

**DEPARTMENT OF THE INTERIOR****Fish and Wildlife Service****50 CFR Part 17**

RIN 1018-AT57

**Endangered and Threatened Wildlife and Plants; Final Rule To Designate Critical Habitat for the Santa Ana Sucker (*Catostomus santaanae*)**

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), designate critical habitat for the threatened Santa Ana sucker (*Catostomus santaanae*) pursuant to the Endangered Species Act of 1973, as amended (Act). This species is now restricted to three noncontiguous populations in three different stream systems in southern California: The lower and middle Santa Ana River in San Bernardino, Riverside, and Orange counties; the East, West, and North Forks of the San Gabriel River in Los Angeles County; and lower Big Tujunga Creek, a tributary of the Los Angeles River in Los Angeles County. We have identified 23,719 acres (ac) (9,599 hectares (ha)) of aquatic and riparian habitats essential to the conservation of the Santa Ana sucker. We are designating two areas in Los Angeles County, one along the San Gabriel River (Unit 2) and the other along the Big Tujunga Creek (Unit 3) as critical habitat for Santa Ana sucker. These units encompass approximately 8,305 ac (3,361 ha) of essential habitat for the Santa Ana sucker within Los Angeles County. Essential habitat for the Santa Ana sucker in Orange, Riverside, and San Bernardino counties has been excluded from the final critical habitat designation, because we have concluded that the benefits of excluding these lands from critical habitat designation outweigh the benefits of their inclusion pursuant to section 4(b)(2) of the Act.

**DATES:** This rule becomes effective on February 3, 2005.

**ADDRESSES:** Comments and materials received, as well as supporting information used in this rulemaking, are available for inspection, by appointment, during normal business hours at the U.S. Fish and Wildlife Service, Carlsbad Fish and Wildlife Office, 6010 Hidden Valley Road, Carlsbad, California 92009. You may obtain copies of the final rule and the economic analysis from the field office address above or by calling (760) 431-9440, or from our Internet site at <http://carlsbad.fws.gov>.

If you would like copies of the regulations on listed wildlife or have questions about prohibitions and permits, please contact the Carlsbad Fish and Wildlife Office (see ADDRESSES above).

**FOR FURTHER INFORMATION CONTACT:** Mr. Jim Bartel, Field Supervisor, Carlsbad Fish and Wildlife Office, at the address and phone number listed above.

**SUPPLEMENTARY INFORMATION:****Designation of Critical Habitat Provides Little Additional Protection to Species**

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

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

While attention to and protection of habitat is paramount to successful conservation actions, we have consistently found that, in most circumstances, the designation of critical habitat is of little additional value for most listed species, yet it consumes large amounts of conservation resources. Sidle (1987) stated, "Because the Act can protect species with and without critical habitat designation, critical habitat designation may be redundant to the other consultation requirements of section 7." Currently, only 445 species or 36 percent of the 1,244 listed species in the U.S. under the jurisdiction of the Service have designated critical habitat. We address the habitat needs of all 1,244 listed species through conservation mechanisms such as listing, section 7 consultations, the Section 4 recovery planning process, the Section 9 protective prohibitions of unauthorized take, Section 6 funding to the States, and the Section 10 incidental take permit process. The Service believes that it is these measures that may make

the difference between extinction and survival for many species.

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

**Procedural and Resource Difficulties in Designating Critical Habitat**

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

The consequence of the critical habitat litigation activity is that limited listing funds are used to defend active lawsuits, to respond to Notices of Intent (NOIs) to sue relative to critical habitat, and to comply with the growing number of adverse court orders. As a result, listing petition responses, the Service's own proposals to list critically imperiled species, and final listing determinations on existing proposals are all significantly delayed. The accelerated schedules of court ordered designations have left the Service with almost no ability to provide for adequate public participation or to ensure a defect-free rulemaking process before making decisions on listing and critical habitat proposals due to the risks associated with noncompliance with judicially-imposed deadlines. This in turn fosters a second round of litigation in which those who fear adverse impacts from critical habitat designations challenge those designations. The cycle of litigation appears endless, is very expensive, and in the final analysis provides relatively little additional protection to listed species.

The costs resulting from the designation include legal costs, the cost of preparation and publication of the designation, the analysis of the economic effects, the cost of requesting and responding to public comment, and in some cases the costs of compliance with the National Environmental Policy

Act (NEPA), all are part of the cost of critical habitat designation. None of these costs result in any benefit to the species that is not already afforded by the protections of the Act enumerated earlier, and they directly reduce the funds available for direct and tangible conservation actions.

### Background

This revised final rule addresses the designation of critical habitat for the Santa Ana sucker (*Catostomus santaanae*) (sucker), which is endemic to the Los Angeles River, the San Gabriel River, and the Santa Ana River, and assumed to be introduced to the Santa Clara River in California. In this revised final rule, we discuss information obtained since the proposed and original final critical habitat rules published concurrently in the **Federal Register** on February 26, 2004 (69 FR 8911 and 69 FR 8839).

The sucker has evolved in the dynamic hydrological systems of southern California and requires clean, clear, and relatively cool streams of varying width and depth with appropriate substrates (e.g., a mix of sand, gravel, cobble, and boulder). The sucker scrapes algae and invertebrates from hard substrates such as gravel and cobbles and spawns over a gravel and cobble substrate. Please refer to the final rule listing the species as threatened (65 FR 19686) and our previous final critical habitat rule (69 FR 8839) for a more detailed discussion about the species' physical description, ecology, range, distribution, and a discussion of factors affecting the species.

### Previous Federal Action

On July 9, 2001, California Trout, Inc., the California-Nevada Chapter of the American Fisheries Society, the Center for Biological Diversity, and the Friends of the River (plaintiffs) filed a 60-day notice of intent to sue over our failure to designate critical habitat for the Santa Ana sucker. The plaintiffs filed a second amended complaint for declaratory judgment and injunctive relief on March 19, 2002, with the U.S. District Court for the Northern District of California. On February 26, 2003, the district court ordered the Service to designate final critical habitat for the Santa Ana sucker by no later than February 21, 2004, and enjoined the Service from issuing any section 7 concurrence letters or biological opinions on actions that "may affect" the sucker until such time as the final critical habitat is designated. The Service published the proposed and final rules concurrently on February 26, 2004 (69 FR 8911 and 69 FR 8839). As a result, the injunction prohibiting the

issuance of biological opinions and concurrence letters was lifted. See the proposed rule (69 FR 8911) for a discussion of why the final rule and proposed rule were published at the same time.

The proposed critical habitat rule, published on February 26, 2004 (69 FR 8911), included a 60-day comment period during which the public could submit comments on the proposed designation. On August 19, 2004, we published a notice in the **Federal Register** (69 FR 51416) announcing the reopening of a 30-day comment period on the proposed critical habitat rule and the scheduling of a public hearing, which was held in Pasadena, California on September 9, 2004. On October 1, 2004, we published a **Federal Register** notice (69 FR 58876) announcing the availability of the draft economic analysis of the proposed critical habitat designation and reopening a 10-day public comment period for the economic analysis and proposed designation. On October 25, 2004, we published another notice in the **Federal Register** (69 FR 62238) reopening a 30-day comment period on the draft economic analysis and the proposed designation.

### Summary of Comments and Recommendations

During the initial 60-day public comment period for the proposed rule (69 FR 8911), we contacted all appropriate State and Federal agencies, county governments, elected officials, scientific organizations, and other interested parties, via mail and/or fax, and invited them to submit comments and/or information concerning the proposed rule. We also published newspaper notices in the *The Press-Enterprise*, Riverside, CA, and in the *Los Angeles Times*, Los Angeles, CA, inviting public comment. During the first comment period, we received comments from three county agencies, three water districts, two businesses, three groups, and 14 individuals. Of the 22 letters we received, four letters supported the designation as proposed, six letters suggested expanding the designation, six letters suggested reducing the designation, one letter requested clarification of the designation, and five letters were neutral.

During the second comment period, we received comments from one utility agency, three groups, and four individuals. Of the six letters we received, one letter supported the designation as proposed, two letters suggested expanding the designation, one letter suggested reducing the

designation, and two letters were neutral. At the public hearing during the second comment period, we received 21 oral comments, all of which requested a reduction in the designation. A transcript of the hearing is available for inspection (see **ADDRESSES** section).

During the third comment period (October 1 to 12, 2004), which regarded the draft economic analysis, we received comments from 1 county agency, 3 water districts, 1 business, 4 groups, and 2 individuals. Of the 7 letters we received, 4 letters were requests for an extension of the comment submission period, and 3 letters contained suggestions for improvements to the draft economic analysis. Of the latter 3 letters, 1 supported the designation as proposed and 2 suggested reducing the designation.

During the fourth comment period (October 25 to November 24, 2004), which regarded the draft economic analysis, we received comments from 7 groups, 8 individuals, and 1 project authority (representing 1 county agency and 4 water districts). Of the 13 letters we received, 10 letters supported the designation as proposed, 2 letters suggested reducing the designation, and 1 letter requested clarification of the draft economic analysis. (After the comments deadline, we received 2 letters with comments from 1 county agency suggested reducing the designation, and a letter from 1 business requesting an extension of the comments deadline.)

In accordance with our peer review policy published in the **Federal Register** on July 1, 1994 (59 FR 34270), we requested the expert opinions of seven independent specialists who are recognized authorities on freshwater fish of Southern California regarding pertinent scientific or commercial data and assumptions relating to the supporting biological and ecological information in the proposed designation. The purpose of such review is to ensure that the designation is based on scientifically sound data, assumptions, and analyses, including input of appropriate experts and specialists.

We reviewed all comments, including the oral statements presented at the public hearing and the written comments received from peer reviewers and the public during the comment periods, for substantive, relevant issues and new data regarding critical habitat and the Santa Ana sucker. Peer reviewer comments are summarized separately in the following section. We have grouped public comments into six general issues relating to critical habitat and the draft economic analysis, combined and

summarized similar comments, and provided our responses in the Public Comments section below.

#### Peer Review Comments

We received three written responses from peer reviewers recommending expansion of critical habitat and one written response supporting critical habitat as designated. One additional peer reviewer supported designated critical habitat, but this letter was received after the deadline. Two peer reviewers supplied specific edits and comments on the critical habitat unit boundaries and the primary constituent elements. Comments from peer reviewers have been incorporated into this final rule as appropriate.

(1) *Comment:* The upper boundary of critical habitat on the East Fork of the San Gabriel River should be the Bridge-of-No-Return and was incorrectly delineated on the map in the final rule (69 FR 8859).

*Our Response:* We acknowledge that this upper boundary was incorrectly delineated on the map of Unit 2 in the original final rule. This area was also inadvertently left out of the legal description of the unit. As a result, we cannot include the area in the revised final designation even though this area is essential to the conservation of the sucker. We may, under the Act, revise the designation of critical habitat in the future to include this area.

(2) *Comment:* The stretches of the San Gabriel River between the San Gabriel Dam and the Morris Dam reservoir, between the Highway 39 bridge and the Fish Canyon confluence with the river, and upstream of Cogswell Dam should be included in critical habitat because these areas contain potentially occupied and/or restorable habitat.

*Our Response:* Although we appreciate the importance of potentially suitable habitat within these stretches of the San Gabriel River, we do not have sufficient information to determine if these portions of the river contain the primary constituent elements essential to the conservation of the sucker and therefore, we could not designate these areas as critical habitat. Under the Act, we can revise critical habitat in the future if new information becomes available indicating that these areas are essential.

(3) *Comment:* Devil's Gulch, a tributary to the East Fork of the San Gabriel River, should not have been included in designated critical habitat because it does not support the Santa Ana sucker.

*Our Response:* Devil's Gulch was not designated as critical habitat.

(4) *Comment:* There is a barrier to fish movement upstream from the San Gabriel River into Big Mermaid's Canyon and therefore Big Mermaid's Canyon should not be designated as critical habitat.

*Our Response:* Using the best available information, including records from the California Natural Diversity Database (CNDDB), we determined that Big Mermaid's Canyon previously supported suckers and still is essential to the conservation of the sucker in that it transports water and substrate essential to the maintenance of occupied sucker habitat downstream.

(5) *Comment:* Haines Creek should be specifically described as part of designated critical habitat for the sucker.

*Our Response:* Haines Creek is located within the boundaries of the Big Tujunga Creek Critical Habitat Unit (Unit 3), and has been specifically listed in the description of this unit in this revised final rule.

(6) *Comment:* The Service has not adequately supported its statement that the upper Santa Ana Wash and tributaries provide sediment transport to occupied habitat.

*Our Response:* We based the Santa Ana sucker critical habitat designation on the best available information, including expert opinion (Dr. Thomas Haglund, Ichthyologist, pers. comm. 2004; Dr. Jonathan Baskin, Ichthyologist, California State Polytechnic University, Pomona, pers. comm. 2004) and studies in similar river systems in California (NOAA 2003).

While the Santa Ana Wash was proposed as critical habitat based on, among other things, its contribution of sediments and maintenance of a functioning hydrograph, these attributes do not, of themselves, warrant determining that an area is "essential to the conservation of the species", which is the statutory standard for designation of unoccupied areas. Therefore, Unit 1B, Santa Ana Wash, has been removed from the revised designation. The basis for this removal is summarized in the section entitled "Summary of Changes".

(7) *Comment:* The criteria used to designate individual tributaries in Unit 1B, the Santa Ana Wash and in Unit 3, Big Tujunga Creek as critical habitat were not consistently applied.

*Our Response:* We based our determination to designate tributaries in Unit 1B and Unit 3 on the best available data, including aerial photographs and historical sucker occurrences. We determined that these tributaries maintain a functioning hydrological system, provide and transport sediment downstream to occupied habitat,

support riparian systems, and maintain the long-term viability of the sucker populations. We believe that we applied these criteria consistently to each area designated as critical habitat. Please refer to the *Methods and Criteria Used To Delineate Critical Habitat* section of this rule for a more detailed discussion. However, the Santa Ana Wash and associated tributaries within Unit 1B have been excluded from the revised designation. The basis for this exclusion is summarized in the section entitled "Summary of Changes".

(8) *Comment:* The primary constituent element describing substrate types should be refined to include low-embeddedness.

*Our Response:* We concur and have revised the description of the primary constituent element describing substrate. Please refer to the *Primary Constituent Elements* section of this rule for a detailed description.

(9) *Comment:* Minimum water depth of from 3 to 30 centimeters (cm) (1.2 to 11.8 inches (in)) should be changed. Depths less than 4 cm (1.6 in) would not provide habitat for most life stages of the sucker.

*Our Response:* We used 3 cm (1.2 in) as the minimum water depth because of the observations of larval suckers in sandy habitats with depths of 3 to 10 cm (1.2 to 3.9 in) of water along the margins of rivers and streams (Haglund *et al.*, 2004).

(10) *Comment:* Juvenile suckers migrate into tributaries, possibly attracted by the cooler temperatures these tributaries experience in the spring. Therefore, tributaries should be included as a primary constituent element in critical habitat. Sunnyslope Creek, Arroyo Tequesquite, Evans Lake Drain, Mt. Rubidoux Creek, Agua Mansa Drain, and the tributaries draining Hidden Valley Regional Park wetlands should be included as critical habitat.

*Our Response:* If a tributary within the critical habitat boundaries contained one or more of the primary constituent elements, then it was considered essential habitat. Some tributaries within the critical habitat boundaries do not contain any of the primary constituent elements and were not, therefore, considered essential. For example, a concrete-lined storm drain directing urban runoff into one of the rivers is unlikely to provide any of the primary constituent elements essential to the conservation of the species. Although we did not specifically describe tributaries as a primary constituent element, they are necessary in a functioning hydrological system and are included in the critical habitat designation where appropriate.

Several of the drains, creeks, and other tributaries listed by the commenter contain the primary constituent elements and are considered essential habitat but were excluded from the critical habitat designation under section 4(b)(2) of the Act, because they are protected under the Western Riverside Multiple Species Habitat Conservation Plan (MSHCP).

(11) *Comment:* Unnatural or anthropogenic ebbs and peaks in water volume may be inadvertently included as primary constituent elements, since the description of a functioning hydrological system as a primary constituent element did not specify that it must contain a natural hydrograph.

*Our Response:* We concur and have revised the primary constituent element describing a functional hydrological system. Please refer to the *Primary Constituent Elements* section of this rule for a detailed description.

#### Public Comments

##### *Issue 1: Comments on the Adequacy and the Extent of Critical Habitat Designation*

(12) *Comment:* Critical habitat should be designated in the Santa Clara River because (1) the Santa Clara River is essential to the conservation of the Santa Ana sucker, (2) the population provides increased genetic variability to the overall sucker population, (3) the Santa Clara River is threatened by rapid development within its watershed, and (4) the Santa Clara River is not otherwise protected under the Act. The Santa Ana sucker in the Santa Clara River should be listed under the Act, since there remains much ambiguity regarding its status as an introduced species in the Santa Clara River.

*Our Response:* Since the sucker population in the Santa Clara River is not federally listed (65 FR 79686), critical habitat could not be designated for that population. The sucker was not listed in the Santa Clara River due to the lack of evidence showing the sucker was native to the Santa Clara River. Our earliest record of the sucker in the Santa Clara River watershed is from 1934 (Hubbs *et al.* 1943). Conversely, we have records of the sucker in the Santa Ana River from 1897 (Snyder 1908). Therefore, based on the best available data, we have presumed the sucker in the Santa Clara River was introduced. If we determine the Santa Clara River population to be crucial to the recovery of the species as we prepare the recovery plan, we may need to reevaluate the status of this population under the Act.

