answer to a complaint must include a certification that the video programming distributor attempted in good faith to resolve the dispute with the complainant.

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018–AG29

Endangered and Threatened Wildlife and Plants; Final Designation of Critical Habitat for the Mexican Spotted Owl

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), designate critical habitat under the Endangered Species Act of 1973, as amended (Act), for the Mexican spotted owl (*Strix occidentalis lucida*) (owl). The owl inhabits canyon and montane forest habitats across a range that extends from southern Utah and Colorado, through Arizona, New Mexico, and west Texas, to the mountains of central Mexico. We designate approximately 1.9 million hectares (ha) (4.6 million acres (ac)) of critical habitat in Arizona, Colorado, New Mexico, and Utah, on Federal lands. Section 7 of the Act requires Federal agencies to ensure that actions they authorize, fund, or carry out are not likely to destroy or adversely modify designated critical habitat. As required by section 4 of the Act, we considered economic and other relevant impacts prior to making a final decision on what areas to designate as critical habitat.

DATES: This final rule is effective March 5, 2001.

ADDRESSES: The complete administrative record for this rule is on file at the New Mexico Ecological Services Field Office, 2105 Osuna Road NE, Albuquerque, New Mexico 87113. You may view the complete file for this rule, by appointment, during normal business hours at the above address.

FOR FURTHER INFORMATION CONTACT: Joy Nicholopoulos, Field Supervisor, New Mexico Ecological Services Field Office, at the above address; telephone 505/346–2525, facsimile 505/346–2542.

SUPPLEMENTARY INFORMATION:

Background

The Mexican spotted owl (*Strix occidentalis lucida*) is one of three subspecies of spotted owl occurring in the United States; the other two are the northern spotted owl (*S. o. caurina*) and the California spotted owl (S. o. occidentalis). The Mexican spotted owl is distinguished from the California and northern subspecies chiefly by geographic distribution and plumage. The Mexican spotted owl is mottled in appearance with irregular white and brown spots on its abdomen, back, and head. The spots of the Mexican spotted owl are larger and more numerous than in the other two subspecies, giving it a lighter appearance.

The Mexican spotted owl has the largest geographic range of the three subspecies. The range extends north from Aguascalientes, Mexico, through the mountains of Arizona, New Mexico, and western Texas, to the canyons of Utah and Colorado, and the Front Range of central Colorado. Much remains unknown about the species' distribution in Mexico, where much of the owl's range has not been surveyed. The owl occupies a fragmented distribution throughout its United States range, corresponding to the availability of forested mountains and canyons, and in some cases, rocky canyonlands. Although there are no estimates of the owl's historical population size, its historical range and present distribution are thought to be similar.

According to the Recovery Plan for the Mexican Spotted Owl (United States Department of the Interior 1995) (Recovery Plan), 91 percent of owls known to exist in the United States between 1990 and 1993 occurred on land administered by the U.S. Forest Service (FS); therefore, the primary administrator of lands supporting owls in the United States is the FS. These numbers are based upon preliminary surveys that were focused on National Forests in the southwest. Nevertheless, most owls have been found within Region 3 of the FS, which includes 11 National Forests in New Mexico and Arizona. FS Regions 2 and 4, including two National Forests in Colorado and three in Utah, support fewer owls. The range of the owl is divided into 11 Recovery Units (RU), 5 in Mexico and 6 in the United States, as identified in the Recovery Plan. The Recovery Plan also identifies recovery criteria and provides distribution, abundance, and density estimates by RU. Of the RUs in the United States, the Upper Gila Mountains RU, located in the central portion of the species' U.S. range in central Arizona and west-central New Mexico, contains over half of known owl sites. Owls here use a wide variety of habitat types, but are most commonly found inhabiting mature mixed-conifer and ponderosa pine-Gambel oak forests. The Basin and Range-East RU encompasses central and southern New Mexico, and includes numerous parallel mountain ranges separated by alluvial valleys and broad, flat basins.

Most breeding spotted owls occur in mature mixed-conifer forest. The Basin and Range-West RU contains mountain ranges separated by non-forested habitat. These ''sky island'' mountains of southern Arizona and far-western New Mexico contain mid-elevation mixed-conifer forest and lower elevation Madrean pine-oak woodlands that support spotted owls. The Colorado Plateau RU includes northern Arizona, southern Utah, southwestern Colorado, and northwestern New Mexico, with owls generally confined to deeply incised canyon systems and wooded areas of isolated mountain ranges. The Southern Rocky Mountains-New Mexico RU consists of the mountain ranges of northern New Mexico. Owls in this unit typically inhabit mature mixed-conifer forest in steep canyons. The smallest number of spotted owls occurs in the Southern Rocky Mountains-Colorado RU. This unit includes the southern Rocky Mountains in Colorado, where spotted owls are largely confined to steep canyons, generally with significant rock faces and various amounts of mature coniferous forest. The critical habitat units identified in this designation are all within these RUs.

A reliable estimate of the numbers of owls throughout its entire range is not currently available. Using information gathered by Region 3 of the FS, Fletcher (1990) calculated that 2,074 owls existed in Arizona and New Mexico in 1990. Based on more up-to-date information, we subsequently modified Fletcher's calculations and estimated a total of 2,160 owls throughout the United States (USDI 1991). However, these numbers are not considered reliable estimates of current population size for a variety of statistical reasons, and a pilot study (Ganey *et al.* 1999) conducted in 1999, estimated the number of owls for the upper Gila Mountains Recovery Unit (exclusive of tribal lands) as 2,950 (95 percent confidence interval 717–5,183).

Mexican spotted owls nest, roost, forage, and disperse in a diverse array of biotic communities. Nesting habitat is typically in areas with complex forest structure or rocky canyons, and contains uneven-aged, multi-storied mature or old-growth stands that have high

canopy closure (Ganey and Balda 1989, USDI 1991). In the northern portion of the range (Utah and Colorado), most nests are in caves or on cliff ledges in steep-walled canyons. Elsewhere, the majority of nests appear to be in Douglas fir (*Pseudotsuga menziesii*) trees (Fletcher and Hollis 1994, Seamans and Gutierrez 1995). A wide variety of tree species is used for roosting; however, Douglas fir is the most commonly used species in mixed conifer forests (Ganey 1988, Fletcher and Hollis 1994, Young *et al.* 1998). Owls generally use a wider variety of forest conditions for foraging than they use for nesting/roosting.

Seasonal movement patterns of Mexican spotted owls are variable. Some individuals are year-round residents within an area, some remain in the same general area but show shifts in habitat use patterns, and some migrate considerable distances (20–50 kilometers (km)) (12–31 miles (mi)) during the winter, generally migrating to more open habitat at lower elevations (Ganey and Balda 1989b, Willey 1993, Ganey *et al.*1998). The home-range size of Mexican spotted owls appears to vary considerably among habitats and/or geographic areas (USDI 1995), ranging in size from 261–1,487 ha (647–3,688 ac) for individuals birds, and 381–1,551 ha (945–3,846 ac) for pairs (Ganey and Balda 1989b, Ganey *et al.* 1999). Little is known about habitat use by juveniles dispersing soon after fledging. Ganey *et al.* (1998) found dispersing juveniles in a variety of habitats ranging from high-elevation forests to piñon-juniper woodlands and riparian areas surrounded by desert grasslands.

Mexican spotted owls do not nest every year. The owl's reproductive pattern varies somewhat across its range. In Arizona, courtship usually begins in March with pairs roosting together during the day and calling to each other at dusk (Ganey 1988). Eggs are typically laid in late March or early April. Incubation begins shortly after the first egg is laid, and is performed entirely by the female (Ganey 1988). The incubation period is about 30 days (Ganey 1988). During incubation and the first half of the brooding period, the female leaves the nest only to defecate, regurgitate pellets, or receive prey from the male, who does all or most of the hunting (Forsman *et al.* 1984, Ganey 1988). Eggs usually hatch in early May, with nestling owls fledging 4 to 5 weeks later, and then dispersing in mid-September to early October (Ganey 1988).

Little is known about the reproductive output for the spotted owl. It varies both spatially and temporally (White *et al.* 1995), but the subspecies demonstrates an average annual rate of about one young per pair. Based on short-term population and radio tracking studies, and longer-term monitoring studies, the probability of an adult owl surviving from 1 year to the next is 80 to 90 percent. Average annual juvenile survival is considerably lower, at 6 to 29 percent, although it is believed these estimates may be artificially low due to the high likelihood of permanent dispersal from the study area, and the lag of several years before marked juveniles reappear as territory holders and are detected as survivors through recapture efforts (White *et al.* 1995). Little research has been conducted on the causes of mortality, but predation by great horned owls (Bubo virginianus), northern goshawks (Accipter gentilis), red-tailed hawks (Buteo jamaicensis), and golden eagles (Aquila chrysaetos), as well as starvation, and collisions (e.g., with cars, powerlines), may all be contributing factors.

Mexican spotted owls consume a variety of prey throughout their range, but commonly eat small- and medium-sized rodents such as woodrats (*Neotoma* spp.), peromyscid mice (*Peromyscus* spp.), and microtine voles (*Microtus* spp.). Owls also may consume bats, birds, reptiles, and arthropods (Ward and Block 1995). Each prey species uses a unique habitat, so that the differences in the owl's diet across its range likely reflect geographic variation in population densities and habitats of both the prey and the owl (Ward and Block 1995). Deer mice (*P. maniculatus*) are widespread in distribution in comparison to brush mice (*P. boylei*), which are restricted to drier, rockier substrates, with sparse tree cover. Mexican woodrats (*N. mexicana*) are typically found in areas with considerable shrub or understory tree cover and high log volumes or rocky outcrops. Mexican voles (*M. mexicanus*) are associated with high herbaceous cover, primarily grasses, whereas long-tailed voles (*M. longicaudus*) are found in dense herbaceous cover, primarily forbs, with many shrubs and limited tree cover.

Two primary reasons were cited for listing the owl as threatened in 1993: (1) Historical alteration of its habitat as the result of timber management practices, specifically the use of even-aged silviculture, and the threat of these practices continuing; and (2) the danger of catastrophic wildfire. The Recovery Plan for the owl outlines management actions that land management agencies and Indian tribes should undertake to remove recognized threats and recover the spotted owl. This critical habitat designation is based on recovery needs and guidelines identified in the Recovery Plan.

Previous Federal Actions

The entire spotted owl species (*Strix occidentalis*) was classified in the January 6, 1989, Animal Notice of Review (54 FR 554) as a category 2 candidate species. A category 2 candidate species was one for which listing may have been appropriate, but for which additional biological information was needed to support a proposed rule.

On December 22, 1989, we received a petition submitted by Dr. Robin D. Silver requesting the listing of the Mexican spotted owl as an endangered or threatened species. On February 27, 1990, we found that the petition presented substantial information indicating that listing may be warranted and initiated a status review. In conducting our review, we published a notice in the **Federal Register** (55 FR 11413) on March 28, 1990, requesting public comments and biological data on the status of the Mexican spotted owl. On February 20, 1991, we made a finding, based on the contents of the status review, that listing the Mexican spotted owl under section 4(b)(3)(B)(I) of the Act was warranted. Notice of this finding was published in the **Federal Register** on April 11, 1991 (56 FR 14678). We published a proposed rule to list the Mexican spotted owl as threatened without critical habitat in the **Federal Register** on November 4, 1991 (56 FR 56344).

We published a final rule listing the Mexican spotted owl as a threatened species on March 16, 1993 (58 FR 14248). Section 4(a)(3) of the Act requires that, to the maximum extent prudent and determinable, we designate critical habitat at the time a species is determined to be endangered or threatened. The Act's implementing regulations (50 CFR 424.12(a)(2)) state that critical habitat is not determinable if information sufficient to perform required analyses of the impacts of the designation is lacking or if the biological needs of the species are not sufficiently well known to permit identification of an area as critical habitat. At the time of listing, we found that, although considerable knowledge of owl habitat needs had been gathered in recent years, habitat maps in sufficient detail to accurately delineate these areas were not available. After the listing, we began gathering the data necessary to develop a proposed rule to designate critical habitat.

On June 23, 1993, and again on August 16, 1993, we received petitions to remove the Mexican spotted owl from

the List of Endangered and Threatened Wildlife. In subsequent petition findings published in the **Federal Register** (58 FR 49467, 59 FR 15361), we addressed the issues raised in the petitions and determined that the delisting petitions did not present substantial information indicating that delisting the Mexican spotted owl was warranted. The petitioners challenged this decision in Federal District Court in New Mexico in *Coalition of Arizona/New Mexico Counties for Stable Economic Growth* v. *United States Fish and Wildlife Service, et al.,* CIV 94–1058–MV. The district court held that the Coalition failed to show that the Service violated any procedural rules that amounted to more than harmless error and failed to demonstrate that the Service acted arbitrarily or capriciously in listing or refusing to delist the Mexican spotted owl. A judgment was issued by the district court denying the plaintiff's petition to delist the owl.

On February 14, 1994, a lawsuit was filed in Federal District Court in Arizona against the Department of the Interior for failure to designate critical habitat for the owl (*Dr. Robin Silver, et al.* v. *Bruce Babbitt, et al.,* CIV–94–0337–PHX–CAM). On October 6, 1994, the Court ordered us to '' * * * publish a proposed designation of critical habitat, including economic exclusion pursuant to 16 U.S.C. Sec. 1533(b)(2), no later than December 1, 1994, [and] publish its final designation of critical habitat, following the procedure required by statute and Federal regulations for notice and comment,'' by submitting the final rule to the **Federal Register** no later than May 27, 1995. Under an extension granted by the court, we issued the proposed rule to designate critical habitat on December 7, 1994 (59 FR 63162).

We prepared a draft economic analysis, and published a notice of its availability in the **Federal Register** on March 8, 1995 (60 FR 12728; 60 FR 12730). The publication also proposed several revisions to the original proposal, solicited additional information and comments, opened an additional 60-day comment period extending to May 8, 1995, and announced the schedule and location of public hearings. We published a final rule designating critical habitat for the Mexican spotted owl on June 6, 1995 (60 FR 29914).

After the listing of the Mexican spotted owl, a Recovery Team was appointed by our Southwestern Regional Director to develop a Recovery Plan in March 1993. The Team assembled all available data on Mexican spotted owl biology, the threats faced across the subspecies' range, current protection afforded the subspecies, and other pertinent information. Using that information, the Team developed the Recovery Plan, which was finalized in the fall of 1995. In 1996, the Southwest Region of the FS incorporated elements of the Recovery Plan into their Forest Plans.

In 1996, the Tenth Circuit Court of Appeals in *Catron County Board of Commissioners* v. *United States Fish and Wildlife Service,* 75 F.3d 1429, 1439 (10th Cir. 1996), ruled that the Service had to comply with the National Environmental Policy Act (NEPA) before designating critical habitat for two desert fish, the spikedace and loach minnow. In addition, a Federal district court in New Mexico later set aside the final rule designating critical habitat for the owl and forbid the Service from enforcing critical habitat for the owl (*Coalition of Arizona-New Mexico Counties for Stable Economic Growth* v. *U.S. Fish and Wildlife Service,* No. 95–1285–M Civil). As a result of these court rulings, we removed the critical habitat designation for the owl from the Code of Federal Regulations on March 25, 1998 (63 FR 14378).

