Southwest Willow Flycatcher Information

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Southwestern Willow Flycatcher Critical Habitat and Rio Grande Water Use - Questions and Answers

1. Q. Why was critical habitat (CH) for the southwestern willow flycatcher (flycatcher) proposed to be designated in the San Luis Valley Management Unit of Colorado?

   A. The Endangered Species Act (Act) directs the Service to designate CH on lands essential to the conservation of a threatened or endangered species. To achieve recovery of the flycatcher, we designated CH across the bird’s breeding range to meet the goals of the flycatcher Recovery Plan. Furthermore, habitat in the San Luis Valley of Colorado along the Rio Grande and Conejos River met the following criteria for CH: It was occupied at the time of listing, is currently occupied by a flycatcher population, has the potential for occupancy with appropriate management, and contains the physical and biological features that the species depends on.

2. Q. If habitat in the San Luis Valley is essential, why was much of it excluded from the final critical habitat designation?

   A. We were able to exclude all of the non-Federal lands in the valley in recognition of a long history of proactive conservation by landowners in the Valley. The majority (87%) of lands proposed as critical habitat are covered by the San Luis Valley Regional Habitat Conservation Plan (HCP) and other conservation partnerships. Development of the HCP spanned several years and was a cooperative process between the Rio Grande Water Conservation District, the Colorado Department of Natural Resources and its divisions such as Colorado Parks and Wildlife (CPW), six counties comprising the San Luis Valley, and four municipalities. Other conservation partnerships used as a basis to exclude CH include wetland and riparian conservation protection, restoration, and management efforts. This long history of demonstrated conservation commitment allowed us to meet the high bar for a legally defensible exclusion.

3. Q. Why was CH for the flycatcher designated on Federal lands?
A. Federal lands could not be excluded from the final designation for two reasons. First, the Federal lands were not covered by the HCP referenced above. The HCP does not include projects that are federally authorized, permitted, or funded, which require interagency consultation under the Act. Because management on the Federal lands is not covered by the HCP, and all actions on Federal land require interagency consultation, the HCP could not be used as a basis for exclusion of Federal land.

Second, we can only exclude lands that meet the definition of critical if the benefits of exclusion outweigh the benefits of inclusion. The Act requires all Federal agencies to use their authorities to contribute to the conservation of listed species. Because of the higher responsibility for recovery under the Act for Federal agencies relative to private landowners and non-Federal entities, few benefits of exclusion can be demonstrated. In light of these benefits of designation on federal lands, our experience is that it is the exception, rather than the norm, for an analysis to justify exclusion of federal lands from a CH designation. Thus, excluding Federal lands would have been legally vulnerable, as was demonstrated in the late 2000s through several lawsuits where Federal lands were determined to have been inappropriately excluded (e.g., lynx, bull trout).

In consideration of the explicit Congressional direction that federal agencies exercise their authorities to conserve listed species, to the extent that there are costs or burdens associated with a CH designation, the Service believes that it is sound public policy for those costs or burdens to be assumed first by the federal estate. Accordingly, in order to provide for more predictability and consistency in the designation of CH, we believe it appropriate as a matter of policy that we generally not exclude federal lands from a CH designation unless a national security or national defense issue is implicated.

4. **Q. What Federal land was and was not designated as CH for the flycatcher in Colorado in the Rio Grande drainage?**

A. We designated critical habitat within the Alamosa National Wildlife Refuge (NWR) and two large parcels of BLM land. The unit on Alamosa NWR is an 11.4 mile segment constituting 8,345 acres along the Rio Grande. The BLM unit is 12.7 miles long constituting 451.7 acres to the south of Alamosa NWR on the west side of the Rio Grande. Additionally, we designated three segments of BLM land that are in close proximity to each other on the Conejos River that, in total, are 2.9 miles long constituting 1,242.7 acres. Five parcels of BLM land on the Rio Grande were not included in the final designation due to their small size and limited contribution toward recovery of the flycatcher.