(13) *Comment:* Since the area below Prado Dam in the Santa Ana River is not adequately protected by either the Santa Ana Sucker (SAS) Conservation Program or by the Western Riverside MSHCP, it should be included in the critical habitat designation. Since the SAS Conservation Program focuses conservation efforts on the upper stretch of the Santa Ana River, it may not adequately address the conservation needs of the sucker throughout the Santa Ana River. Another commenter stated that the benefits of including the areas covered by these plans in the critical habitat designation outweigh potential costs to other agencies and that critical habitat designation provides greater benefits to the sucker than either of the plans.

*Our Response:* Section 4(b)(2) of the Act allows the Service to exclude any area from critical habitat if we determine that the benefits of such an exclusion outweigh the benefits of including the area in the critical habitat designation, unless, based on the best scientific and commercial data available, we determine that failure to designate the area as critical habitat will result in the extinction of the species. Exclusions can be based on Integrated Natural Resource Management Plans (INRMPs) on military lands, Habitat Conservation Plans (HCPs), or other formal conservation plans; except for INRMPs, plans must provide conservation benefits to the species as well as assurances that the plan will be implemented and the conservation effort will be effective. We have determined that both the Western Riverside MSHCP and the SAS Conservation Program satisfy these requisites, and have, therefore, concluded that the benefits of excluding the lands covered by these plans from the final critical habitat designation outweigh the benefits of including these areas. As such, they are excluded from critical habitat designation. See *Lands Covered Under Existing Conservation Plans* for a detailed discussion.

(14) *Comment:* Habitat within the boundaries of the Western Riverside MSHCP and SAS Conservation Program meet the definition of critical habitat and should be included in designated critical habitat.

*Our Response:* Although the habitat within the boundaries of these conservation plans contains one or more of the physical and biological characteristics essential to the conservation of the sucker, we have determined that these conservation plans provide special management and/or protection for the Santa Ana sucker, and have concluded that the benefits of

excluding the lands covered by these plans from the final critical habitat designation outweigh the benefits of including these areas. Thus, we have excluded these areas from critical habitat designation under 4(b)(2) of the Act.

##### *Issue 2: Comments on Individual Units*

(15) *Comment:* Commenters stated that Santa Ana suckers are declining as a result of heavy recreational use in the San Gabriel River. Conversely, some other commenters stated suckers in the San Gabriel River were not declining as the result of recreational activities or as a result of the use of summer homes.

*Our Response:* Based on the best available information, we believe that recreational suction dredging, artificial pool creation, off-road vehicle use, swimming, wading, bathing, and the use of recreational summer homes may have varying detrimental effects on the Santa Ana sucker.

Suction dredging, which occurs on a recreational basis in the San Gabriel River can result in the death of fish eggs, larvae, and fry (Harvey and Lisle 1998; Griffith and Andrews 1981). Suction dredging can also change the functional composition of the invertebrate community and increase sedimentation rates in sensitive spawning and feeding habitats (Somer and Hassler 1992).

The use of the river as an off-highway vehicle (OHV) recreational area may result in adverse effects to the sucker, if the OHV use occurs in areas used by the sucker during the spawning and nursery season, or if vehicles leak oil, gas, and other pollutants into the river. OHV use can change the physical structure of habitat (Wender and Walker 1998; Texas Chapter of American Fisheries Society 2002; Brown 1994), crush eggs and larvae within the substrate (Texas Chapter of American Fisheries Society 2002), and reduce the taxonomic diversity of the macroinvertebrate and algal species (Texas Chapter of American Fisheries Society 2002) which is the food base for the sucker (Haglund and Baskin 2003; Greenfield *et al.* 1970). Haglund and Baskin (2002) recently completed a one-year study in the San Gabriel River; their results suggest that macroinvertebrate diversity was reduced in vehicle ruts and tracks. However, they concluded there was no evidence at that time to indicate that the intensity of OHV usage was related to trends in native fish populations (although they recommended further investigation before drawing firm conclusions).

Swimming, wading, and bathing can degrade the physical structure and

water quality of streams. Erosion associated with heavy recreational use along streambanks contributes to degraded habitat conditions including increased sedimentation in potential spawning and feeding grounds and loss of habitat structure (e.g., pools, riffles, shallow sandy margins) that provide essential elements to the survival of the sucker. The damming of the river to create recreational swimming pools may temporarily eliminate fish passage and limit the availability of suitable habitat for the sucker (Ally, in litt. 2001). Pollution associated with personal care products (e.g., suntan lotion, shampoo, soap, insect repellent) that can be released into the aquatic environment during swimming, wading, and bathing can have adverse physiological effects on the endocrine system of fishes (Daughton and Ternes 1999).

We have been working and will continue to work with the U. S. Forest Service (Forest Service) to ensure their actions with respect to the sucker will not result in jeopardy to or take of the species. The Forest Service has recently implemented measures to reduce OHV activity in areas in which suckers are suspected to spawn as part of the Angeles National Forest Santa Ana Sucker Conservation Strategy.

(16) *Comment:* The San Gabriel Canyon OHV Area is currently a Department of Defense training facility and is also covered under a Forest Service management plan. Therefore, this area should be excluded from designated critical habitat.

*Our Response:* Section 4(b)(2) of the Act allows the Service to exclude any area from critical habitat if the Service determines the benefits of such exclusion outweigh the benefits of specifying such area as part of critical habitat, unless, based on the best scientific and commercial data available, the Service determines that failure to designate the area as critical habitat will result in the extinction of the species. Exclusions can be based on INRMPs for military lands, HCPs, and formal conservation plans. We have confirmed with the Forest Service that the Department of Defense does not currently use the San Gabriel Canyon OHV Area as a training facility (Bill Brown, U.S. Forest Service, pers. comm. 2004), and therefore does not qualify for exclusion as provided for military lands under section 4(b)(2) of the Act.

The Service must determine that a management plan provides a conservation benefit to the species, and assurances that the management plan will be implemented, and the conservation effort will be effective. We have reviewed the San Gabriel Canyon

Off-Road Vehicle Management Plan (U.S. Forest Service 1985) for consistency with the aforementioned criteria. While we appreciate the significant amount of effort private individuals and the Forest Service have expended in the development of this management plan, it does not adequately address the conservation needs of the sucker in the San Gabriel River and therefore, we cannot exclude this area from the critical habitat designation under 4(b)(2) of the Act. We are working with the Forest Service to better conserve the sucker in this area.

(17) *Comment:* Only a small portion of the San Gabriel Canyon OHV Area contains suitable habitat for the Santa Ana sucker.

*Our Response:* Our regulations allow us to designate critical habitat in areas where the species is not present if they are in proximity to areas occupied by the species and are essential to their conservation (50 CFR 424.12(d)). Although suckers may not occupy this area when the reservoir is full, this area does provide a linkage between the West, East, and North Forks of the San Gabriel River. Linkages are essential to maintaining the genetic structure and viability of the species in this river. Therefore, we consider all portions of the San Gabriel Canyon OHV Area within the geographical boundaries of the designation as critical habitat.

(18) *Comment:* Habitat for the sucker is not present in the plunge pool immediately downstream of Cogswell Dam or for 1,000 feet downstream of Cogswell Dam in the West Fork of San Gabriel River. Therefore, this section of the river should be excluded from critical habitat.

*Our Response:* Based on the best available information, we have determined that this area of the West Fork of the San Gabriel River contains substrate, vegetation, and water that are essential for the conservation of the species (Haglund and Baskin 1996; Haglund and Baskin 1995; U.S. Forest Service 2003). The Santa Ana sucker was detected in the vicinity of this area during the last decade (Haglund and Baskin 1996). Therefore, since this area had been occupied and since it contains the primary constituent elements of critical habitat, this area will remain designated as critical habitat. Under the Act, we can revise critical habitat in the future, if new information becomes available.

(19) *Comment:* A 1,000-foot portion of the East Fork of the San Gabriel River downstream of the confluence of the East, West, and North forks should be excluded from critical habitat because critical habitat designation will limit the

implementation of flood protection measures, the amount of water that can be stored behind the San Gabriel Dam, and revenue for the hydroelectric plant located downstream of the dam.

*Our Response:* This area was included in the critical habitat designation because it provides a linkage between the West, East, and North Forks of the San Gabriel River. Linkages are essential to maintaining the genetic structure and viability of the species in this river. Our regulations allow us to designate critical habitat in areas where the species is not present if they are in proximity to areas occupied by the species and are essential to their conservation (50 CFR 424.12(d)). In addition, significant numbers of suckers were detected in the vicinity of this area during recent surveys (M. Chimienti, Los Angeles County Department of Public Works, pers. comm. 2004). Therefore, this area of the East Fork of the San Gabriel River will remain in the critical habitat designation. Under the Act, we can revise critical habitat in the future, if new information becomes available.

(20) *Comment:* Within the San Gabriel River, critical habitat should be designated between Morris Dam and Fish Canyon as well as lower San Jose Creek, a tributary to San Gabriel River. The commenter did not state why this area should be designated.

*Our Response:* Although we appreciate the potential for habitat in this portion of the San Gabriel River and lower San Jose Creek, we do not have sufficient information to determine if these areas contain the primary constituent elements essential to the conservation of the sucker. Therefore, we cannot designate these areas as critical habitat. Under the Act, we can revise critical habitat in the future, if new information becomes available.

(21) *Comment:* Within Big Tujunga Creek, habitat for the sucker is not present in the plunge pool immediately below Big Tujunga Dam or for one mile downstream of Big Tujunga Dam. Therefore, these sections of Big Tujunga Creek should be excluded from critical habitat.

*Our Response:* We have determined that the upstream sections of the Big Tujunga Creek transport sediment from upstream tributaries to known occupied habitat in the lower Big Tujunga Creek. In addition, this portion of the creek meets the definition of critical habitat since it contains water, substrates, and riparian and aquatic vegetation essential for the conservation of the species (Andresen 2001; Haglund and Baskin 2001). Although some structures in this area may seasonally limit upstream movement of suckers, these structures

are not necessarily year-round impediments to fish passage (Swift 2002). Therefore, since this area maintains essential habitat downstream, has a strong potential to be occupied, and contains the primary constituent elements of critical habitat, this area is essential to the conservation of the species and will remain in the critical habitat designation. Under the Act, we can revise critical habitat in the future, if new information becomes available.

(22) *Comment:* Habitat is not present within an unnamed tributary of Big Tujunga Creek that is 500 feet downstream of Foothill Boulevard.

*Our Response:* We have not been provided with enough information to determine the location of this unnamed tributary. However, the floodplain of Big Tujunga Creek meets the definition of critical habitat since it contains the necessary hydrology, substrates, water, and vegetation essential to the conservation of the species. Therefore, any tributaries with these primary constituent elements are considered critical habitat when they are within the Big Tujunga Creek floodplain. Under the Act, we can revise critical habitat in the future, if new information becomes available.

(23) *Comment:* Some commenters stated that Little Tujunga Creek in Unit 3 should be excluded from critical habitat because it is not occupied by the sucker, and does not provide sediment or water to occupied habitat in Big Tujunga Creek. Other commenters emphasized the importance of maintaining the original area proposed as critical habitat, including Little Tujunga Creek.

*Our Response:* Based on comments and information we received during the public comment periods and additional field investigations, we have removed Little Tujunga Creek upstream of its confluence with Big Tujunga Creek from the final critical habitat designation and revised the maps accordingly.

(24) *Comment:* In Unit 3, critical habitat should be designated in Trail Canyon and La Paloma Canyon and all other tributaries to the Big Tujunga Creek.

*Our Response:* Although we appreciate the potential for habitat and water supply in Trail and La Paloma Canyons, as well as in many of the other tributaries to Big Tujunga Creek, we do not have sufficient information to determine if these tributaries contain the primary constituent elements essential to the conservation of the sucker. Therefore, we cannot designate these areas as critical habitat. Under the Act, we can revise critical habitat in the

future, if new information becomes available.

(25) *Comment:* Critical habitat should be designated in the Los Angeles River between State Route 134 and Interstate 5.

*Our Response:* Although we appreciate the potential for habitat in this portion of the Los Angeles River, we do not have sufficient information to determine if it contains the primary constituent elements essential to the conservation of the sucker. Therefore, we cannot designate this area as critical habitat. Under the Act, we can revise critical habitat in the future, if new information becomes available.

(26) *Comment:* Unit 1B (Santa Ana Wash) is not occupied and therefore is not essential to the conservation of the species. Also, Mill Creek is generally dry and could not support the sucker. Furthermore, the Service has not demonstrated that Unit 1B supports a natural hydrograph, is essential to the conservation of the species, or is necessary for the long-term viability of the species.

*Our Response:* As stated in the previous final critical habitat rule or listing rule, Mill Creek, City Creek, and the upper Santa Ana Wash in Unit 1B are a source of sediment for the occupied portion of the Santa Ana River (Dr. Thomas Haglund, pers. comm. 2004; Dr. Jonathan Baskin, pers. comm. 2004; EIP Associates 2004). This sediment, which is composed of cobble, gravel, and sand, provides spawning and feeding substrates for the sucker and is essential to the conservation of the species.

In addition to sediment transport, Unit 1B supports a functioning hydrological system (Dr. Thomas Haglund, pers. comm. 2004; Dr. Jonathan Baskin, pers. comm. 2004) that experiences peaks and ebbs in water volume within the Santa Ana River watershed (Dr. Thomas Haglund, pers. comm. 2004; Dr. Jonathan Baskin, pers. comm. 2004). Although much of the surface water within Unit 1B has been diverted for municipal uses or other purposes, heavy rainstorms during the rainy season do provide flows that are biologically important to the sucker (Swift 2001; EIP Associates 2004).

While the Santa Ana Wash was proposed as critical habitat based on, among other things, its contribution of sediments and maintenance of a functioning hydrograph, these attributes do not, of themselves, warrant determining that an area is "essential to the conservation of the species", which is the statutory standard for designation of unoccupied areas. Therefore, Unit 1B, Santa Ana Wash, has been removed

from the revised designation. The basis for this removal is summarized in the section entitled "Summary of Changes".

(27) *Comment:* Unit 1B does not support riparian systems that are essential to the conservation of the sucker.

*Our Response:* As stated in previous rules, the existing riparian habitat in City Creek, Mill Creek, and the upper Santa Ana Wash in Unit 1B contributes to maintaining water quality and the community structure essential for the conservation of the sucker. City Creek, Mill Creek, and the upper Santa Ana Wash contribute organic nutrients (e.g., woody debris, invertebrates) to the system (Klapproth and Johnson 2000a; Sweeney 1993) and filter pollutants and sediments entering the watershed (Mills and Stevenson 1999; Klapproth and Johnson 2000b).

Unit 1B, Santa Ana Wash, has been removed from the revised designation. The basis for this removal is summarized in the section entitled "Summary of Changes".

(28) *Comment:* In Unit 1B, the Service inconsistently and arbitrarily included a portion of the Santa Ana River covered by the Santa Ana Sucker (SAS) Conservation Program. This portion of the river extends upstream from the La Cadena Avenue bridge to the Mission Channel confluence with the Santa Ana River.

*Our Response:* The portion of Unit 1B between the La Cadena Avenue bridge and the Mission Channel confluence was inadvertently included in the previous critical habitat designation. The text and maps have been modified in this revised final rule to reflect the exclusion of all areas covered by the SAS Conservation Program as allowed under section 4(b)(2) of the Act (see Unit 1 map).

(29) *Comment:* There are no new anticipated impacts to the Santa Ana Wash (Unit 1B) and therefore, it should be excluded from critical habitat designation.

*Our Response:* The Santa Ana Wash is threatened by rapid development of the Santa Ana River watershed in San Bernardino County, and by the demand for increased building materials (e.g., sand and gravel) and water supplies. However, Unit 1B, Santa Ana Wash, has been removed from the revised designation. The basis for this removal is summarized in the section entitled "Summary of Changes".

(30) *Comment:* Chino Creek in Unit 1A does not contain habitat for the Santa Ana sucker and should be removed from the critical habitat designation.

*Our Response:* Chino Creek supported the Santa Ana sucker historically (Koehn, in litt. 1966), and still contains one or more of the primary constituent elements (Swift, pers. comm. 2004). In addition, the riparian habitat adjacent to the stream and the stream's contribution to the overall hydrological regime help the sucker population in the Santa Ana River.

While Chino Creek in the Northern Prado Basin was proposed as critical habitat based on, among other things, its contribution of sediments and maintenance of a functioning hydrograph, these attributes do not, of themselves, warrant determining that an area is "essential to the conservation of the species", which is the statutory standard for designation of unoccupied areas. Therefore, Unit 1A, Northern Prado Basin, has been removed from the revised designation. The basis for this removal is summarized in the section entitled "Summary of Changes".

(31) *Comment:* Critical habitat should be designated in Cajon Creek, a tributary to the Santa Ana River.

*Our Response:* Although we appreciate the potential for sucker habitat in Cajon Creek, we do not have sufficient information to determine if this tributary contains the primary constituent elements essential to conservation of the sucker. Therefore, we cannot designate this tributary as critical habitat. Under the Act, we can revise critical habitat in the future, if new information becomes available.

(32) *Comment:* Please clarify if energy facilities are specifically excluded from the designated critical habitat and whether this includes powerhouse number 3 on Mill Creek in Unit 1B.

*Our Response:* We have clarified the language in the final rule to specifically exclude energy production facilities from the critical habitat designation. However, stream channels adjacent to energy production facilities within the geographical boundaries of the critical habitat designation that contain one or more of the primary constituent elements are considered critical habitat. Unit 1B, which includes Mill Creek, has been removed from the revised critical habitat designation.