On March 13, 2000, the United States District Court for the District of New Mexico, (*Southwest Center for Biological Diversity and Silver* v. *Babbitt and Clark,* CIV 99–519 LFG/LCS–ACE), ordered us to propose critical habitat within 4 months of the court order, and to complete and publish a final designation of critical habitat for the Mexican spotted owl by January 15, 2001. On July 21, 2000, we published a proposal to designate critical habitat for the Mexican spotted owl in Arizona, Colorado, New Mexico, and Utah, mostly on Federal lands (65 FR 45336). The initial comment period was open until September 19, 2000. During this 60-day comment period, we held six public hearings on the proposed rule. On October 20, 2000, we published a notice announcing the reopening of the comment period and announced the availability of the draft economic analysis and draft environmental assessment on the proposal to designate critical habitat for the Mexican spotted owl (65 FR 63047). The final comment period was open until November 20, 2000.

Summary of Comments and Recommendations

In the July 21, 2000, proposed rule, we requested all interested parties to submit comments or information that might bear on the designation of critical habitat for the Mexican spotted owl (65 FR 45336). The first comment period closed September 19, 2000. The comment period was reopened from October 20 to November 20, 2000, to once again solicit comments on the proposed rule and to accept comments on the draft economic analysis and draft environmental assessment (65 FR 63047). We contacted all appropriate State and Federal agencies, Tribes, county governments, scientific organizations, and other interested parties and invited them to comment. In addition, we published newspaper notices inviting public comment and announcing the public hearings in the following newspapers in New Mexico: Albuquerque Journal, Albuquerque Tribune, Sante Fe New Mexican, Silver City Daily Press, Rio Grande Sun, Las Cruces Sun, and Alamogordo Daily News; Arizona: Arizona Republic, Arizona Daily Star, Arizona Daily Sun, Sierra Vista Daily Herald Dispatch, Navajo-Hopi Observer, White Mountain Independent, Lake Powell Chronicle, Verde-Independent-Bugle, Eastern Arizona Courier, and Prescott Daily Courier; Colorado: Rocky Mountain News, Pueblo Chiefton, Denver Post, Colorado Springs Gazette, and Canon City Daily; and Utah: The Spectrum Newspaper, Southern Utah News, Salt-Lake City Tribune, and Times Independent. We held six public hearings on the proposed rule: Sante Fe (August 14, 2000) and Las Cruces (August 15, 2000), New Mexico; Tucson (August 16, 2000) and Flagstaff (August 17, 2000), Arizona; Colorado Springs, Colorado (August 21, 2000); and Cedar City, Utah (August 23, 2000). Transcripts of these hearings are available for inspection (see **ADDRESSES** section).

We solicited seven independent expert ornithologists who are familiar with this species to peer review the proposed critical habitat designation. However, only two of the peer reviewers submitted comments. Both responding peer reviewers supported the proposal. We also received a total of 27 oral and 813 written comments (the majority of written comments were in the form of printed postcards). Of those oral comments, 10 supported critical habitat designation, 14 were opposed to designation, and 3 provided additional information but did not support or oppose the proposal. Of the written comments, 756 supported critical habitat designation, 38 were opposed to designation, and 19 were neutral but provided information. We reviewed all comments received for substantive issues and new data regarding critical habitat and the Mexican spotted owl. We address all comments received

during the comment periods and public hearing testimony in the following summary of issues. Comments of a similar nature are grouped into issues.

Issue 1: Biological Concerns

(1) *Comment:* The wording of the attributes of the primary constituent elements are not consistent with the definitions of forest cover types as described in the Mexican Spotted Owl Recovery Plan, and there is a high potential for confusion over exactly which areas are included in the proposed designation. Do all of the primary constituent elements have to be present or just one, for the area to be considered critical habitat? The constituent elements described are vague (violating 50 CFR Sec. 424.12(c)) and should include the required greater detail defining what constitutes critical habitat. The boundaries are impossible to identify.

Our Response: As stated in the critical habitat designation section, the critical habitat designation is consistent with the Mexican Spotted Owl Recovery Plan and includes areas within the mapped boundaries that meet the definition of protected and restricted areas. Protected areas are areas where owls are known to occur or are likely to occur. Protected areas include, (1) 600 acres around known owl sites within mixed conifer forests or (2) pine-oak forests with slopes greater than 40 percent and where timber harvest has not occurred in the past 20 years. Restricted habitat include areas outside of protected areas which may contain Mexican spotted owls. Restricted areas include mixed conifer forest, pine-oak forest and riparian areas.

We clarified the definitions and use of the terms protected and restricted habitat and the attributes of primary constituent elements of critical habitat in this rule. This final rule describes in the greatest detail possible the primary constituent elements important to Mexican spotted owls to the extent the elements are known at this time. If new information on the primary constituent elements becomes available, we will then evaluate whether a revision of designated critical habitat is warranted, depending on funding and staffing.

Critical habitat units are defined by Universal Transverse Mercator (UTM) coordinates. A list of those coordinates can be obtained by contacting the New Mexico Ecological Services Field Office (see **ADDRESSES** section). We believe that with the revisions to the description of primary constituent elements and the availability of UTM coordinates, the boundaries should be clear.

(2) *Comment:* Some areas proposed as critical habitat units contain a considerable amount of land that is not suitable for or occupied by Mexican spotted owls, and therefore, the areas should be mapped more accurately. Some commenters questioned whether 13.5 million acres are needed for Mexican spotted owls.

Our Response: There are some areas within the critical habitat boundaries that do not, and cannot, support the primary constituent elements and are, by definition, not considered to be critical habitat, even though they are within the identified mapped boundaries. We clarified the primary constituent element descriptions to assist landowners and managers in identifying areas containing these elements. However, a lack of precise habitat location data and the short amount of time allowed by the court to complete this final designation did not allow us to conduct the fine-scale mapping necessary to physically exclude all of the areas that do not contain suitable habitat. Critical habitat is limited to areas within the mapped boundaries that meet the definition of protected and restricted habitat in the Recovery Plan. In addition, the total gross area included within critical habitat boundaries in this final rule is 4.6 million acres, and the actual area designated as critical habitat is considerably less than the 4.6 million acre figure provided in Table 1.

(3) *Comment:* Lack of forest management has resulted in successional and structural changes to forests throughout the range of Mexican spotted owl. Designation and management of critical habitat will place an additional burden on land management agencies, further inhibiting their ability to prevent and suppress catastrophic wildfire, one of the greatest threats to the forest types this species inhabits. The risk and intensity of wildfire will increase. Therefore, designating critical habitat seems contradictory to the owl's recovery.

Our Response: Critical habitat designation does not prevent actions that alleviate the risk of wildfire, nor will it have an effect on suppression activities. The maintenance of mature forest attributes in mixed conifer and pine-oak habitat types over a portion of the landscape and in areas that support existing owl territories is important to the recovery of the Mexican spotted owl; however, critical habitat designation does not emphasize the creation of these features where they do not currently exist. It also does not preclude the proactive treatments necessary to reduce the risk of catastrophic fire. Clearly, the loss of owl habitat by catastrophic fire is counter to the intended benefits of critical habitat designation.

Section 7 prohibits actions funded, authorized, or carried out by Federal agencies from jeopardizing the continued existence of a listed species or destroying or adversely modifying the listed species' critical habitat. Actions likely to ''jeopardize the continued existence'' of a species are those that would appreciably reduce the likelihood of the species' survival and recovery (50 CFR 402.02). Actions likely to ''destroy or adversely modify'' critical habitat are those that would appreciably reduce the value of critical habitat for the survival and recovery of the listed species (50 CFR 402.02). Common to both definitions is an appreciable detrimental effect on both survival and recovery of a listed species. Given the similarity of these definitions, actions likely to destroy or adversely modify critical habitat would almost always result in jeopardy to the species concerned when the habitat is occupied by the species. Therefore, the designation of critical habitat likely will not require any additional restrictions for section 7 consultations, including projects designed to reduce the risk of wildfire (e.g., prescribed burns, mechanical thinning, etc.). Furthermore, we expect that some activities may be considered to be of benefit to Mexican spotted owl habitat and, therefore, would not be expected to adversely modify critical habitat or place an additional burden on land management agencies. Examples of activities that could benefit critical habitat may include some protective measures such as fire suppression, prescribed burning, brush control, snag creation, and certain silvicultural activities such as thinning.

We agree that many vegetative communities have undergone successional and structural changes as a result of past and current management practices. These practices include, to varying degrees, the combined effects of long-term and widespread fire suppression, reduction in surface fuels, rates of tree overstory removal and regeneration treatments on cycles shorter than those found in natural disturbance regimes, inadequate control of tree densities responding to fire suppression and tree harvest, and in xeric forest types, decreases in the proportion of the landscape in stands composed of more fire resistant large-diameter trees. We also agree that the vegetative structural and landscape changes may require proactive management to restore an appropriate distribution of age classes, control

regeneration densities, and reintroduce some measure of natural disturbance processes such as fire events. This may include prescribed fire and thinning treatments, restoration of the frequency and spatial extent of such disturbances as regeneration treatments, and implementation of prescribed natural fire management plans where feasible. We consider use of such treatments to be compatible with the ecosystem management of habitat mosaics and the best way to reduce the threats of catastrophic wildfire. We will fully support land management agencies in addressing the management of fire to protect and enhance natural resources under their stewardship.

(4) *Comment:* The designation of critical habitat for the Mexican spotted owl will conflict with the management objectives of other animal and plant species and ecosystem management. The designation of critical habitat will surely have an impact on many other species of wildlife.

Our Response: Critical habitat management primarily focuses on the maintenance of habitat features in mixed conifer and pine-oak habitat types that support Mexican spotted owls, and the maintenance of good montane riparian habitat conditions. It does not emphasize the creation of these features where they do not currently exist, or do not have the potential to naturally occur. The management approach to critical habitat addresses diversity at the landscape scale by maintaining spatial variation and distribution of age classes, and at the stand scale by managing for complex within-stand structure. The methods to attain or conserve the desired measure of diversity vary, but are designed to maintain existing mature/old forest characteristics while allowing some degree of timber harvest and management of other objectives such as tree density control and prescribed fire. Older forests are productive successional stages that provide favorable environments for diverse assemblages of plants and animals. The maintenance of this under represented seral stage at landscape and stand scales will provide and enhance biological diversity. Therefore, critical habitat management does not preclude managing for other objectives or other species. In addition, critical habitat management is adaptive and will incorporate new information on the interaction between natural disturbance events and forest ecology. We continue to support sound ecosystem management and the maintenance of biodiversity.

As outlined in our final environmental assessment, in areas within the geographic range occupied by the Mexican spotted owl, native fish, wildlife, and plants may directly or indirectly benefit as a result of ecosystem protections provided through the conservation of the owl and the associated requirements of section 7 of the Act. Designation of critical habitat in areas within the geographic range potentially occupied by the owl could provide similar ecological benefits to fish, wildlife, and plants.

(5) *Comment:* How does the critical habitat designation correspond to the reasons why the owl is listed?

Our Response: The two primary reasons for listing the Mexican spotted owl as threatened were historical alteration of its habitat as the result of timber management practices, and the threat of these practices continuing; and the risk of catastrophic wildfire (58 FR 14248). The Recovery Plan outlines management actions that land managers should undertake to remove recognized threats and recover the spotted owl. This critical habitat designation is based on recovery needs identified in the Recovery Plan, and therefore promotes the reduction in the threats that necessitated listing the Mexican spotted owl. By not adversely modifying or destroying critical habitat, the threat of alteration by timber management practices is reduced.

(6) *Comment:* Your list of constituent elements and condemnation of even-aged silviculture suggests that the constituent elements must occur on every acre of the 13.5 million acres. There appears to be an attempt to idealize and maximize owl populations over a very large area. The owl is flexible, adaptable, and capable of doing well with less and surviving.

Our Response: The determination of primary constituent elements and designation of critical habitat is consistent with the Mexican Spotted Owl Recovery Plan. In the Recovery Plan, we outline steps necessary to remove the owl from the list of threatened species (see response to comment 9). The Recovery Plan recognizes that Mexican spotted owls nest, roost, forage, and disperse in a diverse array of biotic communities. The Recovery Plan provides realistic goals for the recovery of the species (including a significant increase in owl population numbers), and these goals are flexible in that they require local land managers to make site-specific decisions, including silviculture management.

(7) *Comment:* Designation of critical habitat is not needed to conserve the owl, because there is information that shows the spotted owl is doing very well; a year ago you were in the process of delisting the spotted owl, because it was doing well. What happened to that activity?

Our Response: We never proposed nor began the process of delisting the Mexican spotted owl. Although the Mexican spotted owl appears to be doing well in some areas of its range (e.g., Sacramento Ranger District, Lincoln National Forest, New Mexico), other populations may be declining (Seamans *et al.* 1999). On September 23, 1993, and April 1, 1994, we announced separate 90-day findings on two petitions to remove the Mexican spotted owl from the list of endangered and threatened wildlife (FR 58 49467, FR 59 15361). We found that the petitions did not present substantial scientific or commercial information indicating that delisting the Mexican spotted owl was warranted.

(8) *Comment:* The designation of critical habitat will not provide any additional conservation benefit to the Mexican spotted owl, which is already protected under section 7.

Our Response: We agree that designation of critical habitat will provide no additional regulatory benefit in areas already managed compatibly with owl recovery. However, the designation of critical habitat may provide some additional conservation benefit to the Mexican spotted owl on lands that are within the geographic range potentially occupied or that may become unoccupied in the future since section 7 consultations required under the listing of the species may not always be done in these areas of potentially occupied habitat. Critical habitat designation requires Federal agencies to consult with us to ensure that any action they authorize, fund, or carry out is not likely to result in the destruction or adverse modification of critical habitat.

(9) *Comment:* Several commenters questioned whether the designation of critical habitat will improve conservation of the Mexican spotted owl because the current Recovery Plan is being implemented.

Our Response: Lands managed by agencies who have formally adopted the Recovery Plan, as well as Indian Tribes who are implementing management plans compatible with owl recovery, have been excluded from the designation.

A recovery plan for the Mexican spotted owl was finalized in December 1995. This plan recommends recovery goals, strategies for varying levels of habitat protection, population and

habitat monitoring, a research program to better understand the biology of the Mexican spotted owl, and implementation procedures. In addition, we have continued working with the Mexican spotted owl recovery team since the plan was finalized. We believe this critical habitat designation is consistent with the Recovery Plan and recommendations of those team members, and will contribute to the conservation and eventual recovery of the species. Designation of critical habitat will help to implement the Recovery Plan because it helps to conserve habitat for the Mexican spotted owl; one of the actions outlined in the Recovery Plan.

(10) *Comment:* One commenter stated that not enough information is known about the total habitat requirements of the species to define critical habitat.

Our Response: Section 4(b)(2) of the Act states ''The Secretary shall designate critical habitat, and make revisions thereto, under section (a)(3) on the basis of the best scientific data available * * *'' We considered the best scientific information available at this time, as required by the Act. Our recommendation is based upon a considerable body of information on the biology of the Mexican spotted owl, as well as effects from land-use practices on their continued existence. Much remains to be learned about this species; should credible, new information become available which contradicts this designation, we will reevaluate our analysis and, if appropriate, propose to modify this critical habitat designation, depending on available funding and staffing.

