents the free flow of oxygenated water. Additionally, siltation can reduce the suitability of the habitat for prey organisms. Juvenile bluehead sucker have been found nearshore in slower and shallower habitats, then moving out into deeper water and faster flowing

habitat as they age (Childs *et al.* 1998, p. 624).

Water temperatures in occupied habitats in New Mexico have ranged from 9.9 to 25.2 degrees Celsius (°C) (49.8 to 77.3 degrees Fahrenheit (°F)) during survey efforts (Propst *et al.* 2001, p. 163; Gilbert and Carmen 2011, pp. 8–10). Year-round data loggers have recorded temperatures as low as –3.2°C (24.3 °F) and as high as 24.1°C (75.3 °F) (Gilbert and Carmen 2011, pp. 8–10).

Therefore, based on the information above, we identify the following habitat parameters as the physical or biological features for the Zuni bluehead sucker:

- A variety of stream habitats, including riffles, runs, and pools, with appropriate flows and substrates, with low to moderate amounts of fine sediment and substrate embeddedness, as maintained by natural, unregulated flow that allows for periodic flooding or, if flows are modified or regulated, flow patterns that allow the river to mimic natural functions, such as flows capable of transporting sediment.

#### Food, Water, Air, Light, Minerals, or Other Nutritional or Physiological Requirements

*Food.* The Zuni bluehead sucker is a benthic forager (eats food from the stream bottom) that scrapes algae, insects, and other organic and inorganic material from the surface of rocks (NMDGF 2004, p. 8). Stomach content analysis of Zuni bluehead suckers revealed small particulate organic matter, including detritus (nonliving organic material), algae, small midge (two-winged fly) larvae, caddisfly larvae, mayfly larvae, flatworms, and the occasional small terrestrial insects (Smith and Koehn 1979, p. 38). In addition, Smith and Koehn (1979, p. 38) also found fish scales, snails, and insect eggs in Zuni bluehead sucker stomachs.

The primary source of food for Zuni bluehead sucker is periphytic algae (algae attached to rocks), which occurs mainly on cobble, boulder, and bedrock substrates with clean flowing water. Diet preferences have been described for adults, but not for the remaining life stages of Zuni bluehead sucker. Larval bluehead suckers (<25 mm (approx.1 in) total length) feed on diatoms (a type of algae), zooplankton (small floating or swimming organisms that drift with water currents), and dipteran larvae (true fly larvae) in stream areas with low velocity or in backwater habitats (Muth and Snyder 1995, p. 100). Juvenile and adult bluehead sucker are reported primarily to eat a variety of inorganic material, organic material, and bottom-dwelling insects and other small organisms (Childs *et al.* 1998, p. 625;

Osmundson 1999, p. 28; Brooks *et al.* 2000, pp. 66–69).

Aquatic invertebrates are another important component of the Zuni bluehead sucker diet. These aquatic invertebrates have specific habitat requirements of their own. Both caddisflies and mayflies occur primarily in a wide variety of standing and running-water habitats with the greatest diversity being found in rocky-bottom streams with an abundance of oxygen (Merritt and Cummins 1996, pp. 126, 309). Caddisflies and mayflies feed on a variety of detritus, algae, diatoms, and macrophytes (aquatic plants) (Merritt and Cummins 1996, pp. 126, 309). Habitat that consists of rocky bottoms with periphytic algal growth is not only important to sustain aquatic invertebrate populations (a Zuni bluehead sucker food source), but also serves as a primary food resource of the Zuni bluehead sucker.

**Water.** As a purely aquatic species, Zuni bluehead sucker is entirely dependent on stream habitat for all stages of their life cycle. Therefore, perennial flows are an essential feature with appropriate seasonal flows to maintain habitat conditions that remove excess sediments. Areas with intermittent flows may serve as connective corridors between occupied or seasonally occupied habitat through which the species may move when the habitat is wetted.

There is very little information on water quality requirements for Zuni bluehead sucker. However, excessive sedimentation is the primary threat to water quality for the Zuni bluehead sucker (as discussed above), primarily due to its effects on reproduction and food resources. Turbidity (sediment suspended in the water column) can inhibit algae production through reducing sunlight penetration into the water.

Therefore, based on the information above, we identify the following prey base and water quality characteristics as physical or biological features for the Zuni bluehead sucker:

- An abundant source of algae production and an aquatic insect food base consisting of caddisflies, mayflies, midges, and various terrestrial insects;
- Streams with no harmful levels of pollutants;
- Areas devoid of sediment deposition;
- Perennial flows, or interrupted stream courses that are periodically dewatered but that serve as connective corridors between occupied or seasonally occupied habitat and through which the species may move when the habitat is wetted;

- Dynamic flows that allow for periodic changes in channel morphology.

#### Cover or Shelter

Cover from predation may be in the form of deep water or physical structure. Very little is known about habitat parameters specifically relating to cover for Zuni bluehead sucker. However, during surveys, Zuni bluehead sucker have been found in shaded pools and near boulder outcrops, which may be used for cover (Kitcheyan 2012, pers. comm.). Additionally, mature bluehead sucker are found in deeper water than larvae and in habitats with less woody cover than younger life stages, which are more vulnerable to predation (Childs *et al.* 1998, p. 624).

#### Sites for Breeding, Reproduction, or Rearing (or Development) of Offspring

Zuni bluehead sucker spawn from early April to early June when water temperatures are 6 to 15 °C (43 to 59 °F), peaking around 10 °C (50 °F) (Propst 1999, p. 50; Propst *et al.* 2001, p. 164). Zuni bluehead sucker may have two spawning periods, with the majority of the spawning effort expended early in the season (Propst *et al.* 2001, p. 158). Females in spawning condition have been found over gravel beds (Sublette *et al.* 1990, p. 210; Propst *et al.* 2001, p. 158). Clean substrates free of excessive sedimentation are essential for successful breeding (see *Habitat and Life History* section of our proposed listing rule published elsewhere in today's **Federal Register**). Periodic flooding removes excess silt and fine sand from the stream bottom, breaks up embedded bottom materials, and rearranges sediments in ways that promote algae production and create suitable habitats with silt-free substrates.

Therefore, based on the information above, we identify the following parameters for breeding, reproduction, or development of offspring as physical or biological features for the Zuni bluehead sucker:

- Gravel and cobble substrates;
- Pool habitat;
- Slower currents along stream margins with appropriate stream velocities for larvae;
- Instream flow velocities that are less than 35 cm/sec (1.1 ft/sec); and
- Dynamic flows that allow for periodic changes in channel morphology.

#### Habitats Protected From Disturbance or Representative of the Historical, Geographic, and Ecological Distributions of the Species

The Zuni bluehead sucker has a restricted geographic distribution. Endemic species (species that are exclusively native to a particular location) whose populations exhibit a high degree of isolation are extremely susceptible to extinction from both random and nonrandom catastrophic natural or human-caused events. Therefore, it is essential to maintain both springs and stream systems upon which the Zuni bluehead sucker depends. This means protection from disturbance caused by exposure to land management actions (logging, cattle grazing, and road construction), water contamination, water depletion, beaver dams, or nonnative species. The Zuni bluehead sucker must, at a minimum, sustain its current distribution for the species to continue to persist. Introduced species are a serious threat to native aquatic species (Miller 1961, pp. 365, 397–398; Lachner *et al.* 1970, p. 21; Ono *et al.* 1983, pp. 90–91; Carlson and Muth 1989, pp. 222, 234; Fuller *et al.* 1999, p. 1; Propst *et al.* 2008, pp. 1246–1251; Pilger *et al.* 2010, pp. 300, 311–312; see both *Factor C: Disease and Predation, and Factor E: Other Natural or Manmade Factors Affecting Its Continued Existence* sections of our proposed listing rule published elsewhere in today's **Federal Register**). Because the distribution of the Zuni bluehead sucker is so isolated and its habitat so restricted, introduction of certain nonnative species into its habitat could be devastating. Potentially harmful nonnative species include green sunfish, northern crayfish, fathead minnow, and other nonnative fish-eating fishes.

Zuni bluehead sucker typically inhabit small desert stream systems including isolated headwater springs, small headwater springs, and mainstem river habitats (Gilbert and Carman 2011, p. 2) with clean, hard substrate, flowing water, and abundant riparian vegetation. Degraded habitat consists of silt-laden substrates, high turbidity, and deep, stagnant water (Gilbert and Carman 2011, p. 6). Ponds formed by beaver dams and impoundments as well as pools formed during river intermittency create such degraded habitats. Therefore, based on the information above, we identify the necessary physical or biological features for the Zuni bluehead sucker:

- Nondegraded habitat devoid of nonnative aquatic species, or habitat in

which nonnative aquatic species are at levels that allow persistence of Zuni bluehead sucker.

#### Primary Constituent Elements for the Zuni Bluehead Sucker

Under the Act and its implementing regulations, we are required to identify the physical or biological features essential to the conservation of the Zuni bluehead sucker in areas occupied at the time of listing, focusing on the features' primary constituent elements. We consider primary constituent elements to be the elements of physical or biological features that provide for a species' life-history processes and are essential to the conservation of the species.

