

filing a separate transmittal letter (see § 1312.4(b) of this part), the title page of every activating range tariff shall provide the name, title and phone number of the party authorized to submit the publication for filing with the Commission, and the fee account number established for the filing carrier or agent; or

(ii) Two copies of each activating tariff transmitted by hand in accordance with the requirements of § 1312.3 and 1312.4(a) and (b) of this part.

(d) Except as expressly provided in this section, range tariffs are subject to the provisions of §§ 1312.1 through 1312.40 of this part.

Decided: January 10, 1994.

By the Commission, Chairman McDonald, Vice Chairman Simmons, Commissioners Phillips, and Philbin. Commissioner Phillips concurred in part and dissented in part with a separate expression.

Sidney L. Strickland, Jr.,
Secretary.

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018-AA95

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Least Bell's Vireo

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: The Fish and Wildlife Service (Service) designates critical habitat for the least Bell's vireo (*Vireo bellii pusillus*), an endangered species, pursuant to the Endangered Species Act of 1973, as amended (Act). This designation encompasses a total of about 38,000 acres at 10 localities in portions of 6 counties in southern California. This designation results in additional protection requirements under section 7 of the Act for activities that are funded, authorized, or carried out by a Federal agency. The Service has considered economic and other relevant impacts in making a final decision on the size and scope of critical habitat.

EFFECTIVE DATE: March 4, 1994.

ADDRESSES: The complete file for this rule is available for inspection, by appointment, during normal business hours at the U.S. Fish and Wildlife Service, Carlsbad Field Office, 2730

Loker Avenue West, Carlsbad, California 92008.

FOR FURTHER INFORMATION CONTACT: Larry Salata or Loren Hays, Fish and Wildlife Biologists, (see ADDRESSES section) at 619/431-9440.

SUPPLEMENTARY INFORMATION:

Background

Introduction

The Act requires the Service to designate critical habitat to the maximum extent prudent and determinable concurrently with listing a species as endangered or threatened. On November 8, 1979, the Service received a petition from James M. Greaves to list the Arizona (*V. b. arizonae*) and least Bell's vireos as endangered. A notice of acceptance of the petition and status review was published on February 6, 1980 (45 FR 8030). Based on the best scientific and commercial data available and comments submitted during the status review, the Service found that the petitioned action was warranted for the least Bell's vireo on October 13, 1983 (49 FR 2485, January 20, 1984); however, a listing action was precluded by other pending listing actions of higher priority, in accordance with section 4(b)(3)(C)(i) of the Endangered Species Act of 1973 (Act), as amended (16 U.S.C. 1531 *et seq.*). Section 4(b)(3)(C)(i) recycles such petitions, resulting in a new finding deadline of October 13, 1984. A finding was made on October 12, 1984, that this action was still warranted but precluded. The Service published a proposed rule to determine the least Bell's vireo to be an endangered species, and to designate critical habitat for the species on May 3, 1985 (50 FR 18968). This proposed rule constituted the next finding required under section 4(b)(3)(B)(ii) of the Act. A correction to some of the legal descriptions of the proposed critical habitat was published in the June 4, 1985, Federal Register (50 FR 23458). Rather than delay protected status for the vireo while the economic analysis that must accompany the final rule designating critical habitat was being prepared, the Service decided to make final only the listing portion of the rule to provide the Act's protection to the least Bell's vireo. Section 4(b)(6)(c)(ii) of the Act allows the Service to postpone designation of critical habitat for up to 12 months. On May 2, 1986, the vireo was listed as endangered and the comment period on proposed designation of critical habitat was reopened for an additional 90 days (51 FR 16483). A further extension of the comment period to January 1, 1987, was published on July 31, 1986 (51 FR

27429). A revised proposed rule was published on August 7, 1992 (57 FR 34892) at which time the public comment period was reopened for 90 days.

Definition of Critical Habitat

Critical habitat is defined in section 3(5)(A) of the Act as: (i) The specific areas within the geographical area occupied by a species on which are found those physical or biological features (I) essential to the conservation of the species and (II) that may require special management considerations or protection, and (ii) specific areas outside the geographical area occupied by a species at the time it is listed, upon determination that such areas are essential for the conservation of the species. Section 3(5)(C) further indicates that in most cases, critical habitat should not encompass the entire geographical area that can be occupied by the species.

Role in Species Conservation

The term "conservation," as defined in section 3 of the Act, means to use and the use of all methods and procedures which are necessary to bring an endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary (i.e., the species has recovered).

The definition of critical habitat, while explicitly mentioning the features essential to conservation of a species, implicitly requires that the areas themselves be essential to the species' survival and recovery. Not all areas containing those features of a listed species' habitat are necessarily essential to its conservation. Conversely, areas not currently containing all of the essential features, but with the capability to do so in the future, may be designated as critical habitat. However, areas not included in critical habitat that contain one or more of the essential features are also important to the species' conservation and would be addressed under other facets of the Act and other conservation laws and regulations.

Relationship to Recovery

Section 2(c)(1) of the Act declares that all Federal departments and agencies shall seek to conserve endangered and threatened species and shall utilize their authorities in furtherance of the purposes of the Act. Section 3(3) of the Act defines conservation to include all measures needed to recover the species and justify its removal from the list of endangered and threatened wildlife and plants. The Act mandates the

conservation of listed species through different mechanisms, such as: Section 7 (requiring Federal agencies to further the purposes of the Act by carrying out conservation programs and insuring that Federal actions will not likely jeopardize the continued existence of the listed species or result in the destruction or adverse modification of designated critical habitat); section 9 (prohibition of taking of listed animal species); section 10 (wildlife research permits and conservation planning on State and private lands); section 6 (cooperative State and Federal grants); land acquisition; and research.

Recovery planning under section 4(f) of the Act is the "umbrella" that eventually guides all of these activities and promotes a species' conservation and eventual delisting. Recovery plans provide guidance, which may include population goals and identification of areas in need of protection or special management, so that a species can be removed from the list of endangered and threatened wildlife and plants. Recovery plans usually include management recommendations for areas proposed or designated as critical habitat.

The Service considers the conservation of a species in its designation of critical habitat. The designation of critical habitat will not, in itself, lead to the recovery of the species, but is one of several measures available to contribute to the conservation of a species. Critical habitat helps focus conservation activities by identifying areas that contain essential habitat features (primary constituent elements) that may require special management. The protection given critical habitat under section 7 also immediately increases the protection given to these primary constituent elements and essential areas and preserves options for the long-term conservation of the species. The protection of these areas may also shorten the time needed to achieve recovery.

Designating critical habitat does not create a management plan; it does not establish numerical population goals; it does not prescribe specific management actions (inside or outside of critical habitat); and it has no direct effect on areas not designated. Specific management recommendations for critical habitat are more appropriately addressed in recovery plans and in section 7 consultation. Areas outside of critical habitat also have an important role in the conservation of a listed species that is not addressed through designation of critical habitat.

The designation of critical habitat may be reevaluated and revised at any

time that new information indicates that changes are warranted. The Service will reassess proposals for designation of critical habitat if land management plans, recovery plans, or other conservation strategies are developed and fully implemented that may reduce the need for the additional protection provided by any critical habitat designation.

Primary Constituent Elements

The Service is required to base critical habitat designations on the best scientific data available (50 CFR 424.12). In determining what areas are to be designated as critical habitat, the Service considers those physical and biological attributes that are essential to the conservation of the species and that may require special management considerations or protection. Such requirements, as stated in 50 CFR 424.12, include, but are not limited to, the following:

- Space for individual and population growth, and for normal behavior;
- Food, water, or other nutritional or physiological requirements;
- Cover or shelter;
- Sites for breeding, reproduction, rearing of offspring; and generally; and
- Habitats that are protected from disturbance or are representative of the historic geographical and ecological distribution of a species.

The Service has determined that the physical and biological habitat features (referred to as the primary constituent elements) that support feeding, nesting, roosting and sheltering are essential to the conservation of the least Bell's vireo. These habitat features can be described as riparian woodland vegetation that generally contains both canopy and shrub layers, and includes some associated upland habitats. Vireos meet their survival and reproductive needs (food, cover, nest sites, nestling and fledgling protection) within the riparian zone in most areas. In some areas they also forage in adjacent upland habitats.

Ecological Considerations

The least Bell's vireo is a small gray migratory songbird that has declined dramatically in both numbers and distribution. This subspecies was once widespread and abundant throughout the Central Valley and other low elevation riverine areas of California. Least Bell's vireos historically bred in riparian woodlands from the interior of northern California (near Red Bluff, Tehama County) to northwestern Baja California, Mexico. Its current breeding distribution is restricted to a few localities in southern California and northwestern Baja California, Mexico (Franzreb 1989).

Least Bell's vireos nest primarily in willows (*Salix* spp.) but also use a

variety of other shrub and tree species for nest placement (Gray and Greaves 1984, Salata 1987). Least Bell's vireos forage in riparian and adjoining upland habitats (Salata 1983, Kus and Miner 1987). Preliminary studies of vireo foraging behavior along the Santa Ynez River and within the Mono Creek Basin (Santa Barbara County) indicated that a large percentage of their foraging may occur in the adjacent chaparral community up to 300 or more yards from the nest (Tom Keeney, biologist, U.S. Army Corps of Engineers, July 31, 1985).

The reduction of least Bell's vireo numbers and distribution is associated with widespread loss of riparian habitats and brood parasitism by the brown-headed cowbird (*Molothrus ater*). Destruction or significant alteration of riparian woodlands may have rendered the least Bell's vireo population incapable of withstanding the increase in brown-headed cowbird numbers that began in the 1920's (Grinnell and Miller 1944, Gaines 1974).

The population decline of the vireo has been well documented. In 1973, no least Bell's vireos were found during an intensive search in nearly all remaining riparian habitat between Red Bluff, Tehama County, and Stockton, San Joaquin County (Gaines 1974). In 1977, the Service reviewed the literature, examined museum material, and contacted numerous National Audubon Society chapters and knowledgeable field observers for information on the status of the least Bell's vireo (Wilbur 1980). Since then, several intensive surveys of virtually all potential breeding habitat in California have been conducted (Gaines 1977, Goldwasser 1978, Goldwasser *et al.* 1980, RECON 1989, unpublished data on file with the Fish and Wildlife Service). Least Bell's vireos remain at only about 40 of over 150 historically occupied sites (some localities cover many miles of a water course) surveyed in the United States from 1977 through 1991. Most of these locations contain fewer than five pairs of vireos. About 76 percent of the U.S. population is found at just five localities. The current breeding population of the least Bell's vireo in California consists of approximately 500 pairs. Fewer than several hundred pairs are estimated to occur in Mexico.

Consideration of New Information

The final rule is based on new biological and economic data, and material received during the comment period for the proposed rule and revised proposed rule.

Total Acres Included in Critical Habitat

The Service is designating critical habitat for the least Bell's vireo at 10 areas encompassing approximately 38,000 acres (15,200 ha) in Santa Barbara, Ventura, Los Angeles, San Bernardino, Riverside, and San Diego Counties, California. About 49 percent of the vireo population in the United States occurs within these 10 areas. Critical habitat for the vireo occurs on the Santa Ynez River (Santa Barbara County), Santa Clara River (Ventura and Los Angeles Counties), Santa Ana River (Riverside and San Bernardino Counties), and Santa Margarita River, San Luis Rey River, Sweetwater River, San Diego River, Tijuana River, Coyote Creek, and Jamul-Dulzura Creeks (San Diego County).

Federal land within the critical habitat consists of approximately 10,979 acres (4,392 ha) including approximately 7,600 acres (3,040 ha) in Santa Barbara County under the jurisdiction of the Forest Service, 3,338 acres (1,335 ha) in Riverside and San Bernardino Counties under the jurisdiction of the Corps of Engineers, and 53 acres (21 ha) in San Diego County under the jurisdiction of the International Boundary and Water Commission. The remainder of the critical habitat is in State, county, city, Indian Tribe, or private ownership.

Differences From Proposed Rule and Revised Proposed Rule and Final Rule

The May 3, 1985, proposed rule identified approximately 43,000 acres for designation as critical habitat. In preparing the revised proposed rule, it was discovered that the 43,000-acre critical habitat figure was in error and should have been reported as approximately 45,805 acres. Therefore, this final rule and associated documents refer to the 45,805-acre figure as the correct acreage figure from the May 3, 1985, proposed designation.