Issue 2: Procedural and Legal Compliance

(11) *Comment:* The designation of critical habitat will place an additional burden on land management agencies above and beyond what the listing of the species would require. The number of section 7 consultations will increase; large areas where no Mexican spotted owls are known to occur will now be subject to section 7 consultation and will result in a waste of time and money by the affected agencies. Many Federal agencies have been making a ''no effect'' call within unoccupied suitable habitat. Now, with critical habitat there will be ''may effect'' determinations, and section 7 consultation will be required if any of the constituent elements are present.

Our Response: If a Federal agency funds, authorizes, or carries out an action that may affect either the Mexican spotted owl or its critical habitat, the Act requires that the agency consult with us under section 7 of the Act. For a project to affect critical habitat, it must affect the habitat features important to the Mexican spotted owl, which are defined in the regulation section in this final rule. Our view is and has been that any Federal action within the geographic area occupied or potentially occupied by the species that affects these habitat features should be considered a situation that ''may affect'' the Mexican spotted owl and should undergo section 7 consultation. This is true whether or not critical habitat is designated, even when the particular project site within the larger geographical area occupied by the species is not known to be currently occupied by an individual Mexican spotted owl. All areas designated as critical habitat are within the geographical area occupied or potentially occupied by the species, so Federal actions affecting essential habitat features of the species should undergo consultation. Thus, the need to conduct section 7 consultation should not be affected by critical habitat designation. As in the past, the Federal action agency will continue to make the determination as to whether their project may affect a species even when the particular project site is not known to be currently occupied by an individual Mexican spotted owl.

(12) *Comment:* Many commenters expressed concern that the Mexican Spotted Owl Recovery Plan is not being implemented, and that federally funded or authorized activities (i.e., logging, grazing, dam construction, etc.) within Mexican spotted owl habitat are not consistent with recovery for the species and/or are not undergoing section 7 consultation for potential impacts to the owl.

Our Response: We have consulted with Federal agencies on numerous projects since we issued the Recovery Plan. The Recovery Plan recognizes, as do we, that agencies must make management decisions for multiple use objectives, and that other pressing resource needs may not always be compatible with Mexican spotted owl recovery. Thus, agencies consult with us under section 7 when they propose actions that may be inconsistent with Recovery Plan recommendations, as well as when they propose actions may affect the species or critical habitat. However, there have been no consultations to date that have concluded that a proposed action is likely to jeopardize the continued existence of the Mexican spotted owl. Further, we are not aware of instances where action agencies have failed to properly consult on actions that may affect the species or its habitat.

(13) *Comment:* One commenter believes that the designation of critical habitat for the Mexican spotted owl conflicts with the Federal Land Policy and Management Act of 1976, the Mining and Minerals Policy Act of 1970, the National Materials and Minerals Policy, Research, and Development Act of 1980, and other State and county policies and plans within the four States.

Our Response: We read through the comments and information provided concerning the various acts and policies; however, the commenter failed to adequately explain the rationale for why they believe critical habitat designation conflicts with the above Federal laws and policies or other State and County policies and plans. We are unaware of any conflicts with the cited laws, policies, and plans.

(14) *Comment:* The Rocky Mountain Region of the Forest Service provided Geographic Information System (GIS) coverages for Pike and San Isabel National Forests and the Royal Gorge Resource area of the BLM. They requested that we revise the critical habitat units in these areas by reducing the size of one critical habitat unit and increasing the size of another. The FS indicated that suggested revisions are based upon digital elevation models, elevation, vegetation, Mexican spotted owl surveys, and BLM land management designations (i.e., wilderness study areas). There was an expressed concern that much of the area within the proposed critical habitat boundaries does not contain the combination of primary constituent elements and attributes to meet the definition of critical habitat and should not be included.

Our Response: We considered the information provided by the commenter and determined that the critical habitat units contain areas that meet the definition of protected areas in the Recovery Plan (e.g., slopes greater than 40 percent where timber harvest has not occurred in the past 20 years). The BLM land management designations (i.e., wilderness study areas) do not provide ''special management considerations or protections,'' pursuant to the definition of critical habitat in section 3 of the Act. Likewise, we have no formal documentation (e.g., consultation records) that demonstrates whether the FS or BLM is integrating the Mexican Spotted Owl Recovery Plan into their activities. Thus, these lands do not meet our criteria for exclusion and we conclude the areas should be designated as they were originally proposed.

We recognize that some areas within the critical habitat units do not contain protected habitat or restricted habitat. These areas are not considered critical habitat. Critical habitat is limited to areas within the mapped boundaries that meet the definition of protected or restricted habitat as described in the Recovery Plan.

(15) *Comment:* Some commenters expressed concern that there are areas containing Mexican spotted owls, but these were not within the critical habitat boundaries. Additional areas not identified in the proposed rule should be designated critical habitat.

Our Response: The critical habitat designation did not include some areas that are known to have widely scattered owl sites, low population densities, and/or marginal habitat quality, which are not considered to be essential to this species' survival or recovery. Section 3(5)(C) of the Act and our regulations (50 CFR Sec. 424.12(e)) state that, except in certain circumstances, not all suitable or occupied habitat be designated as critical habitat, rather only those areas essential for the conservation of the species. Additionally, section 4(b)(4) of the Act requires that areas designated as critical habitat must first be proposed as such. Thus, we cannot make additions in this final rule to include areas that were not included in the proposed rule. Designation of such areas would require a new proposal and subsequent final rule.

If, in the future, we determine from information or analysis that those areas designated in this final rule need further refinement or additional areas are identified which we determine are essential to the conservation of the species and require special management or protection, we will evaluate whether a revision of critical habitat is warranted at that time.

(16) *Comment:* Why are areas included in the designation that are not presently occupied by the Mexican spotted owl?

Our Response: The inclusion of both currently occupied and potentially occupied areas in this critical habitat designation is in accordance with section 3(5)(A) of the Act, which provides that areas outside the geographical area currently occupied by the species may meet the definition of critical habitat upon a determination that they are essential for the conservation of the species. Our regulations also provide for the designation of areas outside the geographical area currently occupied if we find that a designation limited to its present range would be inadequate to ensure the conservation of the species (50 CFR 424.12(e)). The species' Recovery Plan recommends that some areas be managed as ''restricted habitat'' in order to provide for future population expansion and to replace currently occupied areas that may be lost through time. We believe that such restricted habitat is essential and necessary to ensure the conservation of the species.

(17) *Comment:* If land has dual ownership of private and Federal, is it critical habitat? The land in question is under private ownership and the mineral rights are owned by the BLM.

Our Response: The surface ownership is what would contain the primary constituent elements of critical habitat. Because the surface ownership is private and we are not including private land in this designation, we would not consider the lands to be designated critical habitat. However, if a Federal agency (e.g., BLM) funds, authorizes, or carries out an action (e.g., mineral extraction) that may affect the Mexican spotted owl or its habitat, the Act requires that the agency consult with us under section 7 of the Act. This is required whether or not critical habitat is designated for a listed species.

(18) *Comment:* Fort Carson, Colorado, provided information during the comment period that indicated the Mexican spotted owl is not known to nest on the military installation and the species is a rare winter visitor. Protected and restricted habitat is also not known to exist on Fort Carson. Further, Fort Carson is updating the Integrated Natural Resources Management Plan (INRMP) to include specific guidelines and protection measures that have been recently identified through informal consultation with us. The INRMP will include measures to provide year-round containment and suppression of wildland fire and the establishment of a protective buffer zone around each roost tree. The target date of completion for this revision is early 2001. Fort Carson, through consultation with us, indicated they will ensure that the INRMP will meet the criteria for exclusion. They also provided additional information and support to indicate that no protected or restricted habitat exists on the base, and asked to be excluded from the final designation.

Our Response: We agree that Fort Carson should be excluded from the final designation (see discussion under Exclusions section). Nevertheless, Federal agencies are already required to consult with us on activities with a Federal nexus (i.e., when a Federal agency is funding, permitting, or in some way authorizing a project) when their activities may affect the Mexican spotted owl. For example, if Mexican spotted owls are present during certain times of the year (e.g., winter) and there is the potential for Fort Carson's activities to affect the species, the Act requires they consult with us under section 7, regardless of critical habitat designation.

(19) *Comment:* How will the exclusion of certain lands (e.g., State, private, Tribal) affect recovery and delisting of the Mexican spotted owl?

Our Response: In accordance with section 3(5)(A)(i) of the Act and regulations at 50 CFR 424.12, we are required to base critical habitat designation on the best scientific and commercial data available and to consider those physical and biological features (primary constituent elements) that are essential to conservation of the species and that may require special management considerations or protection. We designated critical habitat for those lands we determined are essential to conservation of the Mexican spotted owl. We did not include certain lands (e.g., State, private, and Tribal) because we determined these lands are either not essential to the recovery of the Mexican spotted owl or are already managed in a manner compatible with Mexican spotted owl conservation. The exclusion of State, private, and tribal lands in the designation of critical habitat for the Mexican spotted owl will not affect the recovery and future delisting of the species. Whether or not a species has designated critical habitat, it is protected both from any actions resulting in an unlawful take and from Federal actions that could jeopardize the continued existence of the species.

(20) *Comment:* The areas proposed as critical habitat in Colorado make up 4.2 percent of the total proposed critical habitat. Much of the areas proposed in Colorado do not contain the primary constituent elements for critical habitat of the Mexican spotted owl. It is difficult to understand how the small amount of habitat proposed in Colorado is essential for the survival and recovery of the owl. The current tree stocking levels, species composition, and stand structure of areas proposed as critical habitat in Colorado do not currently nor are they likely to meet the definition of threshold habitat as defined in the Recovery Plan.

Our Response: We carefully considered the information provided with the above comment. If habitat within the mapped boundaries does not meet the definition of protected or restricted habitat as described in the Recovery Plan, then it is not considered critical habitat. We agree that not all of the land within the critical habitat

boundaries in Colorado supports protected and restricted habitat and, therefore, is not critical habitat.

(21) *Comment:* The statement that continued grazing in upland habitat will not adversely affect or modify critical habitat is unsubstantiated and is counter to FS information that suggests grazing may affect Mexican spotted owl prey and increase the susceptibility of owl habitat to fire.

Our Response: Our data indicate that continued grazing in upland habitat has the potential to adversely impact the owl or its designated critical habitat. We concur with reports that there may be a link between continued grazing and an effect to Mexican spotted owl prey populations. We understand that the natural fire regime of frequent low-intensity and spatially extensive understory fire events has been interrupted by a variety of reasons (e.g., grazing eliminating fine fuels, suppression of wildfires, etc). When grazing activities involve Federal funding, a Federal permit, or other Federal action, consultation is required when such activities have the potential to adversely affect the Mexican spotted owl or its critical habitat. The consultation will analyze and determine to what degree those activities impact the Mexican spotted owl.

(22) *Comment:* A premise for the proposed rule is that the Service was ordered by the court on March 13, 2000, to designate critical habitat by January 15, 2001. The court may not order critical habitat to be designated. Rather, the court may order the Service to make a decision on whether to designate critical habitat. The designation of critical habitat is an action that is ultimately discretionary, and the Service must apply the criteria in the ESA and its regulations to decide whether to designate critical habitat. Thus, the Service should seek correction of that court order and reconsider whether and to what extent critical habitat should be designated.

Our Response: The commenter is correct that we cited a court order requiring actual designation of critical habitat. However, recent case law has indicated that critical habitat designation is required for listed species except in only rare instances (for example, *Natural Resources Defense Council* versus *U.S. Department of the Interior* 113 F. 3d 1121 (9th Cir. 1997); *Conservation Council for Hawaii* versus *Babbitt*, 2 F. Supp. 2d 1280 (D. Hawaii 1998)). Thus, we saw no reason to challenge the court order.

(23) *Comment:* Are lands within a National Park that are already protected, but proposed as wilderness areas, considered critical habitat?

Our Response: Yes, we consider lands that are within critical habitat boundaries, that contain the primary constituent elements, and required special management and protection, as critical habitat, regardless of whether they are currently designated as wilderness.

(24) *Comment:* Military aircraft overflights and ballistic missile testing activities have no adverse effect on Mexican spotted owl critical habitat.

Our Response: The designation of critical habitat will not impede the ability of military aircraft to conduct overflights nor to conduct ballistic missile testing activities. Activities such as these that do not affect designated critical habitat will not require section 7 consultation. However, proposed low-level military aircraft overflights that could potentially affect the Mexican spotted owl will be reviewed during the consultation process as they have in the past.

(25) *Comment:* Explain the rationale for excluding, by definition, State and private lands from the proposed designation; there are documented nesting sites for the Mexican spotted owl in Colorado located on State-leased lands; State and private lands should be included; the majority of owl locations are from Federal lands because no one is doing surveys on private and State lands.

Our Response: Although we are aware of some Mexican spotted owl locations on State and private lands, the majority of owl locations are from Federal and Tribal lands. Thus, we believe that Mexican spotted owl conservation can best be achieved by management of Federal and Tribal lands, and determined that State and private lands are not essential to the species' recovery.

(26) *Comment:* Several commenters asked whether projects that have obtained a biological opinion pursuant to section 7 of the Act would be required to reinitiate consultation to address the designation of critical habitat. Will the FS have to reinitiate consultation on their Forest Plans when critical habitat is designated?

Service Response: In the case of projects that have undergone section 7 consultation and where that consultation did not address potential destruction or adverse modification of critical habitat for the Mexican spotted owl, reinitiation of section 7 consultation may be required. We expect that projects that do not jeopardize the continued existence of the Mexican spotted owl will not likely destroy or adversely modify its critical habitat and no additional modification to the project would be required.

(27) *Comment:* The El Paso Natural Gas Company questioned whether the designation of critical habitat will require consultation for routine maintenance and operations. For example, if a linear pipeline project crosses State, private, and FS lands, will consultation be required?

Our Response: Federal agencies are already required to consult with us on activities with a Federal nexus (i.e., when a Federal agency is funding, permitting, or in some way authorizing a project) when their activities may affect the species. We do not anticipate additional regulatory requirements beyond those required by listing the Mexican spotted owl as threatened. For routine maintenance and operations of public utilities or if a linear pipeline project crosses State, private, and FS lands and does not affect critical habitat, consultation will not be required. If maintenance activities would affect critical habitat and there is a Federal nexus, then section 7 consultation will be necessary.

(28) *Comment:* The National Forests in Arizona have amended their land and resource management plans to incorporate the Mexican Spotted Owl Recovery Plan. Consistent with the Service's justification for not designating critical habitat on certain tribal lands because habitat management plans are still valid and being implemented on these lands, the designation of critical habitat on FS lands may not be necessary because of existing land and resource management plans that are responsive to Mexican spotted owl conservation.

Our Response: We determined that FS lands in Arizona and New Mexico do not meet the definition of critical habitat, and have not been included in this designation (see Exclusions section).