Based on our current knowledge of the physical or biological features and habitat characteristics required to sustain the species' life-history processes, we determine that the primary constituent elements specific to the Zuni bluehead sucker are:

(1) A riverine system with habitat to support all life stages of Zuni bluehead sucker (egg, larval, juvenile, and adult), which includes:

a. Dynamic flows that allow for periodic changes in channel morphology and adequate river functions, such as channel reshaping and delivery of coarse sediments.

b. Stream courses with perennial flows, or areas that may be periodically dewatered but serve as connective corridors between occupied or seasonally occupied habitat and through which the species may move when the habitat is wetted;

c. Stream microhabitat types including runs, riffles, and pools with substrate ranging from gravel, cobble, and bedrock substrates with low or moderate amounts of fine sediment and substrate embeddedness; and

d. Streams with depths generally less than 2 m (3.3 ft), and with slow to swift flow velocities less than 35 cm/sec (1.1 ft/sec);

e. Clear, cool water with low turbidity and temperatures in the general range of 9.0 to 28.0 °C (48.2 to 82.4 °F).

f. No harmful levels of pollutants;

g. Adequate riparian shading to reduce water temperatures when ambient temperatures are high and provide protective cover from predators; and

(2) An abundant aquatic insect food base consisting of fine particulate organic material, filamentous algae, midge larvae, caddisfly larvae, mayfly larvae, flatworms, and small terrestrial insects.

(3) Areas devoid of nonnative aquatic species or areas that are maintained to

kept nonnatives at a level that allows the Zuni bluehead sucker to continue to survive and reproduce.

#### Special Management Considerations or Protection

When designating critical habitat, we assess whether the specific areas within the geographic area occupied by the species at the time of listing contain features which are essential to the conservation of the species and which may require special management considerations or protection. We believe each area included in these designations requires special management and protections as described in our unit descriptions.

We need to consider special management considerations or protection for the features essential to the conservation of the species within each critical habitat area. The special management considerations or protections will depend on the threats to the essential features in that critical habitat area. For example, threats requiring special management considerations or protection include the continued spread of nonnative fish species into Zuni bluehead sucker habitat or increasing number of beavers that reduce habitat quality and foster expansion of nonnative fish and crayfish. Other threats requiring special management considerations or protection include the threat of wildfire and excessive ash and sediment following fire. Improper livestock grazing can be a threat to the remaining populations of Zuni bluehead sucker through trampling of habitat and increasing sedimentation. Inadequate water quantity resulting from drought and water withdrawals affect all life stages of Zuni bluehead sucker.

Additionally, the construction of impoundments and water diversions can cause an increase in water depth behind the structure and a reduction or elimination of stream habitat below.

We have included below in our description of each of the critical habitat areas for the Zuni bluehead sucker a discussion of the threats occurring in that area requiring special management considerations or protection.

#### Criteria Used To Identify Critical Habitat

As required by Section 4(b)(2) of the Act, we use the best scientific data available to designate critical habitat. We review available information pertaining to the habitat requirements of the species. In accordance with the Act and its implementing regulation at 50 CFR 424.12(e), we consider whether designating additional areas—outside

those currently occupied as well as those occupied at the time of listing—are necessary to ensure the conservation of the species. We are proposing to designate critical habitat in areas within the geographic area occupied by the species at the time of listing, as described above in the proposed rule to list the Zuni bluehead sucker, and that contain sufficient elements of physical or biological features to support life-history processes essential for the conservation of the species. We are also proposing to designate specific areas outside the geographic area occupied by the species at the time of listing because such areas are essential for the conservation of the species.

Sources of data for this species include multiple databases maintained by universities and State agencies for Arizona and New Mexico, existing State recovery plans, endangered species reports, and numerous survey reports on streams throughout the species' range (Sanchez 1975, pp. 1, 4; Propst *et al.* 1986, pp. 49–51; NMDGF 2003, pp. 6–10; Sponholtz 2003, pp. 18–22; NMDGF 2004, pp. 1–40; Clarkson and Marsh 2006, pp. 1–2; David 2006, pp. 1–40; NMDGF 2007, pp. 1–27; Douglas *et al.* 2009, p. 67; Service 2010, pp. 1–2; NMDGF 2012; Navajo Nation Heritage Program 2012, pp. 1–20). We have also reviewed available information that pertains to the habitat requirements of this species. Sources of information on habitat requirements include existing State recovery plans, endangered species reports, studies conducted at occupied sites and published in peer-reviewed articles, agency reports, and data collected during monitoring efforts (Propst *et al.* 2001, pp. 159–161; NMDGF 2003, pp. 1–14; NMDGF 2004, pp. 4–7).

The current distribution of the Zuni bluehead sucker is much reduced from its historical distribution. We anticipate that recovery will require continued protection of existing populations and habitat, as well as establishing populations in additional streams that more closely approximate its historic distribution in order to ensure there are adequate numbers of fish in stable populations and that these populations occur over a wide geographic area. This will help to ensure that catastrophic events, such as wildfire, cannot simultaneously affect all known populations.

#### Areas Occupied at the Time of Listing

The proposed critical habitat designation does not include all streams known to have been occupied by the species historically; instead, it focuses on occupied streams within the

historical range that have retained the necessary PCEs that will allow for the maintenance and expansion of existing populations. The following streams meet the definition of areas occupied by the species at the time of listing: Agua Remora, Rio Nutria, Tampico Spring, Tampico Draw, Kinlichee Creek, Black Soil Wash, Scattered Willow Wash, Coyote Wash, Crystal Creek, Sonsela Creek, Tsaille Creek, Wheatfields Creek, and Whiskey Creek. There are no developed areas within the proposed designation except for barriers constructed on streams or road crossings of streams, which do not remove the suitability of these areas for this species.

#### Areas Outside of the Geographic Range at the Time of Listing

The Zuni River, Rio Pescado, Cebolla Creek, Red Clay Wash, Palisades Creek, and Little Whiskey Creek are within the historical range of the Zuni bluehead sucker but are not within the geographic range currently occupied by the species; the Zuni River and Rio Pescado experience a high degree of river intermittency, and the Zuni bluehead sucker has not been seen in Cebolla Creek, Red Clay Wash, and Little Whiskey Creek in over 30 years, and it has not been observed in the Zuni River or Rio Pescado in approximately 20 years. We consider these sites to be extirpated. For areas not occupied by the species at the time of listing, we must demonstrate that these areas are essential to the conservation of the species in order to include them in our critical habitat designation. To determine if these areas are essential for the conservation of the Zuni bluehead sucker, we considered: (1) The importance of the site to the overall status of the species to prevent extinction and contribute to future recovery of the Zuni bluehead sucker; (2) whether the area could be restored to contain the necessary habitat to support the Zuni bluehead sucker; (3) does the site provide connectivity between occupied sites for genetic exchange; and (4) whether a population of the species could be reestablished in the area.

Of the unoccupied streams, the Zuni River, Rio Pescado, and Palisades Creek exhibit varying degrees of intermittency; the Zuni River and Rio Pescado are generally only continuous after heavy flows in the spring (NMDGF 2004, p. 13; New Mexico Environment Department (NMED) 2004, p. 1), and Palisades Creek has been noted as dry during recent visits (Hobbes 2001, pp. 25–26; Carman 2004, p. 9). However, when the Zuni River, Rio Pescado, and Cebolla Creek do exhibit flow and if suitable habitat

were restored, they could allow for important population expansion in this watershed and they are therefore essential for the conservation of the Zuni bluehead sucker. On the other hand, Palisades Creek is a tributary to Whiskey Creek that, when wetted, likely does not provide much benefit to the species. Because this formerly occupied site has been so severely impacted and, as a small tributary, it does not connect occupied sites, it is unlikely to contribute to the recovery of the species and is not considered essential to the conservation of the species. Therefore, it is not included in the proposed designation of critical habitat.

In summary, for areas within the geographic area occupied by the species at the time of listing, we delineated critical habitat unit boundaries using the following criterion:

(1) Evaluate habitat suitability of stream segments within the geographic area occupied at the time of listing, and retain those segments that contain some or all of the PCEs to support life-history functions essential for conservation of the species.

For areas outside the geographic area occupied by the species at the time of listing, we delineated critical habitat unit boundaries using the following steps:

(2) Evaluate stream segments not known to have been occupied at listing but that are within the historical range of the species (outside of the geographic area occupied by the species) to determine if they are essential to the survival and recovery of the species. Essential areas are those that:

(a) Serve as an extension of habitat within the geographic area of an occupied unit;

(b) Expand the geographic distribution within areas not occupied at the time of listing across the historical range of the species; and

(c) Are connected to other occupied areas, which will enhance genetic exchange between populations.

We conclude that the areas proposed for critical habitat provide for the conservation of the Zuni bluehead sucker because they include habitat for all extant populations and include habitat for connectivity and dispersal opportunities within units. Such opportunities for dispersal assist in maintaining the population structure and distribution of the species. The current amount of habitat that is occupied is not sufficient for the recovery of the species; therefore, we included unoccupied habitat in this proposed critical habitat designation.

