Source of flooding and location of referenced elevation	Elevation in feet* (NGVD)		Communities affected
	Existing	Modified	
Tributary No. 10:			
At the confluence with Yocona-Spybuck Drainage Canal (MD–1)	*219	*217	City of Forrest City.
Approximately 5,010 feet upstream of County Highway 202/Union Pacific Railroad	None	*221	Unincorporated Areas.
Tributary No. 12:			
At the confluence with Lateral 1–B (Tributary No. 11)	None	*213	Unincorporated Areas.
Approximately 4,035 feet upstream of County Highway 808	None	*221	
Tributary No. 13:			
At the confluence with Tributary No. 12	None	*214	City of Forrest City.
Approximately 4,500 feet upstream of the confluence with Tributary No. 12	None	*222	Unincorporated Areas.
Tributary No. 14:			
At the confluence with Tributary No. 12	None	*215	City of Forrest City.
Approximately 100 feet upstream of Yocona Road	None	*216	Unincorporated Areas.
Tributary No. 16:			
At the confluence with Tributary No. 12	None	*217	City of Forrest City.
Approximately 2,920 feet upstream of Yocona Road	None	*224	Unincorporated Areas.
Tributary No. 17:			
Approximately 260 feet downstream of the confluence of Tributary No. 18	None	*219	Unincorporated Areas.
Approximately 4,150 feet upstream of County Highway 814	None	*229	
Tributary No. 18:			
At the confluence with Tributary No. 17	None	*220	Unincorporated Areas.
Approximately 2,850 feet upstream of the confluence with Tributary No. 17	None	*225	
Tributary No. 19:			
At the confluence with Tributary No. 17	None	*223	Unincorporated Areas.
Approximately 2,390 feet upstream of the confluence with Tributary No. 17	None	*226	

ADDRESSES

City of Forrest City

Maps are available for inspection at the City Hall, 224 North Rosser, Forrest City, Arkansas.

Send comments to The Honorable Larry S. Bryant, City Hall, P.O. Box 1074, 224 North Rosser, Forrest City, Arkansas 72335.

St. Francis County (Unincorporated Areas)

Maps are available for inspection at St. Francis County Courthouse, 313 South Izard Street, Forrest City, Arkansas.

Send comments to The Honorable Carl Cisco, Judge, St. Francis County, 313 Izard Street, Forrest City, Arkansas 72335.

(Catalog of Federal Domestic Assistance No. 83.100, ''Flood Insurance.'')

Dated: July 28, 2004.

David I. Maurstad,

Acting Director, Mitigation Division, Emergency Preparedness and Response Directorate.

[FR Doc. 04–17961 Filed 8–5–04; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018–AJ07

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Colorado Butterfly Plant

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), propose to designate critical habitat for the Colorado butterfly plant (*Gaura neomexicana* ssp. *coloradensis*) pursuant to the Endangered Species Act of 1973, as amended (Act). In total, approximately 8,486 acres (ac) (3,434 hectares (ha)) along approximately 113.1 stream miles (mi) (182.2 kilometers (km)) fall within the boundaries of the proposed critical habitat designation. The proposed critical habitat is located in Laramie and Platte Counties in Wyoming; Kimball County in Nebraska; and Weld County in Colorado.

DATES: We will accept comments from all interested parties until October 5, 2004. We must receive requests for public hearings, in writing, at the address shown in the **ADDRESSES** section by September 20, 2004.

ADDRESSES: If you wish to comment, you may submit your comments and materials concerning this proposal by any one of several methods:

1. You may submit written comments and information to the Field Supervisor,

U.S. Fish and Wildlife Service, Wyoming Field Office, 4000 Airport Parkway, Cheyenne, Wyoming 82001.

2. You may hand-deliver written comments to our Office, at the address given above.

3. You may send comments by electronic mail (e-mail) to *fw6_cobutterflyplant@fws.gov*. Please see the Public Comments Solicited section below for file format and other information about electronic filing.

4. You may fax your comments to 307/772–2358.

Comments and materials received, as well as supporting documentation used in the preparation of this proposed rule, will be available for public inspection, by appointment, during normal business hours at the Wyoming Field Office, 4000 Airport Parkway, Cheyenne, Wyoming, telephone 307/772–2374.

FOR FURTHER INFORMATION CONTACT: Brian Kelly, Field Supervisor, Wyoming Field Office, 4000 Airport Parkway, Cheyenne, Wyoming (telephone 307/772–2374; facsimile 307/772–2358).

SUPPLEMENTARY INFORMATION:

Public Comments Solicited

We intend that any final action resulting from this proposal will be as accurate and as effective as possible. Therefore, comments or suggestions from the public, other concerned governmental agencies, the scientific community, industry, or any other interested party concerning this proposed rule are hereby solicited. Comments particularly are sought concerning:

(1) The reasons any habitat should or should not be determined to be critical habitat as provided by section 4 of the Act, including whether the benefit of designation will outweigh any threats to the species due to designation;

(2) Specific information on the amount and distribution of *Gaura neomexicana* ssp. *coloradensis* habitat, and what habitat is essential to the conservation of the species and why;

(3) Land use designations and current or planned activities in the subject areas and their possible impacts on proposed critical habitat;

(4) Any foreseeable economic, national security, or other potential impacts resulting from the proposed designation and, in particular, any impacts on small entities; and

(5) Whether our approach to designating critical habitat could be improved or modified in any way to provide for greater public participation and understanding, or to assist us in accommodating public concerns and comments.

If you wish to comment, you may submit your comments and materials concerning this proposal by any one of several methods (*see* **ADDRESSES** section). Please submit Internet comments to *fw6_cobutterflyplant@fws.gov* in ASCII file format and avoid the use of special characters or any form of encryption. Please also include ''Attn: *Gaura neomexicana* ssp. *coloradensis*'' in your e-mail subject header and your name and return address in the body of your message. If you do not receive a confirmation from the system that we have received your Internet message, contact us directly by calling our Cheyenne Ecological Services Field Office at phone number 307/772–2374. Please note that the Internet address *fw6_cobutterflyplant@fws.gov* will be closed out at the termination of the public comment period.

Our practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours. Individual respondents may request that we withhold their home addresses from the rulemaking record, which we will honor to the extent allowable by law. There also may be circumstances in which we would withhold from the rulemaking record a respondent's identity, as allowable by law. If you wish us to withhold your name and/or address, you must state this prominently at the beginning of your comment. However, we will not consider anonymous comments. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety. Comments and materials received will be available for public inspection, by appointment, during normal business hours at the above address.