(29) *Comment:* Several commenters questioned what the phrase, ''may require special management considerations,'' means; what kind of management activities might be implemented?

Our Response: Under the definition of critical habitat, an area must be both essential to a species' conservation and require ''special management considerations or protections.'' Our interpretation is that special management is not required if adequate management or protections are already in place. Adequate special management or protection is provided by a legally operative plan that addresses the maintenance and improvement of the

primary constituent elements important to the species and manages for the long term conservation of the species (see Exclusions Under Section 3(5)(A) Definition section).

(30) *Comment:* Maps and descriptions provided are vague and violate the Act and 50 CFR Sec. 424.12(c).

Our Response: The required descriptions of areas designated as critical habitat are available from the New Mexico Ecological Services Field Office (see **ADDRESSES** section), as are more detailed maps and GIS digital files. The maps published in the **Federal Register** are for illustration purposes, and the amount of detail that can be published is limited. If additional clarification is necessary, contact the New Mexico Ecological Services Field Office.

Issue 3: National Environmental Policy Act (NEPA) Compliance and Economic Analysis

(31) *Comment:* Several commenters questioned the adequacy of the Environmental Assessment (EA) and other aspects of our compliance with NEPA. They believe the Fish and Wildlife Service should prepare an Environmental Impact Statement (EIS) on this action.

Our Response: The commenters did not provide sufficient rationale to explain why they believed the EA was inadequate and an EIS necessary. An EIS is required only in instances where a proposed Federal action is expected to have a significant impact on the human environment. In order to determine whether designation of critical habitat would have such an effect, we prepared an EA of the effects of the proposed designation. We made the draft EA available for public comment on October 20, 2000, and published notice of its availability in the **Federal Register** (65 FR 63047). Following consideration of public comments, we prepared a final EA and determined that critical habitat designation does not constitute a major Federal action having a significant impact on the human environment. That determination is documented in our Finding of No Significant Impact (FONSI). Both the final EA and FONSI are available for public review (see **ADDRESSES** section).

(32) *Comment:* Several local and county governments, a coalition of Arizona and New Mexico counties, and a Soil and Water Conservation District requested Joint Lead Agency or Cooperating Agency status in preparation of the NEPA documents for this critical habitat designation. Why were those requests denied?

Our Response: The Village of Cloudcroft; Otero County, New Mexico; the Board of Coalition of Arizona/New Mexico Counties for Stable Economic Growth; and the San Francisco Soil and Water Conservation District, New Mexico, requested Joint Lead Agency status to assist us in preparation of the NEPA documents on the critical habitat designation. When preparing an EIS, a Joint Lead Agency may be a Federal, State, or local agency. However, a cooperating agency may only be another Federal agency (40 CFR 1501.5 and 1501.6). In our EA on the proposed action, we determined that an EIS was not necessary. Thus, the EA resulted in a FONSI, and the issue of Joint Lead Agency or Cooperating Agency status on preparation of an EIS became moot.

(33) *Comment:* The draft economic analysis failed to adequately estimate the potential economic impacts to landowners regarding various forest management practices.

Our Response: The economic analysis addressed a variety of forest management concerns that were voiced by stakeholders (e.g., fire and grazing management, timber harvesting, etc.). These activities are usually subject to a Federal nexus because the actions involve Federal funding, permitting, or authorizations. Although critical habitat designation may result in new or reinitiated consultations associated with activities on Federal lands, we believe these activities likely will not result in additional modifications beyond that required by listing. Whether or not a species has designated critical habitat, it is protected both from any actions resulting in an unlawful take and from Federal actions that could jeopardize the continued existence of the species.

(34) *Comment:* Several commenters voiced concern that they were not directly contacted for their opinions on the economic impacts of critical habitat designation.

Our Response: It was not feasible to contact every potential stakeholder in order for us to develop a draft economic analysis. We believe we were able to understand the issues of concern to the local communities based on public comments submitted on the proposed rule and draft economic analysis, on transcripts from public hearings, and from detailed discussions with Service representatives. To clarify issues, we solicited information and comments from representatives of Federal, State, Tribal, and local government agencies, as well as some landowners.

(35) *Comment:* The draft Economic Analysis and Environmental Assessment were not available for comment during the first comment period; the opportunity for public comment on these documents was limited.

Our Response: We published the proposed critical habitat determination in the **Federal Register** on July 21, 2000, and invited public comment for 60 days. We used comments received on the proposed critical habitat to develop the draft economic analysis. We reopened the comment period from October 20 to November 20, 2000, to allow for comments on the draft Economic Analysis, Environmental Assessment, and proposed rule. We believe that sufficient time was allowed for public comment given the short time frame ordered by the court.

(36) *Comment:* Your draft Economic Analysis did not consider watersheds, nor water rights, State water rights, nor adjudication with Texas on water rights, nor the effect on water rights of any of the people within those watersheds.

Our Response: In conducting our economic analysis, we read through these comments and concluded that the commenter failed to adequately explain the rationale for why they believe critical habitat designation for the Mexican spotted owl impacts watersheds or water rights.

(37) *Comment:* The draft economic analysis and proposed rule do not comply with Executive Order 12866, which requires each Federal agency to assess the costs and benefits of proposed regulations.

Our Response: We determined that this rule will not have an annual economic effect of $100 million or adversely affect an economic sector, productivity, jobs, the environment, or other units of government. Thus, a cost-benefit analysis is not required for purposes of Executive Order 12866 (see Required Determinations section).

(38) *Comment:* The draft economic analysis, draft environmental assessment, and proposed rule failed to adequately estimate and address the potential economic and environmental consequences and how timber, fuel wood, land acquisition and disposal, oil and gas development, and mining would be impacted by the designation.

Our Response: We solicited further information and comments associated with the potential impacts of designating critical habitat for the Mexican spotted owl. We read through all comments received during the two comment periods and have concluded that further information was not provided on how the designation of critical habitat would result in economic or environmental consequences beyond those already addressed in the economic analysis,

environmental assessment, or this final rule.

(39) *Comment:* One commenter questioned whether publishing the proposed rule on July 21, 2000, and not releasing the EA until October 20, 2000, violated the intent of NEPA by being pre-decisional. Others contend that the range of alternatives considered in the EA was inadequate.

Our Response: We began work on our Environmental Assessment at approximately the same time we began to draft the proposed rule. Our Proposed Alternative in the EA was to finalize the designation of critical habitat as described in the proposed rule published in the **Federal Register** on July 21, 2000 (65 FR 45336). The draft EA considered a no-action alternative and four action alternatives. We believe our EA was consistent with the spirit and intent of NEPA, and was not pre-decisional.

(40) *Comment:* The assumption applied in the economic analysis that the designation of critical habitat will cause no impacts above and beyond those caused by listing of the species is faulty, legally indefensible, and contrary to the ESA. ''Adverse modification'and ''jeopardy'' are different, will result in different impacts, and should be analyzed as such in the economic analysis.

Our Response: The statutory language in the Act prohibits us from considering economic impacts when determining whether or not a species should be added to the list of federally protected species. As a result, the designation of critical habitat for the Mexican spotted owl has been evaluated in the economic context known as ''with'' critical habitat and ''without'' critical habitat (i.e., the effects of listing alone). Elsewhere in this rule we discuss that the definitions of ''jeopardy'' to the species and ''adverse modification'' of critical habitat are nearly identical and that the designation of critical habitat will not have significant economic impacts above and beyond those already imposed by listing the Mexican spotted owl. Further, it is our position that both within and without critical habitat, Federal agencies should consult with us if a proposed action is (1) within the geographic areas occupied and potentially occupied by the species, whether or not owls have been detected on the specific project site; (2) the project site contains habitat features that can be used by the species; and (3) the proposed action is likely to affect that habitat (see response to comment 12).

(41) *Comment:* The proposed designation of critical habitat will impose economic hardship on private landowners. There is an expressed concern that the proposed critical habitat designation would have serious financial implications for grazing and sources of revenue that depend upon Federal ''multiple-use'' lands. The designation will have harmful impacts on the quality of life, education, and economic stability of small towns.

Our Response: As stated in the economic analysis, the proposed rule to designate critical habitat for the Mexican spotted owl is adding few, if any, new requirements to the current regulatory process. Since the adverse modification standard for critical habitat and the jeopardy standard are almost identical, the listing of the Mexican spotted owl itself initiated the requirement for consultation. The critical habitat designation adds no additional requirements not already in place due to the species' listing.

Issue 4: Tribal Issues

(42) *Comment:* Why are tribal lands included in the proposed designation?

Our Response: In our proposal to designate critical habitat, we found that lands of the Mescalero Apache, San Carlos Apache, and Navajo Nation likely met the definition of critical habitat with respect to the Mexican spotted owl, and portions of those lands were proposed as critical habitat. However, we worked with the tribes in developing voluntary measures adequate to conserve Mexican spotted owls on tribal lands. The Navajo Nation and Mescalero Apache Tribe completed management plans for the Mexican Spotted Owl that are consistent with the Recovery Plan. The San Carlos Apache Reservation management plan is substantially complete and is expected to be completed in March 2001. We reviewed a draft of their plan and found it to be consistent with the Recovery Plan. We determined that adequate special management is being provided for the Mexican spotted owl on the Navajo Nation and Mescalero Apache lands and, therefore, they were not included in the designation since they do not meet the definition of critical habitat (see Exclusions Under Section 3(5)(A) Definition section of this rule for further information). In the case of the San Carlos Apache Reservation we found, in accordance with section 4(b)(2) of the Act, that the benefits of excluding their lands outweighed the benefits of including them in the designation (see American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act section of this rule for further information).

(43) *Comment:* The Mescalero Apache Tribe believes the Service did not adequately consider how the designation of critical habitat on tribal lands will benefit the Mexican spotted owl or how the designation will impact the Mescalero Apache Reservation.

Our Response: We did not include the Mescalero Apache or other tribal lands in the final designation. As stated in our response above, we determined that adequate special management is being provided for the Mexican spotted owl on Mescalero Apache lands and, therefore, they were not included in the designation since they do not meet the definition of critical habitat.

Issue 5: Other Relevant Issues

(44) *Comment:* The designation of critical habitat would constitute a ''government land grab.'' The Mexican spotted owl is merely the vehicle by which environmental groups plan to stop harvest of ''old growth'' forests.

Our Response: The designation of critical habitat has no effect on non-Federal actions taken on private or State lands, even if the land is within the mapped boundary of designated critical habitat, because these lands were specifically excluded from the designation. We believe that the designation of critical habitat for the Mexican spotted owl does not impose any additional restrictions on land managers/owners within those areas designated as critical habitat, beyond those imposed due to the listing of the Mexican spotted owl (see response to comment 11). All landowners are responsible to ensure that their actions do not result in the unauthorized take of a listed species, and all Federal agencies are responsible to ensure that the actions they fund, permit, or carry out do not result in jeopardizing the continued existence of a listed species, regardless of where the activity takes place.

We also note that this designation is consistent with the Recovery Plan. While the Recovery Plan does not explicitly protect ''old-growth'' forests, it does recommend that large trees and other forest attributes that may be found in ''old-growth'' forests be retained to the extent practicable within certain forest types. Large trees are important ecosystem components, have been much reduced in the Southwest, and take many decades to replace once they are lost.

(45) *Comment:* The Mexican spotted owl by its very name is not exclusive to the United States. Typical of most Mexican fauna entering the United States, it appears rarer than it really is. Therefore, it is Mexico's duty to protect it.

Our Response: A significant portion of the species' entire population occurs in the United States. Furthermore, according to CFR 402.12(h) ''Critical habitat shall not be designated with foreign countries or in other areas outside of the United States jurisdiction.''

(46) *Comment:* Why were the public hearings in Utah held in the southwestern part of the State when most of the critical habitat is in the southeastern portion?

Our Response: The Act requires that at least one public hearing be held if requested. We held six public hearings throughout the four state region. We selected Cedar City, Utah, for a hearing location because of its proximity to four of the five proposed critical habitat units in the State.

(47) *Comment:* The designation of critical habitat abrogates the Treaty of Guadalupe Hidalgo. You do not have constitutional authority to do so.

Our Response: The Treaty of Guadalupe Hidalgo resulted in grants of land made by the Mexican government in territories previously appertaining to Mexico, and remaining for the future within the limits of the United States. These grants of land were respected as valid, to the same extent that the same grants would have been valid within the territories if the grants of land had remained within the limits of Mexico. The designation of critical habitat has no effect on non-Federal actions taken on private land (*e.g.*, land grants), even if the private land is within the mapped boundary of designated critical habitat because we excluded State and private lands by definition. Critical habitat has possible effects on activities by private landowners only if the activity involves Federal funding, a Federal permit, or other Federal action. If such a Federal nexus exists, we will work with the landowner and the appropriate Federal agency to ensure that the landowner's project can be completed without jeopardizing the species or adversely modifying critical habitat. The designation of critical habitat for the Mexican spotted owl in no way abrogates any treaty of the United States.

(48) *Comment:* Many commenters were concerned that the designation of critical habitat would prohibit recreational and commercial activities from taking place.

Our Response: As stated in the economic analysis and this final rule, we do not believe the designation of critical habitat will have adverse economic effects on any landowner above and beyond the effects of listing of the species. It is correct that projects funded, authorized, or carried out by Federal agencies, and that may affect critical habitat, must undergo consultation under section 7 of the Act. This provision includes commercial activities. However, as stated elsewhere in this final rule, we do not expect the result of those consultations to result in any restrictions that would not be required as a result of listing the Mexican spotted owl as a threatened species.

Designation of critical habitat does not preclude commercial projects or activities such as riparian restoration, fire prevention/management, or grazing if they do not cause an adverse modification of critical habitat. We will work with Federal agencies that are required to consult with us under section 7 of the Act to ensure that land management will not adversely modify critical habitat (see responses to prior comments).

Critical Habitat

Critical habitat is defined in section 3(5)(A) of the Act as—(i) the specific areas within the geographic area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features (I) essential to the conservation of the species and (II) that may require special management considerations or protection and; (ii) specific areas outside the geographic area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. The term ''conservation,'' as defined in section 3(3) of the Act, means ''the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary'' (*i.e.*, the species is recovered and removed from the list of endangered and threatened species).

Section 4(b)(2) of the Act requires that we base critical habitat designation on the best scientific and commercial data available, taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat. We may exclude areas from critical habitat designation if we determine that the benefits of exclusion outweigh the benefits of including the areas as critical habitat, provided the exclusion will not result in the extinction of the species.

In order to be included in a critical habitat designation, the habitat must first be ''essential to the conservation of the species.'' Critical habitat designations identify, to the extent known using the best scientific and commercial data available, habitat areas that provide essential life cycle needs of the species (*i.e.*, areas on which are found the primary constituent elements, as defined at 50 CFR 424.12(b)).

Section 4 requires that we designate critical habitat at the time of listing and based on what we know at the time of the designation. When we designate critical habitat at the time of listing or under short court-ordered deadlines, we will often not have sufficient information to identify all areas of critical habitat. We are required, nevertheless, to make a decision and thus must base our designations on what, at the time of designation, we know to be critical habitat.