As a final step, we evaluated those occupied stream segments retained

through step 1 of the above analysis and refined the starting and ending points by evaluating the presence or absence of appropriate PCEs. We selected upstream and downstream cutoff points to omit areas that are highly degraded and are not likely restorable. For example, permanently dewatered areas, or areas in which there was a change to unsuitable parameters (e.g., water quality, bedrock substrate) were used to mark the start or endpoint of a stream segment proposed for designation. Critical habitat stream segments were then mapped using ArcMap version 10 (Environmental Systems Research Institute, Inc.), a Geographic Information Systems program.

The areas proposed for designation as critical habitat provide sufficient stream and spring habitat for breeding, nonbreeding, and dispersing adult Zuni bluehead sucker, as well as for the habitat needs for juvenile and larval stages of this fish. In general, the PCEs of critical habitat are contained within the riverine ecosystem formed by the wetted channel and the adjacent floodplains within 91.4 lateral m (300 lateral ft) on either side of bankfull stage, except where bounded by canyon walls. Areas within the lateral extent also contribute to the PCEs, including water quality and intermittent areas through which fish may move when wetted. Zuni bluehead sucker use the riverine ecosystem for feeding, breeding, and sheltering while breeding and migrating.

When determining proposed critical habitat boundaries, we made every effort to avoid including developed areas such as lands covered by bridges, docks, aqueducts, and other structures because such lands lack physical or biological features for the Zuni bluehead sucker. The scale of the maps we prepared under the parameters for publication within the Code of Federal Regulations may not reflect the exclusion of such developed lands. Any such lands inadvertently left inside critical habitat boundaries shown on the maps of this proposed rule have been excluded by text in the proposed rule and are not proposed for designation as critical habitat. Therefore, if the critical habitat is finalized as proposed, a Federal action involving these lands would not trigger section 7 consultation with respect to critical habitat and the requirement of no adverse modification unless the specific action would affect the physical or biological features in the adjacent critical habitat.

We are proposing for designation of critical habitat lands that we have determined are occupied at the time of listing and contain sufficient elements

of physical or biological features to support life-history processes essential for the conservation of the species, and lands outside of the geographic area occupied at the time of listing that we have determined are essential for the conservation of the Zuni bluehead sucker.

Segments were proposed for designation based on sufficient elements of physical or biological features being present to support the Zuni bluehead sucker life-history processes. Some segments contained all of the identified elements of physical or biological features and supported multiple life-history processes. Some segments contained only some elements of the physical or biological features necessary

to support the Zuni bluehead sucker's particular use of that habitat.

The critical habitat designation is defined by the map or maps, as modified by any accompanying regulatory text, presented at the end of this document in the rule portion. We include more detailed information on the boundaries of the critical habitat designation in the preamble of this document. We will make the coordinates or plot points or both on which each map is based available to the public on <http://www.regulations.gov> at Docket No. FWS-R2-ES-2012-0101, on our Internet sites <http://www.fws.gov/southwest/es/NewMexico/>, and at the field office responsible for the

designation (see **FOR FURTHER INFORMATION CONTACT** above).

**Proposed Critical Habitat Designation**

We are proposing to designate approximately 472 km (293 mi) in three units as critical habitat for the Zuni bluehead sucker. The critical habitat areas we describe below constitute our current best assessment of areas that meet the definition of critical habitat for Zuni bluehead sucker. The three areas we propose as critical habitat are: (1) Zuni River Unit; (2) Kinlichee Creek Unit; and (3) San Juan River Unit. Table 1 shows the occupancy of the units, the land ownership, and approximate areas of the proposed designated areas for the Zuni bluehead sucker.

**TABLE 1—PROPOSED CRITICAL HABITAT UNITS FOR ZUNI BLUEHEAD SUCKER**  
(Area estimates reflect all land within critical habitat unit boundaries)

Stream segment	Occupied at the time of listing	Land ownership	Length of unit in kilometers (miles)
<b>Unit 1—Zuni River Unit</b>			
<b>Subunit 1a—Zuni River Headwaters</b>			
Agua Remora .....	Yes .....	Forest Service .....	6.6 (4.1)
		Private .....	2.4 (1.5)
Rio Nutria .....	Yes .....	Zuni Pueblo .....	38.9 (24.2)
		Forest Service .....	4.1 (2.6)
		State of New Mexico .....	1.8 (1.1)
		Private .....	14.2 (8.8)
Tampico Draw .....	Yes .....	Forest Service .....	2.3 (1.4)
		Private .....	3.7 (2.3)
Tampico Spring .....	Yes .....	Private .....	0.2 (0.1)
Total .....			74.2 (46.1)
<b>Subunit 1b—Zuni River Mainstem</b>			
Zuni River .....	No .....	Zuni Pueblo .....	7.4 (4.6)
Rio Pescado .....	No .....	Zuni Pueblo .....	47.3 (29.4)
		State of New Mexico .....	5.8 (3.6)
		Private .....	15.4 (9.6)
Cebolla Creek .....	No .....	Zuni Pueblo .....	3.7 (2.3)
		State of New Mexico .....	0.4 (.02)
		Forest Service .....	6.4 (4.0)
		Private .....	21.4 (13.3)
Total .....			107.8 (67.0)
<b>Unit 2—Kinlichee Creek Unit</b>			
<b>Subunit 2a—Kinlichee Creek</b>			
Black Soil Wash .....	Yes .....	Navajo Nation .....	21.6 (13.4)
Kinlichee Creek .....	Yes .....	Navajo Nation .....	47.1 (29.3)
Scattered Willow Wash .....	Yes .....	Navajo Nation .....	18.2 (11.3)
Total .....			86.9 (54.0)
<b>Subunit 2b—Red Clay Wash</b>			
Red Clay Wash .....	No .....	Navajo Nation .....	9.6 (6.0)
<b>Unit 3—San Juan River Unit</b>			
<b>Subunit 3a—Canyon de Chelly</b>			
Coyote Wash .....	Yes .....	Navajo Nation * .....	6.4 (4.0)



TABLE 1—PROPOSED CRITICAL HABITAT UNITS FOR ZUNI BLUEHEAD SUCKER—Continued  
 [Area estimates reflect all land within critical habitat unit boundaries]

Stream segment	Occupied at the time of listing	Land ownership	Length of unit in kilometers (miles)
Crystal Creek .....	Yes .....	Navajo Nation * .....	0.5 (0.3)
		Navajo Nation .....	34.2 (21.2)
Sonsela Creek .....	Yes .....	Navajo Nation * .....	19.5 (12.1)
Tsaile Creek .....	Yes .....	Navajo Nation * .....	23.0 (14.3)
		Navajo Nation .....	30.6 (19.0)
Wheatfields Creek .....	Yes .....	Navajo Nation * .....	8.5 (5.3)
		Navajo Nation .....	29.3 (18.2)
Whiskey Creek .....	Yes .....	Navajo Nation * .....	7.5 (4.7)
		Navajo Nation .....	28.1 (17.5)
Total .....			187.9 (112.7)
<b>Subunit 3b—Little Whiskey Creek</b>			
Little Whiskey Creek .....	No .....	Navajo Nation .....	8.9 (5.5)
Total .....			8.9 (5.5)

\* These lands are managed by National Park Service in trust for the Navajo Nation.  
**Note:** Area sizes may not sum due to rounding.

We present below brief descriptions of the units and reasons why the units meet the definition of critical habitat for the Zuni bluehead sucker.

*Unit 1: Zuni River Unit*

*Subunit 1a—Zuni River Headwaters:* Subunit 1a consists of 74.2 km (46.1 mi) along Agua Remora, Rio Nutria, Tampico Draw, and Tampico Spring in McKinley County, New Mexico. The land in this subunit is primarily owned by Zuni Pueblo, Forest Service, and private landowners with a small amount of State inholdings. The Zuni bluehead sucker occupies all stream reaches in this subunit, and the subunit contains all of the primary constituent elements of the physical or biological features essential to the conservation of the Zuni bluehead sucker. This unit represents the only remaining headwater spring habitats occupied by Zuni bluehead sucker.

Livestock grazing is primarily regulated by the Forest Service and Zuni Pueblo in this subunit; however, trespass livestock grazing may occur. Additional special management considerations or protection may be required within Subunit 1a to address low water levels as a result of water withdrawals and drought, predation from nonnative green sunfish, and the upstream and downstream effects of impoundments. Such special management or protection may include maintaining instream flows, nonnative species removal, and reservoir management that improves up- and downstream habitat to benefit the Zuni bluehead sucker.