#### *Issue 3: Comments on Science*

(33) *Comment:* Information used in designating critical habitat was inaccurate, insufficient, and not the best available data.

*Our Response:* We believe we used the best available commercial and scientific data to designate critical habitat for the sucker, including peer-reviewed primary source journal articles, expert opinions, species survey

reports, project reports, and other scientific studies. All new information provided during the public comment periods was considered in this final designation as appropriate.

#### *Issue 4: Procedural and Legal Comments*

(34) *Comment:* The Service cannot exclude lands covered by conservation plans from critical habitat if those plans use public funds and lands to mitigate the taking of threatened and endangered species by private applicants for private purposes.

*Our Response:* Section 4(b)(2) of the Act allows the Service to exclude any area from critical habitat if the Service determines the benefits of such exclusion outweigh the benefits of designating such area as critical habitat, unless, based on the best scientific and commercial data available, the Service determines that failure to designate the area as critical habitat will result in the extinction of the species. Exclusions under section 4(b)(2) can be based on INRMPs, HCPs, and formal conservation plans, or other relevant considerations. In the case of HCPs and other formal conservation plans, the Service must determine that the plan provides conservation benefit to the species, and assurances that the management plan will be implemented and the conservation effort will be effective. The Service is not prohibited from excluding lands covered by plans using public funds or public lands if the plan meets the aforementioned criteria.

(35) *Comment:* The Service unlawfully pre-determined that the exclusion of essential sucker habitat from designated critical habitat outweighs any benefit.

*Our Response:* We issued the final rule (69 FR 8839) designating critical habitat for the sucker without the opportunity for public comment, because we found it would be impracticable and contrary to the public interest to delay the effective date of the final rule (see comment 37 for further details). In the proposed rule (69 FR 8911) that was published concurrently with the final rule, we specifically solicited comments from the public on the exclusion of essential habitat from the critical habitat designation. If additional information had been submitted during the comment period indicating that the conservation plans on which these exclusions were based were not conserving the sucker, we could have re-proposed critical habitat for the excluded areas. However, we did not receive any comments to that effect. Furthermore, the Western Riverside MSHCP has been finalized and an Incidental Take Permit has been issued

for this plan. Significant progress has been made in the ongoing formal consultation with the U.S. Army Corps of Engineers (the Corps) on the SAS Conservation Program and we expect to issue a biological opinion on this program shortly. Therefore, we have excluded these areas of essential habitat from the critical habitat designation as allowed under section 4(b)(2).

(36) *Comments:* The Service did not comply with the National Environmental Policy Act (NEPA). Under NEPA, an Environmental Impact Statement or an Environmental Assessment must be prepared.

*Our Response:* Environmental impact statements and environmental assessments, as defined under NEPA, are not required for regulations enacted under section 4 of the Act (see 48 FR 49244; October 25, 1983). We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244).

(37) *Comment:* The rights of concerned citizens were violated because they were not allowed to participate in the rule-making process.

*Our Response:* The Service published the previous final rule designating critical habitat for the sucker (69 FR 8839) without providing an opportunity for the public to comment under the good cause exemption of the Administrative Procedure Act (APA). Section 553(b)(B) of the APA recognizes an exemption to the public comment requirements. The Service issued the final rule designating critical habitat for the sucker without the opportunity for public comment, because we found it would be impracticable and contrary to the public interest to delay the effective date of the final rule (see comment 37 for further details). The Service also provided the opportunity for the public to comment on the proposed rule identical to and issued concurrently with the final rule. We have reviewed and responded to the substantive comments that we received by the deadline of the each of the 4 public comment periods. Based on these comments, we have revised the final rule to reflect corrections and modifications to the final rule designating critical habitat for the sucker as appropriate.

(38) *Comment:* The Service failed to hold formal public hearings as required under section 556 and 557 of title 5 of the APA. In addition, all settlements resulting from ongoing negotiations with the Service should be made part of the administrative record for this critical habitat designation.

*Our Response:* Section 553(d) of the APA allows publication of a final rule

to take effect immediately upon publication if the agency finds good cause for doing so and provides the reasoning in the final rule. In the final rule published on February 26, 2004, designating critical habitat for the Santa Ana sucker, we stated that we found good cause to make the final rule effective immediately upon publication for reasons outlined in the response to comment 37. Delaying publication of the rule to hold public hearings would have been impracticable and contrary to the public interest at that time (69 FR 8840). We subsequently held a public hearing on the proposed rule—which was identical to and published concurrently with the final rule—on September 9, 2004. Therefore, we have complied with the requirements of the APA and the Act.

(39) *Comment:* The Service can publish a rule that is effective immediately only if the Service has determined the sucker requires emergency protection. If the Service publishes a rule that is effective immediately, the Service must incorporate reasons for the emergency determination into the final rule. Since there was no justification for emergency designation included in the publication of the final rule, the final rule is invalid and unenforceable.

*Our Response:* Section 553(d) of the APA allows publication of a final rule to take effect immediately upon publication if the agency finds good cause for doing so and provides the reasoning in the final rule. In the final rule published on February 26, 2004, designating critical habitat for the Santa Ana sucker, we stated that we found good cause to make the final rule effective immediately upon publication for the following reasons: (1) To comply with the district court's order; (2) to conduct section 7 consultations and prepare written concurrences regarding projects funded, permitted, or carried out by Federal agencies that may affect the Santa Ana sucker or its essential habitat; (3) to ensure those activities will not jeopardize the continued existence of the species; and (4) to ensure Federal agencies can comply with the requirements of the Act, including section 9. Delaying the effective date of the rule would have been impracticable and contrary to the public interest (69 FR 8840). We complied with the requirements of the APA and the Act and therefore the rule is valid and effective. The Service did not issue the final rule based on an emergency finding requiring immediate designation of critical habitat for the sucker.

(40) *Comment:* Data were not made available for public review.

*Our Response:* As stated in the proposed and final critical habitat rules published on February 26, 2004, the supporting information for the rules is available to the public for inspection, by appointment, during normal business hours at the U.S. Fish and Wildlife Service office in Carlsbad, California.

(41) *Comment:* The designation of critical habitat in the Santa Ana and San Gabriel Rivers, and the Big Tujunga Creek will limit the ability of flood control agencies and water conservation districts from maintaining sufficient flood protection and water supplies.

*Our Response:* The designation of critical habitat does not prevent public agencies from implementing flood control protection and water conservation actions. If these actions require a Federal permit, funding, or permission and if the Federal agency determines that these actions may adversely modify designated critical habitat, the Federal agency must request consultation with the Service prior to initiating that action.

(42) *Comment:* The designation of critical habitat should not preclude cooperative conservation efforts implemented in concert with actions that may adversely affect the sucker.

*Our Response:* We encourage cooperative conservation efforts by private individuals, organizations, and local, county, State, and Federal government agencies. We will continue to work with Federal, State, and local entities and private individuals to minimize project-related impacts to the sucker and its habitat.

#### *Issue 5: Misinterpretation of the Original Final Rule*

(43) *Comment:* The Service unfairly exempted Federal agencies and private individuals from the requirements of critical habitat.

*Our Response:* In the previous final rule, the Service did not exempt Federal agencies or private individuals from regulations regarding critical habitat. Instead, the Service described potential Federal actions that may be affected by the critical habitat designation or that may affect critical habitat. If a Federal agency determines their action may affect critical habitat, then they will be required to consult with the Service under section 7 of the Act. Private individuals do not have to consult with the Service if their actions may affect critical habitat unless their actions are permitted or funded by a Federal agency. However, private individuals should consult with the Service if their actions have the potential to result in

take of individual suckers and therefore violate section 9 of the Act.

(44) *Comment:* The critical habitat designation will result in the closure of the National Forest lands to the public resulting in significant effects to many recreational users.

*Our Response:* The designation of critical habitat does not require the Forest Service to close critical habitat areas within the National Forest to the public. The Forest Service will be required to consult with the Service under section 7 of the Act, if they determine that any of their actions may adversely modify critical habitat. However, we intend to continue working with the Forest Service to minimize any impacts to the sucker and its habitat that may result from recreation activities.

#### *Issue 6: Comments on Economic Analysis or Lack of Economic Analysis*

(45) *Comment:* The Service violated the Act because it did not complete an economic analysis prior to issuing a final critical habitat rule, and therefore the rule should be vacated.

*Our Response:* As previously stated (see response to comments 35 and 37), we dispensed with the notice and comment period for the final designation of critical habitat under the good cause exemption of the APA (69 FR 8839), while concurrently publishing the proposed rule to allow for public comment. In the proposed rule (69 FR 8911), we announced our intention to prepare an economic analysis and seek public review and comment on the economic analysis.

(46) *Comment:* Several comments objected to the short timeframe allowed for comments and the lack of immediate availability of the draft economic analysis online.

*Our Response:* We had two comment periods for the draft Economic Analysis, the first for 10 days and the second for 30 days. A Notice of Availability (NOA) was published in the **Federal Register** on October 1, 2004 (69 FR 58876) opening a 10-day public comment period on the economic analysis. On October 25, 2004, we published another notice in the **Federal Register** (69 FR 62238) reopening a 30-day comment period on the draft economic analysis and the proposed designation. All comments on the economic analysis have been incorporated into the final economic analysis and the revised final rule as appropriate.

(47) *Comment:* Two groups suggested that prior written comments they had submitted concerning the economic impacts of the Santa Ana Sucker critical

habitat designation were not addressed by the draft economic analysis.

*Our Response:* Northwest Economic Associates (NEA) and the Service reviewed all of the previously submitted comments in the course of preparing the draft economic analysis. The comments provided useful insight into potential economic effects of the listing and designation of critical habitat for the sucker. However, in some cases, further research revealed that the economic effects could not be substantiated through available information or that the effects were considered too speculative to be considered reasonably foreseeable. For example, one commenter noted that private lands within critical habitat that are dedicated for recreational purposes but not excluded will require "re-evaluation of [previously approved] private projects." This re-evaluation would result in assessment of an "appropriate fee," with an effect of "greater than 100 million dollars." The authors found no evidence that such a fee would result from designation of critical habitat. In other cases, the draft economic analysis included costs that were not addressed by prior written comments.

(48) *Comment:* One comment suggested that the amenity values estimates should appear in the main report, not an appendix.

*Our Response:* See response to Comment 49.

(49) *Comment:* One comment suggested that the amenity values as analyzed are highly conservative and that a broader range should be presented, using a broader range of assumptions. This comment also stated that other benefits, such as indirect or non-use benefits, should be analyzed as well. It also criticized the use of different accounting standards in the evaluation of benefits (amenity values) and costs.

*Our Response:* We appreciate the comment in support of the approach used in the DEA to estimate some of the economic benefits that may be associated with designating riparian corridors as critical habitat for the SAS. However, after further consideration and consultation with the Office of Management and Budget (OMB), we have decided that this approach does not fully meet the minimum standards required by OMB in estimating the potential economic benefits of a proposed Federal action. OMB Circular A-4 stresses that the Benefit-Transfer method, which was the approach used in the DEA, should only be used as a last-resort option to measuring benefits and should not be used without explicit justification. The underlying rationale

for this reasoning is that while the Benefit-Transfer method can provide a quick, low-cost approach for obtaining desired monetary values (as opposed to collecting original data), the methods are often associated with uncertainties and potential biases of unknown magnitude.

*Circular A-4* is very specific in the criteria that must be satisfied in order to use the Benefit-Transfer method. Criteria include using studies that are based on adequate data, sound and defensible empirical methods and techniques, and ensuring that the studies relied upon are measuring similar values that do not have unique attributes. In the DEA, we relied on two studies (Colby and Wishart 2002, Streiner and Loomis 1995) the first measuring the property value premium riparian areas generate for nearby landowners in the arid West, the second measuring the benefits incurred by nearby landowners associated with restoring degraded urban streams. Neither study, it was determined after consultation with OMB, fully met the necessary criteria to base an assessment of the potential economic benefits of SAS critical habitat designation. In the Colby study, concern was expressed over the statistical robustness of the overall model. Concerns over the Loomis study focused on the fact that the measurement of the value associated with restoring degraded riparian corridors was not equivalent to the designation of critical habitat, which essentially recognizes healthy riparian corridors that can support the species. While we attempted to address these and other concerns in the DEA, we were not able to fully satisfy all of the necessary criteria that would allow us to transfer the findings of these two studies to the SAS.

In future analyses we will continue to investigate the appropriateness of using existing data to estimate the economic benefits of critical habitat designation. However, even if we are able to credibly measure such effects, we continue to believe that in carrying out our duty under section 4(b)(2) of the Act that the benefits associated with designating any particular area as critical habitat are best expressed and considered in biological terms.

(50) *Comment:* One comment questioned the failure of the draft economic analysis to address economic impacts to the mining industry. An independent report on potential economic impacts was attached to this comment in support.

*Our Response:* The draft economic analysis considered impacts to the sand and gravel mining industry. Sand and

gravel are important resources in southern California that support development activities such as residential and commercial construction and road building. Due to the costs of transporting the material, sand and gravel mines tend to be located in areas relatively near development. Some of these mines have historically been, and continue to be, located within flood plains and can directly impact sucker habitat. The upper Santa Ana River area has had mining activities for many years.

The boundaries of the proposed critical habitat exclude existing mining activities and the Service has indicated that no burdens will be imposed on existing facilities that operate according to historic practices, as discussed in the draft economic analysis. The independent report suggests the possibility of future expansion of mining activities within Unit 1B. The Corps has received no request for permits to expand operations within the proposed critical habitat. There has only been one emergency consultation associated with sand and gravel mining since the sucker was listed, and it was conducted to protect a bridge and did not involve an ongoing commercial operation. While it is true that new mining activity is being considered within Unit 1B, there is no information with which to demonstrate economic effects. An HCP that will cover mining activities is in the initial stages of development but lacks sufficient detail to base reasonable predictions on how the critical habitat designation for the sucker will affect new mining activities within Unit 1B. However, the HCP has not yet specifically considered the Santa Ana sucker, and therefore no documentation is available to suggest additional conservation measures that may need to be adopted. Furthermore, Unit 1B is not included in the revised critical habitat designation.

(51) *Comment:* One comment questioned the failure of the draft economic analysis to address economic impacts of the water conservation project at Seven Oaks Dam in Unit 1B.

*Our Response:* The draft economic analysis considered potential economic impacts to the proposed water conservation project. According to the Corps, Seven Oaks Dam has not been permitted as a water conservation facility. Its primary purpose is for flood control. Several agencies have pursued the idea of using Seven Oaks as a source of municipal water supply. For example, a letter dated December 11, 2000 from the Service to the Corps attached to the comment letter refers to actions by the Corps and the San

Bernardino Valley Municipal Water District indicating that water conservation activities are reasonably certain to occur and that the application accompanying the petition to revise the appropriation of the Santa Ana River requests the right to store up to 50,000 acre-feet per annum in the reservoir formed by Seven Oaks Dam. However, recent discussions with the Corps suggest that no decisions to change the dam's purpose have been finalized. It is uncertain whether Seven Oaks Dam will be permitted for water conservation with or without critical habitat designation for the sucker. Furthermore, the Service has indicated that it will not require conservation measures unless the releases from the dam are altered from past practices. There is no indication how and if the flow regime will be altered even if the dam is used to provide additional water supply to municipalities. Furthermore, we find no evidence that the Corps is proposing a change of use of the facility to include water conservation.

(52) *Comment:* One comment stated that although they believe the draft economic analysis underestimates the full economic impact of critical habitat designation, the estimates contained in the analysis still support the exclusion of Unit 1B as benefits do not outweigh costs.

*Our Response:* The draft economic analysis did consider the effects of mining and water conservation as described above. Also as discussed above, we did consider the economic and other impacts of the designation when we issued our interim rule, however we also conducted an economic analysis to more fully consider these impacts.

(53) *Comment:* Two groups asserted that the draft economic analysis mischaracterizes the San Gabriel Canyon OHV Area status, and expressed a desire to have local efforts toward sucker recovery be included in the draft economic analysis.

*Our Response:* The draft economic analysis included efforts to properly characterize the status of OHV use in the San Gabriel Canyon. In response to the Santa Ana sucker's listing and critical habitat designation, the Forest Service has installed information signs in the OHV area. In the OHV staging area, there are some educational brochures available with general information on acceptable and unacceptable behaviors. There is also a kiosk with informational signs relating to the sucker. In the past three years, the Forest Service has coordinated with the Service and California Department of Fish and Game (CDFG) to develop

"avoidance criteria" for OHV users at San Gabriel OHV Park, to include the elimination of two stream crossings and the placement of rock and boulders along the riverbank to prevent people from driving into the river. Patrols have increased in sensitive areas, especially during weekends. The Forest Service also has worked with the local OHV club to develop sucker education programs. In addition to the Forest Service efforts, the OHV club is self-policing its members. The OHV club has placed at least one vehicle and drivers per weekend at the San Gabriel OHV Area for the past several years. The draft economic analysis included costs associated with efforts by local OHV groups to provide protection measures and minimize impacts to sucker habitat (pp. 75–78). These costs are shown in Tables 30 and 31 of the draft economic analysis.

(54) *Comment:* Two groups claim that mitigation of other projects, such as dams, is incorrectly described within the draft economic analysis and that the costs of mitigation are understated.

*Our Response:* There are five flood control dams and multiple hydroelectric facilities operating in and around the essential habitat units for the sucker. The economic effects on these operations were quantified in Section 6.6 of the draft economic analysis.