Within the geographic area occupied by the species, we will designate only areas currently known to be essential. We will not speculate about what areas might be found to be essential if better information became available, or what areas may become essential over time. If the information available at the time of designation does not show that an area provides essential life cycle needs of the species, then the area should not be included in the critical habitat designation.

Our regulations state that, ''The Secretary shall designate as critical habitat areas outside the geographic area presently occupied by the species only when a designation limited to its present range would be inadequate to ensure the conservation of the species.'' (50 CFR 424.12(e)). Accordingly, when the best available scientific and commercial data do not demonstrate that the conservation needs of the species require designation of critical habitat outside of occupied areas, we will not designate critical habitat in areas outside the geographic area occupied by the species.

The Service's Policy on Information Standards Under the Endangered Species Act, published in the **Federal Register** on July 1, 1994 (Vol.59, p. 34271), provides criteria, establishes procedures, and provides guidance to ensure that decisions made by the Service represent the best scientific and commercial data available. It requires Service biologists, to the extent consistent with the Act and with the use of the best scientific and commercial data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat. When determining which areas are critical habitat, a primary source of information should be the listing package for the species. Additional information may be obtained from a recovery plan, articles in peer-

reviewed journals, conservation plans developed by states and counties, scientific status surveys and studies, and biological assessments or other unpublished materials (*i.e.* gray literature).

Habitat is often dynamic, and species may move from one area to another over time. Furthermore, we recognize that designation of critical habitat may not include all of the habitat areas that may eventually be determined to be necessary for the recovery of the species. For these reasons, all should understand that critical habitat designations do *not* signal that habitat outside the designation is unimportant or may not be required for recovery. Areas outside the critical habitat designation will continue to be subject to conservation actions that may be implemented under Section 7(a)(1) and to the regulatory protections afforded by the section 7(a)(2) jeopardy standard and the Section 9 take prohibition, as determined on the basis of the best available information at the time of the action. We specifically anticipate that federally funded or assisted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans, or other species conservation planning efforts if new information available to these planning efforts calls for a different outcome.

Primary Constituent Elements

In accordance with section 3(5)(A)(I) of the Act and regulations at 50 CFR 424.12, we are required to base critical habitat designation on the best scientific and commercial data available and to consider those physical and biological features (primary constituent elements) that are essential to conservation of the species and that may require special management considerations or protection. Such requirements include, but are not limited to—space for individual and population growth, and for normal behavior; food, water, or other nutritional or physiological requirements; cover or shelter; sites for breeding, reproduction, or rearing of offspring; and habitats that are protected from disturbance or are representative of the historic geographical and ecological distributions of a species.

The primary constituent elements essential to the conservation of the Mexican spotted owl include those physical and biological features that support nesting, roosting, and foraging. These elements were determined from studies of Mexican spotted owl behavior and habitat use throughout the range of the owl. Although the vegetative communities and structural attributes used by the owl vary across the range of the subspecies, they consist primarily of warm-temperate and cold-temperate forests, and, to a lesser extent, woodlands and riparian deciduous forests. The mixed-conifer community appears to be the most frequently used community throughout most portions of the subspecies' range (Skaggs and Raitt 1988; Ganey and Balda 1989, 1994; USDI 1995). Although the structural characteristics of Mexican spotted owl habitat vary depending on uses of the habitat (*e.g.*, nesting, roosting, foraging) and variations in the plant communities over the range of the subspecies, some general attributes are common to the subspecies' life-history requirements throughout its range.

The Mexican Spotted Owl Recovery Plan provides for three levels of habitat management: protected areas, restricted areas, and other forest and woodland types. The Recovery Plan recommends that Protected Activity Centers (PACs) be designated around known owl sites. A PAC would include an area of at least 243 ha (600 ac) that includes the best nesting and roosting habitat in the area. Based on available data, the recommended size for a PAC includes, on average, 75 percent of the foraging area of an owl. Protected habitat includes PACs and all areas within mixed conifer or pine-oak types with slopes greater than 40 percent, where timber harvest has not occurred in the past 20 years.

Restricted habitat includes mixed conifer forest, pine-oak forest, and riparian areas outside of protected areas described above. Restricted habitat should be managed to retain or attain the habitat attributes believed capable of supporting nesting and roosting owls as depicted in Table III.B.1. on page 92 of the Recovery Plan. These areas are essential to the conservation of the species because the Recovery Plan identifies these areas as providing additional owl habitat that is needed for recovery.

Other forest and woodland types (ponderosa pine, spruce-fir, piñon-juniper, and aspen) are not expected to provide nesting or roosting habitat for the Mexican spotted owl (except when associated with rock canyons). Thus, these other forest and woodland types are not considered to be critical habitat unless specifically delineated within PACs.

Existing man-made features and structures within the boundaries of the mapped units, such as buildings, roads, aqueducts, railroads, airports, other paved areas, and other urban areas, do not contain Mexican spotted owl habitat and are not considered critical habitat.

We determined the primary constituent elements for Mexican spotted owl from studies of their habitat requirements and the information provided in the Recovery Plan and references therein. Since owl habitat can include both canyon and forested areas, we identified primary constituent elements in both areas. Within PACs, primary constituent elements include all vegetation and other organic material within the 243 ha (600 ac) areas delineated by land managers. Within restricted habitat (described in the Recovery Plan,Volume I, part III, pages 84–95, including Table III.B.1), the primary constituent elements that occur in mixed conifer, pine-oak, and riparian forest types, which currently contain or may attain the habitat attributes believed capable of supporting nesting and roosting owls include:

—High basal area of large diameter trees;
—Moderate to high canopy closure;
—Wide range of tree sizes suggestive of uneven-age stands;
—Multi-layered canopy with large overstory trees of various species;
—High snag basal area;
—High volumes of fallen trees and other woody debris;
—High plant species richness, including hardwoods; and
—Adequate levels of residual plant cover to maintain fruits, seeds, and regeneration to provide for the needs of Mexican spotted owl prey species.

For canyon habitat, the primary constituent elements include one or more of the following attributes:

—Cooler and often more humid conditions than the surrounding area;
—Clumps or stringers of trees and/or canyon wall containing crevices, ledges, or caves;
—High percent of ground litter and woody debris; and
—Riparian or woody vegetation (although not at all sites).

The forest habitat attributes listed above usually develop with increasing forest age, but their occurrence may vary by location, past forest management practices or natural disturbance events, forest type, and productivity. These characteristics may also develop in younger stands, especially when the stands contain remnant large trees or patches of large trees from earlier stands. Certain forest management

practices may also enhance tree growth and mature stand characteristics where the older, larger trees are allowed to persist.

Canyon habitats used for nesting and roosting are typically characterized by cooler conditions found in steep, narrow canyons, often containing crevices, ledges, and/or caves. These canyons frequently contain small clumps or stringers of ponderosa pine, Douglas fir, white fir, and/or piñon-juniper. Deciduous riparian and upland tree species may also be present. Adjacent uplands are usually vegetated by a variety of plant associations including piñon-juniper woodland, desert scrub vegetation, ponderosa pine-Gambel oak, ponderosa pine, or mixed conifer. Owl habitat may also exhibit a combination of attributes between the forested and canyon types.

Criteria for Identifying Critical Habitat Units

In designating critical habitat for the owl, we reviewed the overall approach to the conservation of the species undertaken by local, State, tribal, and Federal agencies and private individuals and organizations since the species' listing in 1993. We also considered the features and overall approach identified as necessary for recovery, as outlined in the species' Recovery Plan. We reviewed the previous proposed (59 FR 63162) and final critical habitat rules (60 FR 29914) for the owl, new location data, habitat requirements and definitions described in the Recovery Plan, and habitat and other information provided during the two comment periods, as well as utilized our own expertise.

The previous critical habitat designation included extensive use and evaluation of owl habitat and territory maps, vegetation maps, aerial photography, and field verification to identify areas for designation as critical habitat. We considered several qualitative criteria (currently suitable habitat, large contiguous blocks of habitat, occupied habitat, rangewide distribution, the need for special management or protection, adequacy of existing regulatory mechanisms) when identifying critical habitat areas. We finalized the previous designation prior to the completion of the Recovery Plan for the Mexican Spotted Owl. For this new designation, we examined the previously designated critical habitat units, but relied primarily on the Recovery Plan to provide guidance. We expanded or combined previous units to comply with the Recovery Plan. We also included wilderness areas and other areas containing protected and restricted habitat areas as defined in the Recovery Plan. Some lands were excluded if they did not meet our definition of critical habitat (see discussion below).

Critical Habitat Designation

The designated critical habitat constitutes our best assessment of areas needed for the conservation of the owl and that are in need of special management or protection. The areas designated are within the range of the species, and include (1) most known occupied sites, (2) some sites not surveyed but suspected to be occupied, and (3) other sites surveyed without detecting owls, but believed to be capable of periodically supporting owls. We consider these areas to be within the geographic range occupied or potentially occupied by the species. We've included these areas in the designation based on information contained within the Recovery Plan that finds them to be essential to the conservation of the species because they either currently support populations of the owl, or because they currently possess the necessary habitat requirements for nesting, roosting, and foraging (see description of primary constituent elements). All protected habitat and restricted habitat as described in the Recovery Plan that is within the designated boundaries, is considered critical habitat.

Critical habitat units are designated in portions of McKinley, Rio Arriba, Sandoval, Socorro, and Taos, Counties in New Mexico; Apache, Cochise, Coconino, Graham, Mohave, and Pima Counties in Arizona; Carbon, Emery, Garfield, Grand, Iron, Kane, San Juan, Washington, and Wayne Counties in Utah; and Custer, Douglas, El Paso, Fremont, Huerfano, Jefferson, Pueblo, and Teller Counties in Colorado. Precise legal descriptions of each critical habitat unit are on file at the New Mexico Ecological Services Field Office, as are digital files of each unit (see **ADDRESSES** section).

This critical habitat designation does not include tribal lands; FS lands within Arizona and New Mexico; Fort Carson, Colorado; and low-density areas (see discussion under Exclusions Under Section 3(5)(A) Definition). This critical habitat designation does include FS lands in Utah and Colorado, and other Federal lands used by currently known populations of Mexican spotted owls (Table 1).

We did not designate some areas that are known to have widely scattered owl sites, low population densities, and/or marginal habitat quality, which are not considered to be essential to this species' survival or recovery. These areas include Dinosaur National Park in northwest Colorado; Mesa Verde National Park, Ute Mountain Ute Reservation, Southern Ute Reservation, other FS and Bureau of Land Management land in southwest Colorado and central Utah; and the Guadalupe and Davis Mountains in southwest Texas. We also did not include isolated mountains on the Arizona Strip, such as Mount Trumbull, due to their small size, isolation, and lack of information about owls in the area.

State and private lands are not included in this designation. Some State and private parcels within the critical habitat boundaries likely support mid- and higher-elevation forests that are capable of providing nesting and roosting habitat. However, given that the majority of the owl's range occurs on Federal and tribal lands, we do not consider State and private lands essential to the recovery of the species and, therefore, we are not designating these areas as critical habitat. The overwhelming majority of Mexican spotted owl records are from Federal and tribal lands, indicating that those lands are essential to the species' recovery. Where feasible, we drew critical habitat boundaries so as to exclude State and private lands. However, the short amount of time allowed by the court to complete this designation did not allow us to conduct the fine-scale mapping necessary to physically exclude the smaller and widely scattered State and private parcels that remain within the mapped boundaries. Those areas under State or private ownership that are within mapped critical habitat unit boundaries are excluded from this designation of critical habitat by definition.

We significantly reduced some critical habitat units that we proposed as critical habitat (December 7, 1994; 59 FR 63162 and July 21, 2000; 65 FR 45336) within Arizona and New Mexico because, as discussed below, we are excluding FS lands governed by existing forest management plans. Nevertheless, the remaining Federal lands (e.g., Bureau of Land Management (BLM), National Park Service, etc.) within the mapped boundaries in Arizona and New Mexico, are designated as critical habitat. The critical habitat designation on Federal lands adjacent to FS lands within Arizona and New Mexico will ensure that ''special management considerations or protections'' are provided for the Mexican spotted owl on all Federal lands, pursuant to the definition of critical habitat in section 3 of the Act. (See Exclusion Under

Section 3(5)(A) Definition section for additional information.)

The approximate Federal ownership within the boundaries of owl critical habitat is shown in Table 1. Actual critical habitat is limited to areas within the mapped boundaries that meet the definition of protected and restricted habitat in the Recovery Plan. Therefore, the area actually designated as critical habitat is considerably less than the gross acreage indicated in Table 1.

TABLE 1.—CRITICAL HABITAT BY LAND OWNERSHIP AND STATE IN HECTARES (ACRES)

	Arizona	New Mexico	Colorado	Utah	Total
Forest Service	0	0	152,096 (375,837)	111,133 (274,616)	263,229 (650,453)
Bureau of Land Management	4,238 (10,473)	5,806 (14,346)	60,255 (148,894)	666,270 (1,646,388)	736,569 (1,820,101)
National Park Service	322,248 (796,292)	14,267 (35,255)	0	260,346 (643,328)	596,861 (1,474,875)
Department of Defense	9,728 (24,038)	1,677 (4,145)	0	0	11,405 (28,183)
Bureau of Reclamation	0	0	0	109,377 (270,276)	109,377 (270,276)
Other Federal [a]	0	0	0	156,207 (385,995)	156,207 (385,995)
Total	336,214 (830,803)	21,750 (53,747)	212,351 (524,731)	1,303,333 (3,220,603)	1,873,648 (4,629,883)
Total critical habitat units	11	6	2	5	24

[a] Includes land identified in the current Utah land ownership file as National Recreation Area or National Recreation Area/Power Withdrawal; Federal land ownership is unclear (may be NPS, BOR, or other).

Exclusions Under Section 3(5)(A) Definition

Section 3(5) of the Act defines critical habitat, in part, as areas within the geographical area occupied by the species ''on which are found those physical and biological features (I) essential to the conservation of the species and (II) which may require special management considerations and protection.'' As noted above, special management considerations or protection is a term that originates in the definition of critical habitat. Additional special management is not required if adequate management or protection is already in place. Adequate special management considerations or protection is provided by a legally operative plan/agreement that addresses the maintenance and improvement of the primary constituent elements important to the species and manages for the long-term conservation of the species. We use the following three criteria to determine if a plan provides adequate special management or protection: (1) A current plan/agreement must be complete and provide sufficient conservation benefit to the species; (2) the plan must provide assurances that the conservation management strategies will be implemented; and (3) the plan must provide assurances that the conservation management strategies will be effective, i.e., provide for periodic monitoring and revisions as necessary. If all of these criteria are met, then the lands covered under the plan would no longer meet the definition of critical habitat.