The area encompassed by the 10 critical habitat areas has been adjusted from approximately 45,805 acres (18,322 ha) in the original proposed rule to 48,025 acres (19,210 ha) in the revised proposed rule to about 38,000 acres (15,200 ha) in the final rule. In adjusting the boundaries, 1,400 acres (560 ha) were deleted from critical habitat on the Santa Ynez River and 3,620 acres (1,448 ha) were added, resulting in a net increase of 2,220 acres (888 ha). This adjustment was recommended by the Forest Service and was based on the results of additional field research on the status, distribution, and behavior of the least Bell's vireo on the Santa Ynez River during the 1986

breeding season. An additional 120 acres (48 ha), adjacent to the northern border of Gibraltar Reservoir, were also recommended for deletion by the Forest Service but the Service does not believe that this change is warranted because this area contains potential nesting habitat. All the land suggested for either withdrawal or addition to the Santa Ynez River critical habitat is under the jurisdiction of the Forest Service. The additional 3,620 acres (1,448 ha) that were added are under Federal jurisdiction, withdrawn from mineral entry, and without any private or commercial interests.

Two adjustments have been made in the Santa Margarita River critical habitat area. About 420 acres (168 ha) of upland private property were removed based on a refinement in the legal description. This adjustment did not exclude any vireo habitat. About 9,600 acres (3,840 ha) on Camp Pendleton Marine Corps Base were removed based on the finding that an existing Memorandum of Understanding (MOU) between the Service and the Marine Corps for vireo management is providing an adequate level of protection to the vireo and its habitat. Although this area is essential to the conservation of the species, the Service finds that a formal critical habitat designation is unnecessary because the MOU contains provisions for section 7 consultation for proposed actions that may destroy or adversely modify vireo habitat. The Service also finds that a level of protection equivalent to or greater than that provided by a critical habitat designation can be achieved for the vireo on this portion of the Santa Margarita River through cooperation with the Marine Corps under the MOU. The management actions implemented under this agreement have significantly benefitted the vireo population at this locality. It has increased from 98 territorial males in 1986 when the MOU was established to 212 territorial males in 1991. However, the Service will reconsider its position to designate critical habitat on the Camp Pendleton reach of the Santa Margarita River if conditions warrant. The Service will use its authority under sections 7 and 9 of the Act to insure compliance with the prohibitions on unauthorized take.

One adjustment has been made in the San Luis Rey River critical habitat area: About 80 acres (32 ha) of upland private property were removed based on a refinement in the legal description. This adjustment did not exclude any vireo habitat.

*Available Conservation Measures**Section 7 Consultation*

Section 4(b)(8) of the Act requires, for any proposed or final regulation that designates critical habitat, a brief description and evaluation of those activities (public or private) that may adversely modify such habitat or may be affected by such designation. Regulations found at 50 CFR 402.02 define destruction or adverse modification of critical habitat as a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical.

Once critical habitat is designated, section 7(a)(2) requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to destroy or adversely modify critical habitat. This Federal responsibility accompanies, and is in addition to, the requirement in section 7(a)(2) of the Act that Federal agencies insure that their actions are not likely to jeopardize the continued existence of any listed species. As required by 50 CFR 402.14, a Federal agency must consult with the Service if it determines an action may affect a listed species or its designated critical habitat. Thus, the requirement to consider adverse modification of critical habitat is an incremental section 7 consideration above and beyond section 7 review to evaluate jeopardy and incidental take. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402.

Basis for Analysis

The evaluation of actions that may adversely modify least Bell's vireo critical habitat should consider a number of factors such as the present condition of the habitat, the number of current pairs, the reproductive success of breeding pairs, the expected time to regenerate sufficient habitat to support an effective population at a particular site, and local and regional problems. Although the Service considered the entire range of the least Bell's vireo in determining an approach to critical habitat designation, its section 7 analysis of actions that may adversely affect vireo critical habitat will consider the significance of impacts at individual critical habitat areas as well as the entire range. All proposed actions should be viewed as to their impacts on all four constituent elements relative to the

potential for adverse modification on individual critical habitat areas.

Examples of Actions Affecting Critical Habitat

Activities that disturb or remove the primary constituent elements within proposed critical habitat areas may constitute destruction or adverse modification of critical habitat. In the case of the vireo, these activities include: (1) Removal or destruction of riparian vegetation, (2) thinning of riparian growth, particularly near ground level, (3) removal or destruction of adjacent chaparral or other upland habitats used for foraging, and (4) increases in human-associated or human-induced disturbance. Specific actions that could adversely affect vireo critical habitat include stream channelization, water impoundment or extraction, water diversion, livestock grazing, intensive recreation, and conversion of presently existing riparian or adjacent upland areas to residential, agricultural, or commercial use. Complete or major destruction of riparian vegetation would result in the extirpation of the least Bell's vireo from the affected area, which could further endanger the species throughout the remainder of its range and preclude opportunities for recovery. Thinning or selectively removing components of riparian vegetation could cause vireos to abandon an area because suitable nesting and foraging sites are scarce or absent or could result in lowered reproductive success because of diminished habitat quality. Increases in recreation could cause actual destruction of nests or could disrupt nesting activities which in turn could cause nest abandonment, lowered hatching success, increased rates of cowbird parasitism and depredation events, and a decrease in the number of fledged young.

Other Conservation Measures: Non-Federal Lands

Section 9 of the Act prohibits intentional and unintentional "take" of listed species and applies to all landowners regardless of whether or not their lands are within critical habitat (see 16 U.S.C. 1538(a)(1), 1532(1a) and 50 CFR 17.3). Section 10(a)(1)(B) authorizes the Service to issue permits for the taking of listed species incidental to otherwise lawful activities such as agriculture, sand and gravel mining, and urban development. Incidental take permits must be supported by a habitat conservation plan (HCP) that identifies conservation measures that the permittee agrees to implement to conserve the species, usually on the

permittee's lands. A key element of the Service's review of an HCP is a determination of the plan's effect upon the long-term conservation of the species. The Service would approve an HCP, and issue a section 10(a)(1)(B) permit if the plan would minimize and mitigate the impacts of the taking and would not appreciably reduce the likelihood of the survival and recovery of that species in the wild.

The San Diego Association of Governments (SANDAG) is coordinating the development of HCPs for the San Diego River and Sweetwater River critical habitat areas. This effort also included the development of draft plans for the Santa Ana River and San Luis Rey River critical habitat areas, but these plans are no longer under consideration. The intent of these plans is to address land use conflicts and to conserve the vireo and its habitat. The Service will issue section 10(a)(1)(B) permits, if the HCPs are acceptable. In November 1991, the Service received two permit applications and final draft HCPs from SANDAG for the incidental take of vireos on the San Diego and Sweetwater Rivers. SANDAG is currently finalizing the HCPs and a draft Environmental Assessment is under preparation. Based on the review of drafts of these plans, the Service anticipates that they will be compatible with the designation of critical habitat.

Summary of Economic Analysis

Section 4(b)(2) of the Act requires the Service to designate critical habitat on the basis of the best scientific data available and to consider the economic impact and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusions outweigh the benefits of specifying such area as part of the critical habitat, unless it is determined, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat would result in the extinction of the species concerned. The Act thus requires the Service to evaluate those economic and other effects likely to take place due to the designation of critical habitat, and to consider whether to exclude some critical habitat.

The economic effects of designating critical habitat for the least Bell's vireo are the project-related costs of habitat mitigation within the 10 areas designated as critical habitat over and above those costs incurred as a result of listing the vireo as an endangered species in May 1986 and as a result of compliance with the Federal Clean

Water Act for those activities involving the placement of fill into waters of the United States.

Affected Agencies

The Service assumes in the economic analysis that the impacts to Federal agencies are related to activities that physically alter critical habitat. The Forest Service, Corps of Engineers (Corps), Federal Highway Administration, and International Boundary and Water Commission are the agencies most likely to be affected by the critical habitat designation.

Economic Effects

Activities that may be affected include construction and maintenance of dams, water control and transport, fire suppression, recreation, oil and gas production and transport, sand-mining, residential and commercial development and related facilities, agriculture, and highway and bridge construction.

Private lands within critical habitat (15,961 acres) are currently used primarily for agricultural purposes and are not expected to be economically affected. There are no known proposals with Federal involvement.

Numerous Federal, State, and local agencies have jurisdiction over the affected activities. Several informed the Service that critical habitat designation is consistent or compatible with their management objectives. Although a number of agencies expressed concern that the designation of critical habitat would affect proposed or future projects and asked to have various project areas removed, the economic costs attributable to critical habitat for those projects are expected to be insignificant.

Federal agencies expected to incur economic costs attributable to designation of critical habitat include the Forest Service, Corps of Engineers, and the International Boundary and Water Commission. The Forest Service anticipates an increased cost of \$2,000 per year for additional fire suppression activities and \$1,000 per year for additional ranger patrols to protect vireo habitat in the Santa Ynez River critical habitat area. It may become necessary for the Corps of Engineers to initiate patrols of its land in the Santa Ana River critical habitat area to control trespassing, at an anticipated cost of \$20,000 a year. The Service believes that the International Boundary and Water Commission flood control activities in the Tijuana River area will incur no significant economic costs.

Construction of the Hamner Avenue Bridge in the Santa Ana River area was completed in 1985. The project

included a compensation package for adverse effects to wildlife and wetlands that cost a total of \$462,000, of which \$113,400 was for cowbird control and nest monitoring to compensate for impacts to vireo habitat. The annualized value of the critical habitat effect is \$8,000 per year.

A number of projects may incur economic costs because critical habitat designation is expected in some cases to require habitat mitigation or compensation that goes beyond current requirements. Under current procedures, whenever proposed projects affect wetlands, the proposing agency is required to replace habitat values either concurrently (up to 5 acres replaced for every 1 acre lost) or prior to their destruction (1 acre replaced for every 1 acre lost). In most cases, the agencies have chosen to replace the habitat values concurrently in order to avoid expensive project delays. With critical habitat designation, the Service expects in some cases to require replacement of habitat values prior to implementation of the action. The Service anticipates that the maximum additional cost would be \$75,000 per acre for replacement of vireo habitat values prior to their destruction rather than concurrently. The incremental cost is due primarily to the need for additional landscaping and revegetation to create fully functional vireo habitat in a 2 to 3-year period. The cost of land acquired for mitigation purposes in such cases is attributable to the provisions of the Clean Water Act, or other laws and regulations protecting the environment. In some cases where land values are high, the total cost per acre of habitat destroyed may be less for prior replacement than for concurrent replacement.

A proposed road crossing of the San Diego River associated with the Mission Trails Regional Park could adversely affect critical habitat. The project is still in the planning stage and the exact amount of habitat that would be affected is not known. The Service estimates that up to 5 acres of habitat may need to be replaced. At \$75,000 per acre, an additional cost of \$375,000 would be required for prior replacement of lost vireo habitat values. The annualized equivalent of the \$375,000 one-time cost is \$27,000 per year.

The Home Capital Development Group's planned Rancho San Diego project may adversely affect critical habitat in the Sweetwater River area. The Service estimates that up to 3 acres of habitat may need to be replaced prior to project initiation at an additional cost of \$225,000. The annualized equivalent

of the \$225,000 one-time cost is \$16,000 per year.

The Corps of Engineers authorizes a number of activities in the Prado Basin of the Santa Ana River critical habitat area. Future changes in some of these existing activities could affect critical habitat, and proponents may incur additional costs as a result. However, because project proposals were not identified during the public comment period of the proposed rule, the Service is unable to provide an estimate of any economic impact due to critical habitat considerations.

Sand and gravel mining activities that are regulated under the Clean Water Act could affect critical habitat, especially along the San Luis Rey River. Although there are no specific project proposals, the Service anticipates that the maximum additional cost would be \$75,000 per acre of habitat destroyed.

SANDAG is coordinating the development of HCPs under section 10 of the Endangered Species Act for the San Diego River and Sweetwater River critical habitat areas. This effort also included the development of draft plans for the Santa Ana River and San Luis Rey River critical habitat areas but these sites are no longer under consideration. The habitat conservation planning process is being used to address land use conflicts and to conserve the least Bell's vireo. The Service will issue section 10(a) permits if these plans are acceptable. Based on Service review of drafts of these plans, it is anticipated that they will be compatible with the designation of critical habitat, and no additional economic costs are expected.

The total cost attributable to the designation of critical habitat for projects with supporting data is approximately \$74,000 per year. Projects expected to be affected by critical habitat designation for which adequate cost data are not available would not add substantially to that total. Impacts on regional employment, household income, and tax revenues are expected to be insignificant.