Designation of Critical Habitat Provides Little Additional Protection to Listed Species

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

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

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

Procedural and Resource Difficulties in Designating Critical Habitat

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

The consequence of the critical habitat litigation activity is that limited listing funds are used to defend active lawsuits, to respond to Notices of Intent to sue relative to critical habitat, and to comply with the growing number of adverse court orders. As a result, listing petition responses, the Service's own proposals to list critically imperiled

species, and final listing determinations on existing proposals are all significantly delayed.

The accelerated schedules of court ordered designations have left the Service with almost no ability to provide for adequate public participation or to ensure a defect-free rulemaking process before making decisions on listing and critical habitat proposals due to the risks associated with noncompliance with judicially-imposed deadlines. This in turn fosters a second round of litigation in which those who fear adverse impacts from critical habitat designations challenge those designations. The cycle of litigation appears endless, is very expensive, and in the final analysis provides relatively little additional protection to listed species.

The costs resulting from the designation include legal costs, the cost of preparation and publication of the designation, the analysis of the economic effects and the cost of requesting and responding to public comment, and in some cases the costs of compliance with the National Environmental Policy Act (NEPA). None of these costs result in any benefit to the species that is not already afforded by the protections of the Act enumerated earlier, and they directly reduce the funds available for direct and tangible conservation actions.

Background

We discuss only those topics directly relevant to the designation of critical habitat in this proposed rule. For more information on *Gaura neomexicana* ssp. *coloradensis*, refer to the final listing rule published in the **Federal Register** on October 18, 2000 (65 FR 62302).

Gaura neomexicana ssp. *coloradensis* is a perennial herb that lives vegetatively for several years before bearing fruit once and then dying. *Gaura neomexicana* ssp. *coloradensis* occurs on subirrigated, alluvial (stream deposited) soils on level or slightly sloping floodplains and drainage bottoms at elevations of 1,524–1,951 meters (5,000–6,400 ft). Colonies are often found in low depressions or along bends in wide, active, meandering stream channels a short distance upslope of the actual channel. The plant requires early- to mid-succession riparian (river bank) habitat. *Gaura neomexicana* ssp. *coloradensis* is an early successional plant (although probably not a pioneer) adapted to use stream channel sites that are periodically disturbed. Historically, flooding was probably the main cause of disturbances in the plant's habitat, although wildfire and grazing by native herbivores also may have been important.

Little is known about the historical distribution of *Gaura neomexicana* ssp. *coloradensis*. Prior to 1984, no extensive documentation of the plant's range had been conducted. In 1979, the total known population size was estimated in the low hundreds (Dorn 1979). Intensive range-wide surveys from 1984 to 1986 resulted in the discovery or confirmation of more than 20 populations in Wyoming, Colorado, and Nebraska, containing approximately 20,000 flowering individuals (Marriott 1987). Additional surveys since 1992 have resulted in the discovery of additional populations in Wyoming and Colorado (Fertig 1994; Floyd 1995b).

Gaura neomexicana ssp. *coloradensis* is distributed throughout its occupied range into patchy groups of subpopulations, some of which are isolated with little or no possibility of interbreeding with other local populations. The spatial structuring of this subspecies is commonly referred to as a metapopulation. Local populations exist on a patch of suitable habitat, and although each has its own, relatively independent population dynamics, the long-term persistence and stability of the metapopulation arise from a balance of population extinctions and colonization to unoccupied patches through dispersal events (Hanski 1989, Olivieri *et al.* 1990, Hastings and Harrison 1994).

Balancing local population extinction with new colonization events is problematic for *Gaura neomexicana* ssp. *coloradensis* since naturally occurring disturbance associated with creation of suitable habitat for colonization, such as seasonal floods, has been largely curtailed by water development and flood control. Consequently, what once may have been a dynamic, but stable, metapopulation, may now be characterized by a series of local populations with a very low probability of colonizing new patches, and little opportunity to replace populations that go extinct. Biological characteristics that may serve to reduce these negative consequences at least in the short-term for *G. n.* ssp. *coloradensis* include seed banks, delay of stage transition from rosette to flowering adults under poor habitat conditions, and self-compatibility. However, the regional persistence of a metapopulation has been shown to be possible only when the rate of colonization exceeds the local rate of extinction (Lande 2002). Consequently, the removal of opportunities for future colonization events poses a significant threat to long-term metapopulation persistence and species viability. This highlights the importance of maintaining viability of as many local populations as possible through conservation.

Most of what is known about *Gaura neomexicana* ssp. *coloradensis* and its conservation is based on surveys and research conducted on populations located on the WAFB in Cheyenne, Wyoming, from 1984 to 2003. Floyd and Ranker (1998) studied three *G. n.* ssp. *coloradensis* subpopulations at WAFB, Crow Creek, Diamond Creek, and Unnamed Drainage, from 1992 to 1994. The purpose of their study was to examine population growth, demographic variability, demographic stage transition dynamics and the probability of population extinction. Results suggested that each of the three subpopulations was not stable but exhibited significant demographic variability both spatially and temporally, and population growth values were not useful parameters to describe long-term population dynamics (Floyd and Ranker 1998).

Annual census of flowering plants at WAFB began in 1986, and continued from 1988 to 2003, within subpopulations located at Crow Creek, Diamond Creek, and Unnamed Drainage. Census summaries provided by Heidel (2004a) based on these data show that subpopulations within these three drainages are characterized by dramatic fluctuations in size.

Most populations of *Gaura neomexicana* ssp. *coloradensis* for which census or demographic data have been collected exhibit substantial demographic uncertainty. Some of the observed temporal variation in subpopulations at WAFB has been correlated with unpredictable environmental factors such as temperature and precipitation (Floyd and Ranker 1998; Laursen and Heidel 2003; and Heidel 2004a), and spatial variation may be attributable, in part, to fine-scale microhabitat differences in light availability or competition with other herbaceous vegetation or noxious weeds (Munk *et al.* 2002; Laursen and Heidel 2003; and Heidel 2004b). Similar factors may be correlated with some of the observed demographic variability in less-well-studied populations throughout the subspecies' range. However, even for the well-studied subpopulations at WAFB, no clear cause-and-effect relationships have been found to explain the observed fluctuations in population numbers, and studies have not accounted for the majority of the observed demographic uncertainty. Demographic uncertainty, or stochasticity, is variability in survival and reproduction of individuals due, at

least in part, to chance or random events (Frankel *et al.* 1995); although some chance events may actually be deterministic factors that are currently not understood (Shaffer 1987).