5. **Q. Why was the habitat segment on the BLM land on the Rio Grande designated as CH?**

A. Although the habitat in this segment is currently not suitable for the flycatcher, it has potential to grow into suitable habitat given appropriate riparian management. Therefore, the segment was considered potential habitat and, according to Service guidance could be included in CH designation due to potential for future contribution towards recovery. The BLM land designated as CH contains 451.7 acres of habitat. According to the best available science, an average territory size for a pair of breeding flycatchers is about 11 acres. This equates to 41 flycatcher territories that could be supported in this segment. The Recovery Plan for the flycatcher has a San Luis Valley Management Unit goal of 50 flycatcher territories and prescribes maintenance of at least twice the habitat needed to sustain territorial recovery goals since changes to habitat can occur. The BLM segment of CH could, therefore, potentially support nearly all of the flycatchers for recovery in the San Luis Valley Management Unit and contribute to maintenance of the Recovery Plan habitat goals. Should private
land on the both the western and eastern side of the Rio Grande also be appropriately managed, even more habitat and flycatchers could exist. This segment is also in relatively close proximity to occupied CH to the north on Alamosa NWR and to the northwest on the Conejos River BLM land. Because of the close proximity to occupied habitat and the potential for suitable habitat to expand with appropriate riparian management, we determined it was appropriate to designate this segment of BLM as CH. Management plans for both private and Federal lands developed under the direction of the Rio Grande Natural Area Act may help to achieve appropriate riparian management in the future.

6. Q. What is the consultation process for impacts to the flycatcher itself and its CH?

A. If a project with a Federal nexus (i.e., authorized, funded, or carried out by a Federal agency) affects the flycatcher or its designated CH, the lead Federal agency (such as BLM, US Army Corps of Engineers, Bureau of Reclamation, or Natural Resource Conservation Service) enters into consultation with the Service. The lead Federal agency determines whether a project may affect the flycatcher or designated critical habitat. The Service then reviews the Federal agency’s determination. If the determination is that the project may affect, but is not likely to adversely affect the flycatcher or its CH, and the Service concurs, then the process will end with a letter.

If, after consideration of avoidance or minimization measures, the project is likely to adversely affect the flycatcher or CH, we conduct formal consultation, which results in a biological opinion. In the biological opinion, the Service determines whether the proposed project would jeopardize the continued existence of the species (a jeopardy opinion) or destroy or adversely modify CH. If we conclude that jeopardy or adverse modification is likely, we include reasonable and prudent alternatives (RPAs) to the action that meet project goals but would avoid the jeopardy/adverse modification situation. The decision on whether to implement an RPA lies with the lead Federal agency.

Almost all biological opinions do not result in a jeopardy or adverse modification determinations. For these opinions, the Service provides the project with an exemption to the prohibitions against take if we find that incidental take is likely to result from the action. For this exemption to apply, the project must comply with any reasonable and prudent measures (RPMs) that we find advisable to reduce the amount of take. We also may identify voluntary conservation recommendations to further the conservation of listed species.

7. Q. What is required to reach an adverse modification determination?

A. Adverse modification means that a project would appreciably diminish the conservation value of critical habitat. This means that a project would need to preclude our ability to meet our recovery goals for a species on a range-wide basis. Therefore, it will take a project that has large impacts to CH to reach the threshold where the Service would be likely to find that a project causes destruction or adverse modification.

8. Q. In the unlikely event of an adverse modification determination, would RPAs require water users in the San Luis Valley to deliver water to New Mexico in any manner that is not consistent with the Rio Grande Compact?

A. No, any RPA would have to comply with the Compact. Since Colorado has a state-wide rolling adjudication process, the federal agencies are required under the McCarran amendment to
participate. Where the Service has entered into recovery plans on other rivers for which there are interstate compacts, such as the Colorado and the Platte Rivers, the Service did not have any authority to alter the terms of the compacts. The Service worked with the states and the water users to develop a plan for recovery of listed species while water development proceeded in accordance with federal and state laws and interstate compacts.

9. **Q. Was there any connection between the critical habitat designation for the southwestern willow flycatcher and conservation of the silvery minnow?**

   **A.** There is absolutely no connection between our determinations regarding critical habitat for the flycatcher and the conservation needs for the minnow. At no time during the designation for critical habitat did the subject of the minnow come into consideration, which is reflected in our record for the flycatcher CH designation. Our designation of critical habitat for the flycatcher followed all the laws, regulations, and policies regarding CH designations. In no way can CH designation for the flycatcher in Colorado force delivery of more water for silvery minnow habitat needs in New Mexico.