(55) *Comment:* Two groups suggest that the draft economic analysis should address recovery.

*Our Response:* Economic analyses only address cost associated with designation of critical habitat, as required by the Act.

(56) *Comment:* One group suggests that the draft economic analysis findings support the inclusion of all areas currently designated as critical habitat for the sucker.

*Our Response:* The Secretary considers the draft economic analysis along with other information in determining whether the benefits of excluding particular areas from a revised final critical habitat designation outweigh the biological benefits of including those areas in a revised final designation.

(57) *Comment:* One comment from the Santa Ana Watershed Project Authority provided a number of details on the Santa Ana Regional Interceptor (SARI) line to correct information presented in the draft economic analysis. The comment noted the difficulty in estimating costs for a project that is still conceptual and suggests that the ultimate design choice will likely result in costs "significantly less" than those in the draft economic analysis.

*Our Response:* We appreciate the comment from the watershed authority. The draft economic analysis was based at the time on the information obtained through the Corps, Orange County Sanitation District, and public information about the line available through the internet. The analysis recognizes that a variety of alternatives are under consideration at this time and that associated construction cost estimates are preliminary. However, because the commenter did not provide any specific new estimates, we will rely on those presented in the draft economic analysis, with the understanding that they may overstate actual final costs should one of the design alternatives be implemented.

(58) *Comment:* The County of Los Angeles Department of Public Works submitted a very detailed comment letter addressing a number of specific areas in the draft economic analysis. This letter was received after the deadline for comments. Nevertheless, the comments are addressed below.

*Our Response:* The County of Los Angeles Department of Public Works (Public Works) provides several comments that argue for exclusion of Unit 3, Big Tujunga Creek. In addition, Public Works provides several comments that can be addressed through minor changes and additions to the text in the draft economic analysis and do not result in changes to estimated economic effects. Public Works expressed concern that future utilization of sediment placement sites may be affected by sucker conservation activities. However, there is no evidence from past consultations to suggest that current sediment placement sites will be affected or will be the subject of future consultations. In the comment letter, Public Works speculates that future sucker conservation activities will affect the availability of water conservation storage in San Gabriel Reservoir. However, as stated in the draft economic analysis, no conservation measure or ponding restrictions are anticipated as protection measures for the sucker. Consequently, it was considered to be reasonable to exclude water conservation losses in San Gabriel Reservoir in the draft economic analysis.

Several of the comments from Public Works addressed sediment removal activities. Public Works stated that the draft economic analysis failed to mention the sediment management plan for Cogswell Reservoir and associated sucker conservation activities. While the draft economic analysis does not mention the plan or consider sucker-related costs, the authors believe that

the conservation measures discussed in the comment letter would be implemented with or without the sucker listing and critical habitat designation. It appears that these measures were in place prior to the sucker listing and that they were instituted for the benefit of a number of fish species and have not been altered to specifically address the Santa Ana sucker. Public Works states that periodic cleanouts of Big Tujunga Reservoir will also be necessary in the future and that annual monitoring of the sucker will likely be required as a result. This is new information that was not considered in the draft economic analysis, as it was received after the close of the comment period. Public Works estimates that annual sucker-related costs for the routine cleanouts, which will occur once every ten years, will be \$82,350.

Public Works also contends that ongoing costs associated with the Big Tujunga Wash Mitigation Bank should be included in the economic analysis. Mitigation Bank costs were not included in the draft economic analysis because the site was purchased as mitigation for flood control activities prior to the sucker listing. Furthermore, it appears that the activities related to the Mitigation Bank cited in the comment letter would have occurred with or without the sucker listing and critical habitat designation. While it is possible that a small portion of the costs of these activities could be attributed to sucker-related conservation activities, the consultation history reveals that these activities presented only minor concerns for the sucker.

Finally, Public Works argues for inclusion of potential impacts to energy supply at San Gabriel Dam and provides an estimate of losses between \$300,000 and \$1 million annually. However, Public Works admits that it is "not aware of any final Santa Ana Sucker Conservation Strategy adopted yet for the San Gabriel River." The estimates of hydropower losses are contingent upon hypothetical reservoir level restrictions. Such restrictions have not been imposed and there is little indication to suggest that they will be imposed in the foreseeable future.

(59) *Comment:* Public Works states that the draft economic analysis does not fully consider the economic costs of components of private development projects that are transferred to public agencies for management.

*Our Response:* The draft economic analysis utilized the development mitigation costs as presented in the Western Riverside MSHCP as a means of estimating economic costs of private development. These costs are

considered to be representative of the full costs of mitigation, including ongoing management. While there may be some additional costs associated with ongoing operation and maintenance of specific components of development projects, at this time there is inadequate information available to support their inclusion in the draft economic analysis.

(60) *Comment:* Public Works states that the effects on road maintenance and transportation are underestimated in the analysis because it only considers costs related to past transportation projects, noting: "There were only 4 past project[s], all of which were related to Bridge Projects."

*Our Response:* The draft economic analysis considered a broader approach in estimating future costs. Future projects were estimated using Geographic Information System (GIS) coverage of past Corps permitting within the Santa Ana sucker critical and essential habitat boundaries to identify projects occurring within sucker habitat. In total, 49 Corps permits were issued within sucker habitat between 1999 and 2003. All permits involving construction and maintenance of transportation facilities were selected from this list. In total, ten permits were issued for transportation projects over the five-year period. Thus, the draft economic analysis considers future sucker-related costs on transportation activities by assuming that past permits are appropriate indicators of future costs. Public Works further contends that affected transportation projects are likely to increase in the future. However, no evidence was uncovered during research for the draft economic analysis to support this conclusion.

(61) *Comment:* One comment notes that "the ensuing analysis on small entities [addressed in Appendix A] appears to not include costs to the Corps and Public Works. The comment quotes Paragraph 3 of Page A-4, which includes: "There are five flood control dams operating in and around the critical and essential habitat units for the sucker \* \* \*. The facilities are operated by the U.S. Army Corps of Engineers or owned by [Public Works], and do qualify as small entities."

*Our Response:* Although the authors acknowledge the quote on Page A-4, the statement in the draft economic analysis is in error. The last sentence should state, "The facilities are operated by the USACE or owned by the LADPW, and do not qualify as small entities." The analysis remains unchanged, as these facilities exceed the size standards for small entities, and were properly omitted from the analysis.

### Summary of Changes From the Proposed Rule and the Original Final Rule

On the basis of public comments, we reviewed our description and delineation of critical habitat in the Big Tujunga Creek and the San Gabriel and Santa Ana Rivers. Using information provided in these comments and obtained from field work, we removed Little Tujunga Creek upstream of its confluence with Big Tujunga Creek in Los Angeles County from the critical habitat designation in Unit 3, Big Tujunga Creek. We also refined the text to accurately reflect the critical habitat designation in the San Gabriel River. The text in the proposed rule stated that the upper boundary of Unit 2 along the East Fork of the San Gabriel River in Los Angeles County extended to the Bridge-of-No-Return. However, this upper boundary was not delineated on the map or the legal description of this unit. While this area is essential to the conservation of the species, it cannot be included in the revised final rule since it was never actually proposed.

We also removed proposed units 1A and B from the designation. Units 1A and 1B were proposed because are a source of sediment for the occupied portion of the Santa Ana River. This sediment, which is composed of cobble, gravel, and sand, provides spawning and feeding substrates for the sucker downstream of the proposed units. They were also proposed due to their conveying flood waters to help maintain variability in the hydrological system downstream, because they support riparian vegetation that provides organic nutrients and woody debris which becomes food for the species downstream, and because potions were historically, but not currently, occupied.

However, these attributes do not, of themselves, warrant determining that an area is "essential to the conservation of the species", which is the statutory standard for designation of unoccupied areas. There are many things—indeed, an almost endless range of possibilities—which contribute to the maintenance of primary constituent elements or otherwise provide a beneficial influence to areas designated as critical habitat. That does not warrant also designating the areas from which they originate, or pass through, as critical habitat.

In fact, Congress has instructed us to be "exceedingly circumspect" in designating critical habitat outside of areas currently occupied by the species (House Report 95-1625). With that guidance in mind, we do not find these unoccupied areas essential to the

conservation of the species, and so have not designated them as critical habitat.

Overall, these changes resulted in reducing the designated critical habitat by 12,824 ac (5,190 ha). Table 1 outlines

the changes in acreages for each unit between the original and revised final rules.

TABLE 1.—CHANGES IN ACREAGES (AC; HA) FOR EACH OF THE UNITS BETWEEN ORIGINAL AND REVISED FINAL RULES

Unit	Original final rule	Revised final rule
Santa Ana River, San Bernardino County (Units 1A and 1B) .....	11,709 ac (4,738 ha) .....	0 ac (0 ha)
San Gabriel River, Los Angeles County (Unit 2) .....	5,765 ac (2,333 ha) .....	5,765 ac (2,333 ha)
Big Tujunga Creek, Los Angeles County (Unit 3) .....	3,655 ac (1,479 ha) .....	2,540 ac (1,028 ha)
Total .....	21,129 ac (8,551 ha) .....	8,305 ac (3,361 ha)

### Critical Habitat

Please refer to the previous final rule designating critical habitat for the Santa Ana sucker for a general discussion of sections 3, 4, and 7 of the Act and our policy in relation to the designation of critical habitat (69 FR 8839).

### Methods

As required by section 4(b) of the Act and its implementing regulations (50 CFR 424.12), this rule is based on the best scientific and commercial data available concerning the species' current and historical range, habitat, biology, and threats. In preparing this rule, we reviewed and summarized the current information available on the Santa Ana sucker, including the physical and biological features essential for the conservation of the species (see "Primary Constituent Elements" section), and identified the areas containing these features. We also identified areas outside the geographic range of the species that are essential for its conservation. These areas contribute sediment necessary to maintain breeding and feeding substrates in occupied areas. The information used in the preparation of this designation includes: site-specific species and habitat information collected and/or maintained by the Service; the California Natural Diversity Database (CNDDDB); unpublished survey reports, notes, and communications with qualified biologists or experts; peer reviewed scientific publications; the Angeles National Forest Santa Ana Sucker Conservation Strategy (U.S. Forest Service 2003); the SAS Conservation Program (Conservation Team 2003); the final listing rule for the sucker published April 12, 2000 (65 FR 19686); and discussions and recommendations from Santa Ana sucker experts.

### Primary Constituent Elements

In accordance with sections 3(5)(A)(i) of the Act and regulations at 50 CFR 424.12, in determining which areas to designate as critical habitat, we are

required to base critical habitat determinations on the best scientific and commercial data available and to focus on those physical and biological features (primary constituent elements) essential to the conservation of the species and may require special management considerations or protection. These primary constituent elements include, but are not limited to: space for individual and population growth and for normal behavior; food, water, air, light, minerals, or other nutritional or physiological requirements; cover or shelter; sites for breeding, reproduction, rearing (or development) of offspring; and habitats that are protected from disturbance or are representative of the historic geographical and ecological distributions of a species.

Much of what is known about the physical and biological requirements of Santa Ana sucker was described in the previously published final rule designating critical habitat for the species (69 FR 8839). The primary constituent elements for the Santa Ana sucker were determined by reviewing studies examining the habitat requirements and ecology of the sucker in the Santa Ana River (Allen 2003; Baskin and Haglund 2001; Haglund *et al.* 2003; Haglund *et al.* 2004; Saiki 2000; Swift 2001), the San Gabriel River (Saiki 2000; Haglund and Baskin 2002; Haglund and Baskin 2003), and the Santa Clara River (Greenfield *et al.* 1970). Designated critical habitat has been designed to provide sufficient habitat to maintain self-sustaining populations of sucker throughout its range, and to provide those physical or biological features essential for the conservation of the species. These physical or biological features provide for the following: (1) Space for individual and population growth and for normal behavior (primary constituent elements 1, 2, 3, and 6); (2) food, water, air, light, minerals, or other nutritional or physiological requirements (primary constituent elements 1, 2, 3, 4, 5, and 6); (3) cover

or shelter (primary constituent elements 2 and 6); (4) sites for breeding, reproduction, and development of offspring (primary constituent elements 1, 2, 3, and 6); and (5) habitats that are representative of the historic geographical and ecological distribution of the species (primary constituent elements 1, 2, 3, 4, 5, and 6). Based on the occurrence of this species and associated biological information, all of these physical or biological features are essential to the conservation of the species.

We believe conservation of the Santa Ana sucker is dependent upon multiple factors, including the conservation and management of areas to maintain "normal" ecological functions where existing populations survive and reproduce. The areas we are designating as critical habitat provide some or all of the physical or biological features essential for the conservation of this species. Based on the best available information, the primary constituent elements essential for the conservation of the sucker are the following:

- (1) A functioning hydrological system that experiences peaks and ebbs in the water volume reflecting seasonal variation in precipitation throughout the year;
- (2) A mosaic of loose sand, gravel, cobble, and boulder substrates in a series of riffles, runs, pools, and shallow sandy stream margins;
- (3) Water depths greater than 3 cm (1.2 in) and bottom water velocities greater than 0.03 m per second (0.01 ft per second);
- (4) Non-turbid water or only seasonally turbid water;
- (5) Water temperatures less than 30°C (86°F); and
- (6) Stream habitat that includes algae, aquatic emergent vegetation, macroinvertebrates, and riparian vegetation.

Based on the specific biological and physical requirements of this species, critical habitat units contain many of the same physical and biological features. Management, therefore, will

address both the maintenance of these features and the reduction of threats specific to each critical habitat unit.

### Criteria Used To Identify Essential Habitat

We considered several factors in selecting areas essential to the conservation of the Santa Ana sucker. We reviewed all streams and rivers currently occupied by the sucker and those areas outside of the current geographical distribution supporting one or more of the primary constituent elements.

We analyzed the known historical and current distribution of suckers based on data from the Carlsbad Fish and Wildlife Office internal geographic information systems (GIS) database, California Natural Diversity Database (CNDDB), Los Angeles County Museum Ichthyology Catalog, and the Fish Division of the University of Michigan Museum of Zoology. We also reviewed various scientific articles and reports on the Santa Ana River (Allen 2003; Baskin and Haglund 2001; Haglund *et al.* 2003; Haglund *et al.* 2004; Saiki 2000; Swift 2001), the Big Tujunga Creek (Haglund and Baskin 2001; Holland and Swift 2002), and the San Gabriel River (Saiki 2000; Haglund and Baskin 2002; Haglund and Baskin 2003).

Historically occupied river stretches that have been highly modified by the construction of canals with concrete-lining on sides and bottoms were not considered essential habitat. Other historically occupied habitat no longer providing primary constituent elements were eliminated from this analysis. We selected areas essential for the conservation of the sucker based on the potential for restoration and the presence of one or more of the primary constituent elements in currently occupied and potentially occupied habitat. We eliminated the Santa Clara River population in Ventura and Los Angeles counties from this analysis because it does not appear to represent a native population of the Santa Ana sucker (and it is not listed). We determined that streams, rivers, and associated riparian habitat within the Santa Ana River, San Gabriel River, and Big Tujunga Creek and associated tributaries provide essential habitat for the sucker.

We then considered if this essential area was adequate for the conservation of the Santa Ana sucker, and concluded that it is. The greatest threat to the conservation of the sucker lies in the human-generated alteration of the function, physical structure, water supply, and water quality of existing habitat. The physical structure of and

water supply to each of the three currently occupied streams have been altered by flood control structures (*e.g.*, dams, drop structures, concrete-lined channels), and water conservation operations. In addition to these easily identifiable threats, pollution and water quality standards that are not protective of the sucker also threaten the survival and recovery of the species.

We used the best available scientific and commercial information to determine which areas are essential to the conservation of the sucker. However, we recognize that the historic and recent collection records for this species are incomplete. River segments or small tributaries not included in this final designation may harbor small limited populations of the sucker or may become occupied in the future. The exclusion of such areas does not diminish their potential individual or cumulative importance to the conservation of the species. We believe that proper management of each of the three designated critical habitat units will provide lasting conditions capable of supporting sucker populations and allow for assisted or natural dispersal into adjacent streams in each watershed.

We will continue (with the assistance of State, Federal, and private researchers), to conduct surveys, research, and conservation actions on the species and its habitat in areas designated and not designated as critical habitat. When additional scientific information becomes available on the species' biology, distribution, and threats, we will evaluate the need to revise critical habitat or refine boundaries of critical habitat as appropriate. Areas occupied by this species that are not designated as critical habitat will continue to receive protection under the Act's section 7 jeopardy standard where a Federal nexus may occur (see "Critical Habitat" section).

### Mapping

We determined that three units are essential to the conservation of Santa Ana sucker, and are designating critical habitat in 2 of those units. The third unit consists entirely of essential habitat that is being excluded pursuant to section 4(b)(2) of the Act (see Exclusions Under Section 4(b)(2) of the Act for a detailed discussion of this exclusion). We used site-specific information to determine the extent of these units. The designated critical habitat units were delineated by screen digitizing polygons (map units) using ArcView, a computer GIS program. Based on the known distribution of the sucker, the dynamics of alluvial floodplain systems, and

riparian habitat associated with rivers and streams, we placed boundaries around the species' locations, as well as their primary constituent elements. In defining these critical habitat boundaries, we made an effort to exclude all developed areas, such as housing developments, active mines, and other lands unlikely to contain the primary constituent elements essential for the conservation of the sucker. We used Universal Transverse Mercator (UTM) zone 11, North American Datum 1927 (NAD27) coordinates in meters (m) to designate the boundaries of critical habitat.