Some researchers suggest that demographic uncertainty becomes an important hazard only for small populations (in the range of tens to hundreds of individuals). While there is no managerial solution for threats due to stochastic factors, the magnitude of effect of these threats decreases as population size increases (Shaffer 1987; Frankel *et al.* 1995; Lande 2002). Maintaining the maximum number of individuals within each population, and maintaining the maximum number of populations within the *Gaura neomexicana* ssp. *coloradensis* metapopulation as a whole, may be the only means with which to maintain long-term species persistence.

Of the known populations of *Gaura neomexicana* ssp. *coloradensis*, the vast majority occur on private lands managed primarily for agriculture and livestock. Haying and mowing at certain times of the year, water development, land conversion for cultivation, competition with exotic plants, non-selective use of herbicides, and loss of habitat to urban development are the main threats to these populations (Mountain West Environmental Services 1985, Marriott 1987, Fertig 1994).

Because of the small, isolated nature of populations and few numbers present in many of them, the subspecies is much more susceptible to random events such as fires, insect or disease outbreaks, or other unpredictable events that could easily eliminate local populations.

Previous Federal Actions

On October 18, 2000, *Gaura neomexicana* ssp. *coloradensis* was designated as threatened throughout its entire range under the Act (65 FR 62302). On October 4, 2000, the Center for Biological Diversity and the Biodiversity Legal Foundation filed a complaint in the Federal District Court for the District of Colorado concerning our failure to designate critical habitat for the Colorado butterfly plant (*Center for Biological Diversity, et al.* v. *Norton, et al.* (Civ. Action No. 00–D–1980)). On March 19, 2001, the Court approved a settlement agreement requiring us to submit a final critical habitat designation for the Colorado butterfly plant to the **Federal Register** on or before December 31, 2004. For more information on previous Federal actions concerning *G. n.* ssp. *coloradensis*, refer to the final listing rule (65 FR 62302).

Critical Habitat

Critical habitat is defined in section 3 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. ''Conservation'' means the use of all methods and procedures that are necessary to bring an endangered or a threatened species to the point at which listing under the Act is no longer necessary.

Critical habitat receives protection under section 7 of the Act through the prohibition against destruction or adverse modification of critical habitat with regard to actions carried out, funded, or authorized by a Federal agency. Section 7 requires consultation on Federal actions that are likely to result in the destruction or adverse modification of critical habitat.

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)).

Occupied habitat may be included in critical habitat only if the essential features thereon may require special management or protection. Thus, we do not include areas where existing management is sufficient to conserve the species. As discussed below, such areas also may be excluded from critical habitat pursuant to section 4(b)(2).

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 so require, we will not designate critical habitat in areas outside the geographic area occupied by the species.

Our Policy on Information Standards under the Act, published in the **Federal Register** on July 1, 1994 (59 FR 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.

Critical habitat designations do not signal that habitat outside the designation is unimportant to *Gaura neomexicana* ssp. *coloradensis*. 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.

Methods

As required by the Act and regulations (section 4(b)(2) and 50 CFR 424.12), we used the best scientific and commercial data available in determining areas that contain the physical and biological features that are essential to the conservation of *Gaura neomexicana* ssp. *coloradensis*. This information included data from our files that we used for listing the species; geologic maps, recent biological surveys and reports; information funded by the Air Force and other interested parties, and discussions with botanists.

The long-term probability of the conservation of *Gaura neomexicana* ssp. *coloradensis* is dependent upon the protection of existing populations, and the maintenance of ecologic functions within these sites, including connectivity within and between populations within close geographic proximity to facilitate pollen flow and population expansion. *G. n.* ssp. *coloradensis* is fragmented and patchy in nature and occurs as a metapopulation. The areas we are

proposing to designate as critical habitat provide some or all of the habitat components essential for the conservation of *G. n.* ssp. *coloradensis*.

Criteria Used To Identify Critical Habitat

As previously stated in the Background section of the final listing rule (65 FR 62302, October 18, 2000), ''Thus, of 26 previously known populations, 9 may be extirpated; 3 are probably small, but have not been surveyed since 1992; 4 are still extant, but declining; and 10 are stable or increasing.'' In our delineation of the critical habitat units, we selected areas to provide for the conservation of *Gaura neomexicana* ssp. *coloradensis* at the eight sites where all previously known subpopulations are known to occur. Much of what is known about the specific physical and biological requirements of *G. n.* ssp. *coloradensis* is described in the Primary Constituent Elements section of this proposed rule.

Our approach to delineating critical habitat units was applied in the following manner:

(1) We obtained records of *Gaura neomexicana* ssp. *coloradensis* distribution compiled by the Wyoming Natural Diversity Database (Wyoming Natural Diversity Database 2004) and from the Colorado Natural Heritage Program (Colorado Natural Heritage Program 1995, 2004). Database records were received in the form of shape files formatted for use in ArcView (Environmental Systems Research, Inc. (ESRI)), a computer GIS program. We created polygons by overlaying current and historic plant locations from shape files on digital topographic maps. In other words, we focused on designating units representative of the known current and historical locations of the plant throughout the geographic range of the subspecies.

(2) We then evaluated plant locations in relation to potentially suitable habitat within drainages on the topographic maps. We followed rough boundaries of suitable habitat from which we could identify potential critical habitat, and then further refined these boundaries using corresponding Service National Wetland Inventory maps. A more refined boundary was then created digitally using a second GIS program, ArcMap (ESRI). This boundary was then evaluated in relation to primary constituent elements and adjacent areas containing suitable hydrologic regimes, soils, and vegetation communities. We avoided land areas identified as not suitable for *G. n.* ssp. *coloradensis*, *i.e.*, those areas that do not contain primary constituent elements. Such areas were excluded from the refined boundary to the extent that we could identify these areas on the map.

In order to determine the outward extent of the proposed critical habitat, botanists were consulted who had previously conducted field surveys of *Gaura neomexicana* ssp. *coloradensis* and who had a good working knowledge of habitat requirements for the species. Based on the information from botanists, we are using the outward extent of the proposed critical habitat as 300 feet (91 meters) from the center of the stream within a given stream segment.