*Subunit 1b—Zuni River Mainstem:* Subunit 1b consists of 107.8 km (67.0 mi) of potential Zuni bluehead sucker habitat along the Zuni River, Rio Pescado, and Cebolla Creek in McKinley and Cibola Counties, New Mexico. Land within this subunit is primarily owned by Zuni Pueblo and private landowners, with a small amount of Forest Service and State land. The Zuni bluehead sucker historically occupied these streams but has not been found in the Zuni River or Rio Pescado since the mid-1990s (NMDGF 2004, p. 5) and has been extirpated from Cebolla Creek since at least 1979 (Hanson 1980, pp. 29, 34). We consider this unit unoccupied. When wetted and if suitable habitat were present, the Zuni River and Rio Pescado could provide important connections between occupied reaches in Subunit 1a and potential future populations in Cebolla Creek, which has been identified as containing suitable habitat in the past and could provide for significant population expansion. Therefore, this subunit is essential for the conservation of the Zuni bluehead sucker because it provides for connection between populations and also provides space for the growth and expansion of the species in this portion of its historical range.

*Unit 2: Kinlichee Creek Unit*

*Subunit 2a—Kinlichee Creek:* Subunit 2a consists of 86.9 km (54.0 mi) along Kinlichee Creek and two tributaries (Black Soil Wash and Scattered Willow Wash) in Apache County, Arizona. This entire subunit is located within the Navajo Indian Reservation. The Zuni bluehead sucker occupies all stream

reaches in this subunit, and the subunit contains all of the primary constituent elements of the physical or biological features essential to the conservation of the Zuni bluehead sucker.

Special management considerations or protection may be required within Subunit 2a to address low water levels as a result of water withdrawals and drought, sedimentation and riparian vegetation destruction from road development and livestock grazing, and predation from nonnative species. Such special management considerations or protection may include instream flows, stream fencing, erosion control structures along roads and during construction, reservoir management that improves up- and downstream habitat to benefit the Zuni bluehead sucker and nonnative species removal.

*Subunit 2b—Red Clay Wash:* Subunit 2b consists of 9.6 km (6.0 mi) of potential Zuni bluehead sucker habitat along Red Clay Wash, in Apache County, Arizona, on the Navajo Indian Reservation. The Zuni bluehead sucker historically occupied this stream but does not currently occur there. Inclusion of Red Clay Wash expands the recovery potential of the Zuni bluehead sucker in the lower Kinlichee watershed by increasing population redundancy within the species' historical range and is therefore essential to the conservation of the species.

*Unit 3: San Juan River Unit*

*Subunit 3a—Canyon de Chelly:* Subunit 3a consists of 187.9 km (112.7 mi) along Tsaile Creek, Wheatfields Creek, Whiskey Creek, Coyote Wash, Crystal Creek, and Sonsela Creek in

Apache County, Arizona, and San Juan County, New Mexico. This unit is located within the Navajo Indian Reservation, portions of which are managed by the National Park Service as Canyon de Chelly National Monument in trust for the Navajo Nation. The Zuni bluehead sucker occupies all stream reaches in this subunit, and the subunit contains all of the primary constituent elements of the physical or biological features essential to the conservation of the Zuni bluehead sucker.

Special management considerations or protection may be required within Subunit 3a to address low water levels as a result of water withdrawals and drought, sedimentation and riparian vegetation destruction from road development and livestock grazing, and predation from nonnative species. Such special management considerations or protection may include instream flows stream fencing, erosion control structures along roads and during construction, reservoir management that improves up- and downstream habitat to benefit the Zuni bluehead sucker, and nonnative species removal.

*Subunit 3b—Little Whiskey Creek:* Subunit 3b consists of 8.9 km (5.5 mi) of potential Zuni bluehead sucker habitat along Little Whiskey Creek in San Juan County, New Mexico, on the Navajo Indian Reservation. The Zuni bluehead sucker does not currently occur in Little Whiskey Creek, but suitable habitat is present and it is reasonable to conclude the species occurred there historically. Inclusion of Little Whiskey Creek expands the recovery potential of the Zuni bluehead sucker in the upper Whiskey Creek watershed by increasing population redundancy within the species' historical range and is therefore essential to the conservation of the species.

## Effects of Critical Habitat Designation

### Section 7 Consultation

Section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that any action they fund, authorize, or carry out is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of designated critical habitat of such species. In addition, section 7(a)(4) of the Act requires Federal agencies to confer with the Service on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under the Act or result in the destruction or adverse modification of proposed critical habitat.

Decisions by the 5th and 9th Circuit Courts of Appeals have invalidated our regulatory definition of "destruction or adverse modification" (50 CFR 402.02) (see *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, 378 F. 3d 1059 (9th Cir. 2004) and *Sierra Club v. U.S. Fish and Wildlife Service et al.*, 245 F.3d 434, 442 (5th Cir. 2001)), and we do not rely on this regulatory definition when analyzing whether an action is likely to destroy or adversely modify critical habitat. Under the statutory provisions of the Act, we determine destruction or adverse modification on the basis of whether, with implementation of the proposed Federal action, the affected critical habitat would continue to serve its intended conservation role for the species.

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. Examples of actions that are subject to the section 7 consultation process are actions on State, tribal, local, or private lands that require a Federal permit (such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or a permit from the Service under section 10 of the Act) or that involve some other Federal action (such as funding from the Federal Highway Administration, Federal Aviation Administration, or the Federal Emergency Management Agency). Federal actions not affecting listed species or critical habitat, and actions on State, tribal, local, or private lands that are not federally funded or authorized, do not require section 7 consultation.

As a result of section 7 consultation, we document compliance with the requirements of section 7(a)(2) through our issuance of:

(1) A concurrence letter for Federal actions that may affect, but are not likely to adversely affect, listed species or critical habitat; or

(2) A biological opinion for Federal actions that may affect and are likely to adversely affect listed species or critical habitat.

When we issue a biological opinion concluding that a project is likely to jeopardize the continued existence of a listed species and/or destroy or adversely modify critical habitat, we provide reasonable and prudent alternatives to the project, if any are identifiable, that would avoid the likelihood of jeopardy and/or destruction or adverse modification of critical habitat. We define "reasonable and prudent alternatives" (at 50 CFR

402.02) as alternative actions identified during consultation that:

(1) Can be implemented in a manner consistent with the intended purpose of the action,

(2) Can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction,

(3) Are economically and technologically feasible, and

(4) Would, in the Director's opinion, avoid the likelihood of jeopardizing the continued existence of the listed species and/or avoid the likelihood of destroying or adversely modifying 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 in instances where we have listed a new species or subsequently designated critical habitat that may be affected and the Federal agency has retained discretionary involvement or control over the action (or the agency's discretionary involvement or control is authorized by law). Consequently, Federal agencies sometimes may need to request reinitiation of consultation with us on actions for which formal consultation has been completed, if those actions with discretionary involvement or control may affect subsequently listed species or designated critical habitat.

### Application of the "Adverse Modification" Standard

The key factor related to the adverse modification determination is whether, with implementation of the proposed Federal action, the affected critical habitat would continue to serve its intended conservation role for the species. Activities that may destroy or adversely modify critical habitat are those that alter the physical or biological features to an extent that appreciably reduces the conservation value of critical habitat for the Zuni bluehead sucker. As discussed above, the role of critical habitat is to support life-history needs of the species and provide for the conservation of the species.

Section 4(b)(8) of the Act requires us to briefly evaluate and describe, in any proposed or final regulation that designates critical habitat, activities involving a Federal action that may destroy or adversely modify such

habitat, or that may be affected by such designation.

Activities that may affect critical habitat, when carried out, funded, or authorized by a Federal agency, should result in consultation for the Zuni bluehead sucker. These activities include, but are not limited to:

(1) Actions that would diminish flows within the active stream channel. Such activities could include, but are not limited to: Water diversion, water withdrawal, channelization, construction of any barriers or impediments within the active stream channel, construction of permanent or temporary diversion structures, and groundwater pumping within aquifers associated with the stream or springs. These activities could affect water depth, velocity, and flow patterns, all of which are essential to the different life stages of Zuni bluehead sucker.

(2) Actions that would significantly increase sediment deposition within a stream channel. Such activities could include, but are not limited to: Excessive sedimentation from livestock grazing, road construction, commercial or urban development, channel alteration, timber harvest, or other watershed and floodplain disturbances. These activities could adversely affect reproduction of the species by preventing hatching of eggs through suffocation, or by eliminating suitable habitat for egg placement by Zuni bluehead sucker. In addition, excessive levels of sedimentation reduce or eliminate algae production and can make it difficult for the Zuni bluehead sucker to locate prey.

(3) Actions that result in the introduction, spread, or augmentation of nonnative aquatic species in occupied stream segments, or in stream segments that are hydrologically connected to occupied stream segments, even if those segments are occasionally intermittent, or introduction of other species that compete with or prey on Zuni bluehead sucker. Possible actions could include, but are not limited to: Stocking of nonnative fishes, stocking of sport fish, or other related actions. These activities can introduce parasites or disease, or affect the growth, reproduction, and survival of Zuni bluehead sucker.

(4) Actions that would significantly alter channel morphology. Such activities could include, but are not limited to: Channelization, impoundment, road and bridge construction, mining, dredging, and destruction of riparian vegetation. These activities may lead to changes in water flows and levels that would degrade or eliminate the Zuni bluehead, their habitats, or both. These actions can also

lead to increased sedimentation and degradation of the water.

