



DIRECTOR AND SECRETARY
TO THE COMMISSION
Michael B. Sloane

STATE OF NEW MEXICO
DEPARTMENT OF GAME & FISH

One Wildlife Way, Santa Fe, NM 87507

Tel: (505) 476-8000 | Fax: (505) 476-8180

For information call: (888) 248-6866

www.wildlife.dgf.nm.gov

STATE GAME COMMISSION

RICHARD STUMP
Chair
Santa Fe

SHARON SALAZAR HICKEY
Vice Chair
Santa Fe

FERNANDO CLEMENTE, JR.
Sunland Park

GREGG FULFER
Jal

TIRZIO J. LOPEZ
Cebolla

DR. SABRINA PACK
Silver City

January 20, 2025

Attn: FWS-R2-ES-2024-0143
U.S. Fish and Wildlife Service
MS: PRB/3W
5275 Leesburg Pike
Falls Church, VA 22041-3803

RE: Endangered and Threatened Wildlife and Plants; Threatened Species Status with Section 4(d) Rule for the Pecos Pupfish and Designation of Critical Habitat (NMDGF ERT-4116)

To whom it may concern:

The New Mexico Department of Game and Fish (NMDGF), New Mexico Interstate Stream Commission (NMISC), and New Mexico Department of Agriculture (NMDA), collectively the Agencies, appreciate the opportunity to comment on the proposed rule and designation of critical habitat for Pecos Pupfish *Cyprinodon pecosensis*, as identified in the November 22nd, 2024 Federal Register notice. Since 1999, the Agencies have been signatories to and implemented an interagency Pecos Pupfish Conservation Agreement (Conservation Agreement) that addresses the main threats to the long-term viability of the species. In 2021, NMDGF submitted information for the development of a Species Status Assessment (SSA) for Pecos Pupfish. At that time, NMDGF provided the U.S. Fish and Wildlife Service (Service) with fish survey data collected from 2011–2020 and corresponding annual reports. The NMDGF also submitted a research report to the SSA lead in 2023 that characterized the genetics of these populations.

Though the Conservation Agreement is included in the narrative of the SSA and proposed rule, there is insufficient consideration of the Conservation Agreement and Conservation Team achievements in Pecos Pupfish conservation. The Conservation Agreement and commitments from its signatories (Conservation Team) are sufficient to address the threats included in the proposed rule without requiring federal listing. The initial goal of the 1999 Conservation Agreement was to “secure and protect Pecos Pupfish.” Given our successes under this and subsequent agreements, we updated our goal in the 2022 Conservation Agreement to “maintaining and improving the status of Pecos Pupfish.” The current status of Pecos Pupfish, as acknowledged in the proposed rule, includes “multiple long-term persistent populations throughout its range.” This status is nearly unchanged since the Withdrawal of Proposed Endangered Rule in 2000, largely because of the efforts of the Conservation Team. Under the Conservation Agreement, NMDGF has led annual data collection on Pecos Pupfish populations, enforced strict baitfish rules, installed concrete fish barriers

preventing sheepshead minnow invasion, and supported partners in habitat restoration. We believe the Service's Policy for the Evaluation of Conservation Efforts should have been applied.

The risk of sheepshead minnow invasion in New Mexico to future conditions is overstated in the proposed rule. Though the "Assumptions and Limitations" of the SSA noted that it was not appropriate to project the condition of the species under the assumption that sheepshead minnow introgression would occur, the future condition analysis seems to do just that. We strongly disagree that there is a "cumulative risk" of bait bucket introduction as referenced in the proposed rule. There has not been a bait bucket transfer of sheepshead minnow in the 24 years since the Withdrawal of the Proposed Endangered Listing, largely because of changes to baitfish rules driven by the Conservation Agreement that continue to be enforced and greatly mitigate this risk.

The SSA and proposed rule contain contradictory language and significant conjecture that are at odds with the best available science. For example, the proposed rule states that "the risk of sheepshead minnow invasions is equal across all habitat types" when determining if endangered status throughout a significant portion of its range was applicable. This is counter to multiple references in the SSA (e.g., Table 14) and the proposed rule (e.g., Future Condition Projections: Sheepshead Minnow) where only the Upper Pecos River analysis unit is described as highly vulnerable to introduction. Likewise, sheepshead minnow introgression is described as a "low probability" event, but risk of introgression is evaluated assuming an invasion in the Upper Pecos River will occur. We recommend working with NMDGF and Texas Parks and Wildlife to more accurately assess the risk posed by sheepshead minnow and potential invasion across analysis units.

The proposed rule is heavily reliant on the SSA to determine the Pecos Pupfish status, which included an evaluation of the species' current and future conditions. During the SSA process, NMDGF provided feedback regarding concerns over analyses and condition determinations. Specifically, NMDGF provided comments on the selection of the HUC-12 subwatershed analysis unit and how arbitrary boundaries could affect interpretation of condition. As we previously noted, redundancy and representation should have only been evaluated range-wide rather than within the analysis units. This is especially the case for redundancy, where the units are too small to evaluate the "sufficient number of populations for the species to withstand catastrophic events." Further, the decision to use "environmental setting" as a surrogate for genetics to measure representation is less relevant when contemporary genetic data are available. We suggest that genetic assessments conducted by Whiteley et al. (2023), while not comprehensive, would serve as a better metric to assess the species' condition, is the best available science, and should have been used to evaluate representation.

The 2100 predictions in the SSA rely on speculative long-term models with significant uncertainties, particularly regarding climate change impacts and the probability of sheepshead minnow invasions. While the 2050 projections are more credible and based on near-term data, they still carry some degree of uncertainty. The ESA's standard for "foreseeable future" requires reliable, actionable predictions, and the 2100 scenarios do not meet that standard.