(3) We eliminated areas that did not contain the appropriate vegetation or associated native plant species, as well as features such as cultivated agriculture fields, housing developments, and other areas that are unlikely to contribute to the conservation of Colorado butterfly plant. We used geographic features (ridge lines, valleys, streams, etc.) or manmade features (roads or obvious land use) that created an obvious boundary for a unit as unit area boundaries.

(4) Critical habitat designations were then described for landowners and the public. We mapped using legal descriptions including township, range, and sections associated with the Public Land Survey System so that private landowners and the public could see the proximity of the designation with where they reside.

The Service is working with, and will continue to work with, the Wyoming Stockgrowers Association, the Wyoming Association of Conservation Districts, the Wyoming Department of Agriculture, the Natural Resources Conservation Service in Wyoming and Nebraska, and the City of Fort Collins in Colorado, to develop conservation agreements with willing landowners to provide for the conservation of *Gaura neomexicana* ssp. *coloradensis*. These agreements will include specific on-the-ground actions to alleviate specific threats including—allowing the Service access to private land to conduct annual monitoring of *G. n.* ssp. *coloradensis* populations to evaluate success of management actions under the agreement; establishing an adaptive management approach to evaluate success of management actions under the agreement; and facilitating the collection of data needed for future recovery of the species. Through cooperation and communication between landowners and the Service, such agreements will provide for the conservation needs of *G. n.* ssp. *coloradensis* above and beyond what would be achievable through the designation of critical habitat on private lands while meeting the needs of individual landowners. Working cooperatively with private landowners to protect habitat for *G. n.* ssp. *coloradensis* through conservation agreements is the Service's preferred approach to protecting the species on private lands. The Service will pursue such agreements to the fullest extent practicable prior to finalizing critical habitat. If, prior to finalizing the designation of critical habitat, the Service determines that the benefits of excluding an area subject to one of these agreements outweigh the benefits of including it, the Service will exclude such from the designation. Currently, one such agreement is in place.

The Service will work with landowners to gain access to private lands to survey for plant populations. Most of these populations have not been surveyed since 1998, earlier in some cases, and some may now be extirpated. The Service is in the process of conducting surveys that will continue through August of 2004. We will further refine the designation based on new information.

We propose to designate critical habitat on lands that we have determined are essential to the conservation of *Gaura neomexicana* ssp. *coloradensis*. These areas have the primary constituent elements described. While the species was known historically from several additional locations in northern Colorado and southeastern Wyoming, these populations are believed to be extirpated (Fertig 1994) and are not included in the proposed designation.

Much of the survey data on which this proposed designation is based represents the number of flowering individuals during one point in time. Because of the annual fluctuation in population size for this species (ranging from 200 percent), and because the number of flowering individuals each year depends upon local environmental factors that vary substantially year to year (*e.g.*, precipitation), it is likely that other individual plants and subpopulations exist but were not identified during previous surveys. This is particularly true for those areas, which contain the primary constituent elements for the species, that occur between subpopulations. Not only are these areas essential to achieving the long-term conservation goal of protecting the maximum number of populations possible, but they are essential in maintaining gene flow between populations via pollen flow to maintain, and potentially increase, local population genetic variation.

In our delineation of the critical habitat units, we selected areas to provide for the conservation of *Gaura neomexicana* ssp. *coloradensis* in all areas where it is known to occur, except WAFB (*see* discussion below on the WAFB's Integrated Natural Resources Management Plan (INRMP)). All units are essential because *G. n.* ssp. *coloradensis* populations exhibit significant demographic uncertainty, contain very low genetic variation, and have very little opportunity to colonize new geographic areas with which to balance local extinction events. We believe the proposed designation is of sufficient size to maintain ecological processes and to minimize secondary impacts resulting from human activities and land management practices occurring in adjacent areas. We mapped the units with a degree of precision commensurate with the available information, the size of the unit, and time allotted to complete this proposal. We anticipate that the boundaries of the units may be refined based on additional information received during the comment period and after surveys are completed in August of this year.

Although we are not proposing sites other than where populations are known to occur, we do not mean to imply that habitat outside the designation is unimportant or may not be required for recovery of the species. Areas that support newly discovered populations in the future, but are outside the critical habitat designation, will continue to be subject to the applicable prohibitions of section 9 of the Act and the regulatory protections afforded by the section 7(a)(2) jeopardy standard. In addition, for such populations discovered on private lands, the Service will consider entering into conservation agreements with the landowners similar to the ones contemplated for currently known populations.

We often exclude non-Federal public lands and private lands that are covered by an existing operative Habitat Conservation Plan (HCP) and executed Implementation Agreement (IA) under section 10(a)(1)(B) of the Act from designated critical habitat because the benefits of exclusion outweigh the benefits of inclusion as discussed in section 4(b)(2) of the Act. There are no HCPs in place for *Gaura neomexicana* ssp. *coloradensis* at this time. Department of Defense lands with an approved INRMP also are excluded from critical habitat. We have approved the INRMP for WAFB, which addresses conservation needs of *G. n.* ssp. *coloradensis*. Consequently, we did not consider habitat supporting populations located on WAFB for proposed designation as critical habitat.

Designating critical habitat is one mechanism for providing habitat protection for *Gaura neomexicana* ssp. *coloradensis* populations. However, the benefits of protecting extant populations through conservation agreements, by partnering with private landowners on whose property populations occur, may well outweigh the benefits of designating critical habitat for this species. Greater protection results from conservation agreements because these agreements address the specific types of actions (*e.g.*, indiscriminate application of herbicides; overgrazing; timing of hay cutting) undertaken by private landowners that may adversely impact *G. n.* ssp. *coloradensis* or its habitat and that would not involve a Federal nexus subject to consultation under section 7(a)(2) of the Act. A review of the complete consultation history of *G. n.* ssp. *coloradensis* has revealed that none of the actions undertaken on private lands resulting in these threats to the species have ever required consultation under the Act.