We considered that the Southwest Region of the FS amended the Forest Plans in Arizona and New Mexico in 1996 to incorporate the Mexican Spotted Owl Recovery Plan guidelines as management direction, and these plan amendments underwent consultation (Biological Opinion 000031RO). We evaluated the Forest Plan Amendments against our three criteria used to determine whether lands require ''special management considerations or protections,'' under the definition of critical habitat in section 3 of the Act. We determined that the FS amended their National Forest Plans in Arizona and New Mexico to conform with the Mexican Spotted Owl Recovery Plan, and these plans adequately meet all of our three criteria. The plan provides a conservation benefit to the species since it incorporates all elements of the Recovery Plan; the plan provides assurances that the management plan will be implemented since the FS in the Southwest Region has authority to implement the plan and has obtained all the necessary authorizations or approvals; and the plan provides assurances that the conservation plan will be effective since it includes biological goals consistent with the Recovery Plan, monitoring, and adaptive management (65 FR 63438, 65 FR 63680, 65 FR 69693). Moreover, we consider that the Mexican spotted owl is receiving substantial protection on FS lands in Arizona and New Mexico. We, therefore, determined that FS lands in Arizona and New Mexico do not meet the definition of critical habitat, and we did not include them in this final designation.

At the time of the proposal these lands were included in the designation, even though the FS amended their Forest Plans in 1996 to follow the Recovery Plan. We had recently published a notice seeking public comment on the direction we should take in developing a national critical habitat policy (June 14, 1999; 64 FR 31871). Due to the diversity of comments that we received in response to this notice, we reopened this comment period and held two national workshops on February 8 and 11, 2000, to further discuss critical habitat issues with major stakeholders and the public to obtain their input. Based upon information we received from the public and in our internal discussions that followed these workshops, one issue which emerged was how to consistently interpret the term special management in our critical habitat designations. In the past, we removed areas from critical habitat designations, typically Federal lands, because we felt that the areas were adequately managed and provided for the conservation of the species. For example, we excluded National Park Lands and National Wildlife Refuges from the critical habitat designation for the cactus ferruginous pygmy-owl because we felt that they were adequately protected (July 12, 1999; 64 FR 37419). In the final rule designating critical habitat for the coastal California gnatcatcher (65 FR 63680), we identified three criteria we used to determine whether adequate special management was being provided for to determine, in this case, whether a Department of Defense INRMP was adequate. During our comment period on this proposal, we received two comments indicating that the FS is providing adequate special management through their Forest Plans. In light of these comments and information contained in our final designation of critical habitat for the gnatcatcher, we excluded National Forest lands in Arizona and New Mexico from this final designation since the FS is providing adequate special management through their Forest Plans.

The affected National Forests within the Rocky Mountain Region of the FS (i.e., Utah and Colorado) have not amended their Forest Plans to conform with the Mexican Spotted Owl Recovery Plan. The FS integrates the Mexican Spotted Owl Recovery Plan ''as much as possible'' into their forest management activities (Industrial Economics Inc., 2000). Nevertheless, we do not have formal documentation (e.g., completed consultation) that supports this contention. The National Forests in Utah and Colorado do not have ''special

management considerations or protections,'' pursuant to the definition of critical habitat in section 3 of the Act. Thus, within the mapped boundaries of the National Forests in Utah and Colorado, those lands that meet the definition of protected or restricted habitat are designated as critical habitat.

The Sikes Act Improvements Act of 1997 (Sikes Act) requires each military installation that includes land and water suitable for the conservation and management of natural resources to complete an INRMP by November 17, 2001. An INRMP integrates implementation of the military mission of the installation with stewardship of the natural resources found there. Each INRMP includes an assessment of the ecological needs on the installation, including needs to provide for the conservation of listed species; a statement of goals and priorities; a detailed description of management actions to be implemented to provide for these ecological needs; and a monitoring and adaptive management plan. We consult with the military on the development and implementation of INRMPs for installations with listed species and critical habitat. We believe that bases that have completed and approved INRMPs that address the needs of listed species generally do not meet the definition of critical habitat discussed above, as they require no additional special management or protection. Therefore, we do not include these areas in critical habitat designations if they meet the three criteria described above.

Fort Carson provided information during the second comment period that indicated the Mexican spotted owl is not known to nest on the military installation and the species is a rare winter visitor. Similarly, protected and restricted habitat, as defined in the Recovery Plan, is not known to exist on Fort Carson. Therefore, lands on Fort Carson do not meet the definition of critical habitat and have been excluded from the final designation of critical habitat. Furthermore, Fort Carson, Colorado, is nearing completion of their updated INRMP, which includes specific guidelines for protection and management for the Mexican spotted owl. The target date of completion for this revision is early 2001, prior to the Sikes Act statutory deadline of November 17, 2001. Fort Carson, through consultation with us, indicated they will ensure that the INRMP meets the above criteria, and when Fort Carson's INRMP is complete, it will undergo formal consultation.

We indicated in the proposed rule (July 21, 2000; 65 FR 45336) that the Navajo Nation, Mescalero Apache, and San Carlos Apache were working on Mexican Spotted Owl Habitat Management Plans. We indicated that if any of these tribes submit management plans, we will consider whether these plans provide adequate special management considerations or protection for the species, or we will weigh the benefits of excluding these areas under section 4(b)(2).

During the second comment period, the Mescalero Apache and Navajo Nation completed management plans for the Mexican Spotted Owl. We reviewed these plans to determine whether adequate special management is being provided, through their consistency with the Recovery Plan. We determined that these plans conform with the Mexican Spotted Owl Recovery Plan, and therefore adequately meet all of our three criteria. Both plans provide a conservation benefit to the species since they are both complete and specifically written to provide for the conservation of the Mexican spotted owl. The Navajo Nation plan provide assurances that the management plan will be implemented since the Navajo Nation plan is within the scope of work of the Navajo Natural Heritage Program of the Navajo Nation. This program is contracted by the Bureau of Indian Affairs to collect and manage information on rare, and federally and tribally listed plant and animal species on the Navajo Nation and will ensure that the Mexican spotted owl plan will be properly implemented and funded. The Mescalero Apache plan has been approved by the Tribal council, indicating a commitment to implement the plan. Both plans provide assurances the conservation plan will be effective since they both include a monitoring component. We, therefore, determine that lands of the Mescalero Apache and virtually all lands of the Navajo Nation are not in need of special management considerations and protection, and therefore do not meet part 3(5)(A)(i)(II) of the definition of critical habitat and are not included in this designation.

During our review of the Navajo Nation management plan for the Mexican Spotted Owl, we concluded that there is a unique land ownership of Navajo National Monument and Canyon de Chelly wherein the land is owned by the Navajo Nation, but under the management authority and administration of the National Park Service. Although we excluded other lands owned by the Navajo Nation from critical habitat, we designated critical habitat on Navajo National Monument and Canyon de Chelly, because the National Park Service retains management authority over these lands, and any management that may have the potential to adversely affect the owl or its critical habitat would stem from their actions.

As reported in the proposed rule (65 FR 45336), the Southern Ute Reservation has not supported Mexican spotted owls historically, and our assessment revealed that the Southern Ute Reservation does not support habitat essential to the species' conservation. Thus, lands of the Southern Ute Reservation do not meet part 3(5)(A)(i)(I) of the definition of critical habitat stated above; we are, therefore, not designating these lands as critical habitat.

We are not designating lands of the Ute Mountain Ute Tribe as critical habitat. Due to the low owl population density and isolation from other occupied areas in Colorado, New Mexico, and Utah, the Mexican spotted owl habitat in southwestern Colorado is not believed to be essential for the survival or recovery of the species. Thus, these lands do not meet part 3(5)(A)(i)(I) of the definition of critical habitat stated above; we are, therefore, not designating these lands as critical habitat. Owls in these areas will retain the other protections of the Act, such as the prohibitions of section 9 and the prohibition of jeopardy under section 7.

In addition, other tribal lands including the Picuris, Taos, and Santa Clara Pueblos in New Mexico and the Havasupai Reservation in Arizona may have potential owl habitat. However, the available information, although limited, on the habitat quality and current or past owl occupancy in these areas does not indicate that these areas meet the definition of critical habitat. Therefore, we are not designating these lands as critical habitat.

American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act

In accordance with the Presidential Memorandum of April 29, 1994, we believe that, to the maximum extent possible, fish, wildlife, and other natural resources on tribal lands are better managed under tribal authorities, policies, and programs than through Federal regulation wherever possible and practicable. Based on this philosophy, we believe that, in most cases, designation of tribal lands as critical habitat provides very little additional benefit to threatened and endangered species. This is especially true where the habitat is occupied by the species and is therefore already subject to protection under the Act through section 7 consultations

requirements. Conversely, such designation is often viewed by tribes as unwarranted and an unwanted intrusion into tribal self governance, thus compromising the government-to-government relationship essential to achieving our mutual goals of managing for healthy ecosystems upon which the viability of threatened and endangered species populations depend.

Section 4(b)(2) of the Act requires us to consider the economic and other relevant impacts of critical habitat designation, and authorizes us to exclude areas from designation upon finding that the benefits of exclusion outweigh the benefits of including the areas as critical habitat, so long as excluding those areas will not result in the extinction of the species concerned. As mentioned above, in the proposed rule we indicated that if the San Carlos Apache Tribe submitted a management plan to us, we would considering excluding their land from the designation under section 4(b)(2) of the Act.

The San Carlos Apache Tribe submitted a draft management plan for the Mexican Spotted Owl to us in September 2000, which we reviewed and determined to be consistent with the Recovery Plan and substantially complete. The Tribe also commented on the proposed rule and indicated in their comments that their management plan was nearing completion. Based on recent conversations with the Tribe, their plan is expected to be completed in March 2001. In 1996 we reviewed the San Carlos Apache Reservation Tribe's Malay Gap Management Plan and determined that the plan provided adequate special management for the owl. We did not include areas covered by that plan in the proposed designation. Based on our review of their draft plan, it is similar to the Tribe's Malay Gap Management Plan as they are both consistent with the Recovery Plan. Their comment letter also indicates that suitable nesting and roosting habitat, as well as foraging habitat, on the reservation has been mapped and PACs have been established for all known owl pairs. Thus, any impacts from management activities to either PACs or owl habitat will trigger section 7, regardless of critical habitat, since the areas are presently occupied by the owl. In light of this and the fact that the Tribe will soon have their management plan completed, we find that the designation of critical habitat will provide little or no additional benefit to the species. The designation of critical habitat would be expected to adversely impact our working relationship with the Tribe and we believe that Federal regulation through critical habitat designation would be viewed as an unwarranted and unwanted intrusion into tribal natural resource programs. Our working relationships with the Tribe has been extremely beneficial in implementing natural resource programs of mutual interest.

After weighing the benefits of critical habitat designation on these lands against the benefits of excluding them, we find that the benefits of excluding the San Carlos Apache Tribe from the designation of critical habitat outweighs the benefits of including those areas as critical habitat. We also find that the exclusion of these lands will not lead to the extinction of the species. Therefore, we are not designating San Carlos Apache Tribal lands as critical habitat for the owl.

Effect of Critical Habitat Designation

Section 7 Consultation

Section 7(a) of the Act requires Federal agencies to ensure that actions they fund, authorize, or carry out do not destroy or adversely modify critical habitat to the extent that the action appreciably diminishes the value of the critical habitat for the survival and recovery of the species. Individuals, organizations, States, local governments, and other non-Federal entities are affected by the designation of critical habitat only if their actions occur on Federal lands, require a Federal permit, license, or other authorization, or involve Federal funding.

Section 7(a) of the Act requires Federal agencies 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 designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. If a species is listed and critical habitat is designated, section 7(a)(2) requires Federal agencies to ensure that actions they authorize, fund, or carry out are not likely to jeopardize the continued existence of such a species and do not 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.

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 we believe 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 reinitiate 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 reinitiation with us on actions for which formal consultation has been completed if those actions may affect designated critical habitat.

Activities on Federal lands that may affect the Mexican spotted owl or its critical habitat will require section 7 consultation. Activities on State or private lands requiring a permit from a Federal agency, such as a permit from the U.S. Army Corps of Engineers (Army Corps) under section 404 of the Clean Water Act, or some other Federal action, including funding (e.g., Federal Highway Administration, Federal Aviation Administration, or Federal Emergency Management Agency) will continue to be subject to the section 7 consultation process only for actions that may affect the Mexican spotted owl, but not for critical habitat because areas under State or private ownership are excluded from the critical habitat designation by definition. Similarly, Federal lands that we did not designate as critical habitat (e.g., FS lands in Arizona and New Mexico) will also continue to be subject to the section 7 consultation process only for actions that may affect the Mexican spotted owl. Federal actions not affecting listed species or critical habitat and actions on non-Federal lands that are not federally funded or regulated do not require section 7 consultation.

Section 4(b)(8) of the Act requires us to evaluate briefly in any proposed or final regulation that designates critical habitat those activities involving a Federal action that may adversely modify such habitat or that may be

affected by such designation. Adverse effects on one or more primary constituent elements or segments of critical habitat generally do not result in an adverse modification determination unless that loss, when added to the environmental baseline, is likely to appreciably diminish the capability of the critical habitat to satisfy essential requirements of the species. In other words, activities that may destroy or adversely modify critical habitat include those that alter one or more of the primary constituent elements (defined above) of protected or restricted habitat to an extent that the value of critical habitat for both the survival and recovery of the Mexican spotted owl is appreciably reduced.

To properly portray the effects of critical habitat designation, we must first compare the section 7 requirements for actions that may affect critical habitat with the requirements for actions that may affect a listed species. Section 7 prohibits actions funded, authorized, or carried out by Federal agencies from jeopardizing the continued existence of a listed species or destroying or adversely modifying the listed species' critical habitat. Actions likely to ''jeopardize the continued existence'' of a species are those that would appreciably reduce the likelihood of the species' survival and recovery (50 CFR 402.02). Actions likely to ''destroy or adversely modify'' critical habitat are those that would appreciably reduce the value of critical habitat for the survival and recovery of the listed species (50 CFR 402.02).

Common to both definitions is an appreciable detrimental effect on both survival and recovery of a listed species. Given the similarity of these definitions, actions likely to destroy or adversely modify critical habitat would almost always result in jeopardy to the species concerned when the habitat is occupied by the species. The purpose of designating critical habitat is to contribute to a species' conservation, which by definition equates to survival and recovery. Section 7 prohibitions against the destruction or adverse modification of critical habitat apply to actions that would impair survival and recovery of the listed species, thus providing a regulatory means of ensuring that Federal actions within critical habitat are considered in relation to the goals and recommendations of any existing Recovery Plan for the species concerned. As a result of the direct link between critical habitat and recovery, the prohibition against destruction or adverse modification of the critical habitat should provide for the protection of the critical habitat's ability to contribute fully to a species' recovery.

A number of Federal agencies or departments fund, authorize, or carry out actions that may affect the Mexican spotted owl and its critical habitat. Among these agencies are the FS, Bureau of Indian Affairs, Bureau of Land Management, Department of Defense, Department of Energy, National Park Service, and Federal Highway Administration. We have reviewed and continue to review numerous activities proposed within the range of the Mexican spotted owl that are currently the subject of formal or informal section 7 consultations. Actions on Federal lands that we reviewed in past consultations on effects to the owl include land management plans; land acquisition and disposal; road construction, maintenance, and repair; timber harvest; livestock grazing and management; fire/ecosystem management projects (including prescribed natural and management ignited fire); powerline construction and repair; campground and other recreational developments; and access easements. We expect that the same types of activities will be reviewed in section 7 consultations for designated critical habitat.