### Need for Special Management Considerations or Protection

Areas occupied by the species and designated as critical habitat contain one or more of the primary constituent elements essential to the conservation of the species (see "Primary Constituent Elements" section). Unoccupied areas that contain one or more of the PCEs are also included in the designation. When designating critical habitat, we assess whether the areas containing PCEs may require special management considerations or protections.

Regulations at 50 CFR 424.02(j) define special management considerations or protection to mean any methods or procedures useful in protecting the physical and biological features of the environment for the conservation of listed species. Critical habitat designations apply only to Federal activities or those funded or authorized by a Federal agency.

All critical habitat units identified in this final designation may require special management considerations or protection to maintain a functioning hydrological regime consisting of a mosaic of loose sand, gravel, and cobble substrates; channel morphology (*i.e.*, runs, riffles, pools, and stream margins); sufficient water quality, volume, and depth; and complex native stream associations involving algae, aquatic emergent vegetation, macroinvertebrates, and riparian vegetation. Each designated unit is threatened by activities that may result in the alteration of the hydrological system, reduced water quality or supply, loss of suitable substrates for spawning and feeding, loss of complex floral and faunal associations, and an increase in populations of nonnative predatory and competitive species.

We have determined the critical habitat units may require special management or protection, due to the existing threats to this fish, and because no long-term protection or management plans exist for any of the units. Absent

special management or protection, these three units are susceptible to existing threats and activities such as the ones listed in the "Effects of Critical Habitat" section, which could result in degradation and disappearance of the populations and their habitat.

#### Critical Habitat Designation

We determined that three units are essential to the conservation of Santa Ana sucker, and are designating critical habitat in 2 of those units. The third unit consists entirely of essential habitat that is being excluded pursuant to section 4(b)(2) of the Act (see Exclusions Under Section 4(b)(2) of the Act for a detailed discussion of this exclusion).

#### *Essential Habitat Excluded From Critical Habitat (Unit 1) for Santa Ana Sucker, Orange, Riverside, and San Bernardino Counties, California (15,414 ac (6,238 ha))*

The Santa Ana River essential habitat excluded from designation includes the mainstem of the Santa Ana River from the confluence of Mission Channel and the Santa Ana River downstream to the vicinity of the Route 90 crossing and portions of Prado Basin, as identified in the map titled "Essential habitat excluded from critical habitat (Unit 1) for Santa Ana Sucker" in the *Regulations Promulgation* section. The Santa Ana River supports one of three listed populations of the Santa Ana sucker. Approximately 60 percent of the total remaining range of the listed Santa Ana sucker is in the Santa Ana River (65 FR 19686).

The occupied essential habitat has been excluded from designation because they fall within the Western Riverside MSHCP (Riverside County) and the SAS Conservation Program (Orange, Riverside, and San Bernardino counties). The basis for these exclusions are summarized in the section entitled "Exclusions Under 4(b)(2)".

#### Critical Habitat Unit Descriptions

We are designating two critical habitat units encompassing 8,305 ac (3,361 ha) of streams and rivers in Los Angeles County. We are designating critical habitat on lands having one or more of the primary constituent elements as described above. Lands designated as critical habitat are under Federal (6,356 ac (2,573 ha)) and private (1,949 ac (790 ha)) ownership. For each stream reach identified as a critical habitat unit, the up- and downstream boundaries are described in general in the unit descriptions below; more precise latitudinal and longitudinal (UTM) coordinates for the unit boundaries are provided in the *Regulation*

*Promulgation* section of this rule. Habitat areas contained within the designated units constitute our best evaluation of areas essential for the conservation of the sucker. Critical habitat for the sucker may be revised should new information become available.

We have designated critical habitat in Los Angeles County. We determined that essential habitat for the Santa Ana sucker occurs in four counties (Los Angeles, Orange, Riverside, and San Bernardino counties). Essential habitat for the Santa Ana sucker in Riverside, Orange, and portions of San Bernardino counties is being excluded from critical habitat designation under section 4(b)(2) of the Act (See Exclusions Under 4(b)(2) of the Act for a detailed discussion of these exclusions).

To provide determinable legal descriptions of the critical habitat boundaries, we drew polygons around these units. Criteria used to delineate the unit boundaries included the primary constituent elements, the known extent of the populations, and the extent of riparian vegetation on an aerial image. We made an effort to avoid developed areas that are unlikely to contribute to the conservation of Santa Ana sucker. Areas within the boundaries of the mapped units such as paved roads, bridges, parking lots, railroad tracks, railroad trestles, and residential, commercial, and industrial developments including energy production facilities do not contain one or more of the primary constituent elements and are therefore not considered critical habitat for the sucker. Federal actions limited to these areas would not trigger consultation pursuant to section 7 of the Act, unless they affect the species or primary constituent elements in the critical habitat. The areas designated as critical habitat in Los Angeles County are under Federal and private ownership.

#### *Unit 2: San Gabriel River Critical Habitat Unit, Los Angeles County, California (5,765 ac (2,333 ha))*

The San Gabriel River Unit (Unit 2) consists of the West, North, and East Forks of the San Gabriel River and the following tributaries: Cattle Canyon Creek, Bear Creek, Bichota Canyon Creek, and Big Mermaids Canyon Creek. The San Gabriel River portion of the unit extends from the Cogswell Dam on the West Fork to 3,882 ft (1,229 m; 0.77 miles; 1.21 kilometers) downstream of the Bridge-of-No Return on the East Fork, and just above the confluence of Coldbrook and Soldier creeks on the North Fork. Suckers occupy the West, North, and East Forks of the San Gabriel

River and Cattle Canyon Creek, Bear Creek, and Big Mermaids Canyon Creek.

Approximately 15 percent of the total remaining range of the listed Santa Ana sucker is in the San Gabriel River (65 FR 19686). Approximately 15 percent of its distribution in the San Gabriel River Basin occurs on private lands, and the remaining 85 percent occurs in the Angeles National Forest (65 FR 19686).

The San Gabriel River Unit provides the best remaining habitat capable of sustaining the Santa Ana sucker. Data gathered during sampling indicated the San Gabriel River may contain the largest population of Santa Ana suckers (R. Ally, in litt. 1996; Mike Guisti, CDFG, in litt. 1996; M. Wickman, in litt., 1996; Juan Hernandez, CDFG, in litt. 1997; M. Saiki, pers. comm. 1999). Moyle and Yoshiyama (1992) considered the population of suckers in the San Gabriel River drainage to be the only viable population within the species' native range. This population is found in the relatively undisturbed watershed of the Angeles National Forest, unlike the population within the Santa Ana River which is within a highly urbanized watershed receiving significant urban and agricultural run-off. The high quality riparian habitat adjacent to the river and tributaries provide organic inputs essential to the maintenance of a healthy stream ecosystem (Diana 1995; Klapproth and Johnson 2000a; Sweeney 1993). The East and North Forks and associated tributaries are largely unimpeded by dams or other obstructions.

This is the only unit that has a sediment transport and hydrological regime existing in a relatively natural state. This unit supports a population occurring within a relatively intact watershed that provides good water quality, supply, and sediment transport. The inclusion of this area in critical habitat ensures the conservation of the only extant population of listed suckers that can avoid chronic exposure to urban run-off or tertiary-treated wastewater discharges, reduced water supply, and loss of feeding and spawning substrates. Lands designated as critical habitat may require special management to avoid and minimize activities associated with recreational off-road vehicle use, grazing, road, bridge, or dam construction and/or maintenance in the Angeles National Forest.

#### *Unit 3: Big Tujunga Creek Critical Habitat Unit, Los Angeles County, California (2,540 ac (1,028 ha))*

The Big Tujunga Creek Unit (Unit 3) consists of the stretch of Big Tujunga Creek between the Big Tujunga Dam and

Hansen Dam and the following tributaries: Stone Canyon Creek, Delta Canyon Creek, and Gold Canyon Creek. Haines Creek, a small stream within the floodplain of Big Tujunga Creek is also within this critical habitat designation. The Santa Ana sucker occupies the Big Tujunga Creek between Big Tujunga Dam and Hansen Dam. Please see "Summary of Changes From the Proposed Rule and the Original Final Rule" section for more details on the removal of Little Tujunga Creek from the critical habitat designation.

Approximately 25 percent of the total remaining range of the Santa Ana sucker is within Big Tujunga Creek (65 FR 19686). In Big Tujunga Creek, approximately 60 percent of the current range of the Santa Ana sucker occurs on private lands. The remaining 40 percent of the range occurs on Angeles National Forest lands managed by the Forest Service.

The upstream portion of this population in Big Tujunga Creek is largely contained within the Angeles National Forest. It is not exposed to the effects of urban run-off and tertiary treated wastewater discharge. This is the only unit supporting three of the remaining native freshwater fishes in southern California (Swift 1993). Although this ecological association is not well understood at this time, this fragile community may offer unique insights into the ability of the sucker to coexist with native and nonnative species in this ecosystem. This unit contains one or more PCEs and is also essential because it maintains habitat for the northernmost extent of the distribution of the Santa Ana sucker. The unit enhances the long-term sustainability of the sucker by maintaining its genetic adaptive potential and a well-distributed geographical range to buffer the sucker's particular vulnerability to environmental fluctuations and catastrophe (Moyle 2002).

Stone Canyon Creek, Delta Canyon Creek, and Gold Canyon Creek are not known to be occupied, but are essential to the conservation of the sucker because they transport sediment necessary to maintain preferred substrates utilized by this fish. These creeks convey stream flows and flood waters necessary to maintain habitat conditions for the Santa Ana sucker; and support riparian habitats that protect water quality in the occupied portions of the Big Tujunga Creek. Similar to the Santa Ana River, these tributaries are essential to the Big Tujunga Creek sucker population because they provide renewal of spawning and feeding substrates and

peaks and ebbs in water volumes. These three tributaries are particularly essential to the conservation of the sucker and require special management and protection since the Big Tujunga Dam has reduced the transfer of sediment downstream and altered the natural flow in the upper Big Tujunga Creek.

The sucker has been able to maintain its population in the Big Tujunga Creek despite the fragmented habitat and presence of nonnative species. Most likely, the sucker population has survived because of the presence of the relatively undisturbed condition of the tributaries to Big Tujunga Creek.

### Effects of Critical Habitat Designation

#### Section 7 Consultation

Section 7 of the Act requires Federal agencies, including the Service, to ensure that actions they fund, authorize, or carry out are not likely to destroy or adversely modify critical habitat. In our regulations at 50 CFR 402.2, we define destruction or adverse modification 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." We are currently reviewing the regulatory definition of adverse modification in relation to the conservation of the species.

Section 7(a) of the Act requires Federal agencies, including the Service, to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened and with respect to its critical habitat, if any is proposed or designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402.

Section 7(a)(4) of the Act requires Federal agencies to confer with us on any action that is likely to jeopardize the continued existence of a proposed species or result in destruction or adverse modification of proposed critical habitat. Conference reports provide conservation recommendations to assist the agency in eliminating conflicts that may be caused by the proposed action. We may issue a formal conference report if requested by a Federal agency. Formal conference reports on proposed critical habitat contain an opinion that is prepared according to 50 CFR 402.14, as if critical habitat were designated. We may adopt the formal conference report as the biological opinion when the critical

habitat is designated, if no substantial new information or changes in the action alter the content of the opinion (see 50 CFR 402.10(d)). The conservation recommendations in a conference report are advisory.

If a species is listed or 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 jeopardize the continued existence of such a species or to destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. Through this consultation, the action agency ensures that their actions do not destroy or adversely modify critical habitat.

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

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

Federal activities that may affect the Santa Ana sucker or its critical habitat will require section 7 consultation. Activities on private or State lands requiring a permit from a Federal agency, such as a permit from the Corps

under section 404 of the Clean Water Act, a section 10(a)(1)(B) permit from the Service, or some other Federal action, including funding (e.g., Federal Highway Administration (FHA) or Federal Emergency Management Agency (FEMA) funding), will also continue to be subject to the section 7 consultation process. Federal actions not affecting listed species or critical habitat and actions on non-Federal and private lands that are not federally funded, authorized, or permitted do not require section 7 consultation.

Section 4(b)(8) of the Act requires us to briefly evaluate and describe in any proposed or final regulation that designates critical habitat those activities involving a Federal action that may destroy or adversely modify such habitat, or that may be affected by such designation. Activities that may destroy or adversely modify critical habitat may also jeopardize the continued existence of the Santa Ana sucker. Federal activities that, when carried out, may adversely affect critical habitat for the sucker include, but are not limited to:

(1) Actions that would alter the hydrology to a degree that appreciably reduces the value of the critical habitat for both the long-term survival and recovery of the species. Such activities could include, but are not limited to, impoundment, channelization, water diversion, construction, licensing, relicensing, and operation of dams or other water impoundments.

(2) Actions that would significantly alter water quality to a degree that appreciably reduces the value of the critical habitat for both the long-term survival and recovery of the species. Such activities could include, but are not limited to, release of chemicals, biological pollutants, or heated effluents into the surface water or connected groundwater at a point source or by dispersed release (non-point).

(3) Actions that would significantly increase sediment deposition within the stream channel to a degree that appreciably reduces the value of the critical habitat for both the long-term survival and recovery of the species. Such activities could include, but are not limited to, excessive sedimentation from livestock grazing, road construction, timber harvest, off-road vehicle use, residential, commercial, and industrial development, and other watershed and floodplain disturbances.

(4) Actions that would significantly alter channel morphology or geometry to a degree that appreciably reduces the value of the critical habitat for both the long-term survival and recovery of the species. Such activities could include, but are not limited to, channelization,

impoundment, road and bridge construction, mining, and destruction of riparian vegetation.

(5) Actions that would introduce, spread, or augment nonnative aquatic species into critical habitat to a degree that appreciably reduces the value of the critical habitat for both the long-term survival and recovery of the species. Such activities could include, but are not limited to, stocking for sport, biological control, or other purposes; aquaculture; and construction and operation of canals.

#### *Previous Section 7 Consultations*

Federal actions that we have reviewed since the sucker received protection under the Act include Federal land management plans, flood control, channelization, channel maintenance, dam construction, dam operation, bridge construction, a habitat conservation plan, and issuance of permits under section 404 of the Clean Water Act. Federal agencies involved with these activities included the Forest Service, the Corps, and the FHA. Since the listing of the sucker, 10 formal consultations have been initiated and 8 have been completed. None of the completed consultations resulted in a finding that the proposed action would jeopardize the continued existence of the sucker.

In each of the biological opinions resulting from these consultations, we included discretionary conservation recommendations to the action agency. Conservation recommendations are activities that would avoid or minimize the adverse effects of a proposed action on a listed species or its critical habitat, help implement recovery plans, or develop information useful to the species' conservation.

These biological opinions also included nondiscretionary reasonable and prudent measures, with implementing terms and conditions, which are designed to minimize the proposed action's incidental take of the sucker. Section 3(18) of the Act defines the term take as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect or to attempt to engage in any such conduct." Harm is further defined in our regulations (50 CFR 17.3) to include significant habitat modification or degradation that results in death or injury to listed species by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.

Conservation recommendations and reasonable and prudent measures provided in previous biological opinions for the sucker have included: restricting in-stream activities during

the spawning and nursery season; minimizing activities in actively flowing streams; reducing pollution from roads and highways; restoring, enhancing, or creating sucker habitat; maintaining or improving water quality standards, developing a nonnative aquatic species removal program; modifying or removing obstructions to fish passage; investigating velocities against which suckers can swim; and conducting sediment transport studies.

The designation of critical habitat will not have an impact on private landowner activities not requiring Federal funding or permits. Designation of critical habitat is only applicable to activities approved, funded, or carried out by Federal agencies.

If you have questions regarding whether specific activities may constitute adverse modification of critical habitat in California, contact Ecological Services, Carlsbad Fish and Wildlife Office ((760) 431-9440). To request copies of the regulations on listed wildlife and plants, and for inquiries regarding prohibitions and permits, please contact the U.S. Fish and Wildlife Service, Branch of Endangered Species, 911 N.E. 11th Avenue, Portland, OR 97232 (telephone (503) 231-2063; facsimile (503) 231-6243).

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

Section 4(b)(2) of the Act states that critical habitat shall be designated, and revised, on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. An area may be excluded from critical habitat if it is determined that the benefits of exclusion outweigh the benefits of specifying a particular area as critical habitat, unless the failure to designate such area as critical habitat will result in the extinction of the species.

Lands we have excluded pursuant to section 4(b)(2) include those covered by the following types of plans if they provide assurances that the conservation measures they outline will be implemented and effective: (1) Legally operative HCPs that cover the species, (2) draft HCPs that cover the species and have undergone public review and comment (*i.e.*, pending HCPs), (3) Tribal conservation plans that cover the species, (4) State conservation plans that cover the species, and (5) National Wildlife Refuge System Comprehensive Conservation Plans.

We have determined that the benefits of excluding essential habitat within the boundaries of the Western Riverside MSHCP and essential habitat within the area covered by SAS Conservation Program outweigh the benefits of including these areas as critical habitat, as described in further detail below. Exclusion of these areas will not result in the extinction of the sucker.