Primary Constituent Elements

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

The primary constituent elements for *Gaura neomexicana* ssp. *coloradensis* include those habitat components essential for the biological needs of rosette growth and development, flower production, pollination, seed set and fruit production, and genetic exchange. *G. n.* ssp. *coloradensis* typically lives and reproduces on subirrigated, stream-deposited soils on level or slightly sloping floodplains and drainage bottoms at elevations of 5,000 to 6,400 feet (1,524 to 1,951 meters). Most colonies are found in low depressions or along bends in wide, active, meandering stream channels a short distance upslope of the active channel, and may occur at the base of alluvial ridges at the interface between riparian meadows and drier grasslands (Fertig 2001). Average annual precipitation within its range is 13 to 16 in (33 to 41 cm) primarily in the form of rainfall (Fertig 2000). Soils in *G. n.* ssp. *coloradensis* habitat are derived from conglomerates, sandstones, and tufaceous mudstones and siltstones (*i.e.*, derived from spongy, porous limestone formed by the precipitation of calcite from the water of streams and springs) of the Tertiary White River, Arikaree, and Ogallala formations (Fertig 2000).

Ecological processes that create and maintain *Gaura neomexicana* ssp. *coloradensis* habitat are important primary constituent elements. Essential habitat components to *G. n.* ssp. *coloradensis* occur in areas where past and present hydrological and geological processes have created streams, floodplains, and conditions supporting favorable plant communities. Historically, *G. n.* ssp. *coloradensis* habitat has been maintained along streams by natural flooding cycles that periodically scour riparian vegetation, rework stream channels and floodplains, and redistribute sediments to create vegetation patterns favorable to *G. n.* ssp. *coloradensis*. *G. n.* ssp. *coloradensis* commonly occurs in communities including *Agrostis stolonifera* (redtop) and *Poa pratensis* (Kentucky bluegrass) on wetter sites, or *Glycyrrhiza lepidota* (wild licorice), *Cirsium flodmanii* (Flodman's thistle), *Grindelia squarrosa* (curlytop gumweed), and *Equisetum laevigatum* (smooth scouring rush) on drier sites (Fertig 1994). Both of these habitat types are usually intermediate in moisture between wet, streamside communities dominated by *Carex* spp. (sedges), *Juncus* spp. (rushes), and *Typha* spp. (cattails), and dry upland shortgrass prairie. Where hydrological flows are controlled to preclude a natural pattern of habitat development, and other forms of disturbance are curtailed or eliminated, a less favorable mature successional stage of vegetation will develop, resulting in the loss of many of these plant associates.

Hydrological processes, and their importance in maintaining the moisture regime of habitat preferred by *Gaura neomexicana* ssp. *coloradensis*, also have an important direct effect on seed germination and seedling recruitment. Analysis by Heidel (2004a) demonstrated a significant positive correlation between census number and net growing season precipitation 2 years

prior to census. Important direct effects of moisture on *G. n.* ssp. *coloradensis* establishment and recruitment also have been demonstrated by the appearance of high numbers of new vegetative plants within 27 days after a 100–year flood event at WAFB on August 1, 1985 (Rocky Mountain Heritage Task Force 1987 cited in Heidel 2004a).

The long-term availability of favorable *Gaura neomexicana* ssp. *coloradensis* habitat also depends on impacts of drought, fires, windstorms, herbivory, and other natural events. *G. n.* ssp. *coloradensis* requires open, early- to mid-succession riparian habitat experiencing periodic disturbance. Periodic disturbance is necessary to control competing vegetation, and to create open, bare ground for seedling establishment (Fertig 2001). *Salix exigua* (coyote willow) and *Cirsium arvense* (Canada thistle) may become locally dominant in *G. n.* ssp. *coloradensis* habitat that is not periodically flooded or otherwise disturbed, resulting in decline of the species. Research has demonstrated negative impacts on *G. n.* ssp. *coloradensis* populations from competition with locally abundant noxious weeds, forbs, and grasses (Munk *et al.* 2002, Heidel 2004b).

Based on our knowledge to date, the primary constituent elements for *Gaura neomexicana* ssp. *coloradensis* consist of, but are not limited to:

(1) Subirrigated, alluvial soils on level or low-gradient floodplains and drainage bottoms at elevations of 5,000 to 6,400 feet (1,524 to 1,951 meters).

(2) A mesic moisture regime, intermediate in moisture between wet, streamside communities dominated by sedges, rushes, and cattails, and dry upland shortgrass prairie.

(3) Early- to mid-succession riparian (streambank or riverbank) plant communities that are open and without dense or overgrown vegetation (including hayed fields, grazed pasture, other agricultural lands that are not plowed or disced regularly, areas that have been restored after past aggregate extraction, areas supporting recreation trails, and urban/wildland interfaces).

(4) Hydrological and geological conditions that serve to create and maintain stream channels, floodplains, floodplain benches, and wet meadows that support patterns of plant communities associated with *G. n.* ssp. *coloradensis*.

Existing features and structures within the boundaries of the mapped units, such as buildings, roads, parking lots, other paved areas, lawns, other urban and suburban landscaped areas, regularly plowed or disced agricultural areas, and other features not containing any of the primary constituent elements are not considered critical habitat.

Special Management Considerations or Protections

When designating critical habitat, we assess whether the areas determined to be essential for conservation may require special management considerations or protections. For *Gaura neomexicana* ssp. *coloradensis* special management considerations include maintaining surface or subsurface water flows that provide the essential hydrological regime that supports the species; appropriate constraints on application of herbicides used to control noxious weeds; preventing habitat degradation caused by plant community succession; and preventing harmful habitat fragmentation from residential and urban development that detrimentally affects plant-pollinator interactions, leads to a decline in species reproduction, and increases susceptibility to non-native plant species. While excessive grazing can lead to changes in essential habitat conditions (*e.g.*, increases in soil temperature resulting in loss of moisture, decreases in plant cover, and increases in non-native species), managing for appropriate levels of grazing provides an important management tool with which to maintain open habitat needed by the species.

Proposed Critical Habitat Designation

We are proposing eight units as critical habitat for *Gaura neomexicana* ssp. *coloradensis.* The critical habitat areas described below constitute our best assessment at this time of the areas essential for the conservation of *G. n.* ssp. *coloradensis* that may require special management. The eight proposed units are: (1) Tepee Ring Creek in Wyoming; (2) Bear Creek East in Wyoming; (3) Bear Creek West in Wyoming; (4) Little Bear Creek/Horse Creek in Wyoming; (5) Lodgepole Creek West in Wyoming; (6) Lodgepole Creek East in Wyoming and Nebraska; (7) Borie in Wyoming; and (8) Meadow Springs Ranch in Colorado.

The approximate area encompassed within each proposed critical habitat unit is shown in Table 1.