Actions that would be expected to both jeopardize the continued existence of the Mexican spotted owl and destroy or adversely modify its critical habitat would include those that significantly and detrimentally alter the species' habitat over an area large enough that the likelihood of the Mexican spotted owls' persistence and recovery, either range-wide or within a recovery unit, is significantly reduced. Thus, the likelihood of an adverse modification or jeopardy determination would depend on the baseline condition of the RU and the baseline condition of the species as a whole. Some RUs, such as the Southern Rocky Mountains-New Mexico and Southern Rocky Mountains-Colorado, support fewer owls and owl habitat than other RUs and, therefore, may be less able to withstand habitat-altering activities than RUs with large contiguous areas of habitat supporting higher densities of spotted owls.

Actions not likely to destroy or adversely modify critical habitat include activities that are implemented in compliance with the Recovery Plan, such as thinning trees less than 9 inches in diameter in PACs; fuels reduction to abate the risk of catastrophic wildfire; ''personal use'' commodity collection such as fuelwood, latillas and vigas, and Christmas tree cutting; livestock grazing that maintains good to excellent range conditions; and most recreational activities including hiking, camping, fishing, hunting, cross-country skiing, off-road vehicle use, and various activities associated with nature appreciation. We do not expect any restrictions to those activities as a result of this critical habitat designation. In addition, some activities may be considered to be of benefit to Mexican spotted owl habitat and, therefore, would not be expected to adversely modify critical habitat. Examples of activities that could benefit critical habitat may include some protective measures such as fire suppression, prescribed burning, brush control, snag creation, and certain silvicultural activities such as thinning.

If you have questions regarding whether specific activities in New Mexico will likely constitute destruction or adverse modification of critical habitat, contact the Field Supervisor, New Mexico Ecological Services Field Office (see **ADDRESSES** section). In Arizona, Colorado, and Utah, refer to the regulation at the end of this final rule for contact information. If you would like copies of the regulations on listed wildlife or have questions about prohibitions and permits, contact the U.S. Fish and Wildlife Service, Division of Endangered Species, P.O. Box 1306, Albuquerque, New Mexico 87103 (telephone 505–248–6920; facsimile 505–248–6788).

Effects on Tribal Trust Resources From Critical Habitat Designation on Non-Tribal Lands

In complying with our tribal trust responsibilities, we communicated with all tribes potentially affected by the designation of critical habitat for the Mexican spotted owl. We solicited and received information from the tribes (see discussion above) and arranged meetings with the tribes to discuss potential effects to them or their resources that may result from critical habitat designation.

Summary of Changes From the Proposed Rule

In addition to the areas deleted from the proposed designation as described previously, this final rule differs from the proposal as follows:

We attempted to clarify the definitions and use of protected and restricted habitat and the attributes of primary constituent elements of critical habitat in this rule. As stated in the critical habitat designation section, critical habitat is limited to areas within the mapped boundaries that meet the definition of protected and restricted habitat.

In the proposed rule we stated that all ''reserved'' lands would be considered critical habitat and included ''designated'' wilderness areas. In this final rule, we are only considering lands that are within critical habitat boundaries and that meet the definition of protected and restricted habitat as critical habitat, regardless of whether they are currently designated as wilderness.

Economic Analysis

Section 4(b)(2) of the Act requires us to designate critical habitat on the basis of the best scientific and commercial data available and to consider the economic and other relevant impacts of designating a particular area as critical habitat. We based this designation on the best available scientific information, and believe it is consistent with the Recovery Plan and recommendations of those team members. We utilized the economic analysis, and took into consideration comments and information submitted during the public hearing and comment period to make this final critical habitat designation. 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.

The economic effects already in place due to the listing of the Mexican spotted owl as threatened is the baseline upon which we analyzed the economic effects of the designation of critical habitat. The critical habitat economic analysis examined the incremental economic and conservation effects of designating critical habitat. The economic effects of a designation were evaluated by measuring changes in national, regional, or local indicators. A draft analysis of the economic effects of the proposed Mexican spotted owl critical habitat designation was prepared and made available for public review (65 FR 63047). We concluded in the final analysis, which included review and incorporation of public comments, that no significant economic impacts are expected from critical habitat designation above and beyond that already imposed by listing the Mexican spotted owl. A copy of the economic analysis is included in our administrative record and may be obtained by contacting the New Mexico Ecological Services Field Office (see **ADDRESSES** section).

Required Determinations

Regulatory Planning and Review

In accordance with the criteria in Executive Order 12866, this rule is a significant regulatory action and has been reviewed by the Office of Management and Budget.

(a) This rule will not have an annual economic effect of $100 million or adversely affect an economic sector, productivity, jobs, the environment, or other units of government. A cost-benefit analysis is not required for purposes of Executive Order 12866. The Mexican spotted owl was listed as a threatened species in 1993. Since that time, we have conducted, and will continue to conduct, formal and informal section 7 consultations with other Federal agencies to ensure that their actions would not jeopardize the continued existence of the Mexican spotted owl.

Under the Act, critical habitat may not be adversely modified by a Federal agency action; critical habitat does not impose any restrictions on non-Federal persons unless they are conducting activities funded or otherwise sponsored or permitted by a Federal agency (see Table 2 below). Section 7 requires Federal agencies to ensure that they do not jeopardize the continued existence of the species. Based upon our experience with the species and its needs, we believe that any Federal action or authorized action that could potentially cause an adverse modification of the designated critical habitat would currently be considered as ''jeopardy'' to the species under the Act. Accordingly, we do not expect the designation of critical habitat in areas within the geographic range occupied by the species to have any incremental impacts on what actions may or may not be conducted by Federal agencies or non-Federal persons that receive Federal authorization or funding. Non-Federal persons who do not have a Federal ''sponsorship'' of their actions are not restricted by the designation of critical habitat (however, they continue to be bound by the provisions of the Act concerning ''take'' of the species).

TABLE 2.—IMPACTS OF DESIGNATING CRITICAL HABITAT FOR MEXICAN SPOTTED OWL.

Categories of activities	Activities potentially affected by the designation of critical habitat in areas occupied by the species (in addition to those activities affected from listing the species)	Activities potentially affected by the designation of critical habitat in unoccupied areas
Federal Activities Potentially Affected [1]	None	None.
Private or other non-Federal Activities Potentially Affected [2].	None	None.

[1] Activities initiated by a Federal agency.
[2] Activities initiated by a private or other non-Federal entity that may need Federal authorization or funding.

We evaluated any potential impact through our economic analysis, and found that we anticipate little, if any, additional impact due to designating areas within the geographic range potentially occupied by the owl, because the designated critical habitat units all occur within the Recovery Units. (See Economic Analysis section of this rule.)

(b) This rule will not create inconsistencies with other agencies' actions. Federal agencies have been required to ensure that their actions do not jeopardize the continued existence of the Mexican spotted owl since its listing in 1993. The prohibition against adverse modification of critical habitat is not expected to impose any additional restrictions to those that currently exist in areas of proposed critical habitat.

(c) This designation will not significantly impact entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients. Federal agencies are currently required to ensure that their activities do not jeopardize the continued existence of the species, and, as discussed above, we anticipate that the adverse modification prohibition (resulting from critical habitat designation) will have little, if any, incremental effects in areas of critical habitat.

(d) This rule will not raise novel legal or policy issues. The designation follows the requirements for determining critical habitat contained in the Endangered Species Act.

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

In the economic analysis, we determined that designation of critical habitat will not have a significant effect on a substantial number of small entities. As discussed under Regulatory Planning and Review above, this designation is not expected to result in any restrictions in addition to those currently in existence.

Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 804(2))

Our economic analysis demonstrated that designation of critical habitat will not cause (a) an annual effect on the economy of $100 million or more, (b) any increases in costs or prices for consumers; individual industries; Federal, State, or local government agencies; or geographic regions, or (c) any significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

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

In accordance with the Unfunded Mandates Reform Act:

a. This rule will not ''significantly or uniquely'' affect small governments. A Small Government Agency Plan is not required. Small governments will be affected only to the extent that any programs involving Federal funds, permits, or other authorized activities must ensure that their actions will not destroy or adversely modify critical habitat. However, as discussed above in the Regulatory Planning and Review section, these actions are currently subject to equivalent restrictions through the listing protections of the species, and no further restrictions are anticipated in areas of proposed critical habitat.

b. This rule will not produce a Federal mandate on State, local, or tribal governments or the private sector of more than $100 million or greater in any year, *i.e.,* 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.

Takings

In accordance with Executive Order 12630, this designation does not have significant takings implications, and a takings implication assessment is not required. This designation will not ''take'' private property. In this designation, State and private lands were excluded by definition.

Federalism

In accordance with Executive Order 13132, this designation will not affect the structure or role of States, and will not have direct, substantial, or significant effects on States. A Federalism assessment is not required. As previously stated, critical habitat is applicable only to Federal lands or to non-Federal lands when a Federal nexus exists.

In keeping with Department of the Interior and Department of Commerce policy, we requested information from and coordinated development of this critical habitat designation with appropriate State resource agencies in Arizona, New Mexico, Colorado, and Utah. In addition, Arizona and Utah have representatives on the recovery team for this species.

Civil Justice Reform

In accordance with Executive Order 12988, the Department of the Interior's Office of the Solicitor determined that this rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order. The Office of the Solicitor reviewed this final determination. We made every effort to ensure that this final determination contained no drafting errors, provides clear standards, simplifies procedures, reduces burden, and is clearly written such that litigation risk is minimized.

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

This rule does not contain any information collection requirements for which Office of Management and Budget approval under the Paperwork Reduction Act is required.

National Environmental Policy Act (NEPA)

Our position is that, outside the Tenth Circuit, we do not need to prepare environmental analyses as defined by the NEPA in connection with designating critical habitat under the Endangered Species Act of 1973, as amended. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This assertion was upheld in the courts of the Ninth Circuit (*Douglas County* v. *Babbitt,* 48 F.3d 1495 (9th Cir. Ore. 1995), *cert. denied* 116 S. Ct. 698 (1996). However, when the range of the species includes States within the Tenth Circuit, such as that of the Mexican spotted owl, pursuant to the Tenth Circuit ruling in *Catron County Board of Commissioners* v. *U.S. Fish and Wildlife Service,* 75 F.3d 1429 (10th Cir. 1996), we undertake a NEPA analysis for critical habitat designation. We completed an environmental assessment and finding of no significant impact on the designation of critical habitat for the Mexican spotted owl.

References Cited

A complete list of all references cited in this proposed rule is available upon request from the New Mexico Ecological Services Field Office (see **ADDRESSES** section).

Authors

The primary authors of this notice are the New Mexico Ecological Services Field Office staff (see **ADDRESSES** section).

List of Subjects in 50 CFR Part 17

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

Regulation Promulgation

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

PART 17—[AMENDED]

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

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

2. Amend § 17.11(h), by revising the entry for ''Owl, Mexican spotted'' under ''BIRDS'' 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 rules
Common name	Scientific name						
*	*	*	*	*	*		*
BIRDS							
*	*	*	*	*	*		*
Owl, Mexican spotted.	*Strix occidentalis lucida.*	U.S.A. (AZ, CO, NM, TX, UT), Mexico.	Entire	T	494	§ 17.95(b)	NA
*	*	*	*	*	*		*

3. Amend § 17.95(b) by adding critical habitat for the Mexican spotted owl (*Strix occidentalis lucida*) in the same alphabetical order as this species occurs in § 17.11(h).

§ 17.95 Critical habitat—fish and wildlife.

* * * * *

(b) Birds. * * *

Mexican Spotted Owl (Strix occidentalis lucida)

Critical habitat is limited to areas within the mapped boundaries that meet the definition of protected habitat as described in the Recovery Plan (600 acres around known owl sites and mixed conifer or pine-oak forests with slopes greater than 40 percent where timber harvest has not occurred in the past 20 years). All restricted habitat as described in the Recovery Plan is also designated as critical habitat. Private and State lands within mapped boundaries are not designated as critical habitat. No Tribal lands other than those administered by the National Park Service are designated. Existing man-made features and structures, such as buildings, roads, railroads, and urban development, are not considered critical habitat. Critical habitat units for the States of Arizona, Colorado, New Mexico, and Utah are depicted on the maps below. Larger maps and digital files for all four States and maps of critical habitat units in the State of New Mexico are available at the New Mexico Ecological Services Field Office, 2105 Osuna N.E., Albuquerque, New Mexico 87113, telephone (505) 346–2525. For the States of Arizona, Colorado, and Utah, maps of the critical habitat units specific to each State are available at the following U.S. Fish and Wildlife Service offices—Arizona Ecological Services Field Office, 2321 West Royal Palm Road, Suite 103, Phoenix, Arizona 85021, telephone (602) 640–2720; Colorado State Sub-Office, 764 Horizon Drive South, Annex A, Grand Junction, Colorado 81506, telephone (970) 243–2778; and Utah Ecological Services Field Office, Lincoln Plaza, 145 East 1300 South, Suite 404, Salt Lake City, Utah 84115, telephone (801) 524–5001.

1. Critical habitat units are designated in portions of McKinley, Rio Arriba, Sandoval, Socorro, and Taos, Counties in New Mexico; Apache, Cochise, Coconino, Graham, Mohave, and Pima Counties in Arizona; Carbon, Emery, Garfield, Grand, Iron, Kane, San Juan, Washington, and Wayne Counties in Utah; and Custer, Douglas, El Paso, Fremont, Huerfano, Jefferson, Pueblo, and Teller Counties in Colorado. Precise descriptions of each critical habitat unit are on file at the New Mexico Ecological Services Field Office.

2. Within these areas, the primary constituent elements for Mexican spotted owl include, but are not limited to, those habitat components providing for nesting, roosting, and foraging activities. Primary constituent elements in Protected Activity Centers include all vegetation and other organic matter contained therein. Primary constituent elements on all other areas are provided in canyons and mixed conifer, pine-oak, and riparian habitat types that typically support nesting and/or roosting. The primary constituent elements that occur in mixed conifer, pine-oak, and riparian forest types, as described in the Recovery Plan, which currently contain or may attain the habitat attributes believed capable of supporting nesting and roosting owls include: high basal area of large-diameter trees; moderate to high canopy closure; wide range of tree sizes suggestive of uneven-age stands; multi-layered canopy with large overstory trees of various species; high snag basal area; high volumes of fallen trees and other woody debris; high plant species richness, including hardwoods; and adequate levels of residual plant cover to maintain fruits, seeds, and regeneration to provide for the needs of Mexican spotted owl prey species. For canyon habitats, the primary constituent elements include the following attributes: cooler and often higher humidity than the surrounding area; clumps or stringers of ponderosa pine, Douglas-fir, white fir, and/or piñon-juniper trees and/or canyon wall containing crevices, ledges, or caves; high percent of ground litter and woody debris; and riparian or woody vegetation (although not at all sites).