Summary of Comments and Recommendations

In the proposed rule published May 3, 1985, the revised proposed rule published on August 7, 1992, and associated notifications, all interested parties were requested to submit factual reports or information that might contribute to the development of a final rule for the vireo or its critical habitat. Appropriate State agencies, county governments, Federal agencies, scientific organizations, and other interested parties were contacted and requested to comment. A correction to

some of the legal descriptions of the proposed critical habitat was published in the June 4, 1985, *Federal Register* (50 FR 23458). Newspaper notices were published by June 7, 1985, in the *Blade Tribune*, *Enterprise*, *Los Angeles Times*, *News Press*, *Riverside Press*, *San Bernardino Sun*, *San Diego Transcript*, *San Diego Tribune*, and *San Diego Union*, all of which invited general public comment. Notification of public hearings and an extension of the comment period to August 30, 1985, was published on July 9, 1985 (50 FR 27992). Public hearings were conducted in San Diego on July 30, 1985, in Oxnard on July 31, 1985, and in Anaheim, California, on August 1, 1985.

An additional notification extending the comment period to December 2, 1985, was published on October 3, 1985 (50 FR 40424). These two additional notifications were also published in the aforementioned nine newspapers in July and October, respectively. On May 2, 1986, the least Bell's vireo was listed as endangered, and the public comment period on proposed critical habitat was reopened for an additional 90 days (51 FR 16483). A further extension of the comment period to January 1, 1987, was published on July 31, 1986 (51 FR 27429). Approximately 120 interested parties were notified regarding this extension of the comment period.

The public comment period was again reopened for 90 days subsequent to the publication of the revised proposed rule on August 7, 1992 (57 FR 34298). Two additional public hearings were also scheduled by the Service. A legal notice announcing the hearings and inviting general public comment on the revised proposal was published in the *San Diego Union-Tribune* on August 17, 1992. About 200 potentially affected or interested parties were notified regarding this revised proposed action. Public hearings were held in Garden Grove, California, on October 20, 1992, and in San Diego on October 22, 1992. A total of about 30 individuals attended these hearings.

Multiple comments whether written or oral from the same interested party are regarded as one comment. Written comments and oral statements questioning or opposing critical habitat designation as originally proposed were grouped into 24 issues and discussed in the revised proposed rule (57 FR 34892).

Of the 87 comments received on the revised proposal to designate critical habitat, 24 (28 percent) supported the designation, 3 (3 percent) opposed the designation, 51 (59 percent) recommended that the Service change the boundaries or delay the designation, and 9 (10 percent) were non-committal.

The Service has identified 25 issues associated with these 87 comments that reflect a questioning of, or opposition to, critical habitat designation and are discussed below.

Issue 1: Certain areas should be excluded from critical habitat because the habitat is already degraded, or proposed plans will indirectly degrade the habitat. Along the Santa Clara River, for example, cowbirds are numerous within the habitat and make it less suitable for vireos. Also, reclaimed sewage water flows through the Santa Clara River, and treatment chemicals may affect the vireo. At expected build-out conditions, the noise generated by traffic along such areas as Jamul Creek and the San Luis Rey River may render the habitat unsuitable for vireos.

Service Response: As long as the constituent elements of critical habitat are present, the factors leading to the degradation of such habitat are not considered in the designation process. Noise, cowbird parasitism, pollution, and other factors contribute incremental impacts upon the vireo, but management of critical habitat areas may reduce or eliminate these impacts. Extensive unmitigated habitat loss may preclude the ability of a listed species to recover. Critical habitat designation should reduce the chances of this occurring with respect to the least Bell's vireo.

The Act also specifies that certain management considerations may be necessary in critical habitat areas. Cowbirds are common in riparian habitat throughout the range of the least Bell's vireo. The judicious trapping of cowbirds and monitoring of vireo nests has significantly reduced the detrimental effects of cowbird parasitism on the vireo at several localities.

Issue 2: Critical habitat should be modified to more accurately reflect the location of nesting and foraging habitat. Urban developments, agricultural lands, industrial operations, recreational facilities, highways, railroads, etc., are included within the boundaries of critical habitat designation.

The Service has exceeded its authority under the Act by including in the critical habitat area, land which it knows does not meet the Act's definition of critical habitat. The regulations state that "critical habitat will be defined by specific limits using reference points and lines as found on standard topographic maps of the area" [50 CFR 424.12(c)]. The Service should choose reference points that are more precise than section lines, and less ephemeral than trees and sandbars.

Service Response: The suggestion to designate more precise boundaries may be possible in some cases. No specifics on suggested boundaries were provided. Attempting to redefine the critical habitat by another means would unduly delay a final decision on this matter.

The Service is required to use existing, readily recognizable boundaries in the development of legal descriptions for critical habitat. The Service cannot use ephemeral features such as vegetation for boundaries. In cases where areas designated as critical habitat do not contain the primary constituent elements, impacts occurring within this area will not result in a finding of adverse modification by the Service. Thus, designation of critical habitat will not effect those areas within the legal critical habitat boundaries that do not contain vireo nesting or foraging habitat.

Issue 3: The Service has not clarified the potential effects of critical habitat designation on private landowners. For example, Service responses to Issues 7 and 18 in the revised proposed rule (50 FR 34892) appear contradictory. The response to Issue 7 states that most activities potentially taking place within critical habitat will require Federal approval, and therefore be subject to the requirements of section 7 consultation. The discussion of Issue 18, however, implies that Federal involvement in projects on private land would be unusual.

Federal case law indicates that designation of critical habitat will, contrary to the Service's representations, affect activities on State and private property even if there is no Federal involvement. For example, in *Palila v. Hawaii*, 639 F. 2d 495 (9th Cir. 1981), the court held that the state of Hawaii's maintenance of sheep and goats within Palila (*Loxioides bailleui*) critical habitat constituted a take, even though there was no Federal involvement.

Service Response: Section 7 of the Act applies only to Federal agencies, directing them to ensure that their actions do not jeopardize the continued existence of listed species or adversely modify critical habitat. The Service maintains that a project potentially affecting a federally listed species will only require section 7 consultation when Federal funding, approval, permitting, licensing, or other discretionary authority is involved. Because the least Bell's vireo critical habitat is primarily wetland, it is anticipated that the Army Corps of Engineers will be involved in projects affecting this habitat, through the section 404 permitting process of the

Clean Water Act. A section 404 permit is required for projects involving dredge or fill of jurisdictional wetlands or waters of the United States. For projects on private property, where wetland within critical habitat is neither dredged nor filled, Federal involvement under section 7 is not anticipated.

By contrast, section 9, which prohibits the unpermitted "take" of endangered species, applies to all "persons" (as defined in the Act) within the jurisdiction of the United States. Pursuant to section 9 of the Act and the regulations and statutes pertaining thereto, "take" means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or to attempt to engage in any such conduct" [16 U.S.C. 1532(19)]. In the case of *Palila v. Hawaii*, the Court rendered an opinion on the legal definition of "take." The Court ruled in *Palila v. Hawaii* that habitat destruction harms a species by indirectly causing a decline in the population, and precluding recovery of the species. Therefore, the court's ruling in this case pertained to the legal definition of "take" and not the designation or function of critical habitat. A landowner destroying vireo habitat might be involved in a section 9 taking, but would have no incremental legal exposure as a result of critical habitat designation.

Issue 4: The revised proposed rule uses an improper incremental approach to the economic analysis required by the Act. In the revised proposed rule, the Service stated that the economic analysis should only apply to project-related costs of mitigation within critical habitat designation over and above those costs that would be incurred as a result of listing the vireo. The Service thereby eliminated the restraints imposed through the balancing process set forth in section 4 of the Act.

Service Response: The effects of critical habitat designation are incremental, and represent only a portion of the total cost of a species' conservation. A high level of protection is already afforded to least Bell's vireo habitat by the Clean Water Act and Federal wetlands policy. An additional layer of protection has been added to this by the listing of the vireo, which prohibits jeopardy and take of the species. Even without designation of critical habitat, modification of occupied vireo habitat can constitute jeopardy or take. Federal agencies cannot adversely modify designated critical habitat. As discussed above under "Available Conservation Measures," that is in addition to the requirement to avoid jeopardizing the

continued existence of a federally listed species. Furthermore, if a Federal agency may affect critical habitat, that agency must consult with the Service even if the habitat happens to be unoccupied. These added section 7 requirements were considered in the development of the economic analysis.

In the 1982 amendments to section 4 of the Act, Congress added the word "solely" to the statutory directive that the Secretary base listing on the best scientific and commercial data available. A House of Representatives report states:

The addition of the word "solely" is intended to remove from the process of the listing or delisting of species any factor not related to the biological status of the species. The committee strongly believes that economic considerations have no relevance to determinations regarding the status of species* * *. Applying economic criteria to the analysis of these alternatives and to any phase of the species listing process is applying economics to the determinations made under section 4 of the Act and is specifically rejected by the inclusion of the word "solely" in this legislation. [H.R. Rep. No. 97-304; see 16 U.S.C. 1533(b)(1)(A)]

The Joint Regulations on Endangered Species also state that the Secretary may make a determination of listing "solely on the basis of the best available scientific and commercial information regarding a species' status, without reference to possible economic or other impacts to such determination" (50 CFR § 424.11(b)). In 1978, Congress amended section 4 of the Act to require the Secretary to take into consideration "the economic impact, and any other relevant impact, of specifying any particular area as critical habitat" (16 U.S.C. 1532(5)(A)(i)). Federal regulations on implementation of the Act state that "A final designation of critical habitat shall be made on the basis of the best scientific information available, after taking into consideration the probable economic and other impacts of making such a designation in accordance with § 424.19" (50 CFR § 424.12(a)). The Service interprets the history of the Act and Federal regulations to clearly indicate that the economic analysis should only take into account the effects of designating critical habitat, and not those of listing the species.

Issue 5: Some individuals wanted to know if critical habitat designation would result in the need for additional mitigation for projects with ongoing management or conservation plans designed to mitigate impacts to vireos.

Service Response: For projects that have completed the section 7 consultation process to develop mitigation measures for direct and indirect impacts to the least Bell's vireo and vireo habitat, it is highly unlikely that additional measures will be required as a result of the critical habitat designation.

For example, two California Department of Transportation (CALTRANS) projects in San Diego County and an Orange County Water District water conservation project in the Prado Basin that involve Federal funds, permits, or authorizations prompted formal section 7 consultations because of proposed impacts to vireos and/or vireo habitat irrespective (and in advance) of critical habitat designation. In each case, the overall project-related impacts to the vireo were evaluated and disclosed, and mitigation was proposed in the required environmental documentation. Mitigation was appropriately developed in each instance that compensates, to the extent deemed reasonable and prudent, for unavoidable direct and indirect impacts to the vireo, vireo habitat, and public fish and wildlife resources in general. Therefore, the Service fully anticipates, in these instances, that no additional mitigation would be required, prudent, or even possible as a result of the designation of critical habitat. In this regard, the Service cannot summarily dismiss the Orange County Water District's (District) position that "barring unforeseen circumstances, the mitigation and conservation measures that have been implemented and proposed for implementation" as a result of a current section 7 consultation will fully mitigate for impacts associated with the District's water conservation project.

Issue 6: Since conversion of land to residential or commercial development would adversely affect critical habitat, property owners would lose beneficial use of their land. Critical habitat designation within certain areas, such as the San Luis Rey Municipal Water District, would thus constitute a regulatory taking of property.

Service Response: Property owners within the critical habitat boundaries are not expected to lose beneficial use of their land as a result of critical habitat designation itself. In evaluating proposed projects within critical habitat boundaries, under section 7 of the Act, the Service would first determine if the specific area contained foraging or nesting habitat for least Bell's vireos. The designation of critical habitat would only affect those areas that contained elements of nesting or

foraging habitat. Areas that lack foraging or nesting habitat would not be affected by the designation. Furthermore, within critical habitat, only those activities with Federal involvement would be subject to section 7 consultation. Such involvement is most likely to occur when a project involves dredge or fill of waters of the United States. In cases where section 7 consultation is required, reasonable and prudent alternatives or measures are likely to be developed that do not preclude the development of private property. Given the pertinent data pertaining to past section 7 consultations involving the vireo or other listed species in southern California, it is extremely unlikely that any project would be effectively stopped or significantly modified because of the section 7 process. In fact, a World Wildlife Fund study, using 12 years of data from the entire United States, concluded that "The vast majority of federal activities subject to consultation successfully proceeded to completion while accommodating the needs of endangered and threatened species." Less than 1 percent of the actions that were the subject of formal consultation during this study were "blocked" because of section 7 (Barry *et al.* 1992).

In the rare cases when the Service issues jeopardy opinions without acceptable reasonable and prudent alternatives, the action agency may take the project to an exemption committee and ask that its projects be exempted from the requirements of the Act. The Service anticipates that few, if any, opinions would not contain acceptable reasonable and prudent alternatives.