TABLE 1.—CRITICAL HABITAT UNITS PROPOSED FOR GAURA NEOMEXICANA SSP. COLORADENSIS

Critical habitat unit	Acres	Hectares	Stream miles
1. Tepee Ring Creek	107	43	1.5 (2.4 km)
2. Bear Creek East	801	324	11.2 (18 km)
3. Bear Creek West	500	202	7.3 (11.8 km)
4. Little Bear Creek/Horse Creek	2,480	1,004	36.1 (58.1 km)
5. Lodgepole Creek West	1,067	432	15.0 (24.2 km)
6. Lodgepole Creek East	1,683	681	24.8 (40 km)
7. Borie	1,141	462	17.2 (27.7 km)
8. Meadow Springs Ranch	707	286	N/A
Total	8,486	3,434	113.1 (182 km)

We present brief descriptions of all units, and reasons why they are essential for the conservation of *Gaura neomexicana* ssp. *coloradensis*, below.

Unit 1: Tepee Ring Creek

Unit 1 consists of 107 ac (43 ha) along 1.5 stream mi (2.4 km) of Tepee Ring Creek in Platte County, Wyoming, and is under private ownership. One subpopulation of *Gaura neomexicana* ssp. *coloradensis* has been found along Tepee Ring Creek in the lower SE corner of T21N R68W Section 2. Habitat occupied by *G. n.* ssp. *coloradensis* is moist meadow along the stream. Habitat along this stream reach throughout this unit is primarily identified as PEMA (palustrine emergent temporarily flooded) wetland intermixed with PEMC (palustrine emergent seasonally flooded) wetland, according to National Wetlands Inventory terminology (U.S. Fish and Wildlife Service 1993). Habitat containing primary constituent elements extends throughout this entire reach, and it is likely that *G. n.* ssp.

coloradensis occurs in Section 1 downstream of the subpopulation in Section 2. This unit is essential to the conservation of the species because it represents the northernmost extent of the subspecies' known range of occurrence, separated by approximately 25 mi (40.3 km) from the closest population, and likely contains unique genetic variability not found in other populations.

Unit 2: Bear Creek East

Unit 2 consists of 801 ac (324 ha) along 11.2 stream mi (18 km) of the South Fork of the Bear Creek and the Bear Creek in Laramie County, Wyoming. Colonies of *Gaura neomexicana* ssp. *coloradensis* have been found throughout the South Fork Bear Creek from T19N67W Section 25, extending northeast approximately 13 mi (21 km) to the far eastern edge of T19N66W Section 11. This unit is primarily under private ownership but includes some Wyoming State lands. Three main habitat types occur in this unit—(1) hay field adjacent to streams; (2) upper stream banks with snowberry; and (3) willow thickets (WNDD 2004). Much of the habitat in this unit is mowed for hay. Habitat within this stream reach is primarily identified as PEMC intermixed with PEMA. The primary constituent elements extend throughout this entire reach in which several subpopulations of *G. n.* ssp. *coloradensis* have been found. While there are no known locations for *G. n.* ssp. *coloradensis* within Section 36, it is likely that subpopulations occur there because it is adjacent to, and just upstream of, Section 25 to the north, where a subpopulation occurs very close to the section border. Proposed critical habitat on the northern and eastern end of the unit was extended to include T19N R66W Section 12 because: (a) suitable habitat with primary constituent elements continues throughout Section 12; (b) there is a subpopulation of plants at the eastern end of Section 11 very close to Section 12 from which colonization is likely to have occurred; and (c) Section 12 is downstream of several other populations serving as likely seed sources. This unit has historically supported a number of *G. n.* ssp. *coloradensis* populations in a variety of habitat types, and is located at the furthest point downstream within the Bear Creek drainage. Disconnected from other population gene pools, subpopulations within this unit likely contain genotypes unique to this drainage. This unit is essential to the overall objective of maintaining the maximum number of populations possible for future species conservation.

Unit 3: Bear Creek West

Unit 3 consists of three stream reaches encompassing a total of 500 ac (202 ha) along 7.3 stream mi (11.8 km) within the Bear Creek drainage in Laramie County, Wyoming. This unit is primarily under private ownership, but includes some Wyoming State lands.

Reach 1: Habitat within this reach is semi-moist meadows on flat benches and streambanks along an intermittent stream. Plants are most abundant in areas with low thistle density and heavily browsed willow, and are absent from adjacent, ungrazed areas with dense willow thickets (WNDD 2004). Subpopulations of *Gaura neomexicana* ssp. *coloradensis* have been found throughout this reach in T18N R68W Sections 8 and 9. Habitat is primarily PEMC containing primary constituent elements and extends through Sections 8, 9, and 4 to the northwest. Proposed critical habitat on the northern and eastern end of the unit was extended to include Section 4 because: (a) Suitable habitat with primary constituent elements continues throughout Section 4; (b) there is a subpopulation of plants at the northern end of Section 9 very close to Section 4; and (c) Section 4 is downstream of 8 and 9 and it is likely that these upstream subpopulations have already dispersed seeds into Section 4. This reach is an important location that has always supported a large population with good reproduction, and this site has remained in very good condition with few impacts compared with other occupied sites.

Reach 2: Habitat within this reach consists of hummocky banks of loamy clay soil and gravelly, sloping terraces in semi-moist, closely grazed *Poa pratensis* (Kentucky bluegrass) / *Elymus spp.* (wild rye) streamside meadow at the edge of dense *Carex aquatilis* (Nebraska sedge) / *Juncus balticus* (Baltic rush) community (WNDD 2004). It is likely that grazing maintains open habitat for *Gaura neomexicana* ssp. *coloradensis* (WNDD 2004). Subpopulations of *G. n.* ssp. *coloradensis* have been found throughout this reach in T18N R68W Sections 16 and 17. Habitat is primarily PEMC containing primary constituent elements and extends through both sections. Nimmo Reservoir in Section 15, adjacent to Section 16, is likely a barrier to seed dispersal downstream. Therefore, proposed critical habitat was not extended further. This location represents the uppermost elevation within the species' known range of occurrence. Historically it has supported a large population located in habitat with few threats to its good condition.