(5) Actions that significantly alter the water chemistry of the active channel. Such activities could include release of chemicals, biological pollutants, or other substances into the surface water or connected groundwater at a point source or by dispersed release (nonpoint source), and storage of chemicals or pollutants that can be transmitted, via surface water, groundwater, or air, into critical habitat. These actions can affect water chemistry and the prey base of the Zuni bluehead sucker.

#### Exemptions

##### *Application of Section 4(a)(3) of the Act*

The Sikes Act Improvement Act of 1997 (Sikes Act) (16 U.S.C. 670a) required each military installation that includes land and water suitable for the conservation and management of natural resources to complete an integrated natural resources management plan (INRMP) by November 17, 2001. An INRMP integrates implementation of the military mission of the installation with stewardship of the natural resources found on the base. Each INRMP includes:

- (1) An assessment of the ecological needs on the installation, including the need to provide for the conservation of listed species;
- (2) A statement of goals and priorities;
- (3) A detailed description of management actions to be implemented to provide for these ecological needs; and
- (4) A monitoring and adaptive management plan.

Among other things, each INRMP must, to the extent appropriate and applicable, provide for fish and wildlife management; fish and wildlife habitat enhancement or modification; wetland protection, enhancement, and restoration where necessary to support fish and wildlife; and enforcement of applicable natural resource laws.

The National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108–136) amended the Act to limit areas eligible for designation as critical habitat. Specifically, section 4(a)(3)(B)(i) of the Act (16 U.S.C. 1533(a)(3)(B)(i)) now provides: “The Secretary shall not designate as critical habitat any lands or other geographic areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a

benefit to the species for which critical habitat is proposed for designation.”

There are no Department of Defense lands within the proposed critical habitat designation for Zuni bluehead sucker.

#### Exclusions

##### *Application of Section 4(b)(2) of the Act*

Section 4(b)(2) of the Act states that the Secretary shall designate and make revisions to critical habitat on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude an area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species. In making that determination, the statute on its face, as well as the legislative history, are clear that the Secretary has broad discretion regarding which factor(s) to use and how much weight to give to any factor.

Under section 4(b)(2) of the Act, we may exclude an area from designated critical habitat based on economic impacts, impacts on national security, or any other relevant impacts. In considering whether to exclude a particular area from the designation, we identify the benefits of including the area in the designation, identify the benefits of excluding the area from the designation, and evaluate whether the benefits of exclusion outweigh the benefits of inclusion. If the analysis indicates that the benefits of exclusion outweigh the benefits of inclusion, the Secretary may exercise his discretion to exclude the area only if such exclusion would not result in the extinction of the species.

##### Exclusions Based on Economic Impacts

Under section 4(b)(2) of the Act, we consider the economic impacts of specifying any particular area as critical habitat. In order to consider economic impacts, we are preparing an analysis of the economic impacts of the proposed critical habitat designation and related factors. Potential land use sectors that may be affected by the Zuni bluehead sucker critical habitat designation include water diversion or impoundment repairs, forest management (silvicultural practices), fire suppression activities, road development, grazing, groundwater

withdrawals, and subdivision development. We also consider any social impacts that might occur because of the designation.

During the development of a final designation, we will consider economic impacts based on information in our economic analysis, public comments, and other new information, and areas may be excluded from the final critical habitat designation under section 4(b)(2) of the Act and our implementing regulations at 50 CFR 424.19.

#### Exclusions Based on National Security Impacts

Under section 4(b)(2) of the Act, we consider whether there are lands where a national security impact might exist. In preparing this proposal, we have determined that the lands within the proposed designation of critical habitat for the Zuni bluehead sucker are not owned or managed by the Department of Defense, and, therefore, we anticipate no impact on national security. Consequently, the Secretary is not intending to exercise his discretion to exclude any areas from the final designation based on impacts on national security.

#### Exclusions Based on Other Relevant Impacts

Under section 4(b)(2) of the Act, we consider any other relevant impacts, in addition to economic impacts and impacts on national security. We consider a number of factors including whether the landowners have developed any HCPs or other management plans for the area, or whether there are conservation partnerships that would be encouraged by designation of, or exclusion from, critical habitat. In addition, we look at any tribal issues, and consider the government-to-government relationship of the United States with tribal entities. We also consider any social impacts that might occur because of the designation.

When we evaluate the existence of a conservation plan when considering the benefits of exclusion, we consider a variety of factors, including but not limited to, whether the plan is finalized; how it provides for the conservation of the essential physical or biological features; whether there is a reasonable expectation that the conservation management strategies and actions contained in a management plan will be implemented into the future; whether the conservation strategies in the plan are likely to be effective; and whether the plan contains a monitoring program or adaptive management to ensure that the conservation measures are effective

and can be adapted in the future in response to new information.

There are tribal lands included in the proposed designation of critical habitat for the Zuni bluehead sucker. Using the criteria found in the *Criteria Used To Identify Critical Habitat* section, we have determined that tribal lands that are occupied by the Zuni bluehead sucker contain the features essential for the conservation of the species, as well as tribal lands unoccupied by the Zuni bluehead sucker that are essential for the conservation of the species. We have begun government-to-government consultation with these tribes, and will continue to do so throughout the public comment period and during development of the final designation of critical habitat for the Zuni bluehead sucker. We will consider these areas for exclusion from the final critical habitat designation to the extent consistent with the requirements of section 4(b)(2) of the Act. The Navajo Nation and Zuni Pueblo are the main tribes affected by this proposed rule. We sent notification letters in July 2012 to both tribes describing the exclusion process under section 4(b)(2) of the Act, and we have engaged in conversations with both tribes about the proposal to the extent possible without disclosing predecisional information. We coordinated with the Navajo Nation in May 2012, to coordinate surveys on Navajo lands. Additionally, we are working with Zuni Pueblo to develop a management plan for their lands. We will schedule a meeting with the tribes and any other interested tribes shortly after publication of this proposed rule so that we can give them as much time as possible to comment.

A final determination on whether the Secretary will exercise his discretion to exclude any of these areas from critical habitat for the Zuni bluehead sucker will be made when we publish the final rule designating critical habitat. We will take into account public comments and carefully weigh the benefits of exclusion versus inclusion of these areas. We may also consider areas not identified above for exclusion from the final critical habitat designation based on information we may receive during the preparation of the final rule (e.g., management plans for additional areas).

#### Peer Review

In accordance with our joint policy on peer review published in the **Federal Register** on July 1, 1994 (59 FR 34270), we will seek the expert opinions of at least three appropriate and independent specialists regarding this proposed rule. The purpose of peer review is to ensure that our listing determination and

critical habitat designation are based on scientifically sound data, assumptions, and analyses. We have invited these peer reviewers to comment during this public comment period.

We will consider all comments and information received during this comment period on this proposed rule during our preparation of a final determination. Accordingly, the final decision may differ from this proposal.

#### Public Hearings

Section 4(b)(5) of the Act provides for one or more public hearings on this proposal, if requested. Requests must be received within 45 days after the date of publication of this proposed rule in the **Federal Register**. Such requests must be sent to the address shown in the **FOR FURTHER INFORMATION CONTACT** section. We will schedule public hearings on this proposal, if any are requested, and announce the dates, times, and places of those hearings, as well as how to obtain reasonable accommodations, in the **Federal Register** and local newspapers at least 15 days before the hearing.

#### Required Determinations

##### *Regulatory Planning and Review—Executive Orders 12866 and 13563*

Executive Order 12866 provides that the Office of Information and Regulatory Affairs will review all significant rules. The Office of Information and Regulatory Affairs has determined that this rule is not significant.

Executive Order 13563 reaffirms the principles of Executive Order 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. Executive Order 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

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

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 et seq.) as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 (5 U.S.C. 801 et seq.), whenever an

agency must 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 (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 RFA to require Federal agencies to provide a certification statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities.

According to the Small Business Administration, small entities include small organizations such as independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; and small businesses (13 CFR 121.201). Small businesses include such businesses as manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than \$5 million in annual sales, general and heavy construction businesses with less than \$27.5 million in annual business, special trade contractors doing less than \$11.5 million in annual business, and forestry and logging operations with fewer than 500 employees and annual business less than \$7 million. To determine whether small entities may be affected, we will consider the types of activities that might trigger regulatory impacts under this designation as well as types of project modifications that may result. In general, the term "significant economic impact" is meant to apply to a typical small business firm's business operations.

Importantly, the incremental impacts of a rule must be *both* significant and substantial to prevent certification of the rule under the RFA and to require the preparation of an initial regulatory flexibility analysis. If a substantial number of small entities are affected by the proposed critical habitat designation, but the per-entity economic impact is not significant, the Service may certify. Likewise, if the per-entity economic impact is likely to be significant, but the number of affected entities is not substantial, the Service may also certify.