*Western Riverside Multiple Species Habitat Conservation Plan*

Section 10(a) of the Act authorizes the Service to issue to non-Federal entities a permit for the incidental take of endangered or threatened species. This permit allows a non-Federal landowner to proceed with an activity that is legal in all other respects, but results in the incidental taking of a listed species (*i.e.*, take that is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity). The Act specifies that an application for an incidental take permit must be accompanied by a conservation plan. A permit may not be issued unless the conservation plan submitted to the Service meets certain requirements, as provided in section 10(a)(2)(A) of the Act. For example, the conservation plan must specify what steps the applicant will take to minimize and mitigate such impacts, and the funding that will be available to implement such steps. After an opportunity for public comment on the conservation plan, the Service may issue the permit provided we determine that certain conditions, as specified in section 10(a)(2)(B), are met. For instance, the Service must find that the taking will be incidental, and the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild.

The Western Riverside MSHCP was in development for six years and we issued a biological opinion and a 75-year Incidental Take Permit (ITP) on June 22, 2004. Participants in the Western Riverside MSHCP include 14 cities: the County of Riverside (including the Riverside County Flood Control and Water Conservation District, Riverside County Transportation Commission, Riverside County Parks and Open Space District, and Riverside County Waste Department); the California Department of Parks and Recreation; and the California Department of Transportation. The Western Riverside MSHCP will also serve as a sub-regional plan under the State's Natural Community Conservation Program (NCCP) and was developed in cooperation with the California Department of Fish and Game. The NCCP permit was issued on July 22,

2004. Within the 1.26 million-acre (510,000 ha) planning area of the Western Riverside MSHCP, approximately 153,000 ac (62,000 ha) of diverse habitats are proposed for conservation. The conservation of 153,000 ac (62,000 ha) will complement other, existing natural and open space areas that are already conserved through other means (*e.g.*, State Parks, Forest Service, and county park lands).

We believe that the Western Riverside MSHCP meets the three criteria used by the Service to determine if a plan provides adequate special management or protection to a listed species. First, the Western Riverside MSHCP provides a conservation benefit to the species through the protection of 3,480 acres of habitat within the Santa Ana River. The primary constituent elements of essential habitat for the sucker will be maintained in the Santa Ana River in Riverside County by the following conservation measures: (1) The implementation of a nonnative species removal program, (2) maintaining or improving water quality standards, (3) removing or modifying barriers to fish passage within the Santa Ana River, and (4) assessing any threats from degraded habitat to the sucker in the Santa Ana River in Riverside County and addressing those threats as feasible. Third, the Western Riverside MSHCP provides assurance that the conservation management strategies and actions will be implemented. All permittees for the Western Riverside MSHCP have entered into an Implementation Agreement to ensure that conservation measures for each species are being implemented as appropriate. This Implementing Agreement was signed by all Permittees on June 22, 2004. Funding for the conservation measures and land acquisition, which is described by the Implementing Agreement, will be supported by fees collected by Riverside County, the Cities, and other Permittees. The Western Riverside MSHCP provides assurances that conservation strategies and actions will be implemented by outlining a schedule of management and monitoring activities to be conducted for the Santa Ana sucker. Third, to provide assurances that the conservation strategies and measures will be effective, the HCP was developed on the basis of the best available information, and the adaptive management program developed for the Western Riverside MSHCP uses a flexible approach to management to ensure that the covered species, including the sucker, are maintained and/or enhanced within the MSHCP

Conservation Area during the term of the Incidental Take Permit. Management principles and the monitoring efforts are described in the Western Riverside MSHCP document available at the County of Riverside website: <http://rcip.org/conservation.htm>.

For the reasons described above, we have determined that lands covered by the Western Riverside MSHCP can be excluded from this final designation of critical habitat pursuant to section 4(b)(2) of the Act.

*Draft Santa Ana Sucker Conservation Program and Associated Maintenance and Operation Activities of Existing Water Facilities on the Santa Ana River*

The SAS Conservation Program, developed over a six-year period, is a multi-agency partnership of Federal, local government agencies, and the private sector that encourages a river-wide approach to conservation of the Santa Ana sucker within the Santa Ana River and its tributaries. This partnership is intended to: Increase the knowledge base to implement recovery strategies for the sucker in the Santa Ana River; ensure that each participating agency minimizes, to the extent possible, effects from routine activities that occur within their jurisdiction in the Santa Ana River; and develop restoration techniques for degraded habitat. Partners in the SAS Conservation Program include the Corps, the Service, Santa Ana Watershed Project Authority, and the following participating agencies (Participants): Orange County Water District, Orange County Resources and Development Management Department, Orange County Sanitation District, Riverside County Flood Control and Water Conservation District, Riverside County Transportation Department, City of Riverside Regional Water Quality Control Plant, San Bernardino County Flood Control District, and the City of San Bernardino Municipal Water Department Rapid Infiltration and Extraction Facility.

We believe that the SAS Conservation Program meets the criteria used by the Service to determine if a plan provides adequate special management or protection to a listed species. First, the SAS Conservation Program provides a conservation benefit to the species through the development of avoidance and minimization measures, research, and habitat restoration efforts. Participants in the SAS Conservation Program are required to implement specific avoidance and minimization measures that will significantly reduce the magnitude of the effects of their activities on the sucker. The SAS

Conservation Program has also yielded several scientific reports, many of which were used in preparation of the critical habitat designation. The SAS Conservation Program is also funding efforts to restore or enhance primary constituent elements of critical habitat in the Santa Ana River watershed. Planned research projects of the SAS Conservation Program in 2004 include the development of habitat restoration methods, characterization of the movement and diet of various life history stages of suckers, and investigate the effects of nonnative adult fish on larval and juvenile suckers.

Second, the SAS Conservation Program provides assurances that the conservation management strategies and actions will be implemented. Although the SAS Conservation Program is in draft form currently, we expect that the section 7 consultation on the SAS Conservation Program initiated with the U.S. Army Corps of Engineers in January 2003 will be completed within the following year. Further, the Participants have shown their commitment to the SAS Conservation Program by meeting monthly with the Service since 1998 to develop and implement appropriate measures to conserve and/or conduct research and focus habitat restoration goals on recovering the species in the Santa Ana River. The Participants have also drafted a Memorandum of Agreement that is currently being discussed. For the past 6 years, the SAS Conservation Program has been funded for \$125,000 per annum on an annual basis by the Participants. Participants will continue funding at this level or greater for the life of the SAS Conservation Program. The Administrator of the SAS Conservation Program, currently the Santa Ana Watershed Project Authority, annually issues an invoice to each Participant. Implementation of the SAS Conservation Program is assured by the requirement that an Annual Operating Plan must be submitted to the Service and the SAS Conservation Team by July 31st of each year, and approved by August 31st, which then functions from September 1st through August 31st of the following year.

Third, to provide assurances that the conservation strategies and measures will be effective, the SAS Conservation Program was developed on the basis of the best available information. The SAS Conservation Program also requires an annual report that summarizes all activities conducted during the past year, provides success or failure of existing avoidance and minimization measures, and any recommendations be submitted to the Service for review. The

SAS Conservation Program also includes an Annual Operating Plan that allows the Service to refine research and habitat restoration goals and objectives and avoidance and minimization measures as necessary based on the information supplied in their annual reports.

For the reasons described above, we have determined that lands covered by the SAS Conservation Program can be excluded from this final designation of critical habitat pursuant to section 4(b)(2) of the Act.

#### (1) Benefits of Inclusion

The benefits of designating critical habitat on lands within the boundaries of HCPs and other conservation plans that cover the species for which critical habitat is being designated are small. Conservation plans generally include management measures and protections designed to protect, restore, monitor, manage, and enhance the habitat to benefit the conservation of the species, while a critical habitat designation can only mandate protection against actions with a Federal nexus. There is nothing in the critical habitat designation which ensures restoration, monitoring, active management or habitat enhancement. The Western Riverside MSHCP seeks to accomplish these goals for the Santa Ana sucker through the implementation of specific conservation measures. The principal benefit of designating critical habitat is that federally authorized or funded activities that may affect a species' critical habitat would require consultation with us under section 7 of the Act. Under section 7, proposed actions that would adversely modify or destroy designated critical habitat cannot go forward, unless they are altered to eliminate the adverse modification or destruction of critical habitat.

An important objective of the Western Riverside MSHCP is to implement measures, including monitoring and management, necessary to conserve important habitat for the Santa Ana sucker within the plan's boundaries. Thus, the purpose of the Western Riverside MSHCP is consistent with the purpose served by undergoing consultation under section 7 to ensure that critical habitat of the sucker is not adversely modified by a proposed Federal action, and provides benefits far in excess of those that would result from the critical habitat designation. Because issuance of an incidental take permit (ITP) under section 10 is a Federal action, we completed an internal section 7 consultation for every species that is covered under the MSHCP and ITP, including the Santa Ana sucker. During

consultation, we analyzed the impacts of the MSHCP and ITP on the Santa Ana sucker and its essential habitat within the plan boundaries and whether or not that habitat was officially designated as critical habitat. Therefore, including the Santa Ana River within the boundaries of the Western Riverside MSHCP as critical habitat would provide little benefit to the Santa Ana sucker, because the potential impacts to the species' essential habitat within the MSHCP area have been addressed under the plan and have been analyzed in our internal section 7 consultation on the ITP.

The SAS Conservation Program includes measures to restore, monitor, and enhance habitat for the Santa Ana sucker in the Santa Ana River. Similar to the Western Riverside MSHCP, the SAS Conservation Program is specifically designed to benefit the sucker and its essential habitat within the Santa Ana River. The SAS Conservation Program is a comprehensive conservation program for the sucker that includes measures to minimize the impacts of routine water management activities on the sucker and restore degraded river habitat to improve the species' prospects for survival and recovery. As noted previously, this type of active management and restoration is not part of a critical habitat designation. Because the SAS Conservation Program is specifically designed to benefit the sucker and its essential habitat within the Santa Ana River habitat and the programmatic consultation on the SAS Conservation Program will analyze the effects of the SAS Conservation Program on the sucker and its habitat, the designation of critical habitat within the area covered by the SAS Conservation Program would provide fewer benefits to this species than does the SAS Conservation Program.

#### (2) Benefits of Exclusion

Excluding lands within the Western Riverside MSHCP or within the area covered by the SAS Conservation Program from critical habitat will provide several benefits. Exclusion of the lands from the final designation will allow us to continue working with the participants in a spirit of cooperation and partnership. In the past, HCP applicants and participants in voluntary conservation programs have generally viewed the designation of critical habitat as having a potential negative regulatory effect that discourages voluntary, cooperative, and proactive efforts to conserve listed species and their habitats by non-Federal parties. Partners and cooperators view designation of critical habitat as an

indication by the Federal government that their proactive efforts to protect the species and its habitat are inadequate. Excluding these areas from critical habitat will ensure the continuation of the existing conservation efforts and provide the basis for future opportunities to conserve species and their essential habitat.

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

We are excluding areas along the Santa Ana River because they are within the planning area boundary for the Western Riverside MSHCP and the SAS Conservation Program from critical habitat designation. Exclusion of these areas will not result in extinction of the sucker. We find the benefits of exclusion outweigh the benefits of designating the areas covered by the plans as critical habitat.

The exclusion of these areas from critical habitat will help preserve the partnerships we have developed with the local jurisdictions and agencies in the development of the Western Riverside MSHCP and SAS Conservation Program. The only potential benefit of designating critical habitat within these areas, apart from the conservation actions discussed above, would be educational—informing the public of areas essential for the long-term survival and conservation of the species. However, this information has already largely been provided to the public through the critical habitat designation process and resulting publicity, including public participation as set forth above, the material provided on our website, and through the ample opportunity for public participation provided throughout the development of the Western Riverside MSHCP. The Corps is also likely to issue a Public Notice and solicit public comment on the issuance of a permit for activities related to the maintenance and operation of existing water facilities on the Santa Ana River in association with the SAS Conservation Program, further increasing the public's knowledge of the importance of the Santa Ana River to the sucker. We believe that designating critical habitat has little benefit in areas covered by the Western Riverside MSHCP and SAS Conservation Program. The Western Riverside MSHCP and SAS Conservation Program have ensured authorized activities within these areas include measures to protect the Santa Ana sucker and its habitat.

Based on our evaluation of our past consultation history on the sucker and the analysis conducted for those consultations, we believe that we have

a general understanding of potential impacts, including those related to economics, of this designation. We have considered these potential impacts in the development of this designation and do not believe, at this time, that additional exclusion, including those based on economics, pursuant to section 4(b)(2) of the Act are warranted.

### Economic Impacts

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

Following the publication of the proposed critical habitat designation, we conducted an economic analysis to estimate the potential economic effect of the designation. The draft analysis was made available for public review on October 1, 2004 (69 FR 58876); the public comment period was open for 10 days. On October 25, 2004, we published another notice in the **Federal Register** (69 FR 62238) reopening a 30-day comment period on the draft economic analysis and the proposed designation.

The primary purpose of the economic analysis is to estimate the potential economic impacts associated with the designation of critical habitat for the sucker. This information is intended to assist the Secretary in making decisions about whether the benefits of excluding particular areas from the designation outweigh the benefits of including those areas in the designation. This economic analysis considers the economic efficiency effects that may result from the designation, including habitat protections that may be co-extensive with the listing of the species. It also addresses distribution of impacts, including an assessment of the potential effects on small entities and the energy industry. This information can be used by the Secretary to assess whether the effects of the designation might unduly burden a particular group or economic sector.

This analysis focuses on the direct and indirect costs of the proposed rule. However, economic impacts to land use activities can exist in the absence of critical habitat. These impacts may result from, for example, local zoning

laws, State and natural resource laws, and enforceable management plans and best management practices applied by other State and Federal agencies. Economic impacts that result from these types of protections are not included in the analysis as they are considered to be part of the regulatory and policy baseline.

Categories of direct and indirect costs considered in the analysis included the costs associated with: (1) Conducting section 7 consultations; (2) modifications to projects, activities, or land uses resulting from section 7 consultations; (3) uncertainty and public perceptions resulting from the designation of critical habitat, including potential effects on property values; and (4) the potential offsetting beneficial costs associated with critical habitat. The most likely economic effects of critical habitat designation are on activities funded, authorized, or carried out by a Federal agency (*i.e.*, direct costs).

The economic analysis determined that retrospective costs (*i.e.*, costs since listing, 1999–2004) total \$4.2 million, with transportation comprising \$3.4 million of those costs. The remainder of retrospective costs was split among OHV recreation, flood control agencies, and Federal agencies. Total prospective costs of the proposed rule (*i.e.*, costs for the 20-year period 2004–2024) are \$30.5 million assuming a three percent discount rate and \$21.8 million with a seven percent discount rate. Annual prospective costs are estimated to be \$2.0 million. Costs associated with transportation contribute 49 percent of the annual costs and overall prospective costs. Other leading activities include water supply, flood control agencies, and residential and commercial development.

### Clarity of the Rule

Executive Order 12866 requires each agency to write regulations and notices that are easy to understand. We invite your comments on how to make this final rule easier to understand, including answers to questions such as the following:

- (1) Are the requirements in the final rule clearly stated?
- (2) Does the final rule contain technical jargon that interferes with the clarity?
- (3) Does the format of the final rule (grouping and order of the sections, use of headings, paragraphing, and so forth) aid or reduce its clarity?
- (4) Is the description of the notice in the **SUPPLEMENTARY INFORMATION** section of the preamble helpful in understanding the final rule?

(5) What else could we do to make this final rule easier to understand?

Send a copy of any comments on how we could make this final rule easier to understand to: Office of Regulatory Affairs, Department of the Interior, Room 7229, 1849 C Street, NW., Washington, DC 20240. You may e-mail your comments to this address: [Exsec@ios.doi.gov](mailto:Exsec@ios.doi.gov).

### Required Determinations

#### *Regulatory Planning and Review*

In accordance with Executive Order 12866, this document is a significant rule in that it may raise novel legal and policy issues, but will not have an annual effect on the economy of \$100 million or more or affect the economy in a material way. Due to the tight timeline for publication in the **Federal Register**, the Office of Management and Budget (OMB) has not formally reviewed this rule. As explained above, we prepared an economic analysis of this action. We used this analysis to meet the requirement of section 4(b)(2) of the Act to determine the economic consequences of designating the specific areas as critical habitat. We also used it to help determine whether to exclude any area from critical habitat, as provided for under section 4(b)(2), if we determine that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless we determine, 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.

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

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

substantial number of small entities. The SBREFA also amended the RFA to require a certification statement.

Small entities include small organizations, such as independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; as well as small businesses. Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than \$5 million in annual sales, general and heavy construction businesses with less than \$27.5 million in annual business, special trade contractors doing less than \$11.5 million in annual business, and agricultural businesses with annual sales less than \$750,000. To determine if potential economic impacts to these small entities are significant, we consider the types of activities that might trigger regulatory impacts under this rule, as well as the types of project modifications that may result. In general, the term "significant economic impact" is meant to apply to a typical small business firm's business operations.

To determine if the rule could significantly affect a substantial number of small entities, we consider the number of small entities affected within particular types of economic activities (*e.g.*, housing development, grazing, oil and gas production, timber harvesting). We apply the "substantial number" test individually to each industry to determine if certification is appropriate. However, the SBREFA does not explicitly define "substantial number" or "significant economic impact." Consequently, to assess whether a "substantial number" of small entities is affected by this designation, this analysis considers the relative number of small entities likely to be impacted in an area. In some circumstances, especially with critical habitat designations of limited extent, we may aggregate across all industries and consider whether the total number of small entities affected is substantial. In estimating the number of small entities potentially affected, we also consider whether their activities have any Federal involvement.