Issue 7: If it is found that water extraction is damaging to least Bell's vireo critical habitat, then restrictions on water extraction would impinge on the rights of landowners and have a large economic impact on agriculture. Such restrictions would also threaten the supply of domestic water necessary to meet the water demands for certain communities.

Service Response: As discussed in the response to Issue 3 above, only those projects with Federal involvement would be directly affected by critical habitat designation. The Service does not anticipate any circumstances in which there would be Federal involvement in water extraction processes on private property within any of the critical habitat areas. Water extraction rights on private property could not be negated because of critical habitat designation.

Issue 8: The benefits of designating certain areas such as Newhall property on the Santa Clara River do not exceed the economic costs of such designation.

Current and potential revenues from agriculture, housing development, and filming activities on Newhall property, within proposed critical habitat, exceed \$200 million, and revenues from adjacent Newhall activities potentially impacted by the designation exceed \$160 million. In addition to Newhall, other property owners have expressed concerns over the costs of mitigation requirements that would be generated by the critical habitat designation on their lands.

Service Response: Newhall's analysis (Newhall Land and Farming Company 1992) and comments submitted by other landowners are based on the assumption that designation of critical habitat would prohibit or substantially modify all activities within the designated boundaries. The response to Issue 6 above indicates that the Service anticipates very few, if any, projects to be stopped or significantly modified due to critical habitat designation itself. Any impact on these projects would be through section 9 prohibitions on taking.

In addition, habitat occupied by vireos is already protected because of its status as a federally-listed species. The Clean Water Act, National Environmental Policy Act, Fish and Wildlife Coordination Act, Federal wetland policy, sections 1601 and 1603 of the California Fish and Game Code, and the California Environmental Quality Act also provide various degrees of consideration or protection for these areas. The requirements of these statutes overlap considerably, and ascribing costs incurred for mitigation or compensation to each of these statutes separately is problematical.

If occupied vireo habitat, jurisdictional wetlands or waters of the United States are to be affected by a Federal agency or project proponent, that agency or project proponent is presently required (in the absence of critical habitat designation) to replace those values with from 1 to 5 acres of appropriate habitat created for every acre lost. However, this replacement is generally mandated at the Federal level only if the impact exceeds 1 acre under the Corps' Nationwide Permit Program implementing, in part, section 404 of the Clean Water Act or if vireos would be affected by the project pursuant to section 7 of the Act and the implementing regulations pertaining thereto.

With critical habitat designation, the essential elements of suitable, but unoccupied, habitat must be preserved through project design or mitigation. Thus, designation of critical habitat generally would have an incremental

economic effect only on federally involved projects that are less than an acre in size or that require mitigation measures above and beyond what is currently being negotiated or required given the vireo's status as a listed species and the regulatory authority of the Corps of Engineers and California Department of Fish and Game to require the minimization or mitigation of impacts to jurisdictional wetlands or waters. Therefore, those mitigation measures attributable solely to critical habitat designation (e.g., the replacement or rehabilitation of small amounts of habitat, contributions to habitat or species management funds) are expected to be relatively infrequent and add only incrementally to project costs. Costs associated with wetland creation are discussed under the response to Issue 3 in the revised proposed rule (57 FR 34892).

In any case, the National Environmental Policy Act and the Endangered Species Act state that costs associated with mitigation or compensation are part of the project costs. Because the least Bell's vireo is essentially an obligate wetland species, the costs associated with impacts to unoccupied vireo habitat would be borne by the project applicant whether or not critical habitat was designated. However, the Service believes that no mitigation costs will be attributable to the designation of critical habitat for projects on private lands that are outside the jurisdiction of Federal regulatory agencies.

Issue 9: The designation of critical habitat may impact flood control projects. If periodic removal of riparian vegetation from flood control channels is restricted, the impacts will involve not only losses of water and uncontrolled flooding, but also costs in terms of human life.

Service Response: The response to Issue 6 above states that projects are rarely blocked, since reasonable and prudent alternatives or measures are usually developed that allow the project to proceed in a timely manner. The response to Issue 8 above addresses the potential increase in regulation due to critical habitat designation. A high level of protection is afforded to wetlands by the Clean Water Act and Federal wetland policy. Regulations to avoid, minimize, or compensate for impacts to wetlands in general, and vireo habitat in particular, would be incurred even if critical habitat was not designated. The layer of regulation added through critical habitat designation is not expected to preempt public health and safety. Although the Service encourages long-range planning of all projects that

adversely affect the vireo or vireo habitat, it recognizes that emergencies (e.g., fires) develop that necessitate accelerated consultations or the assessment of impacts and development of appropriate mitigation measures after-the-fact.

Issue 10: Utility corridors and access roads should not be included as critical habitat. Both routine and emergency maintenance are necessary to maintain public safety and service.

Service Response: Utility corridors exist within least Bell's vireo critical habitat; however, no biological evidence or other basis justifies the exclusion of such corridors from a critical habitat designation. The Service will address each project on a case-by-case basis and assist the Federal action agency in avoiding, minimizing, and mitigating for impacts to the vireo and its critical habitat. In addition, agencies are generally encouraged to request formal consultation on programmatic activities. Such consultations would facilitate long range planning efforts. The Service is unaware of any instances where the maintenance of utility structures or facilities was precluded by the listing of the vireo; it is anticipated that the designation of critical habitat similarly will not impinge on necessary operations. Furthermore, as was explained in the response to Issue 9 above, pertinent regulations and Service policy provide for the resolution of impacts to listed species and their critical habitat that result from corrective actions taken in true emergency situations.

Issue 11: Designation of critical habitat requires an Environmental Impact Statement (EIS) pursuant to the requirement for Federal agencies to comply with the National Environmental Policy Act (NEPA).

Service Response: For the reasons cited in the NEPA section of this rule, the Service has determined that rules issued pursuant to section 4(a) of the Endangered Species Act do not require the preparation of an EIS.

Issue 12: Prior replacement of habitat should only be required when it can be conclusively determined that existing habitat is being used at its full potential. Several commenters also expressed the opinion that the mandated replacement of vireo habitat prior to project commencement would be an unreasonable and excessive requirement.

Service Response: In the vast majority of section 7 consultations on potential impacts to the vireo, the Service has recommended prior replacement of vireo habitat, and does not anticipate changing this pattern with designation

of critical habitat. Only in cases involving a relatively large acreage of unoccupied vireo habitat would such a requirement result from critical habitat designation. Because requirements for habitat replacement in advance have invariably been prompted by projects with substantial impacts to vireos or significant portions of occupied vireo habitat, it is anticipated that prior habitat replacement would be necessary in those circumstances regardless of whether critical habitat has been designated. In some cases, especially where land costs are high, project proponents have chosen to mitigate project-related impacts in advance to increase the likelihood of "no net loss" of wetland or vireo habitat values. This approach has also been used as a means to minimize the required amount of habitat compensation.

Issue 13: Several commenters suggested that the Service should specify the criteria used to distinguish vireo quality habitat within the designated boundaries. Some suggested that the Service should have designated boundaries to more accurately reflect the actual habitat boundaries.

Service Response: In establishing the approximate limits of actual critical habitat within the designated critical habitat area boundaries, the Service utilized National Wetland Inventory maps. Because the large majority of vireo habitat consists of mixed woodland or willow woodland habitats that are contained within jurisdictional wetlands and waters of the United States, these maps fairly accurately designate the extent of actual or potential habitat at a designated locale.

Issue 14: The Service has not addressed the biological implications of artificially sustaining riparian habitat in the successional stage appropriate to support least Bell's vireos. What associated habitats and species will suffer from receiving a lower level of protection as a direct or indirect effect of the designation?

Service Response: The Service is not advocating artificial maintenance of riparian habitat at a particular successional stage. Rather, the Service is advocating maintenance of natural systems under conditions that will be conducive to supporting vireo populations. Since the vireo was first listed by the state of California in 1980, it has not been necessary to artificially maintain vireo habitat at a given successional stage.

Issue 15: Designation of critical habitat should be postponed until ongoing conservation plans to mitigate negative impacts to the vireo are in place and evaluated, or until further

studies are completed and we know exactly why the vireo has declined.

Service Response: On the basis of past experience with other listed species and critical habitat designations, the Service believes that the designation of critical habitat will not be incompatible with existing conservation or management plans. Current drafts of habitat conservation plans for the San Diego and Sweetwater Rivers are considered by the Service to be compatible with critical habitat designation. The designation of critical habitat may, in fact, simplify the creation and funding of area or drainage-specific management plans.

Based on the demonstrated, relative success of several vireo management plans and other conservation efforts within its range and the endangered status of this species, the Service cannot justify the postponement of critical habitat designation until all management plans are evaluated or in place. Such a postponement could reduce the chances for the survival or recovery of the species.

Issue 16: The Orange County Water District requested the exclusion of all lands below the 505-foot elevation in the Prado Basin from critical habitat designation because of its commitment to mitigate impacts to vireos and vireo habitat below that elevational contour.

Service Response: The Corps' Draft EIS for the Orange County Water District's water conservation project indicates that implementation of the District's project will be phased. The level of the water conservation pool will be incrementally raised: (1) Once habitat above the 505-foot elevation is rehabilitated, restored, or created to replace occupied and presently unoccupied vireo habitat below 505-ft that is destroyed or degraded because of the project, and (2) it is demonstrated that the vireo population is not adversely impacted by their displacement or the destruction or degradation of preferred habitat. For these reasons, the Service did not remove lands from critical habitat designation within the Prado Basin that currently accommodate a majority of the nesting pairs representing the second largest vireo population in the United States.

Issue 17: Several commenters noted that the Service should also list critical habitat for other areas (e.g., the lower Santa Ynez River in Santa Barbara County) or for all areas with populations of more than 10 pairs of vireos.

Service Response: The Service retains the option to consider the designation of additional critical habitat. Designation of more critical habitat would be the

subject of a new proposed rule that would solicit public comments and provide for a public hearing, if so requested.

Issue 18: Given the high levels of cowbird nest parasitism and habitat loss, it may already be too late to save the vireo even if habitat is preserved.

Service Response: The stability or instability of populations is not one of the criteria used to determine the appropriateness of designating critical habitat. The Act requires the Service to designate critical habitat for a listed species in areas that are essential to the conservation of the species, unless it is not prudent to do so. The Act would require the designation of critical habitat even if little could be done to minimize most threats facing the species. Fortunately, however, the vireo has responded favorably to management in a number of locations throughout its range. Therefore, it seems reasonable to conclude that the designation of critical habitat will provide additional protection to the vireo and increase the likelihood of its recovery.

Issue 19: Certain areas should not be designated as critical habitat because they do not " * * * require special management considerations or protections," as prescribed by section 3(5)(A)(i)(II) of the Act. This comment was usually followed by a belief about which type of regulations already provide "special management considerations or protections."

The Service should not designate critical habitat because other regulations and levels of government already protect the habitat sufficiently. For example, local and/or State governments can manage habitat and prevent private landowners from clearing riparian vegetation. Projects altering a stream course are subject to review under section 1601 or 1603 of the California Fish and Game Code.

Federal regulations also protect proposed critical habitat. Designation of critical habitat is not necessary for areas in which activities are planned that will require National Environmental Policy Act (NEPA) review and compliance. Nor is it necessary to designate critical habitat on the Santa Ynez River because this area is already protected under the jurisdiction of the Forest Service. All these regulations and management practices preclude the need for designating critical habitat.

Service Response: Local governments have not prevented habitat loss for the least Bell's vireo under existing regulatory mechanisms. Areas under Federal jurisdiction may require special management considerations or protection that would not be afforded

without critical habitat designation. For these reasons, the Service believes that inclusion of areas already subject to local, State, or Federal regulations is consistent with the definition of critical habitat cited under section 3(5)(A)(i)(II) of the Act.

Issue 20: Critical habitat designation in the Prado Basin of the Santa Ana River would force the Corps of Engineers to release storm water quickly (to minimize the adverse effects of standing water on vireo habitat) and at too great a velocity for the local water district to divert it into their percolation (spreading) basins for water conservation.

Service Response: The Service has been working with the Corps of Engineers, Orange County Water District, and The Nature Conservancy to resolve conflicts between vireo conservation and flood control/water conservation activities in the Prado Basin. Based on the distribution and abundance of the vireo within the Prado Basin relative to the reservoir pool inundation zone, these water management activities may affect a listed species. On that basis, the Corps initiated formal consultation with the Service on October 16, 1992. The Corps has included a thorough compensation package as part of the project description. The proposed compensation measures very likely adequately provide for impacts to the vireo and its habitat. For this reason, the Service believes that a critical habitat designation is not likely to impose any additional costs for avoiding, minimizing, or mitigating impacts to the vireo.