Reach 3: Habitat within this reach consists of three types: (1) Seasonally wet *Juncus balticus / Agrostis stolonifera* (redtop) / *Poa pratensis* community on subirrigated gravelly-sandy soil in low depressions a distance from the current stream channel; (2) streambank terraces of dark-brown loamy clay in dense *Helianthus nuttallii* (Nuttall's sunflower) / *Solidago canadensis* (Canada goldenrod) / *Phleum pratense* (timothy) grass community; and (3) grassy terrace dominated by *Agrostis stolonifera, Poa pratensis, Elymus smithii* (wild rye), and *Melilotus albus* (white sweetclover) on brown clay-loam (WNDD 2004). Populations are small and inside fenced areas where bulls are kept, but much more common in surrounding upland sites where grazing is moderate and willow and thistle are not well established; the plants are less abundant where growth of snowberry is thick (WNDD 2004). The population within this reach has been growing in years leading up to the last survey date and is located in habitat in good condition.

One subpopulation of *Gaura neomexicana* ssp. *coloradensis* has been found on the eastern edge of T18N R68W Section 21. Habitat is primarily PEMA containing primary constituent elements and extends from the middle of Section 21 through the adjacent Section 22 to the east. There is a natural break in habitat approximately in the center of Section 21 at which point the PEMA habitat changes to scrub-shrub and continues upstream (to the southwest) through the remainder of Section 21. We did not propose critical habitat beyond this natural break. Proposed critical habitat includes Section 22 to the east because: (a) Suitable habitat with primary constituent elements continues throughout Section 22; (b) the subpopulation of plants in Section 21 is very close to the border of Section 22; and (c) Section 22 is downstream of 21 and it is likely that this upstream subpopulation has dispersed seeds into Section 22.

Unit 4: Little Bear Creek/Horse Creek

Unit 4 consists of two stream reaches encompassing a total of 2,480 ac (1,004 ha) along 36.1 stream mi (58.1 km) within the Little Bear Creek and Horse Creek drainages in Laramie County, Wyoming. This unit is primarily under private ownership, but includes some Wyoming State lands.

Reach 1: Habitat for *Gaura neomexicana* ssp. *coloradensis* within

this reach occurs in four main types: (1) Moist hay meadows; (2) wild licorice thickets in sandy, dry stream channels; (3) depressions in alluvial meadows away from the main stream channel; and (4) moist meadows and streambanks on alluvium derived from the Ogallala Formation. Plants appear to be more abundant in hay meadow sites than other habitat types (WNDD 2004). Subpopulations of *G. n.* ssp. *coloradensis* have been found throughout Little Bear Creek from the southwest end of Unit 4 in T18N R68W Section 36, extending northeast approximately 12 stream mi (19 km) to the southwestern corner of T18N R67W Section 23. It is likely that subpopulations occur within Section 35, the section adjacent to, and just upstream of, Section 36 on Little Bear Creek, where a subpopulation resides very close to the section border. Subpopulations also have been found along the Paulson Branch of Little Bear Creek from T17N R68W Section 2 on the southwest end of Unit 4, extending northwest approximately 5 stream mi (8 km) to Section 31 where it merges with Little Bear Creek. Habitat throughout Little Bear Creek and the Paulson Branch stream reaches is primarily identified as PEMC intermixed with PEMA, containing primary constituent elements throughout. Proposed critical habitat on the northern and eastern end of the unit was extended to include all of Section 23 because suitable habitat with primary constituent elements continues throughout this section and it is likely that the subpopulation in the southwestern corner of this section has dispersed seeds into the remainder of this section. This reach has supported a large number of subpopulations with a moderate to large number of plants over the years. Because this reach is reproductively isolated from any others, it likely harbors genotypes unique to the species that could be important to future species persistence.

Reach 2: Subpopulations occur in several habitat types: (a) Open meadow on the edge of a marshy, spring-fed pond; (b) subirrigated meadows and hay fields in a broad alluvial valley among clumps of *Poa pratensis, Equisetum spp.* (horsetail), and *Carex spp.* (sedges); and (c) *Solidago spp.* (goldenrod) / *Glycyrrhiza lepidota* (wild licorice) / *Schizachyrium scoparium* (little bluestem) community near the creek; and (d) on the edges of willow thickets and semi-moist meadows, extending into a right-of-way. The species is absent from wet sites dominated by *Glyceria spp.* (mannagrass) and *Carex rostrata* (beaked sedge) and from stream banks where vegetation is overgrown by willow, thistle, sunflower and goldenrod from succession. Land within this reach is used extensively for hay production. Subpopulations located downstream of Brunyansky Draw are large and occupy habitat in good condition where threats are low (WNDD 2004).

Subpopulations of *Gaura neomexicana* ssp. *coloradensis* have been found along Horse Creek from T17N R67W Section 7 on the west end of this reach, for approximately 4 mi (6 km) to the east into Section 3. There is an approximate 3-mi (5-km) stretch encompassing Sections 2, 1, and 6, in which plants have not been found; however, continuing downstream to the east subpopulations have been found in the following 3 mi (5 km) in T17N R66W Sections 5, 4, and 3, as well as in Section 10 adjacent (to the south) to Section 3. Habitat throughout the majority of the reach is PEMC and PEMA, intermixed with scrub-shrub through Sections 2, 1, and 6. It is likely that subpopulations occur within Sections 2, 1, and 6 since there are several subpopulations both upstream and downstream of these sections, and habitat with primary constituent elements also is present; therefore, these sections were included in the critical habitat proposal. Including these sections also is important to maintain connection (*i.e.*, gene flow in terms of pollen dispersal) between subpopulations upstream and downstream.

Proposed critical habitat was not extended beyond the center of Section 10 on the east end of the reach because primary constituent elements are no longer present because of changes in habitat. Subpopulations have been found in Section 16 along a tributary to Horse Creek. It is likely that other subpopulations of *Gaura neomexicana* ssp. *coloradensis* also occur downstream of Section 16 closer to its point of merging with Horse Creek, since habitat and primary constituent elements are present throughout this tributary. Horse Creek is important to the species because it harbors several subpopulations throughout many miles of habitat, contributing considerably to the objective of maximizing the number of individuals and populations for species conservation.