Designation of critical habitat only affects activities conducted, funded, or permitted by Federal agencies. Some kinds of activities are unlikely to have any Federal involvement and so will not be affected by critical habitat designation. In areas where the species is present, Federal agencies already are

required to consult with us under section 7 of the Act on activities they fund, permit, or implement that may affect the sucker. Federal agencies also must consult with us if their activities may affect critical habitat. However, we believe this will result in minimal additional regulatory burden on Federal agencies or their applicants because most consultations would already be required due to the presence of the Santa Ana sucker or other federally listed species or their respective critical habitats (*e.g.*, San Bernardino kangaroo rat (*Dipodomys merriami parvus*)), and consultations to avoid the destruction or adverse modification of critical habitat would be incorporated into the existing consultation process and trigger only minimal additional regulatory impacts beyond the duty to avoid jeopardizing any listed species.

Designation of critical habitat could result in an additional economic burden on small entities due to the requirement to reinitiate consultation for ongoing Federal activities. The economic analysis determined that costs involving conservation measures for the SAS would be incurred for activities involving residential and commercial development, water treatment facilities, the Santa Ana River Interceptor (SARI) line, water supply, flood control agencies, off-highway vehicle (OHV) recreation, transportation, flood control dams, and federal agencies. Of these, only businesses that are involved with land development would be affected; in all other cost categories, the affected entities exceed the SBA size criteria for small entities. For businesses that are involved with land development, the relevant threshold for small businesses is an annual revenue of \$6 million or less. The effects on small businesses in the land development sector would be concentrated in San Bernardino, where most of the development is expected to take place. Based on the estimated costs to development and the average sales per small business, the annual costs range from 0.13 percent to 3.97 percent of sales for a small firm in the land development sector depending upon county.

In general, two different mechanisms in section 7 consultations could lead to additional regulatory requirements for the approximately four small businesses, on average, that may be required to consult with us each year regarding their project's impact on the Santa Ana sucker and its habitat. First, if we conclude, in a biological opinion, that a proposed action is likely to jeopardize the continued existence of a species or adversely modify its critical habitat, we can offer "reasonable and

prudent alternatives.” Reasonable and prudent alternatives are alternative actions that can be implemented in a manner consistent with the scope of the Federal agency’s legal authority and jurisdiction, that are economically and technologically feasible, and that would avoid jeopardizing the continued existence of listed species or result in adverse modification of critical habitat. A Federal agency and an applicant may elect to implement a reasonable and prudent alternative associated with a biological opinion that has found jeopardy or adverse modification of critical habitat. An agency or applicant could alternatively choose to seek an exemption from the requirements of the Act or proceed without implementing the reasonable and prudent alternative. However, unless an exemption were obtained, the Federal agency or applicant would be at risk of violating section 7(a)(2) of the Act if it chose to proceed without implementing the reasonable and prudent alternatives.

Second, if we find that a proposed action is not likely to jeopardize the continued existence of a listed animal or plant species, we may identify reasonable and prudent measures designed to minimize the amount or extent of take and require the Federal agency or applicant to implement such measures through non-discretionary terms and conditions. We may also identify discretionary conservation recommendations designed to minimize or avoid the adverse effects of a proposed action on listed species or critical habitat, help implement recovery plans, or to develop information that could contribute to the recovery of the species.

Based on our experience with consultations pursuant to section 7 of the Act for all listed species, virtually all projects—including those that, in their initial proposed form, would result in jeopardy or adverse modification determinations in section 7 consultations—can be implemented successfully with, at most, the adoption of reasonable and prudent alternatives. These measures, by definition, must be economically feasible and within the scope of authority of the Federal agency involved in the consultation. We can only describe the general kinds of actions that may be identified in future reasonable and prudent alternatives. These are based on our understanding of the needs of the species and the threats it faces, as described in the final listing rule and this critical habitat designation. Within the final CHUs, the types of Federal actions or authorized activities that we have identified as potential concerns are:

(1) Regulation of activities affecting waters of the United States by the Corps under section 404 of the Clean Water Act;

(2) Regulation of water flows, damming, diversion, and channelization implemented or licensed by Federal agencies;

(3) Transportation issues such as bridges, rights-of-way, etc. that may involve the Federal Highway Administration;

(4) Regulation of grazing, mining, and recreation by the USFS;

(5) Hazard mitigation and post-disaster repairs funded by the FEMA; and

(6) Activities funded by the EPA, U.S. Department of Energy, or any other Federal agency.

It is likely that a developer or other project proponent could modify a project or take measures to protect the sucker. The kinds of actions that may be included if future reasonable and prudent alternatives become necessary include conservation set-asides, management of competing nonnative species, restoration of degraded habitat, and regular monitoring. These are based on our understanding of the needs of the species and the threats it faces, as described in the final listing rule and proposed critical habitat designation. These measures are not likely to result in a significant economic impact to project proponents.

In summary, we have considered whether this would result in a significant economic effect on a substantial number of small entities. We have determined, for the above reasons and based on currently available information, that it is not likely to affect a substantial number of small entities. Federal involvement, and thus section 7 consultations, would be limited to a subset of the area designated. The most likely Federal involvement could include Corps permits, permits we may issue under section 10(a)(1)(B) of the Act, FHA funding for road improvements, and regulation of grazing, mining, and recreation by the USFS. A regulatory flexibility analysis is not required.

*Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 801 et seq.)*

Under SBREFA, this rule is not a major rule. Our detailed assessment of the economic effects of this designation is described in the economic analysis. Based on the effects identified in the economic analysis, we believe that this rule will not have an annual effect on the economy of \$100 million or more, will not cause a major increase in costs or prices for consumers, and will not

have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. Refer to the final economic analysis for a discussion of the effects of this determination.

*Executive Order 13211*

On May 18, 2001, the President issued Executive Order 13211 on regulations that significantly affect energy supply, distribution, and use. Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This final rule to designate critical habitat for the Santa Ana sucker is not expected to significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action and no Statement of Energy Effects is required.

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

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.), we make the following findings:

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

private sector mandate” includes a regulation that “would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance; or (ii) a duty arising from participation in a voluntary Federal program.”

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

(b) We do not believe that this rule will significantly or uniquely affect small governments because it will not produce a Federal mandate of \$100 million or greater in any year, that is, it is not a “significant regulatory action” under the Unfunded Mandates Reform Act. The designation of critical habitat imposes no obligations on State or local governments. As such, Small Government Agency Plan is not required.

#### Takings

In accordance with Executive Order 12630 (“Government Actions and Interference with Constitutionally Protected Private Property Rights”), we have analyzed the potential takings implications of designating approximately 8,305 ac (3,361 ha) of lands in Los Angeles County, California as critical habitat for the Santa Ana sucker in a takings implication assessment. The takings implications assessment concludes that this final designation of critical habitat for the sucker does not pose significant takings implications.

#### Federalism

In accordance with Executive Order 13132, this rule does not have

significant federalism effects. A federalism assessment is not required. In keeping with Department of the Interior policy, the Service requested information from, and coordinated development of this critical habitat designation with, appropriate State resource agencies in California, as well as during the listing process. The impact of the designation on State and local governments and their activities was fully considered in the economic analysis. As discussed above, the designation of critical habitat in areas currently occupied by the Santa Ana sucker would have little incremental impact on State and local governments and their activities. The designations may have some benefit to these governments in that the areas essential to the conservation of these species are more clearly defined, and the primary constituent elements of the habitat necessary to the survival of the species are identified. While making this definition and identification does not alter where and what federally sponsored activities may occur, it may assist local governments in long-range planning, rather than waiting for case-by-case section 7 consultation to occur.

#### Civil Justice Reform

In accordance with Executive Order 12988, the Office of the Solicitor has determined that the rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order. We are designating critical habitat in accordance with the provisions of the Act, as amended. This rule uses standard property descriptions and identifies the primary constituent elements within the designated areas to assist the public in understanding the habitat needs that are essential for the conservation of the Santa Ana sucker.

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

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

#### National Environmental Policy Act

We have determined that we do not need to prepare an Environmental Assessment or an Environmental Impact Statement as defined by the National Environmental Policy Act of 1969, in

connection with regulations adopted pursuant to section 4(a) of the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244).

#### Government-to-Government Relationship With Tribes

In accordance with the President’s memorandum of April 29, 1994, “Government-to-Government Relations with Native American Tribal Government” (59 FR 22951), Executive Order 13175, and the Department of the Interior’s manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. We are not aware of any Tribal lands essential for the conservation of the Santa Ana sucker. Therefore, the critical habitat designation for the sucker does not contain any Tribal lands or lands that we have identified as impacting Tribal trust resources.

#### References Cited

A complete list of all references cited in this rule is available upon request from the Carlsbad Fish and Wildlife Office (*see ADDRESSES* section).

#### Author

The primary author of this document is the Carlsbad Fish and Wildlife Office (*see ADDRESSES* section).

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

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

#### Regulation Promulgation

■ For the reasons given in the preamble, we amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as follows:

#### PART 17—[AMENDED]

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

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

■ 2. Amend § 17.11(h), by revising the entry for “Sucker, Santa Ana” under “FISHES” to read as follows:

#### § 17.11 Endangered and threatened wildlife.

\* \* \* \* \*

(h) \* \* \*

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rule
Common name	Scientific name						
*	*	*	*	*	*	*	*
FISHES							
*	*	*	*	*	*	*	*
Sucker, Santa Ana ..	( <i>Catostomus santaanae</i> ).	U.S.A. (CA) .....	Los Angeles River basin, San Gabriel River basin, Santa Ana River basin.	T	694	17.95(e)	N/A
*	*	*	*	*	*	*	*

■ 3. Amend § 17.95(e) by adding critical habitat for the Santa Ana sucker (*Catostomus santaanae*) in the same alphabetical order as this species occurs in 17.11(h).

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

\* \* \* \* \*  
(e) Fishes. \* \* \*

Santa Ana Sucker (*Catostomus santaanae*)

(1) Areas determined to be essential to the conservation of the Santa Ana sucker and designated critical habitat units are depicted for Los Angeles County, California, on the maps and as described as follows:

(2) Based on the best available information, primary constituent elements essential for the conservation of the Santa Ana sucker include the following:

(i) A functioning hydrological system that experiences peaks and ebbs in the water volume that reflects seasonal variation in precipitation throughout the year;

(ii) A mosaic of loose sand, gravel, cobble, and boulder substrates in a series of riffles, runs, pools, and shallow sandy stream margins;

(iii) Water depths greater than 3 cm (1.2 in) and bottom water velocities greater than 0.03 meter per second (0.01 feet per second);

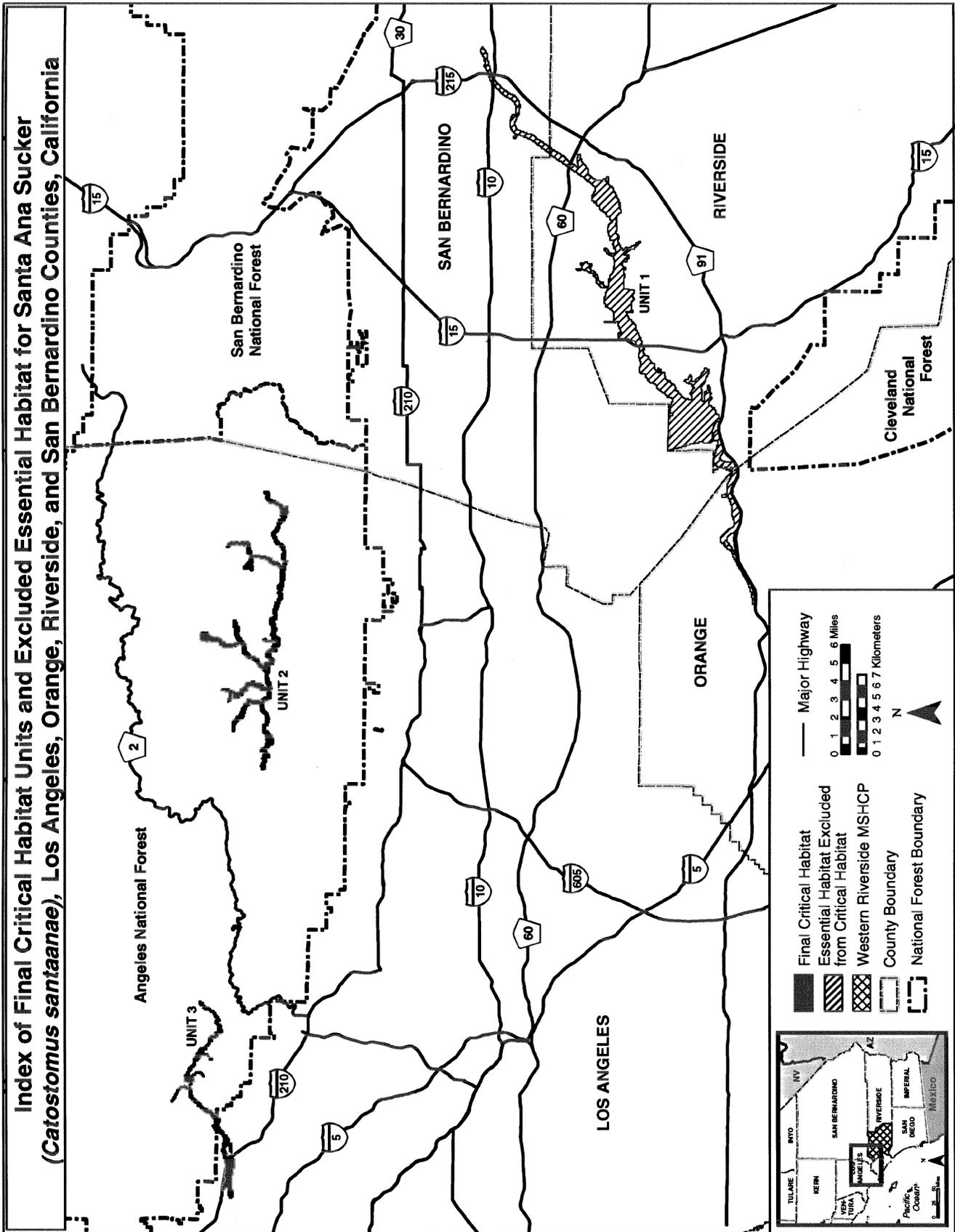
(iv) Non-turbid water or only seasonally turbid water;

(v) Water temperatures less than 30 °C (86 °F); and

(vi) Stream habitat that includes algae, aquatic emergent vegetation, macroinvertebrates, and riparian vegetation.

(3) Existing features and structures made by people, such as paved roads, bridges, parking lots, railroad tracks, railroad trestles, and residential, commercial, and industrial developments including energy production and distribution facilities (exclusive of the stream channel), do not contain one or more of the primary constituent elements and are not critical habitat. Federal actions limited to those areas, therefore, would not trigger a consultation under section 7 of the Act unless they may affect the species and/or primary constituent elements in adjacent critical habitat.

(4) Areas determined to be essential to the conservation of the Santa Ana sucker and designated critical habitat units are shown on the following index map.



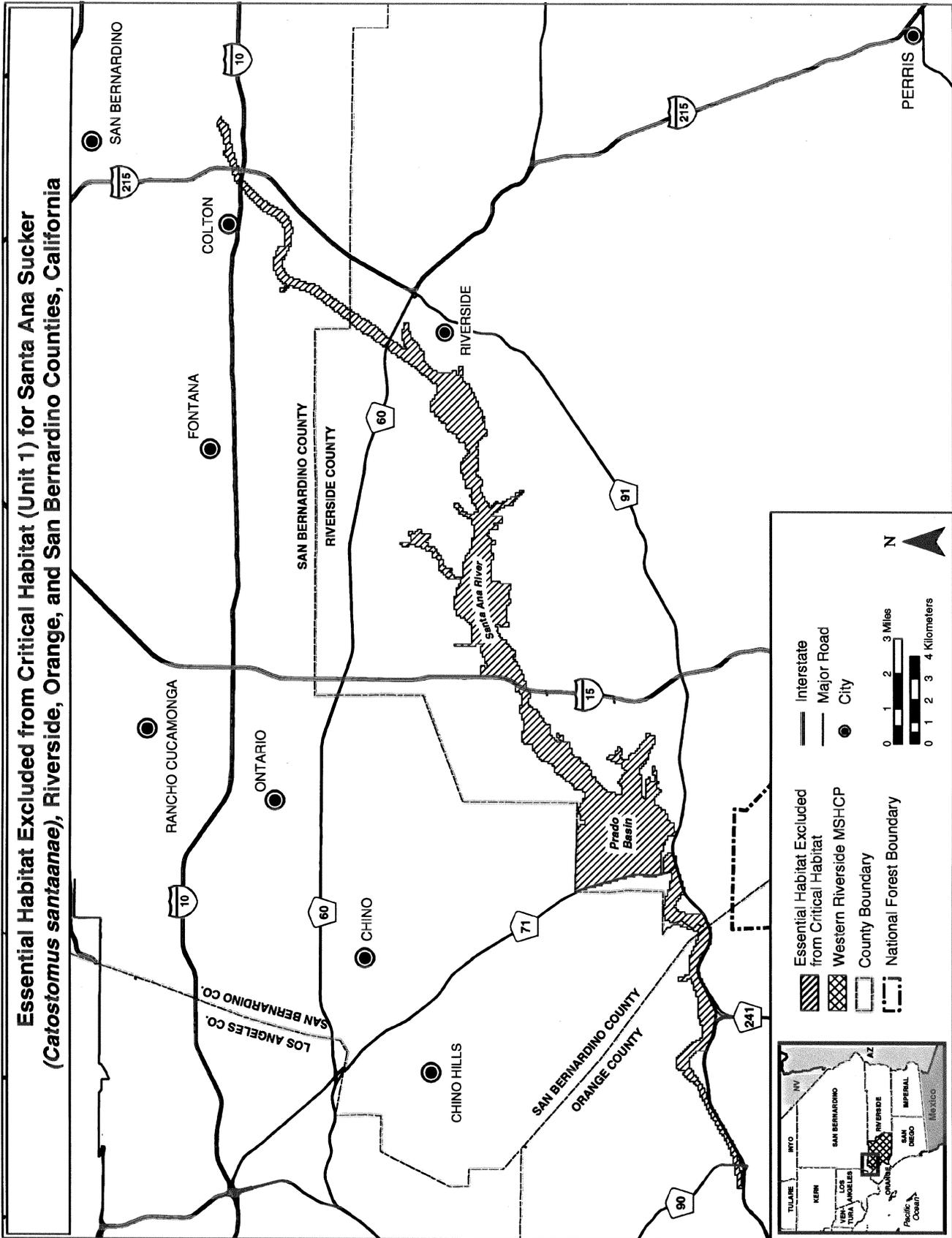
(5) Areas that have been determined to be essential to the conservation of the Santa Ana sucker and that have been excluded from critical habitat designation pursuant to section 4(b)(2) of the Act are described as follows:

(i) All essential areas within the boundaries of the Western Riverside

Multiple Species Habitat Conservation Plan (which may be obtained by going to the Riverside County Integrated Project Web site (<http://www.rcip.org/conservation.htm>) and other areas of the Santa Ana River, from the confluence of Mission Channel and the Santa Ana River downstream to the vicinity of the

Route 90, covered by the Santa Ana Sucker Conservation Program.