Issue 21: The cost of mitigation as a result of critical habitat designation would place an unreasonable financial risk on the project proponent. For example, one commenter estimated it would cost about \$4-10 million to create habitat to compensate for the habitat that would be destroyed by raising the height of Gibraltar Dam. Since riparian habitat creation is expensive and the results are unpredictable, the project proponents may spend a great deal of money with no return if the mitigation program should fail.

Service Response: As stated in the response to Issue 12 above, designation of critical habitat could, in a few cases, require prior habitat replacement of applicants for projects in areas that contain suitable, but unoccupied, vireo habitat.

Wetland compensatory mitigation can be a costly, time-consuming, and difficult endeavor with an uncertain probability of success. However, in the

6 years since the vireo was listed, two agencies have constructed projects that have been subject to this prior replacement requirement, and both have successfully created habitat that now supports vireos. As restoration techniques are further refined, it is likely that revegetation projects will become more successful in shorter time frames. The requirement to create vireo habitat before existing habitat is destroyed ensures that this federally listed species would not sustain a loss of habitat, even temporarily. In some cases, the temporary loss of habitat may have a significant adverse impact on the vireo. Given the uncertainty of wetland creation or restoration, it is unlikely that the Service would support a project proposal that would result in the destruction of large areas of riparian habitat without first providing adequate replacement habitat for the least Bell's vireos in the area.

Under section 4(b)(2) of the Act, the Secretary has the authority to exclude an area from critical habitat designation " * * * 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 and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned." The Gibraltar Reservoir population of the vireo represents the northern edge of its current range, and therefore is most likely to be the source of recolonization to the north or to the Central Valley. Because of this geographical significance, the designation of this area as critical habitat is appropriate.

In any case, the proposed project to raise the height of Gibraltar Dam is not currently being considered, since the city of Santa Barbara is using economically feasible alternative water sources.

Issue 22: Critical habitat should not be designated because of project delays due to lengthy permitting processes and the time required to offset negative impacts before a project could be constructed.

Service Response: For projects where unavoidable impacts to unoccupied vireo habitat would occur, compensatory mitigation in the form of habitat creation may have to be completed prior to the destruction of existing habitat so that the vireo would not sustain a net loss of available nesting or foraging habitat.

The amount of time for successful habitat creation would vary depending on the methods used and could take several years. The action agency or permit applicant would need to initiate

the restoration activities early enough to allow sufficient time for vireo habitat to develop. Most major projects are in the planning stages long enough to provide adequate time for advance habitat creation if the compensation efforts are done expeditiously. Proper planning would reduce the likelihood of a project delay.

Section 7 regulations require the Service to complete formal consultation within 90 days of initiation and issue a biological opinion within an additional 45 days. By policy and in practice, the Service usually completes formal consultation within 90 days.

Issue 23: Designation of critical habitat is unnecessary because nest parasitism by cowbirds and predation are responsible for the decline of the vireo, rather than habitat loss. One commenter stated that vireo habitat is plentiful, and efforts to conserve the species should focus on other aspects of its ecology.

Service Response: Two major factors have been identified as being responsible for the relatively recent, dramatic decline of the least Bell's vireo: (1) Widespread habitat destruction, and (2) high rates of nest parasitism by cowbirds (Goldwasser *et al.* 1980). The synergistic effects of these two factors may have further exacerbated the situation. Although cowbird removal programs have effectively solved the problem of excessive parasitism at a number of locales, habitat conservation and creation programs have not achieved the same level of success. These programs eventually must be successful if conservation and recovery of the vireo is to be achieved. To that end, the designation of critical habitat affords a higher level of protection to riparian woodland habitats that currently (or potentially could) support nesting pairs of vireos. The Service considers this action particularly appropriate in light of the inability of existing regulatory mechanisms (e.g., the Clean Water Act, local regulations) to adequately protect vireo habitat.

Issue 24: The critical habitat designation would result in more stringent local permitting and approval processes.

Service Response: The Service has no authority to require local agencies to implement land use restrictions consistent with the regulations protecting designated critical habitat although the Service would support such actions. The commenters who raised this issue are land owners in San Diego County. The Service contacted the San Diego County Department of Planning and Land Use (DPLU) with

respect to this issue and was informed that the DPLU does not anticipate any changes in local ordinances as a result of critical habitat designation (T. Oberbauer, County of San Diego, Department of Planning and Land Use, pers. comm.).

Issue 25: The Service should not designate critical habitat on Camp Pendleton Marine Corps Base because the Service and the Marine Corps have signed a Memorandum of Understanding (MOU) that was designed to accomplish the same degree of habitat protection as critical habitat would provide. The management program for the least Bell's vireo on Camp Pendleton eliminates the need for special management considerations, and therefore, designation of critical habitat is unnecessary.

Service Response: The Service believes that the MOU is providing an adequate level of protection to the vireo and its habitat on Camp Pendleton. Under the MOU, the Service agreed to offer technical assistance and to consult under section 7 of the Act when requested. The Marine Corps agreed to consult under section 7 of the Act on activities that may affect the least Bell's vireo, to request formal consultation on various programmatic issues such as road maintenance and fire control, to maintain 1,200 acres (480 ha) of vireo quality habitat along the Santa Margarita River, and to continue cowbird trapping efforts (which were initiated in 1983) and nest monitoring activities (which were initiated in 1981) as long as funding was available.

The Santa Margarita River supported 1,200 acres of quality vireo habitat and 98 territorial male least Bells' vireos when the MOU was signed in 1986. Since 1986, the Marine Corps has continued cowbird trapping efforts, and until 1991 carried out a thorough monitoring program. The vireo population along the Santa Margarita River on Camp Pendleton has increased from 98 to 212 territorial males from 1986 to 1991.

Although this area is essential to the conservation of the species, the Service finds that a formal critical habitat designation is unnecessary because the MOU contains provisions for section 7 consultation for proposed actions that may destroy or adversely modify vireo habitat. The Service also finds that a level of protection equivalent to or greater than that provided by a critical habitat designation can be achieved for the vireo on this portion of the Santa Margarita River through cooperation with the Marine Corps under the MOU. However, the Service will reconsider its position to designate critical habitat at

this locality if conditions warrant. The Service will use its authority under sections 7 and 9 of the Act to insure compliance with the prohibitions on unauthorized take. For these reasons, the Service has removed about 9,600 acres (3,840 ha) on Camp Pendleton from the critical habitat designation.

National Environmental Policy Act

The Service has determined that an Environmental Assessment, as defined under the authority of the National Environmental Policy Act of 1969, need not be prepared in connection with regulations adopted pursuant to section 4(a) of the Endangered Species Act of 1973, as amended. A notice outlining the Service's reasons for this determination was published in the *Federal Register* on October 25, 1983 (48 FR 49244).

Regulatory Flexibility Act and Executive Order 12866

This rule has been reviewed under Executive Order 12866. The Department of the Interior has determined that this designation will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Based on the information discussed in this rule concerning public projects and private activities within the critical habitat areas, it is not expected that significant economic impacts will result from the critical habitat designation. In addition, there are a limited number of actions on private land that have Federal involvement through funds or permits that would affect or be affected by the critical habitat designation; the potential economic impact of the critical habitat designation on these actions will be minor. Also, no direct costs, enforcement costs, or information collection or recordkeeping requirements are imposed on small entities by this designation. This action does not impose any recordkeeping requirements as defined by the Paperwork Reduction Act of 1980.

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Authors

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List of Subjects in 50 CFR Part 17

Endangered and threatened species
Exports, Imports, Reporting and

recordkeeping requirements, Transportation.

Regulation Promulgation

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

PART 17—[AMENDED]

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

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

§ 17.11 [Amended]

2. Amend § 17.11(h) by revising the “Critical habitat” entry for “Vireo, least Bell’s,” under BIRDS to read “17.95(b)”.

3. Amend § 17.95(b) by adding critical habitat for the least Bell’s vireo in the same alphabetical order as the species occurs in § 17.11(h).

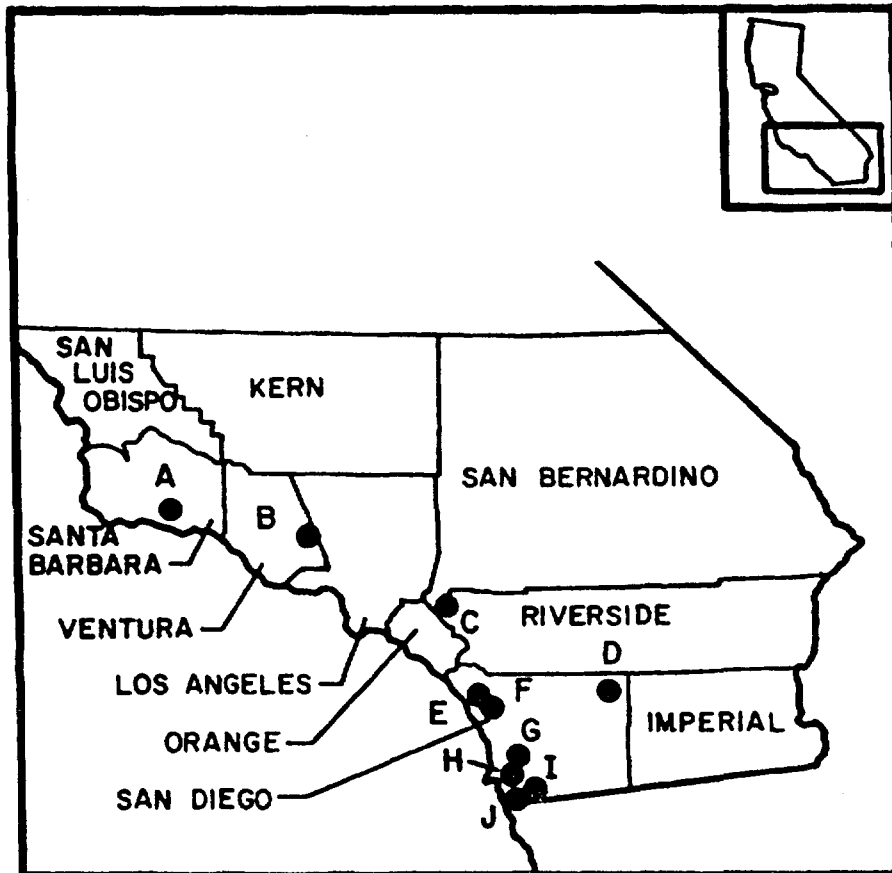
§ 17.95 Critical habitat—fish and wildlife.

* * * * *

(b) * * *

LEAST BELL’S VIREO (*Vireo bellii pusillus*)

California: Areas of land and water as follows:

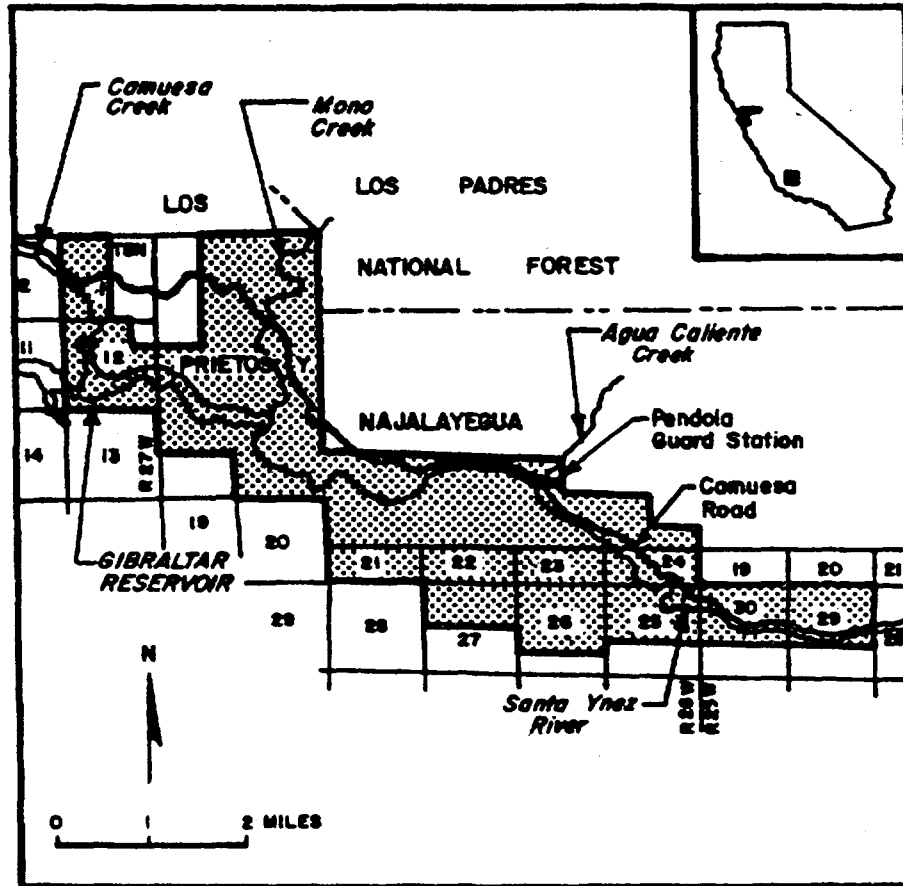


1. Santa Ynez River, Santa Barbara County (Index map location A).

T. 5 N., R. 27 W.: secs. 1, W½, and 12, all except NE¼. In addition, all adjacent lands within the following circumscribed area: beginning at a point 0.25 mi south of the northeast corner of sec. 12, T. 5 N., R. 27 W.; thence east about 0.5 mi; thence north about 1.25 mi; thence east approximately 1.3 mi to the intersection of Mono Creek and the Los Prietos Y Najalayegua land grant boundary; thence south about 2.5 mi; thence east approximately 2.6 mi to Agua Caliente Creek