The Service's current understanding of recent case law is that Federal agencies are only required to evaluate

the potential impacts of rulemaking on those entities directly regulated by the rulemaking; therefore, they are not required to evaluate the potential impacts to those entities not directly regulated. The designation of critical habitat for an endangered or threatened species only has a regulatory effect where a Federal action agency is involved in a particular action that may affect the designated critical habitat. Under these circumstances, only the Federal action agency is directly regulated by the designation, and, therefore, consistent with the Service's current interpretation of RFA and recent case law, the Service may limit its evaluation of the potential impacts to those identified for Federal action agencies. Under this interpretation, there is no requirement under the RFA to evaluate the potential impacts to entities not directly regulated, such as small businesses. However, Executive Orders 12866 and 13563 direct Federal agencies to assess costs and benefits of available regulatory alternatives in quantitative (to the extent feasible) and qualitative terms. Consequently, it is the current practice of the Service to assess to the extent practicable these potential impacts if sufficient data are available, whether or not this analysis is believed by the Service to be strictly required by the RFA. In other words, while the effects analysis required under the RFA is limited to entities directly regulated by the rulemaking, the effects analysis under the Act, consistent with the EO regulatory analysis requirements, can take into consideration impacts to both directly and indirectly impacted entities, where practicable and reasonable.

In conclusion, we believe that, based on our interpretation of directly regulated entities under the RFA and relevant case law, this designation of critical habitat will only directly regulate Federal agencies which are not by definition small business entities. And as such, we certify that, if promulgated, this designation of critical habitat would not have a significant economic impact on a substantial number of small business entities. Therefore, an initial regulatory flexibility analysis is not required. However, though not necessarily required by the RFA, in our draft economic analysis for this proposal we will consider and evaluate the potential effects to third parties that may be involved with consultations with Federal action agencies related to this action.

#### *Energy Supply, Distribution, or Use—Executive Order 13211*

Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) requires agencies to prepare Statements of Energy Effects when undertaking certain actions. We do not expect the designation of this proposed critical habitat to significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required. However, we will further evaluate this issue as we conduct our economic analysis, and 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 et seq.), we make the following findings:

(1) This proposed 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, or 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; Aid to Families with Dependent Children 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 that receive Federal funding, assistance, or permits, or that 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 onto State governments.

(2) We lack the available economic information to determine if a Small Government Agency Plan is required. Therefore, we defer this finding until completion of the draft economic analysis is prepared under section 4(b)(2) of the Act.

#### *Takings—Executive Order 12630*

In accordance with Executive Order 12630 (Government Actions and Interference with Constitutionally Protected Private Property Rights), we will analyze the potential takings implications of designating critical habitat for the Zuni bluehead sucker in a takings implications assessment. The draft economic analysis will provide the foundation for us to use in preparing a takings implication assessment. Critical habitat designation does not affect landowner actions that do not require Federal funding or permits, nor does it preclude development of habitat conservation programs or issuance of incidental take permits to permit actions that do require Federal funding or permits to go forward.

#### *Federalism—Executive Order 13132*

In accordance with Executive Order 13132 (Federalism), this proposed rule does not have significant Federalism effects. A Federalism assessment is not required. In keeping with Department of the Interior and Department of Commerce policy, we requested information from, and coordinated development of, this proposed critical

habitat designation with appropriate State resource agencies in New Mexico and Arizona. The designation of critical habitat in areas currently occupied by the Zuni bluehead sucker imposes no additional restrictions to those currently in place and, therefore, has little incremental impact on State and local governments and their activities. The designation may have some benefit to these governments because the areas that contain the physical or biological features essential to the conservation of the species are more clearly defined, and the elements of the features of the habitat necessary to the conservation of the species are specifically identified. This information does not alter where and what federally sponsored activities may occur. However, it may assist local governments in long-range planning (rather than having them wait for case-by-case section 7 consultations to occur).

Where State and local governments require approval or authorization from a Federal agency for actions that may affect critical habitat, consultation under section 7(a)(2) would be required. While non-Federal entities that receive Federal funding, assistance, or permits, or that 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.

#### *Civil Justice Reform—Executive Order 12988*

In accordance with Executive Order 12988 (Civil Justice Reform), the Office of the Solicitor has determined that the rule does not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the Order. We are designating critical habitat in accordance with the provisions of the Act. To assist the public in understanding the habitat needs of the species, the rule identifies the elements of physical or biological features essential to the conservation of the species. The designated areas of critical habitat are presented on maps, and the rule provides several options for the interested public to obtain more detailed location information, if desired.

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

This rule does not contain any new collections of information that require approval by OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.). This rule will not impose recordkeeping or reporting requirements

on State or local governments, individuals, businesses, or organizations. 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 (42 U.S.C. 4321 et seq.)*

It is our position that, outside the jurisdiction of the U.S. Court of Appeals for the Tenth Circuit, we do not need to prepare environmental analyses pursuant to NEPA in connection with designating critical habitat under the Endangered Species Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This position was upheld by the U.S. Court of Appeals for the Ninth Circuit (*Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. 1995), cert. denied 516 U.S. 1042 (1996)). However, when the range of the species includes States within the Tenth Circuit, such as that of the Zuni bluehead sucker, under 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 (Consultation and Coordination With Indian Tribal Governments), 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. In accordance with Secretarial Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with tribes in developing programs for healthy ecosystems, to acknowledge that tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to tribes.

There are tribal lands in Arizona and New Mexico included in this proposed designation of critical habitat. Using the criteria found in the *Criteria Used To Identify Critical Habitat* section, we

have determined that there are tribal lands that are occupied by the Zuni bluehead sucker that contain the features essential for the conservation of the species, as well as tribal lands unoccupied by the species at the time of listing that are essential for the conservation of the Zuni bluehead sucker. We have begun government-to-government consultation with these tribes throughout the public comment period and during development of the final designation of Zuni bluehead sucker critical habitat. We will consider these areas for exclusion from the final critical habitat designation to the extent consistent with the requirements of section 4(b)(2) of the Act. The Navajo Nation and Zuni Pueblo are the main tribes affected by this proposed rule. We sent notification letters in July 2012 to each tribe describing the exclusion process under section 4(b)(2) of the Act, and we have engaged in conversations with both tribes about the proposal to the extent possible without disclosing predecisional information. We coordinated with the Navajo Nation in May 2012 to coordinate surveys on Navajo lands. Additionally, we are working with Zuni Pueblo to develop a management plan for their lands. We will schedule meetings with these tribes and any other interested tribes shortly after publication of this proposed rule so that we can give them as much time as possible to comment.

#### Clarity of the Rule

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

- (1) Be logically organized;
- (2) Use the active voice to address readers directly;
- (3) Use clear language rather than jargon;
- (4) Be divided into short sections and sentences; and
- (5) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the **ADDRESSES** section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

#### References Cited

A complete list of references cited in this rulemaking is available on the Internet at <http://www.regulations.gov> and upon request from the New Mexico Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

#### Authors

The primary authors of this proposed rule are the staff members of the New Mexico Ecological Services Field Office.

#### List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping 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; 1531–1544; and 4201–4245, unless otherwise noted.

- 2. In § 17.95, amend paragraph (e) by adding an entry for “Zuni bluehead sucker (*Catostomus discobolus yarrowi*),” after the entry for “Warner Sucker (*Catostomus warnerensis*)” to read as follows:

#### § 17.95 Critical habitat—fish and wildlife.

\* \* \* \* \*

(e) *Fishes*.

\* \* \* \* \*

Zuni bluehead sucker (*Catostomus discobolus yarrowi*)

(1) Critical habitat units are depicted for Apache County, Arizona, and Cibola, McKinley, and San Juan Counties, New Mexico, on the maps below.

(2) Within these areas, the primary constituent elements of the physical or biological features essential to the conservation of the Zuni bluehead sucker consist of three components:

(i) A riverine system with habitat to support all life stages of Zuni bluehead sucker, which includes:

(A) Dynamic flows that allow for periodic changes in channel morphology and adequate river functions, such as channel reshaping and delivery of coarse sediments.

(B) Stream courses with perennial flows, or areas that may be periodically dewatered but serve as connective corridors between occupied or

seasonally occupied habitat and through which the species may move when the habitat is wetted.

(C) Stream microhabitat types including runs, riffles, and pools with substrate ranging from gravel, cobble and bedrock substrates with low or moderate amounts of fine sediment and substrate embeddedness.

(D) Streams with depths generally less than 2 m (3.3 ft), and with slow to swift flow velocities less than 35 cm/sec (1.1 ft/sec).

(E) Clear, cool water with low turbidity and temperatures in the general range of 9.0 to 28.0 °C (48.2 to 82.4 °F).

(F) No harmful levels of pollutants.

(G) Adequate riparian shading to reduce water temperatures when ambient temperatures are high and provide protective cover from predators.

(ii) An abundant aquatic insect food base consisting of fine particulate organic material, filamentous algae, midge larvae, caddisfly larvae, mayfly larvae, flatworms, and small terrestrial insects.