(ii) *Note:* Map of essential habitat excluded from critical habitat (Unit 1) for Santa Ana Sucker follows:



(6) The following textual unit descriptions are the definitive source for determining critical habitat boundaries. General location maps by unit are provided at the end of each unit description and are provided for general guidance purposes only, and not as a definitive source for determining critical habitat boundaries.

(7) Unit 2: San Gabriel River system in Los Angeles County, California.

(i) Unit 2 includes the West, North and East Forks of the San Gabriel River and the following tributaries: Cattle Canyon Creek, Bear Creek, Bichota Canyon Creek, and Big Mermaids Canyon Creek. The San Gabriel River portion of the unit extends from the Cogswell Dam on the West Fork to approximately 3,882 feet (1,229 meters; 0.77 miles; 1.21 kilometers) downstream from the Bridge-of-No Return on the East Fork, and portions of the North Fork. The lateral extent of Unit 2 is defined by the UTM coordinates described in the legal description.

*Unit 2: San Gabriel River, Los Angeles County, California.* From USGS 1:24,000 quadrangle maps Azusa, Crystal Lake, Glendora, Mount Baldy, Mount San Antonio, and Waterman Mountain, California, land bounded by the following UTM 11 NAD 27 coordinates (E, N): 422700, 3795100; 423300, 3795100; 423300, 3795000; 423400, 3795000; 423400, 3794400; 423300, 3794400; 423300, 3794300; 423300, 3794300; 423200, 3794200; 423100, 3794200; 423100, 3794000; 423000, 3794000; 423000, 3793400; 422900, 3793400; 422900, 3793300; 422800, 3793200; 422700, 3793100; 422600, 3793100; 422600, 3792900; 422500, 3792900; 422500, 3792800; 422400, 3792800; 422400, 3792100; 422500, 3792100; 422500, 3791800; 422700, 3791800; 422900, 3791900; 422900, 3792000; 423100, 3792000; 423100, 3792100; 423800, 3792100; 423800, 3792200; 424500, 3792200; 424500, 3791900; 424300, 3791900; 424300, 3791800; 424000, 3791800; 424000, 3791700; 423900, 3791600; 423400, 3791600; 423400, 3791700; 423200, 3791700; 423000, 3791600; 423000, 3791500; 422900, 3791500; 422900, 3791400; 422700, 3791400; 422600, 3791300; 422600, 3791300; 422600, 3791200; 422500, 3791200; 422500, 3791100; 422400, 3791100; 422400, 3791000; 421700, 3791000; 421700, 3790900; 421600, 3790900; 421600, 3790800; 421500, 3790800; 421500, 3790700; 421400, 3790700; 421400, 3790600; 421300, 3790600; 421300, 3790200; 421200, 3790200; 421200, 3790100; 421100,

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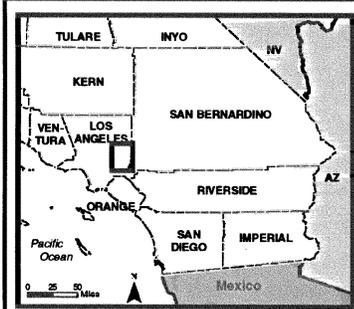
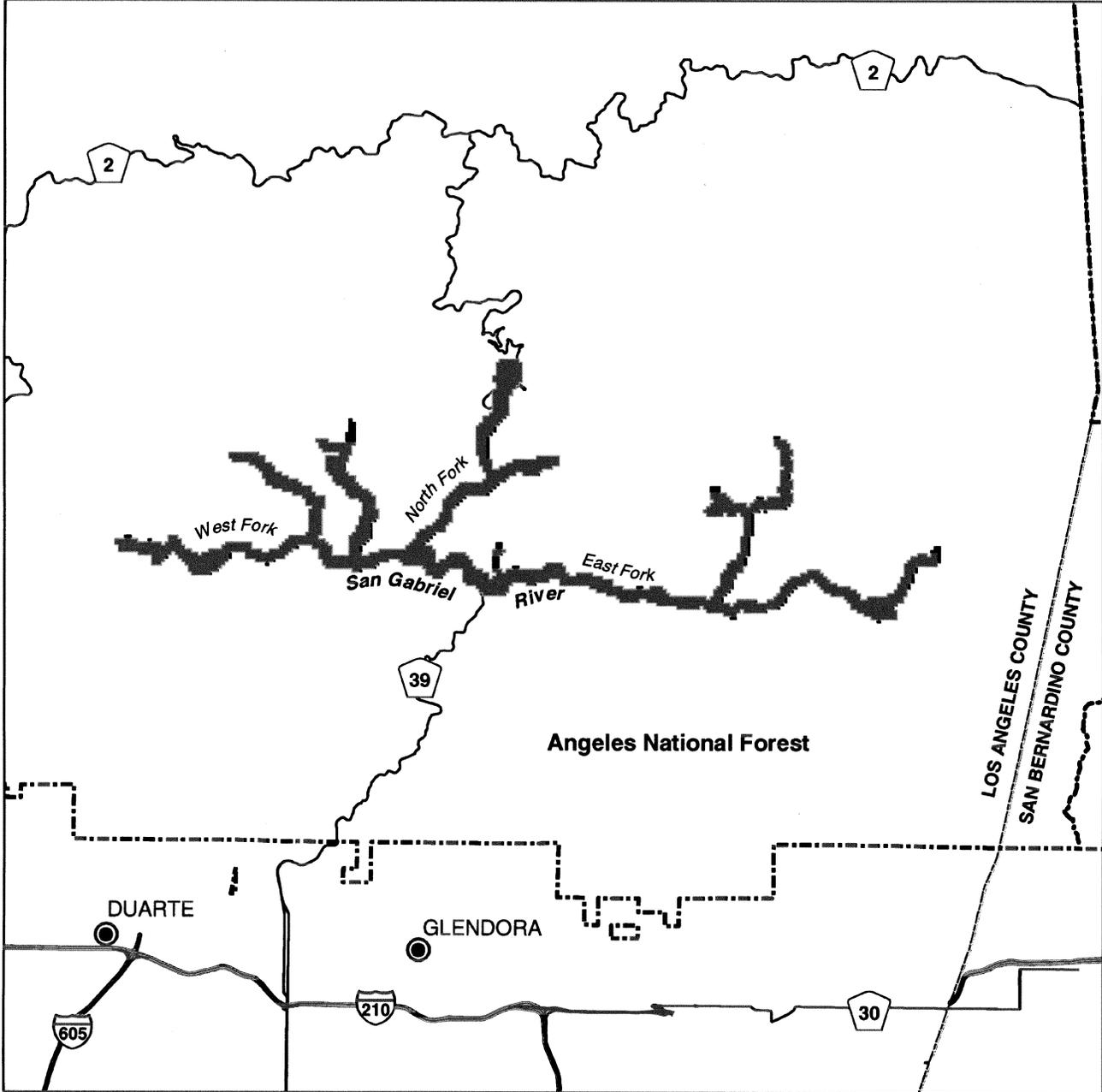
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3795000; returning to 422700, 3795100.  
(ii) The map of Unit 2 follows:

### Final Critical Habitat (Unit 2) for Santa Ana Sucker (*Catostomus santaanae*), Los Angeles County, California



	Final Critical Habitat		Interstate
	County Boundary		Major Road
	National Forest Boundary		City

0 1 2 3 Miles

0 1 2 3 Kilometers

N



(8) Unit 3: Big Tujunga Creek system in Los Angeles County, California.

(i) Unit 3 includes the stretch of Big Tujunga Creek between the Big Tujunga Dam and Hansen Dam and the following tributaries: Stone Canyon Creek, Delta Canyon Creek, and Gold Canyon Creek. The lateral extent of Unit 3 is defined by the UTM coordinates described in the legal description.

*Unit 3: Big Tujunga Canyon. Los Angeles County, California. From USGS 1:24,000 quagrange maps Condor Peak, San Fernando, and Sunland, California, land bounded by the following UTM 11 NAD 27 coordinates (E, N):* 381900, 3797700; 382100, 3797700; 382100, 3797600; 382200, 3797600; 382200, 3797500; 382400, 3797500; 382400, 3797400; 382600, 3797400; 382600, 3797300; 382800, 3797300; 382800, 3797200; 383000, 3797200; 383000, 3797100; 383100, 3797100; 383100, 3797000; 383200, 3797000; 383200, 3796900; 383300, 3796900; 383300, 3796500; 383400, 3796500; 383400, 3796400; 383300, 3796400; 383300, 3796200; 383200, 3796200; 383200, 3796100; 383500, 3796100; 383500, 3796000; 383600, 3796000; 383600, 3796300; 383700, 3796300; 383700, 3796500; 384300, 3796500; 384300, 3796400; 384400, 3796400; 384400, 3796300; 384600, 3796300; 384600, 3796200; 384900, 3796200; 384900, 3796100; 385000, 3796100; 385000, 3796000; 385100, 3796000; 385100, 3795900; 385200, 3795900; 385200, 3795800; 385300, 3795800; 385300, 3795700; 385800, 3795700; 385800, 3795600; 386000, 3795600; 386000, 3795500; 386200, 3795500; 386200, 3795400; 386300, 3795400; 386300, 3795300; 386500, 3795300; 386500, 3795200; 386600, 3795200; 386600, 3795100; 386700, 3795100; 386700, 3794900; 386800, 3794900; 386800, 3794700; 386900, 3794700; 386900, 3794600; 387000, 3794600; 387000, 3794500; 387100, 3794500; 387100, 3794400; 387600, 3794400; 387600, 3794300; 387700, 3794300; 387700, 3794200; 387800, 3794200; 387800, 3793800; 387900, 3793800; 387900, 3793900; 388000, 3793900; 388000, 3793800; 388100, 3793800; 388100, 3793600; 388700, 3793600; 388700, 3793700; 388800, 3793700; 388800, 3793800; 389100, 3793800; 389100, 3793700; 389300, 3793700; 389300, 3793800; 389400, 3793800; 389400, 3793900; 389600, 3793900; 389600, 3794000; 389800, 3794000; 389800, 3794200; 389900, 3794200; 389900, 3794300; 390000, 3794300; 390000, 3794700; 390100, 3794700; 390100, 3794900; 390300, 3794900; 390300, 3795000; 390400, 3795000; 390400, 3795100; 390500, 3795100; 390500,

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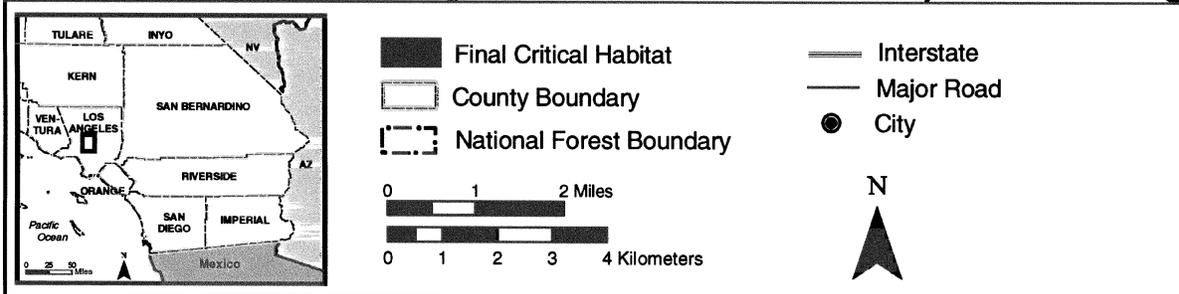
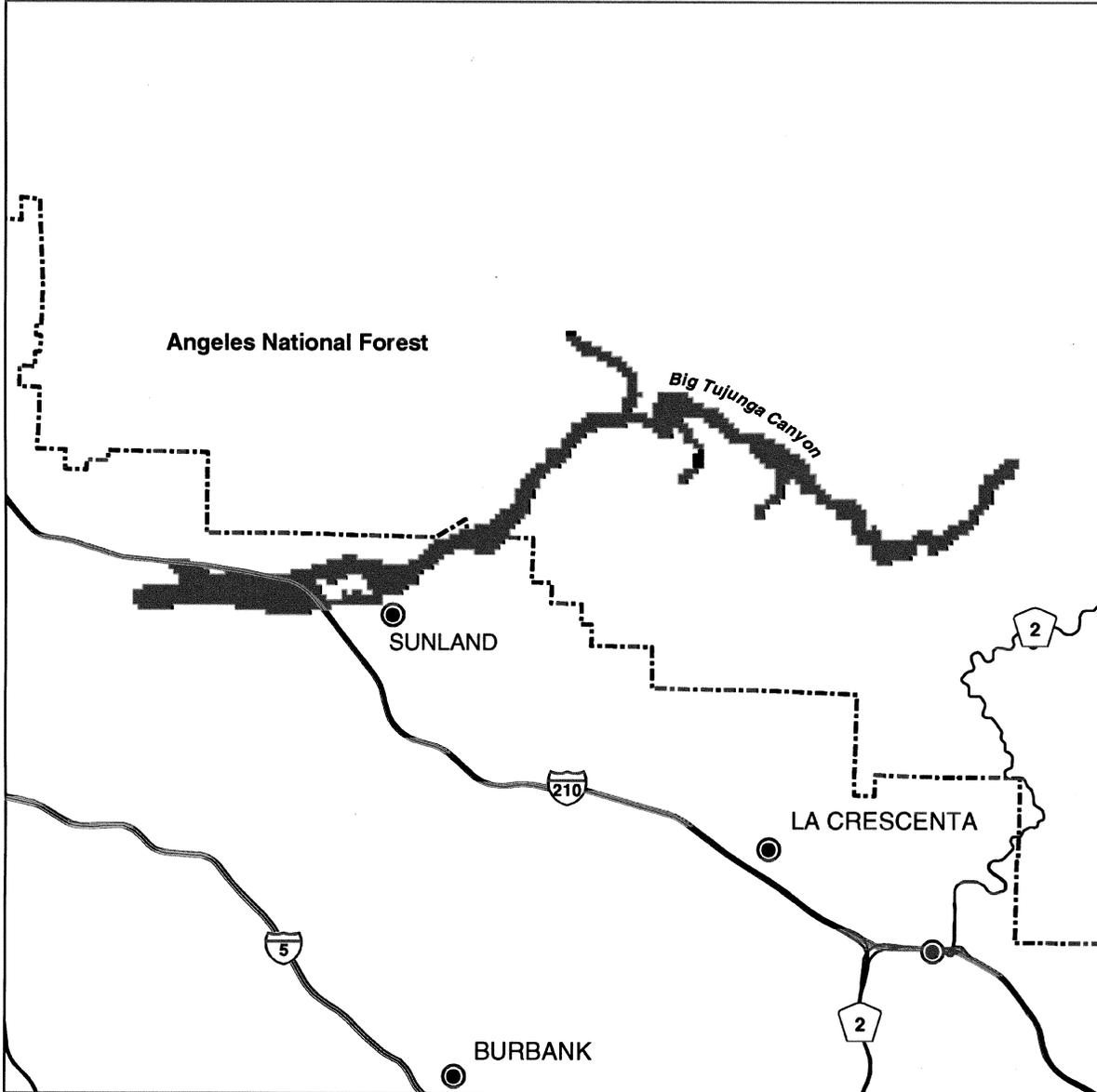
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3797400; 382000, 3797400; 382000,  
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381900, 3797700; excluding land  
bounded by 377600, 3792900; 377600,  
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3792800; 377900, 3792800; 377900,  
3792900; 377600, 3792900.

(ii) The map of Unit 3 follows:

### Final Critical Habitat (Unit 3) for Santa Ana Sucker (*Catostomus santaanae*), Los Angeles County, California



\* \* \* \* \*

Dated: December 21, 2004.  
**Craig Manson,**  
*Assistant Secretary for Fish and Wildlife and Parks.*  
 [FR Doc. 04-28286 Filed 12-30-04; 8:45 am]  
 BILLING CODE 4310-55-C