(at a point about 0.4 mi north and 0.1 mi east of the Pendola Guard Station); thence south about 0.5 mi; thence east about 1.0 mi; thence south about 0.25 mi; thence east about 0.5 mi; thence south about 0.75 mi to the southwest corner of T. 5 N., R. 25 W., sec. 19; thence east to the southeast corner of T. 5 N., R. 25 W., sec. 20; thence south about 0.63 mi; thence west to western boundary of T. 5 N., R. 26 W., sec. 25; thence south about 0.16 mi; thence west to eastern boundary of T. 5 N., R. 26 W., sec. 27; thence north about 0.25 mi; thence west to western boundary of

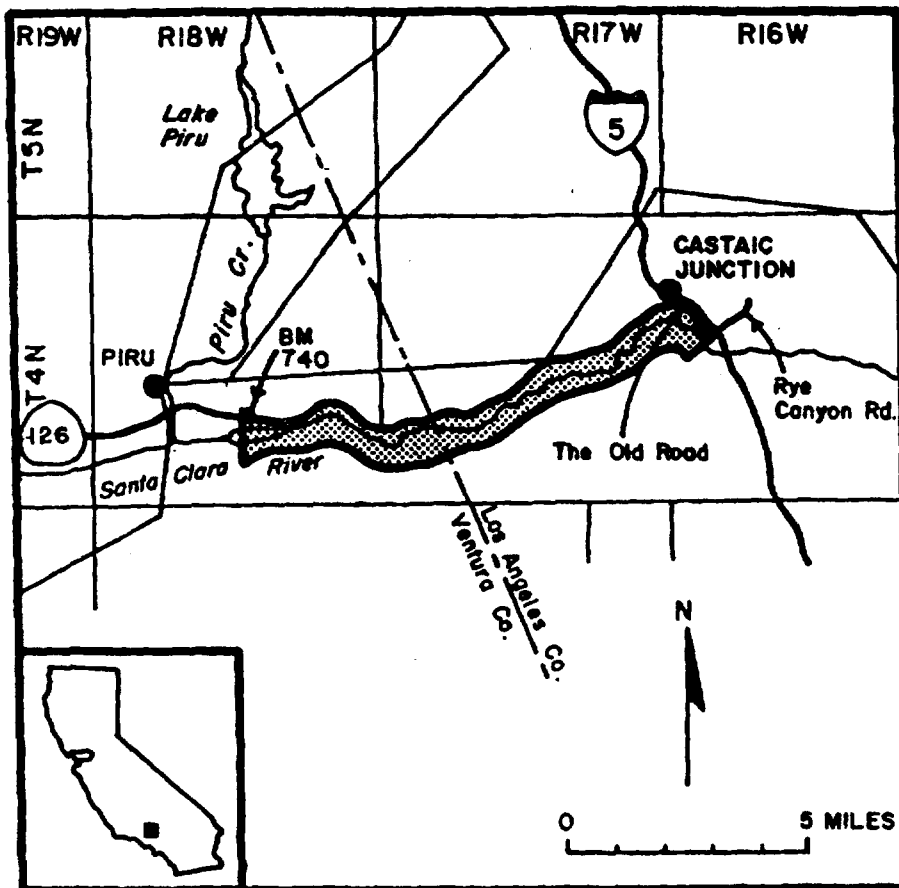
T. 5 N., R. 26 W., sec. 27; thence north to the northeastern corner of T. 5 N., R. 26 W., sec. 27; thence north to the northeastern corner of T. 5 N., R. 26 W., sec. 28; thence west to the northwest corner of T. 5 N., R. 26 W., sec. 28; thence north to the northeast corner of T. 5 N., R. 26 W., partially unsurveyed sec. 20; thence west to the northeast corner of T. 5 N., R. 26 W., unsurveyed sec. 19; thence north about 0.5 mi; thence west to the southeast corner of T. 5 N., R. 27 W., sec. 13 NE¼; and thence north to the southeast corner of T. 5 N., R. 27 W., sec. 12.



2. Santa Clara River, Los Angeles and Ventura Counties (Index map location B). T. 4 N., Rs. 17 and 18 W.: all land within 3,500 feet perpendicularly and generally

southward or westward of a line commencing at a point 100 yards west of BM 740 (a point about 2.3 mi east of the intersection of Main Street and State Highway 126 in Piru); thence

east along State Highway 126 to its intersection with The Old Road at Castaic Junction; and thence eastward and southward along The Old Road to its intersection with Rye Canyon Road.



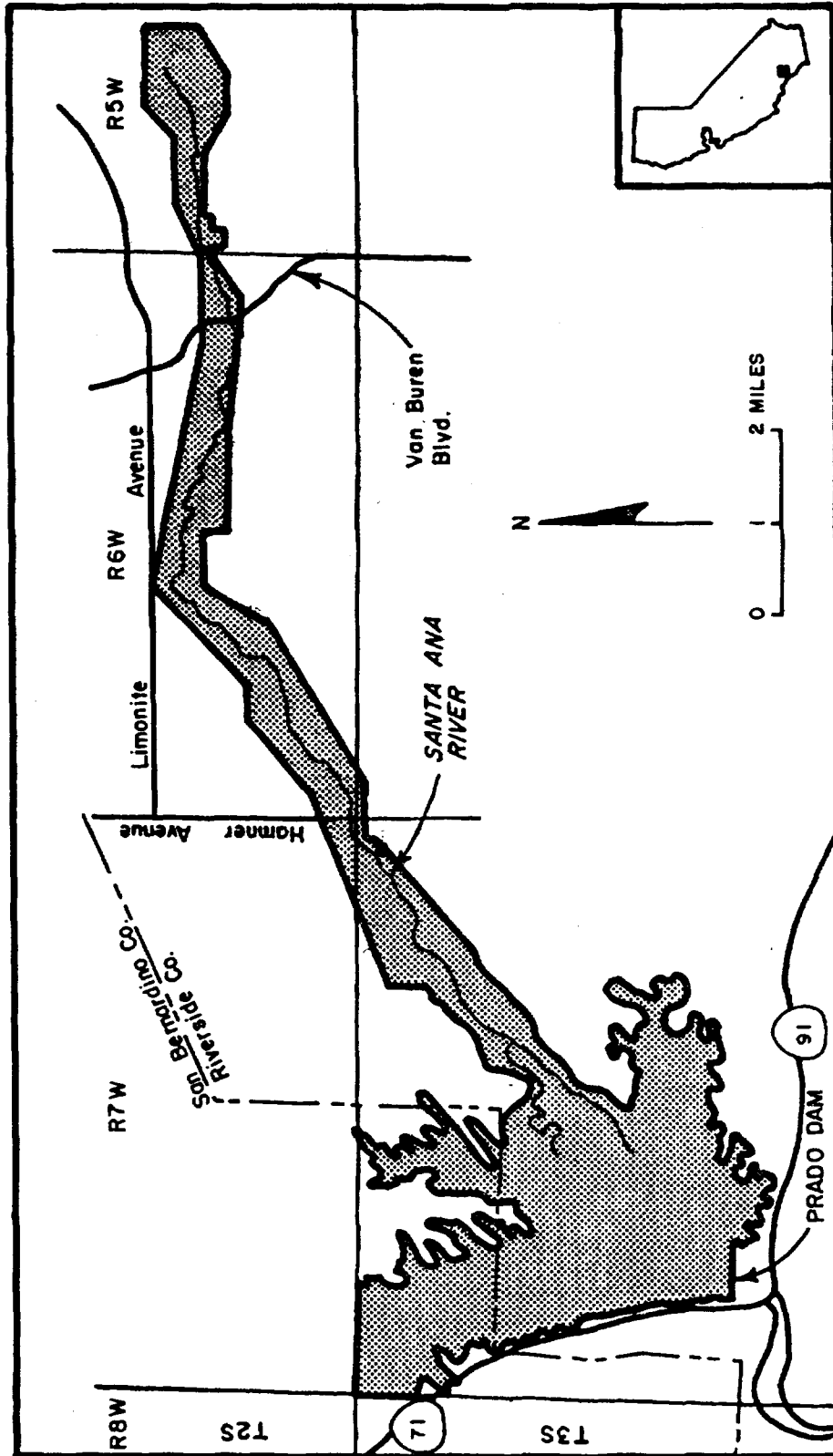
3. Santa Ana River, Riverside and San Bernardino Counties (Index map location C).

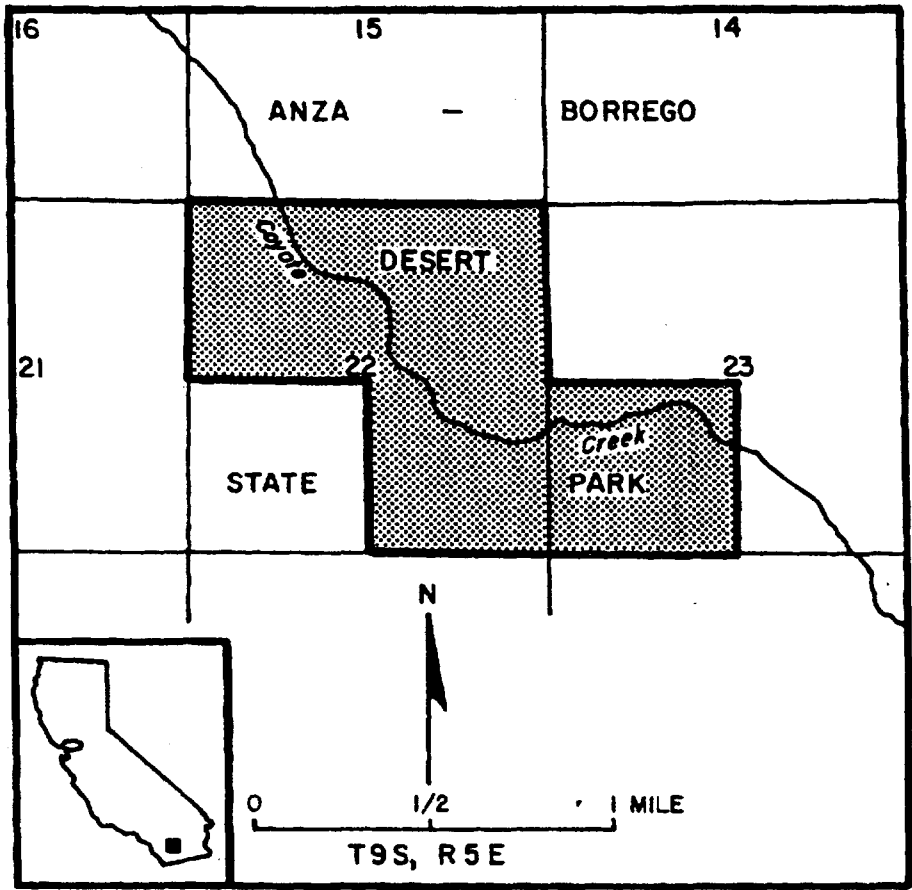
All lands below the 543-foot contour in partially surveyed T. 3 S., R. 7 W., within the Prado Flood Control Basin (upstream from Prado Dam). In addition, the following adjacent lands above the 543-foot contour in the Santa Ana River bottom and within the following boundaries: commencing at a point 0.1 mi east and 0.2 mi north of the southwest corner of sec. 2, T. 3 S., R. 7 W.; thence north about 0.4 mi; thence to a point 0.25 mi east and 0.4 mi north of southwest corner of sec. 31, T. 2 S., R. 6 W.; thence to the northeast corner of sec. 31, T. 2 S., R. 6 W.; thence east

0.35 mi; thence to midpoint of southern section line of sec. 21, T. 2 S., R. 6 W.; thence to a point 0.6 mi south of the northwest corner of sec. 25, T. 2 S., R. 6 W.; thence east about 0.6 mi; thence to a point 0.2 mi north of the center of sec. 30, T. 2 S., R. 5 W.; thence east about 0.7 mi; thence to a point 0.6 mi east of the southwest corner of sec. 20, T. 2 S., R. 5 W.; thence east about 0.8 mi; thence 0.6 mi south; thence to a point 0.3 mi north of the southwest corner of sec. 28, T. 2 S., R. 5 W.; thence to a point 0.45 mi north of the southwest corner of sec. 29, T. 2 S., R. 5 W.; thence generally westward and southward along the Riverside Corporation

Boundary (as shown on USGS Riverside Quadrangle 1980) to its intersection with Van Buren Blvd.; thence to a point 0.2 mi east and 0.75 mi south of the northwest corner of sec. 27, T. 2 S., R. 6 W.; thence 0.25 mi north; thence 0.7 mi west; thence to a point 0.85 mi north of the southwest corner of sec. 32, T. 2 S., R. 6 W.; thence to a point 0.75 mi west and 0.1 mi south of the northeast corner of sec. 6, T. 3 S., R. 6 W.; thence 0.5 mi west; and thence to the 543-foot contour at a point 0.3 mi west of the southeast corner of sec. 2, T. 3 S., R. 7 W.