The proposed exceptions under Section 4(d) have a very limited scope and, as currently written, stymie ongoing conservation actions in New Mexico. Should the Service move forward with listing Pecos pupfish, the Agencies request additional exceptions that allow for continued conservation in New Mexico, including: 1) management and maintenance of captive-bred Pecos Pupfish to augment existing populations, 2) genetic research to prevent sheepshead minnow spread, 3) translocation of wild and captive Pecos Pupfish to allow for establishment of new populations, and 4) continued annual monitoring activities.

The Agencies would like to clarify the occupied habitat described in the Critical Habitat designation. The designation indicates that all sinkhole habitat at Bottomless Lakes State Park is occupied, when there are two sinkholes that are not currently occupied (Pasture Lake and Devil's Inkwell). We request that these habitats are excluded from Critical Habitat designation.

The last paragraph on page 92750 that extends onto page 92751 is unclear and contains several factual errors. A thorough review and revision of this paragraph is needed. The NMISC would be happy to work with the Service on clarifying language for water operations in this paragraph.

Notable clarifications needed in this paragraph include the specific comments from NMISC below:

- The proposed rule does not fully describe the NMISC's purpose and role in Pecos River water operations on pages 92750-92751. The proposed rule describes the NMISC as "owning the groundwater rights" associated with the Pecos River inflows, perhaps conflating the New Mexico Office of the State Engineer's overall management of groundwater statewide with the NMISC's ownership of some specific groundwater rights in the Pecos Basin. The NMISC is responsible for maintaining compliance with numerous interstate water compacts for the State of New Mexico, including the Pecos River Compact. NMSA 1978, § 72-14-3. To be clear, the NMISC does not own all of the groundwater rights in the Pecos Basin, as suggested in the proposed rule.
- The proposed rule goes on to correctly describe that State and Federal agencies work together collaboratively to maintain flows for a variety of reasons. In fact, the NMISC, Reclamation, United States Geological Survey, United States Army Corps of Engineers, Fort Sumner Irrigation District (FSID), Carlsbad Irrigation District (CID), and the Service meet weekly during the irrigation season to coordinate Pecos River Operations for irrigation district and listed species needs. However, the proposed rule then incorrectly states that in recent decades "the only releases from Ft. Sumner Reservoir (*sic*) to Brantley Reservoir have been block releases," ignoring other releases that support environmental flows in the stretch of the Pecos downstream of Lake Sumner. While block releases, which transfer Carlsbad Project water between the two reservoirs for use by CID, do make up the majority of water released from Lake Sumner, water is also released for the FSID, and return flows from FSID help supplement the flow of the river downstream of this reach. In addition, both the NMISC and Reclamation have acquired water rights from the irrigation districts and other private entities. These rights support smaller, more frequent releases from Lake Sumner outside of the block release periods and groundwater pumping to augment the Pecos River. These activities help to maintain river connectivity for the Pecos bluntnose shiner (*Notropis simus peconsensis*) and likely provide similar benefits to the Pecos pupfish.
- Additionally, the Service characterizes the block releases as managing for the shiner and acting as a buffer for drying events, when the opposite is true: block releases are artificially limited in both flow rate and duration to mitigate potential impacts on the shiner. While block releases do buffer against drying events when they occur and shortly afterwards, it is the active management described above¹ by Reclamation and the NMISC that prevent drying events from occurring in between relatively infrequent block releases.

¹ See e.g., *Pecos Pupfish Conservation Agreement 2022*, EMNRD No. 22-521-0500-0051 (Nov. 16, 2022); *Pecos River Depletions Accounting and Offsets Agreement between the United States of America Department of Interior Bureau of Reclamation and the New Mexico Interstate Stream Commission and the Carlsbad Irrigation District* (October 24, 2019); *Biological Opinion on the Carlsbad Project Water Operations and Water Supply Conservation*, Consultation No. 02ENNM00-2016-F-0506 (Dec. 4, 2017).

The proposed rule extensively cites the Pecos River Basin Study by Reclamation and the NMISC. In several instances, the Service might be better served by using the primary sources for some citations. As an example, in the middle of the first column on page 92751, the proposed rule cites the Pecos River Basin Study regarding stream impairments when the more appropriate citation would be the New Mexico Environment Department (NMED)'s most updated 303(d)/305(b) integrated report. This report can be accessed at <https://www.env.nm.gov/surface-water-quality/303d-305b/>. The same issue exists in the third column of page 92755.

The Agencies generally agree with the Service's conclusion that changes to water availability resulting from climate change and novel introductions of sheepshead minnow are the most important factors affecting Pecos Pupfish viability. However, the impacts of climate change on the Pecos Pupfish continue to deserve further study. Furthermore, we believe the Conservation Agreement has largely abated the risk of sheepshead minnow invasion for current populations in New Mexico. We would also like to credit the Service for including NMDGF expertise in the SSA development. Ultimately, addressing NMDGF concerns provided during the draft SSA review would have led to a more informed decision.

Thank you again for the opportunity to provide input regarding this proposed rule. If you have any questions or require additional information, please contact Joanna Hatt at 505-500-5001 or joanna.hatt@dgf.nm.gov.

Sincerely,

Michael B. Sloane

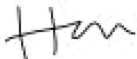
Digitally signed by Michael B.

Sloane

Date: 2025.01.16 15:13:43 -07'00'

Michael B. Sloane

Director, New Mexico Department of Game and Fish



1-17-25

Hannah Riseley-White

Director, New Mexico Interstate Stream Commission

Jeff M Witte

Digitally signed by Jeff M Witte

Date: 2025.01.16 16:57:26 -07'00'

Jeff Witte,

Secretary, New Mexico Department of Agriculture