*Issue 42*: The Service should perform additional surveys before listing.

Service Response: The Service is supporting continuing surveys to detect additional E. t. extimus, to monitor known nest sites, and to evaluate habitat presence, quality, and distribution. The Service supports these surveys with funding to States in accordance with section 6 of the Act, and through logistical and technical assistance to other agencies and parties. Extensive surveys in New Mexico and Arizona in 1993 located E. t. extimus in numbers that do not significantly change the total population estimates made in the proposed rule. These surveys also confirmed high levels of brood parasitism by cowbirds. With low estimates of total flycatcher numbers being validated by continuing surveys. the Service has determined that sufficient information exists on the threats of habitat loss and cowbird parasitism to justify listing.

*Issue 43:* The Service failed to consult adequately with private interests, State, Federal, and local agencies prior to publishing the proposed rule.

Service Response: The Service published public requests for information on the status of E. t. extimus in the Federal Register when it was designated a category 2 candidate species in January 1989, and when it was designated a category 1 species in November 1991. The Service supplemented these requests with general mailings soliciting information, and information solicitations in professional publications. Beyond these mechanisms, the Service is constrained by funding limitations and citizens' suits such as Environmental Defense Center, Inc. vs. Babbitt et al. IV 93-1848-R (C.D. Calif.), which was brought to compel the Service to propose listing and designation of critical habitat for the species, that preclude individually

contacting every interested party. *Issue 44:* The parties who petitioned for listing should pay for studies supporting their request.

Service Response: Regulations implementing section 4 of the Act, specifically the petition process [50 CFR 424.14], do not require petitioners to fund studies supporting their request. Listing determinations are made if existing information is deemed sufficient to make a determination. This information typically originates from a variety of sources.

*Issue 45:* The southwestern willow flycatcher is abundant. There is no need to list.

*Service Response:* The Service has determined that *E. t. extimus* is rare, not abundant, faces serious threats to its

continued existence, and warrants listing as endangered. See discussion under Factor A: *The present or threatened destruction, modification, or curtailment of its habitat or range.* 

*Issue 46:* The "little" willow flycatcher (*E. t. brewsteri*) is the most common subspecies observed and collected in the Southwest.

Service Response: The abundance of collections of *E. t. brewsteri* from within the breeding range of *E. t. extimus* is because *E. t. brewsteri* migrates through the Southwest between its Pacific coastal breeding range and wintering grounds in Central America. *E. t. brewsteri* passes through riparian habitats in the breeding range of *E. t. extimus* in spring and fall, but does not breed there.

*Issue 47:* There is no need to list *E. extimus* in areas where it is doing well.

Service Response: The Service has determined that E. t. extimus is endangered; local areas where the bird is relatively stable could only be excluded from listing or classified as threatened if they constituted distinct population segments [50 CFR 424.02(k)]. The Service has not identified any distinct population segments of E. t. extimus. Further, because the Service determines E. t. extimus to be endangered, all existing habitat and local nesting concentrations are deemed to be essential to the conservation and recovery of the species. Protection of locales where the bird is doing relatively well may be especially important for the conservation and recovery of E. t. extimus.

*Issue 48:* Prey availability may be a limiting factor.

Service Response: The Service recognizes that food availability is always a potential limiting factor in wildlife populations. It is possible that reduction of riparian habitats not only reduced vegetation for nesting, but reduced or altered the arthropod fauna associated with surface water and extensive vegetation. Also, as noted in this rule, some speculation exists that tamarisk provides a substandard nesting habitat because it supports a significantly different insect fauna than native vegetation. However, no information was available to evaluate this factor directly for E. t. extimus.

*Issue 49:* Several comments were received that pertained to the Service's management of the 90-day petition finding, including that the 90-day petition finding was late; that it is not the Service's role to conduct a status review if information in a petition is lacking; and that a 30-day comment period on the 90-day petition finding was insufficient.

Service Response: The Service acknowledges that its finding on the listing petition was published after 90 days, however, the Act (section 4(b)(3)(A) states that the [Service] shall, to the maximum extent practicable, make a petition finding within 90 days (emphasis added). Because the petition was found to present substantial information indicating that the petitioned action may have been warranted, the Service continued a status review after this finding, in accordance with 50 CFR 424.14(b)(3). There are no requirements for the Service to open a formal comment period regarding a 90-day petition finding. The Service did so in this case to solicit additional information on E. t. extimus. In reaching its 12-month petition finding, the Service considered all information received within the 30day period identified, and information received for several months thereafter.

*Issue 50: E. t. extimus* should be listed as threatened, not endangered.

Service Response: The Service carefully evaluated the status of *E. t. extimus* and has determined that it meets the definition of an endangered species, not a threatened species. As stated in the proposed rule, (58 FR 39495) threatened status would not be appropriate because the large historic habitat loss already has caused extirpation throughout a significant portion of the species' range. Population numbers are extremely low, and a variety of threats are serious and imminent.

*Issue 51*: Restrictions on rural livestock grazing will cause ranching to become nonviable, and the land will be converted by suburban development, which is a greater threat to *E. t. extimus* than overgrazing.

Service Response: The conversion of lands from livestock grazing to suburban development is hypothetical and therefore cannot drive the Service's determination on this issue. Much of the livestock grazing that may be affected by this rule takes place on Federal lands.

Therefore, conversion to suburban development would require land exchanges or sales. These actions, if they were determined to affect *E. t. extimus*, would require consultation under section 7 of the Act. Regardless, prioritization of threats should be undertaken in the recovery, rather than listing, process.

*Issue 52:* The proposed rule fails to consider changing ecological factors: drought, migration patterns, nesting habits, and climatic changes.