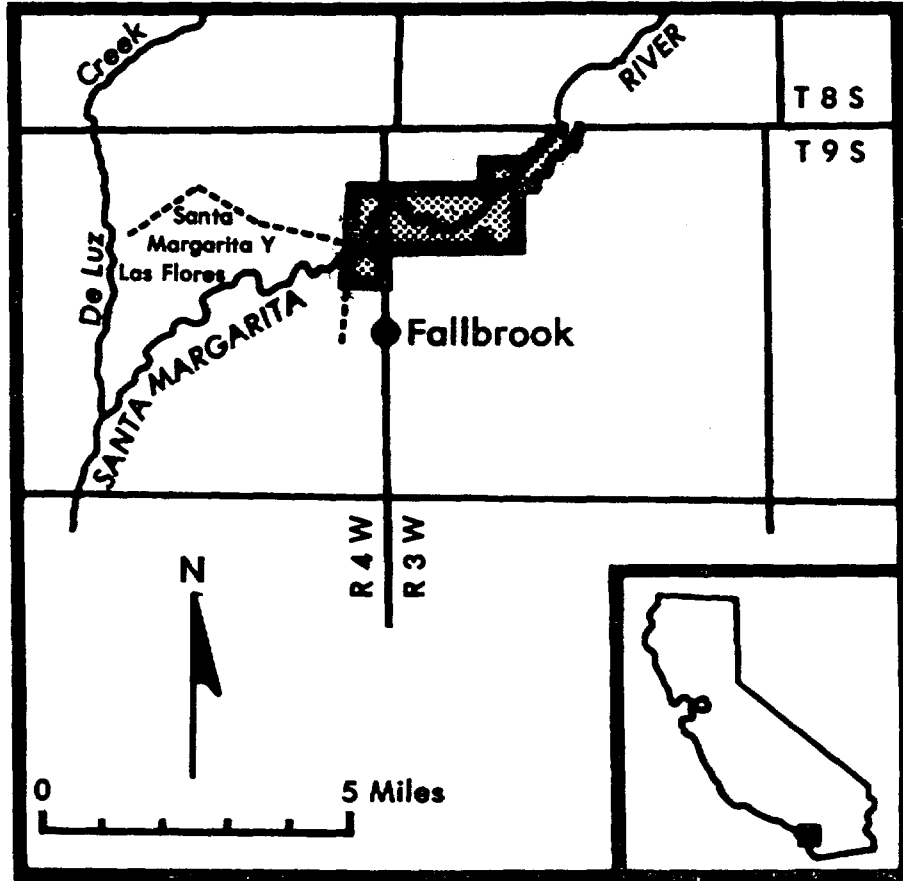
Billing Code 4310-65-P





4. Coyote Creek, San Diego County (Index map location D).

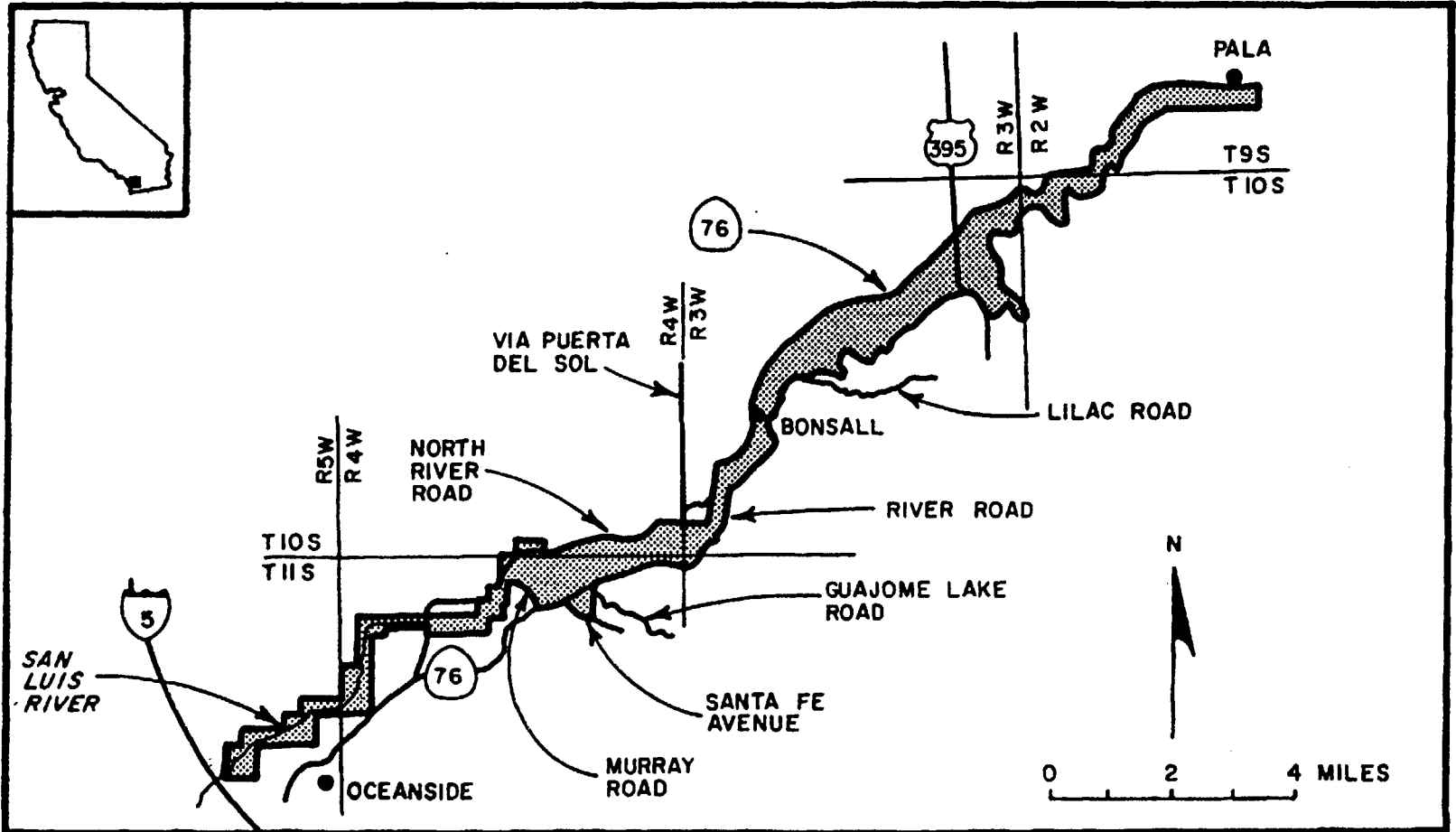
T. 9 S., R. 5 E.: secs. 22, N $\frac{1}{2}$, SE $\frac{1}{4}$; and 23, SW $\frac{1}{4}$.



5. Santa Margarita River, San Diego County (Index map location E).

T. 9 S., R. 3 W.: secs. 4, all lands below the 600-foot contour; 5 SE $\frac{1}{4}$; 7; and 8.

In T. 9 S., R. 4 W., Sec. 12 E $\frac{1}{2}$; 13 NE $\frac{1}{4}$.



6. San Luis Rey River, San Diego County (Index map location F).

T. 11 S., R. 5 W.: secs. 13, S $\frac{1}{2}$ NE $\frac{1}{4}$, SE $\frac{1}{4}$ NW $\frac{1}{4}$, SW $\frac{1}{4}$; 14, SE $\frac{1}{4}$ SW $\frac{1}{4}$, S12SE $\frac{1}{4}$; and 23, NW $\frac{1}{4}$.

T. 11 S., R. 4 W.: secs. 3, all land north of Murray Road; 4, E $\frac{1}{2}$ NE $\frac{1}{4}$, E $\frac{1}{2}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$, W $\frac{1}{2}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$, E $\frac{1}{2}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$, SW $\frac{1}{4}$ SE $\frac{1}{4}$; 7, N $\frac{1}{2}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$, NW $\frac{1}{4}$ NE $\frac{1}{4}$, E $\frac{1}{2}$ W $\frac{1}{2}$, SW $\frac{1}{4}$ SW $\frac{1}{4}$; 8, N $\frac{1}{2}$ NE $\frac{1}{4}$, N $\frac{1}{2}$ N $\frac{1}{2}$ NW $\frac{1}{4}$; 9, N $\frac{1}{2}$ NW $\frac{1}{4}$; and 18, NW $\frac{1}{4}$.

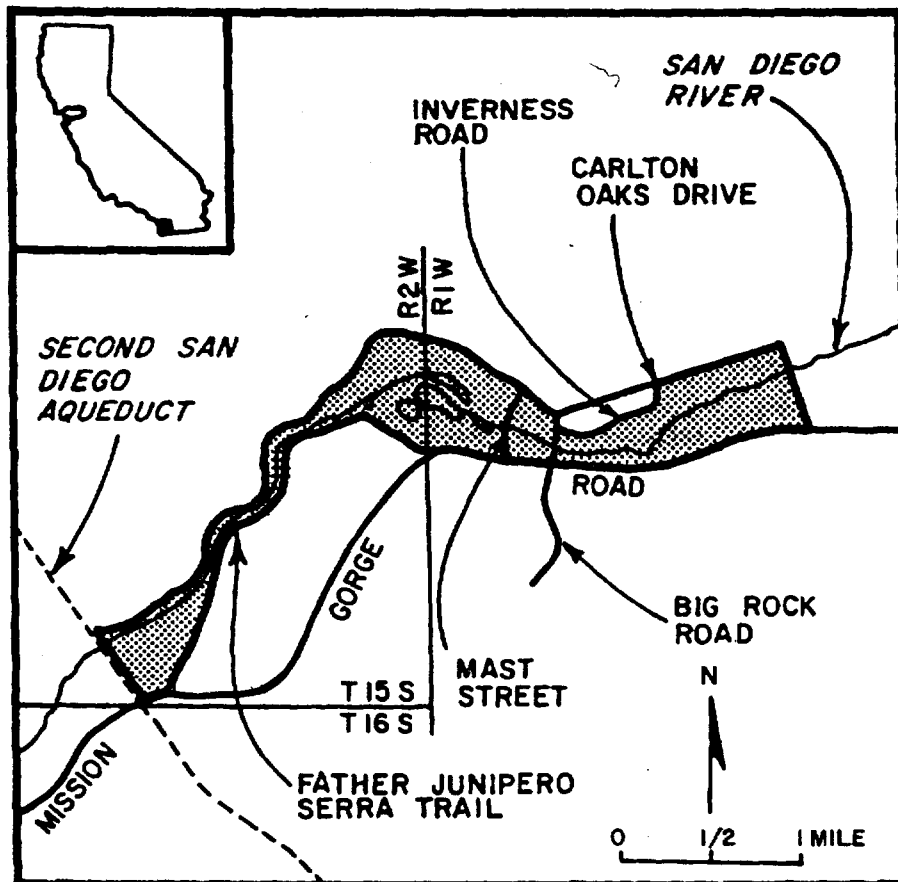
T. 10 S., R. 4 W.: sec. 34, S1/2SW $\frac{1}{4}$.