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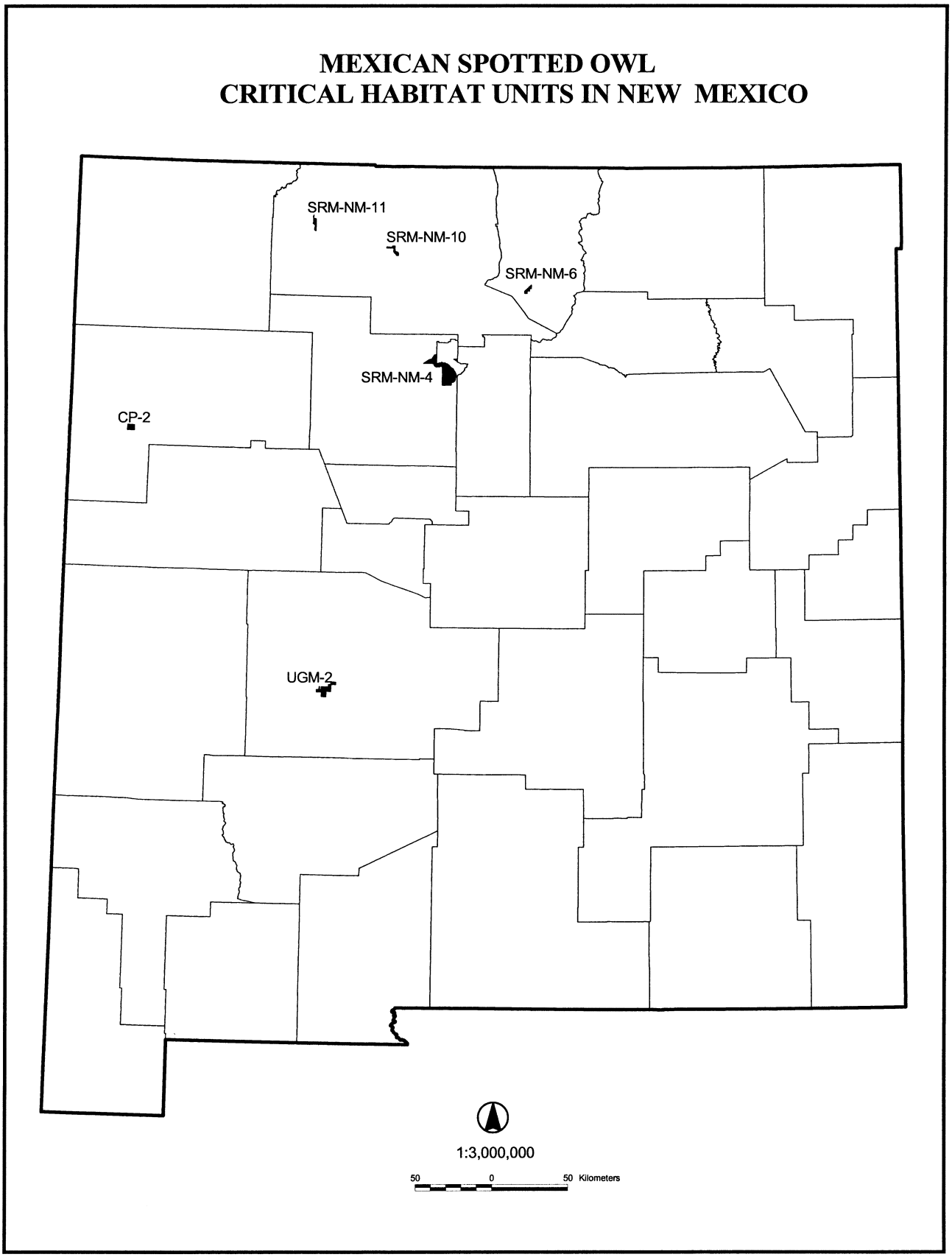
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CRITICAL HABITAT UNITS IN NEW MEXICO
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SRM-NM-10
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SRM-NM-4
CP-2
UGM-2
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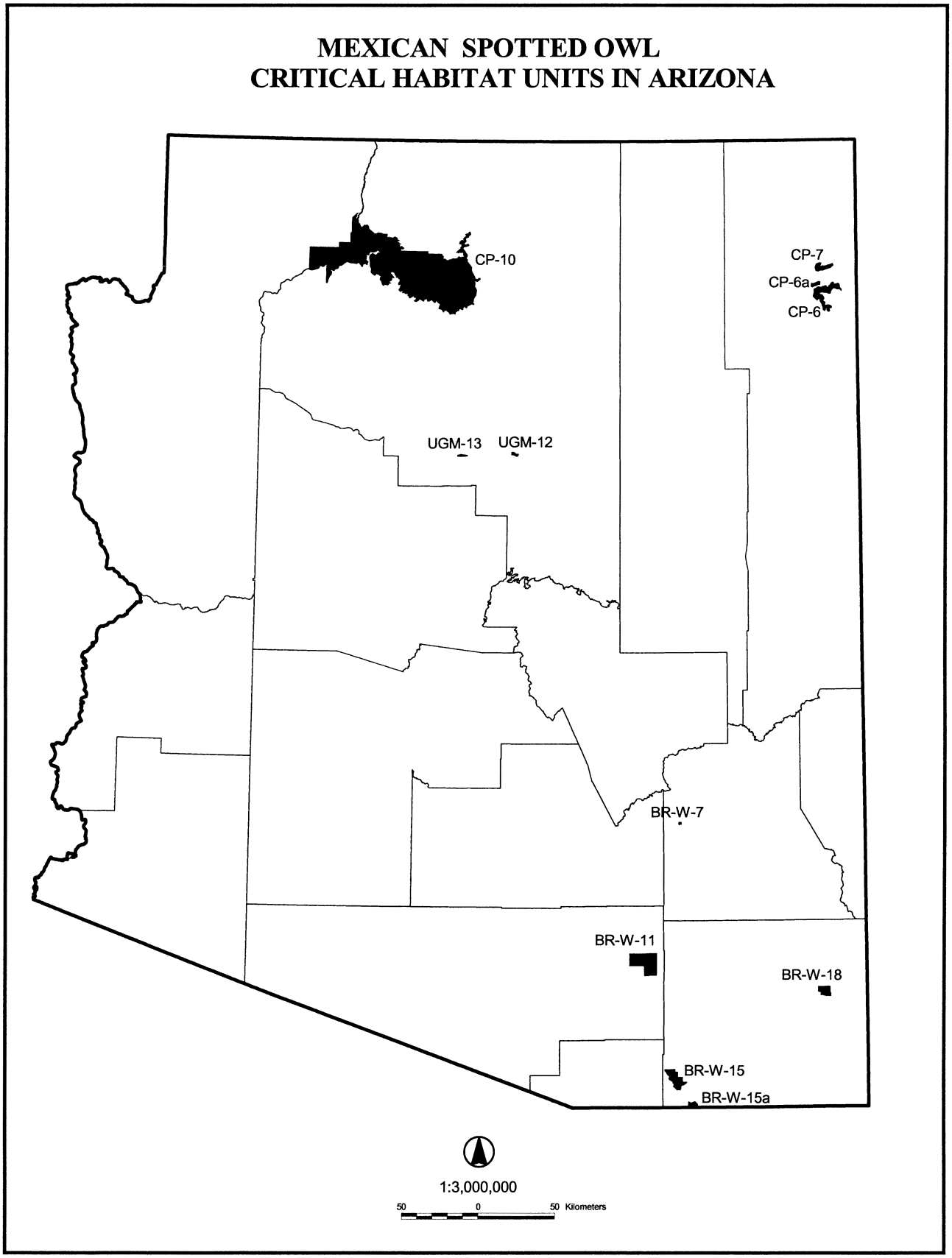
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CRITICAL HABITAT UNITS IN ARIZONA
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CP-7
CP-6a
CP-6
UGM-13
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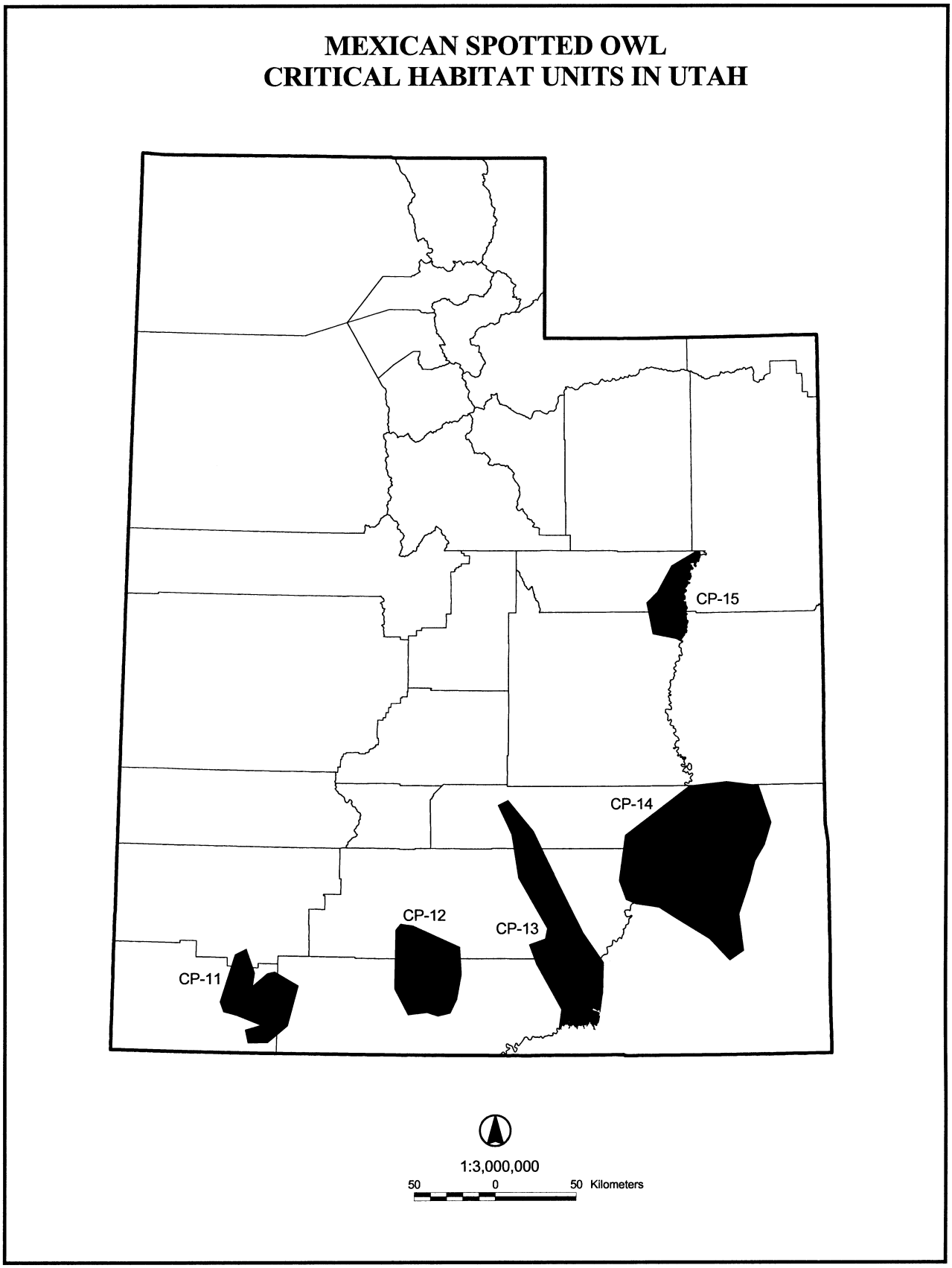
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CRITICAL HABITAT UNITS IN UTAH
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CP-14
CP-12
CP-13
CP-11
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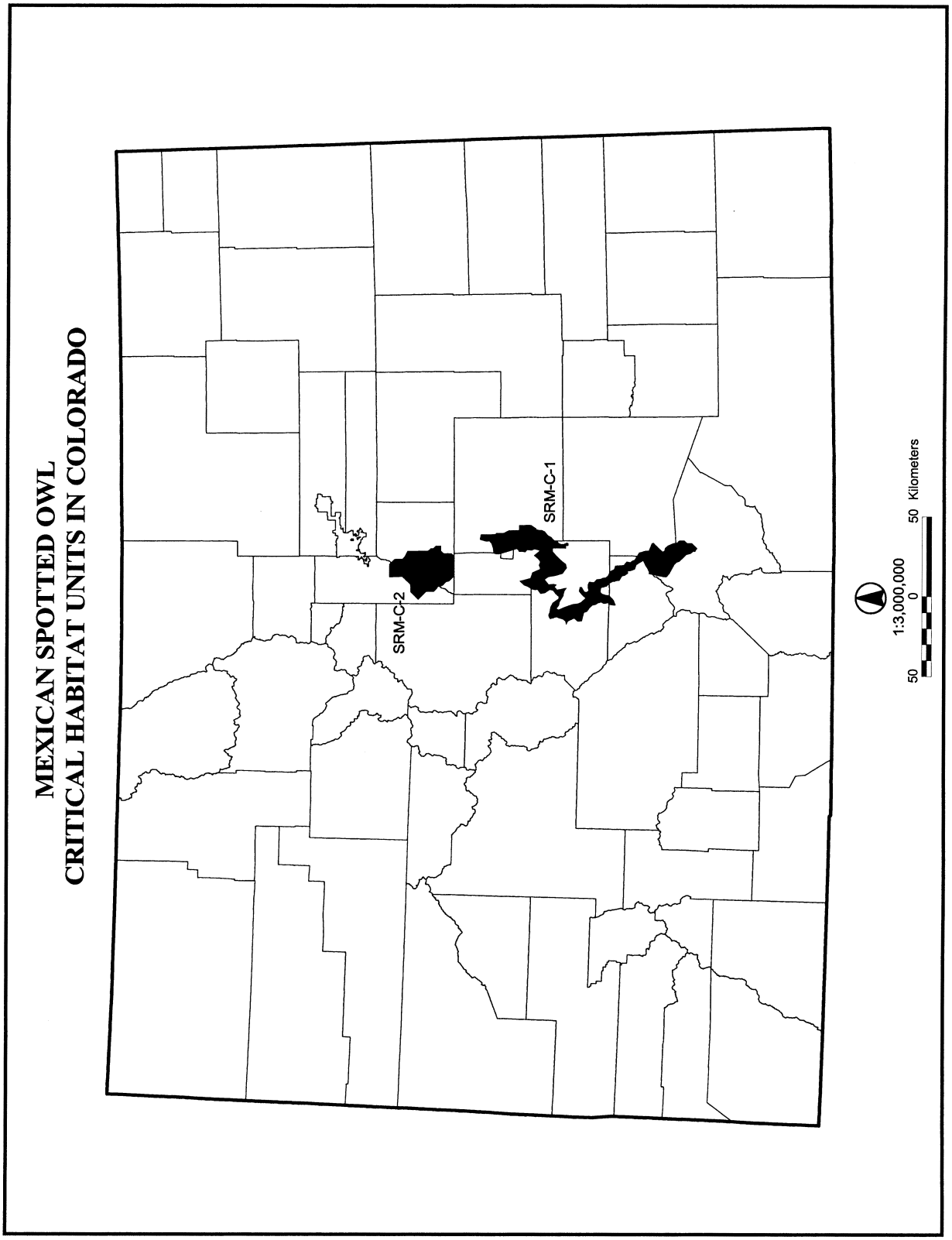

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Dated: January 16, 2001.

Kenneth L. Smith,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 01–1798 Filed 1–30–01; 10:06 am]

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