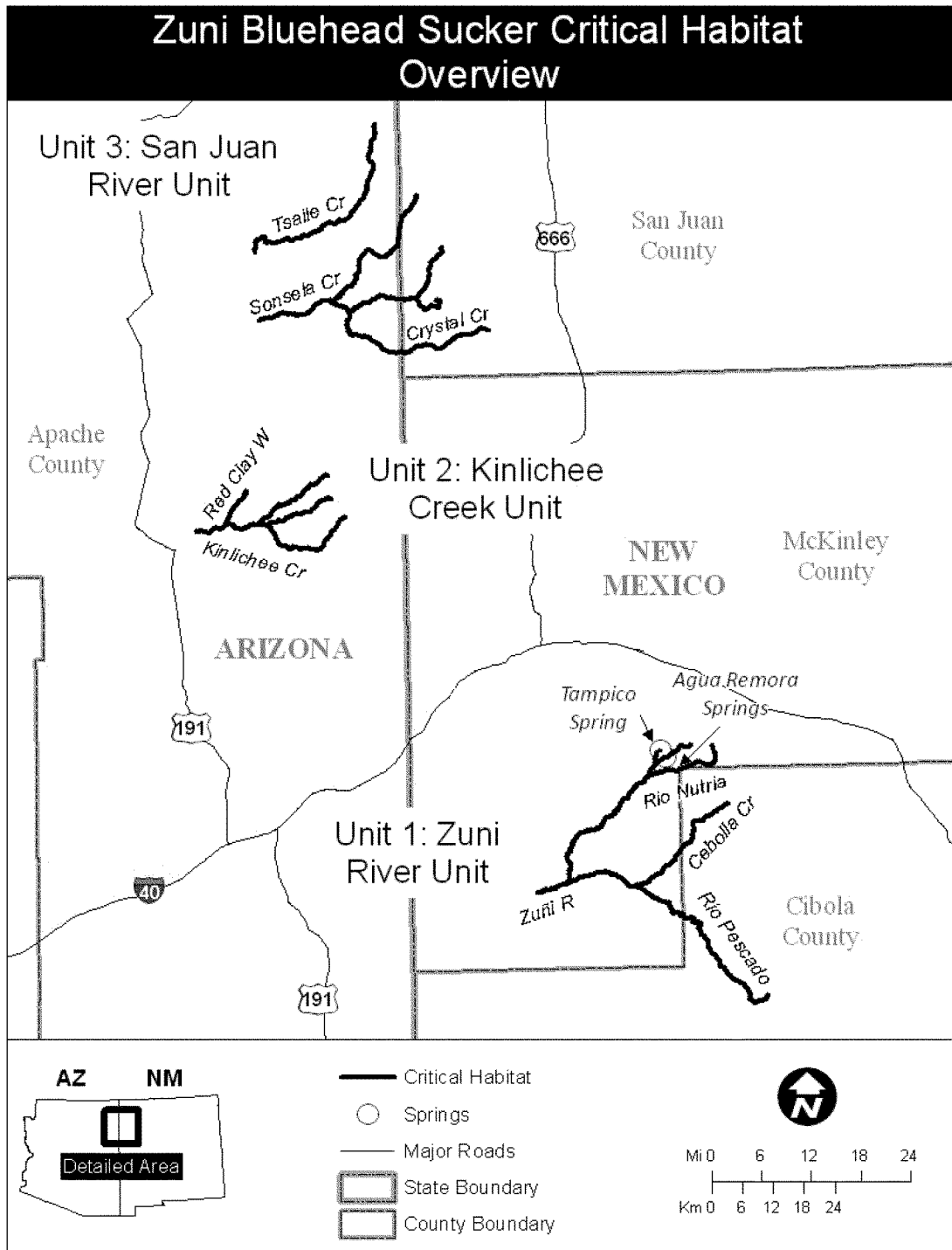
(iii) Areas devoid of nonnative aquatic species or areas that are maintained to kept nonnatives at a level that allows the Zuni bluehead sucker to continue to survive and reproduce.

(3) Critical habitat does not include manmade structures (such as bridges, docks, and aqueducts) and the land on which they are located existing within the legal boundaries on [DATE 30 DAYS AFTER THE DATE OF PUBLICATION OF THE FINAL RULE IN THE **Federal Register**].

(4) *Critical habitat map units*. Data layers defining map units were created on a base of USGS digital ortho-photo quarter-quadrangles, and critical habitat units were then mapped using Universal Transverse Mercator (UTM) Zone 15N coordinates. The maps in this entry, as modified by any accompanying regulatory text, establish the boundaries of the critical habitat designation. The coordinates or plot points or both on which each map is based are available to the public at the Service's Internet site, (<http://www.fws.gov/southwest/es/NewMexico/>), (<http://www.regulations.gov> at Docket No. FWS–R2–ES–2013–002 and at the New Mexico Ecological Services Field Office. You may obtain field office location information by contacting one of the Service regional offices, the addresses of which are listed at 50 CFR part 22.

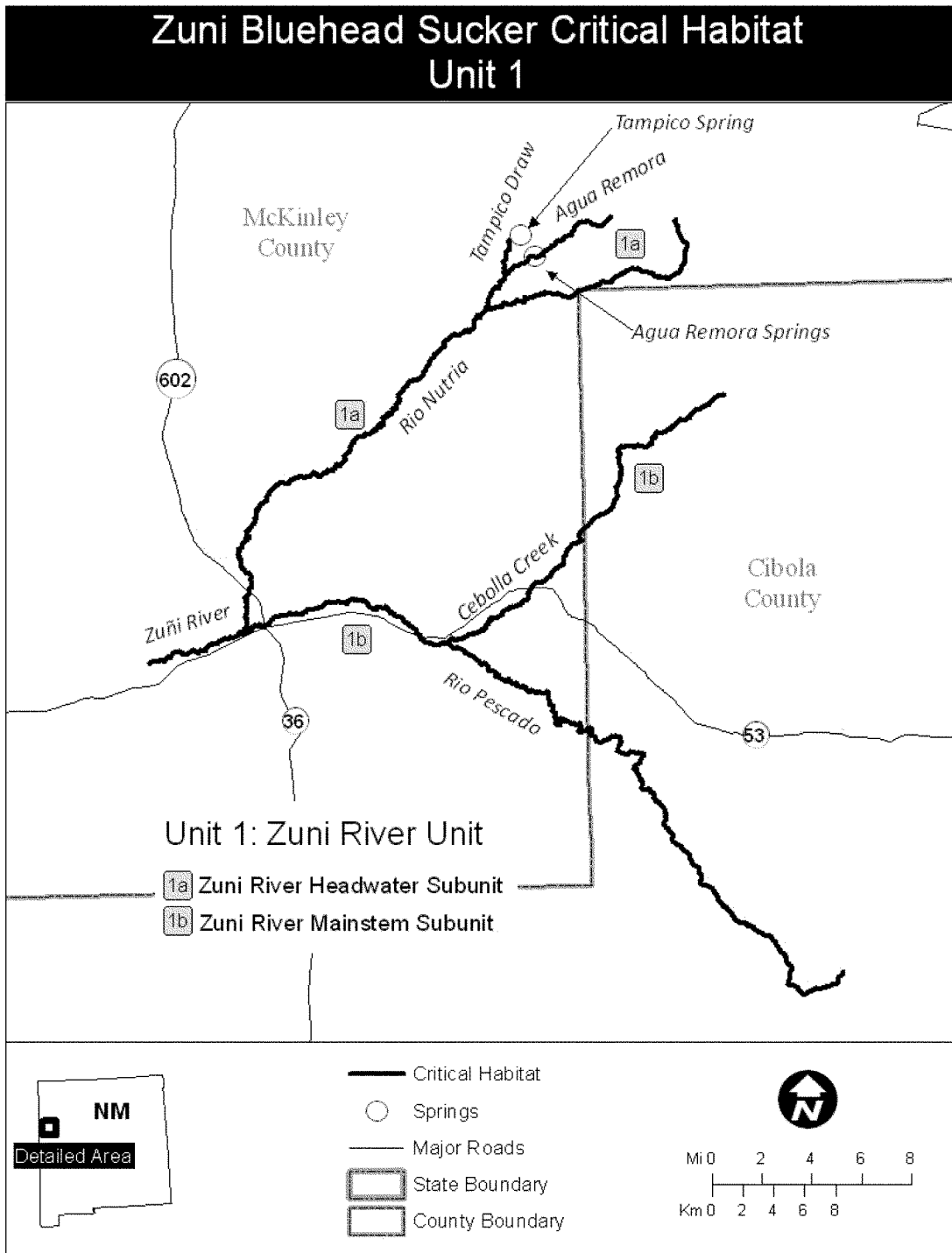
(5) *Note*: Index of critical habitat units for the Zuni bluehead sucker follows:

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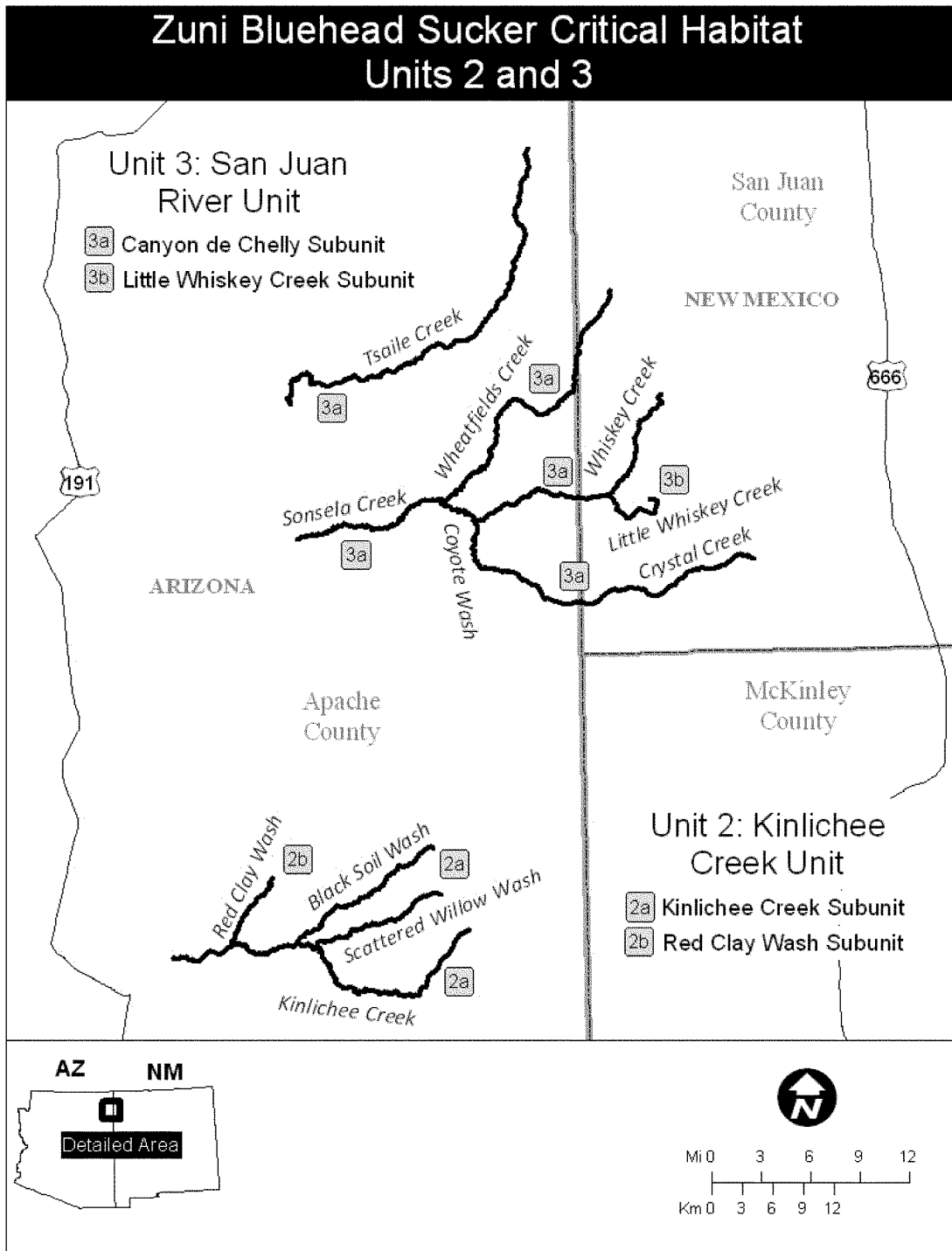
(6) Unit 1: Zuni River Unit, McKinley and Cibola Counties, New Mexico. Map of Unit 1 follows:





(7) Unit 2: Kinlichee Creek Unit, Apache County, Arizona, and McKinley

and San Juan Counties, New Mexico. Map of Unit 2 follows:



(8) Unit 3: San Juan River Unit, Apache County, Arizona, and San Juan County, New Mexico. Map of Unit 3 is provided at paragraph (7) of this entry.

\* \* \* \* \*

Dated: January 15, 2013.

**Michael Bean,**

*Acting Principal Deputy Assistant Secretary for Fish Wildlife and Parks.*

[FR Doc. 2013-01302 Filed 1-24-13; 8:45 am]

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## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### 50 CFR Part 17

[Docket No. FWS-R2-ES-2012-0101; 4500030113]

RIN 1018-AY25

#### Endangered and Threatened Wildlife and Plants; Proposed Endangered Status for the Zuni Bluehead Sucker

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Proposed rule.

**SUMMARY:** We, the U.S. Fish and Wildlife Service, propose to list the Zuni bluehead sucker as an endangered species under the Endangered Species Act and propose to designate critical habitat for the species. If we finalize this rule as proposed, it would extend the Act's protections to this subspecies and its critical habitat. The effect of these regulations will be to conserve the Zuni bluehead sucker and protect its habitat under the Act.

**DATES:** We will accept comments received or postmarked on or before March 26, 2013. Comments submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES** section, below) must be received by 11:59 p.m. Eastern Time on the closing date. We must receive requests for public hearings, in writing, at the address shown in **FOR FURTHER INFORMATION CONTACT** by March 11, 2013.

**ADDRESSES:** You may submit comments by one of the following methods:

(1) *Electronically:* Go to the Federal eRulemaking Portal: <http://www.regulations.gov>. In the Search box, enter FWS-R2-ES-2012-0101, which is the docket number for this rulemaking. Then, in the Search panel on the left side of the screen, under the Document Type heading, click on the Proposed Rules link to locate this document. You may submit a comment by clicking on "Comment Now!"

(2) *By hard copy:* Submit by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS-R2-ES-2012-0101; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, MS 2042-PDM; Arlington, VA 22203.

We request that you send comments only by the methods described above. We will post all comments on <http://www.regulations.gov>. This generally means that we will post any personal information you provide us (see the Public Comments section below for more information).

**FOR FURTHER INFORMATION CONTACT:** Wally "J" Murphy, Field Supervisor, U.S. Fish and Wildlife Service, New Mexico Ecological Services Field Office, 2105 Osuna NE., Albuquerque, NM 87113, by telephone 505-346-2525 or by facsimile 505-346-2542. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800-877-8339.

#### SUPPLEMENTARY INFORMATION:

##### Executive Summary

*Why we need to publish a rule.* Under the Act, if a species is determined to be an endangered or threatened species throughout all or a significant portion of its range, we are required to promptly publish a proposal in the **Federal Register** and make a determination on our proposal within 1 year. Critical habitat shall be designated, to the maximum extent prudent and determinable, for any species determined to be an endangered or threatened species under the Act. Listing a species as an endangered or threatened species and designations and revisions of critical habitat can only be completed by issuing a rule. Elsewhere in today's **Federal Register**, we propose to designate critical habitat for the Zuni bluehead sucker under the Act.

*This rule consists of:* (1) A proposed rule to list the Zuni bluehead sucker (*Catostomus discobolus yarrowi*) as an endangered species; and (2) a proposed rule for designation of critical habitat for the Zuni bluehead sucker. The Zuni bluehead sucker is a candidate species for which we have on file sufficient information on biological vulnerability and threats to support preparation of a listing proposal, but for which development of a listing regulation has been precluded by other higher priority listing activities. This rule reassesses all available information regarding status of and threats to the Zuni bluehead sucker.

*The basis for our action.* Under the Act, we can determine that a species is an endangered or threatened species

based on any of five factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) Overutilization for commercial, recreational, scientific, or educational purposes; (C) Disease or predation; (D) The inadequacy of existing regulatory mechanisms; or (E) Other natural or manmade factors affecting its continued existence.

We have determined that the Zuni bluehead sucker is threatened by Factors A, C, D, and E.

*We will seek peer review.* We are seeking comments from knowledgeable individuals with scientific expertise to review our analysis of the best available science and application of that science and to provide any additional scientific information to improve this proposed rule. Because we will consider all comments and information received during the comment period, our final determinations may differ from this proposal.

#### Information Requested

We intend that any final action resulting from this proposed rule will be based on the best scientific and commercial data available and be as accurate and as effective as possible. Therefore, we request comments or information from the public, other concerned governmental agencies, Native American tribes, the scientific community, industry, or any other interested parties concerning this proposed rule. We particularly seek comments concerning:

(1) The Zuni bluehead sucker's biology, range, and population trends, including:

(a) Habitat requirements for feeding, breeding, and sheltering;

(b) Genetics and taxonomy;

(c) Historical and current range including distribution patterns;

(d) Historical and current population levels, and current and projected trends; and

(e) Past and ongoing conservation measures for the species, its habitat or both.

(2) The factors that are the basis for making a listing determination for a species under section 4(a) of the Act (16 U.S.C. 1531 *et seq.*), which are:

(a) The present or threatened destruction, modification, or curtailment of its habitat or range;

(b) Overutilization for commercial, recreational, scientific, or educational purposes;

(c) Disease or predation;

(d) The inadequacy of existing regulatory mechanisms; or

(e) Other natural or manmade factors affecting its continued existence.