Surveyed and unsurveyed portions according to the following metes and bounds: bordered on the north by a line commencing at the intersection of North River Road and the surveyed eastern section line of sec. 3, T. 11 S., R. 4 W.; thence east along said road to its junction with Via Puerta Del Sol; thence east approximately 0.5 mi to State Highway 76 nearest the midpoint of sec. 31,

T. 10 S., R. 3 W.; thence northward and eastward along said highway to its intersection with the eastern section line of sec. 27, T. 9 S., R. 2 W.; and bordered on the south by a line commencing at the intersection of Murray Road and the surveyed eastern section line of sec. 3, T. 11 S., R. 4 W.; thence southward and eastward along said road to its junction with State Highway 76; thence eastward and northward along said highway to its junction with Santa Fe Avenue; thence southeastward 3,000 feet along said avenue; thence northward along a straight line to Guajome Lake Road at a point 800 feet from the junction of said road and State Highway 76; thence northwestward along Guajome Lake Road to its junction with said highway; thence eastward along said highway to its junction with River Road in sec. 31, T. 10 S., R. 3 W.; thence northward along said road to its intersection with the

surveyed eastern section line of sec. 20, T. 10 S., R. 3 W.; thence north to and northeasterly along the 250-foot contour in sec. 21 through partially surveyed sec. 15, T. 10 S., R. 3 W.; thence north to a point about 0.2 mi south of the northwest corner of sec. 14 and continuing along the 300-foot contour from the western section line of sec. 14 eastward through unsurveyed sec. 11, surveyed secs. 13 and 12, T. 10 S., R. 3 W.; and surveyed sec. 18, T. 10 S., R. 2 W.; thence east to and along the 325-foot contour through sec. 1, T. 10 S., R. 3 W.; thence south to and along the 350-foot contour in secs. 6 and 5, T. 10 S., R. 2 W., and secs. 32 and 33, T. 9 S., R. 2 W., to the northern section line of sec. 33; thence east approximately 1.5 mi to the southeastern corner of sec. 27, T. 9 S., R. 2 W.; and thence north about 0.4 mi to State Highway 76 in Pala.

Billing Code 4310-55-P

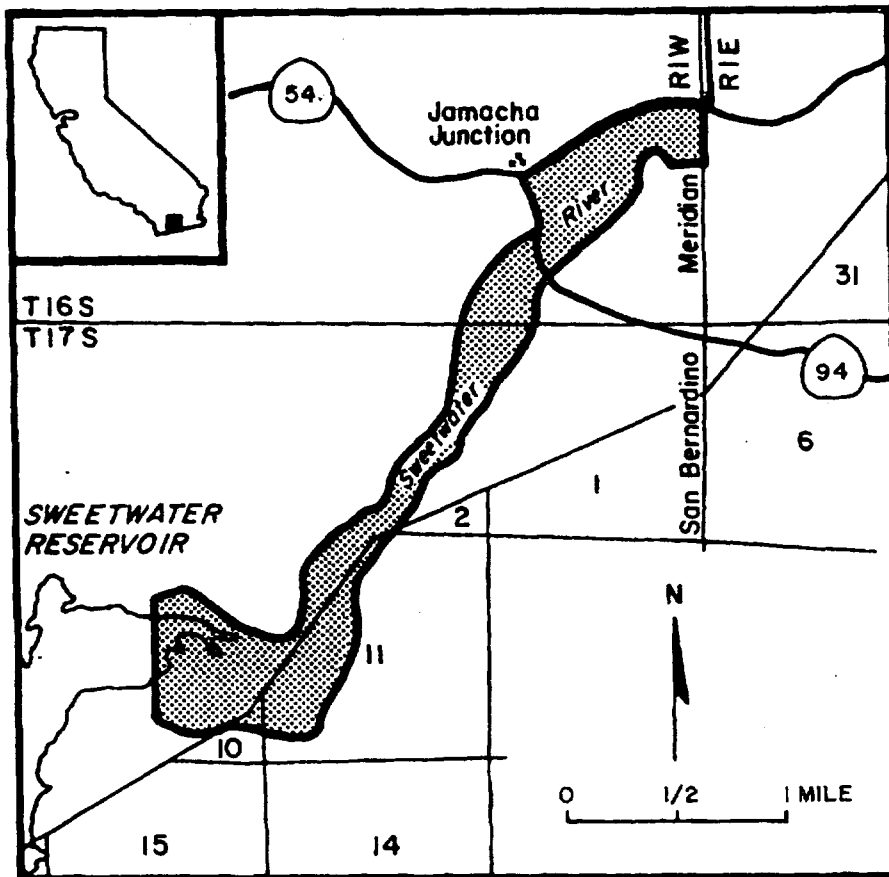


7. San Diego River, San Diego County (Index map location G).

T. 15 S., Rs. 1 and 2 W.: commencing at the intersection of the Second San Diego Aqueduct and Mission Gorge Road; thence eastward along said road to the western-most intersection with Father Junipero Serra Trail; thence northward and eastward along said

trail to the eastern-most intersection of said trail and said road; thence eastward along Mission Gorge Road to its intersection with Carlton Hills Blvd.; thence northward to its intersection with Carlton Oaks Drive; thence westward along said drive to its eastern-most intersection with Inverness Road; thence westward along said road to its intersection

with Carlton Oaks Drive; thence westward along said drive to its intersection with Mast Street; thence westward and southward along the 320-foot contour to its intersection with the Second San Diego Aqueduct on the north side of the San Diego River; thence southeastward along said aqueduct to its intersection with Mission Gorge Road



8. Sweetwater River, San Diego County (Index map location H).

T. 16 and 17 S., R. 1 W.: commencing at the intersection of the 320-foot contour and 116°58'14" W longitude immediately north of the confluence of Sweetwater River and Sweetwater Reservoir; thence eastward along the contour to the intersection of said contour with State Highway 94; thence northward along said highway to its intersection with State Highway 54; thence northeastward along said highway to the San Bernardino Meridian; thence south approximately 1,500 feet to the intersection

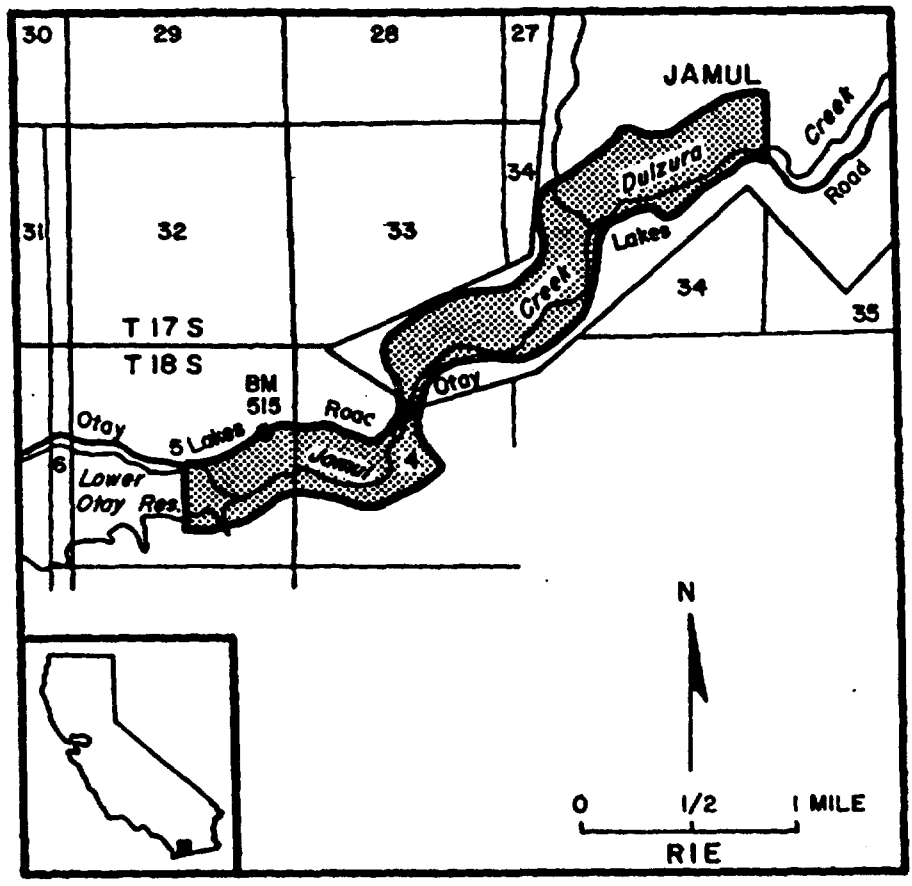
with the 340-foot contour; thence westward and southward along said contour to the south end of the Steele Canyon Bridge on State Highway 94; thence south approximately 900 feet to the 340-foot contour; thence southwesterly along said contour to its intersection with 116°58'14" W longitude; thence north to starting point.

[Insert Map # 9 here]

9. Jamul-Dulzura Creeks, San Diego County (Index map location I).

T. 17 and 18 S., R. 1 E.: commencing from a point approximately 2,200 feet west of BM

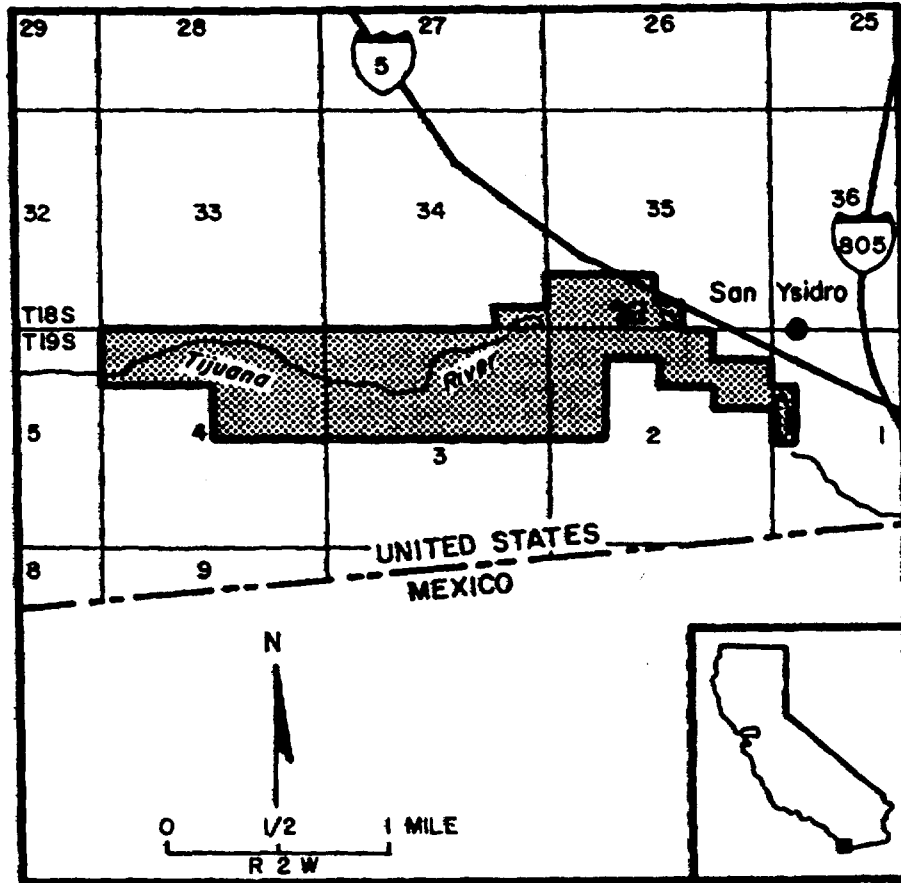
515 along Otay Lakes Road, in sec. 5, T. 18 S., R. 1 E.; thence east approximately one mile to the crossing of said road at a bridge over Jamul Creek, including all land within 1,500 feet southward of Otay Lakes Road as measured perpendicularly from the road; thence eastward for about 2.4 mi along said road and including all lands within 1,500 feet northward of said road as measured perpendicularly from the road, and including all lands within 500 feet of said bridge not otherwise included above.



10. Tijuana River, San Diego County (Index map location II).

T. 18 S., R. 2 W.: secs. 34, S½SE¼SE¼; and 35, S½SW¼, SW¼SW¼SE¼.

T. 19 S., R. 2 W.: secs. 1, W½SW¼NW¼; 2, S½NE¼NE¼, NW¼NE¼, N½SE¼NE¼, N½NE¼NW¼, W½NW¼; 3, N½; and 4, NE¼, N½NW¼.



Primary constituent elements: riverine and floodplain habitats (particularly willow-dominated riparian woodland with dense understory vegetation maintained, in part, in

a non-climax stage by periodic floods or other agents) and adjacent coastal sage scrub, chaparral, or other upland plant communities.

Dated: October 12, 1993.

Richard N. Smith,
Acting Director, U.S. Fish and Wildlife Service.

[FR Doc. 94-2304 Filed 2-1-94; 8:45 am]
BILLING CODE 4310-55-P