Unit 5: Lodgepole Creek West

Unit 5 consists of 1,067 ac (432 ha) along 15 stream mi (24.2 km) of Lodgepole Creek in Laramie County, Wyoming. This unit is primarily under private ownership, but includes some Wyoming State lands. Occupied habitat within this unit includes moist meadows, streambanks, and hayfields and pastures along the creek, primarily areas where the land slopes gently down to the creek, creating flat, alluvial deposits below the surrounding hills (WNDD 2004). Some sites are becoming choked with willows and other vegetation. Ungrazed habitat west of Interstate 25 is being invaded by *Salix exigua* (sandbar willow) and other forbs. Subpopulations of *Gaura neomexicana* ssp. *coloradensis* have been found along Lodgepole Creek from T16N 68W Section 24 on the western edge of this unit, extending 12 stream mi (19 km) east to T15N R66W Section 3. Habitat throughout this stream reach is primarily identified as PEMC intermixed with PEMA, containing primary constituent elements throughout its entirety. Therefore, it is likely that the plant also occurs in Sections 27 and 28 which occur in the middle of the reach, adjacent to sections upstream and downstream in which subpopulations have been found, and in Section 2 on the eastern end just downstream of a subpopulation in the adjacent Section 3. This unit has supported a large number of small, and a few large, subpopulations over the years in a variety of habitat types and land management practices. The number of subpopulations within the variety of habitat may represent a number of locally selected genotypes existing under unique conditions, providing an important contribution to the long-term conservation of the species.

Unit 6: Lodgepole Creek East

Unit 6 consists of two stream reaches encompassing a total of 1,683 ac (681 ha) along 24.8 stream mi (40 km) of Lodgepole Creek in Laramie County, Wyoming, and in Kimball County, Nebraska. This unit is primarily under private ownership with some Wyoming State lands.

Reach 1: Habitat occupied by subpopulations within this reach is sandy and silty loam alluvium along the creek in mowed and grazed hay fields and horse pastures. The area is managed for livestock grazing and hay production, mowed late in the season and used for winter pasture. The largest subpopulation was found on a heavily grazed meadow. Although little impact from exotic plant species was found in 1997, spraying herbicides for weed control is likely the greatest threat to habitat at this site (WNDD 2004).

Subpopulations of *Gaura neomexicana* ssp. *coloradensis* have been found along Lodgepole Creek from Thompson Reservoir Number 2 in T14N

R62W Section 4 on the eastern edge of this unit, extending approximately 13 mi (21 km) west to T15N R64W Section 27 on the reach's western edge. Habitat throughout this stream reach is primarily identified as PEMC with sparse amounts of PEMA, containing primary constituent elements throughout its entirety. The only section in which subpopulations have not been located is T15N 63W Section 28, approximately in the middle of the reach. Because this section contains primary constituent elements and populations occur both upstream and downstream, it is likely that the plant also occurs here. A natural break in habitat type occurs within the westernmost Section 27, beyond which primary constituent elements are no longer found and subpopulations have not been located, providing a logical western boundary for proposed critical habitat designation. On the eastern boundary of this reach, subpopulations have been found 0.5 mi (0.8 km) upstream of Thompson Reservoir Number 2, and, because this portion of the reach also contains primary constituent elements, plants likely occur throughout this portion of Section 4 as well. Subpopulations have not been found downstream of the reservoir, which provides a natural eastern boundary for the proposed critical habitat. This reach supports some of the largest populations surveyed, on some of the best habitat with the fewest impacts.

Reach 2: Habitat within this reach is described as hay meadows with silty loam alluvium along the creek (WNDD 2004). The site is mowed for hay, sprayed for Canada thistle, and used for winter grazing. Subpopulations of *Gaura neomexicana* ssp. *coloradensis* have been found along Lodgepole Creek from T14N R58W Section 8 in western Nebraska, extending west approximately 4.4 mi (7.1 km) to T14N 60W Section 10 in Wyoming. One subpopulation was found along Spring Creek approximately 0.75 mi (1.2 km) upstream of its confluence with Lodgepole Creek in Section 10. Habitat throughout the entire reach is primarily identified as PEMA intermixed with PEMC, containing primary constituent elements throughout. It is likely that the plant occurs throughout Section 8 in Nebraska, just downstream of subpopulations found within the western portion of this section. Similar to Reach 1, this reach supports some of the larger populations located on some of the best habitat.

Unit 7: Borie

Unit 7 consists of three stream reaches encompassing a total of 1,141 ac (462 ha) along 17.2 stream mi (27.7 km) along Diamond Creek, Spring Creek, and Lone Tree Creek in Laramie County, Wyoming. This unit is primarily under private ownership, with some Wyoming State lands and lands owned by the city of Cheyenne, Wyoming.

Reach 1: Habitat within this reach is described as silty loam alluvium along Diamond Creek and a small reservoir in a residential greenbelt, hayfields, and pastures (WNDD 2004). This site is in close proximity to a number of roads, a dam, and a housing subdivision, and is subject to livestock grazing. This population is confluent with another population downstream along Diamond Creek on WAFB. Hay fields are intensively plowed and fertilized, and herbicide has been used in the greenbelt to help control a serious thistle problem. Some plant mortality has been observed due to herbicide spraying. Subpopulations of *Gaura neomexicana* ssp. *coloradensis* have been found along Diamond Creek from the eastern boundary of this reach within T14N R67W Section 33, adjacent to WAFB, approximately 3.5 mi (5.6 km) southwest to T13N R67W Section 6. Subpopulations also have been found along smaller, unnamed tributaries to Diamond Creek from the eastern edge of T14N 67W Section 32 approximately 2 mi (3 km) upstream within several small tributaries in Section 31 and T13N R67W Section 6. Habitat throughout this entire reach is PEMC intermixed with PEMA, containing primary constituent elements throughout. Section boundaries on the western edge of this reach provide easily identifiable boundaries, as does WAFB on the eastern edge. This reach supports a large number of plants within several subpopulations, likely harboring considerable genetic variation contributing to the long-term conservation of this species.

Reach 2: Habitat within this reach is described as the edge of a field mowed for hay (WNDD 2004). One subpopulation of *Gaura neomexicana* ssp. *coloradensis* has been found along Spring Creek within T13N R67W Section 18 along the border with Section 17 to the east. Habitat throughout both sections is PEMC intermixed with PEMA, containing primary constituent elements throughout. Therefore, it is likely that plants occur within habitat containing primary constituent elements upstream of the known subpopulation within Section 18, as well downstream of the known subpopulation and extend eastward into Section 17. This is the only population within this stream reach, and may harbor locally adapted genotypes important to the long-term conservation of the species.

Reach 3: The habitat within this reach is described as marginal within a meadow that is grazed, and includes an area by a road crossing that is sprayed for weed control (WNDD 2004). Subpopulations of *Gaura neomexicana* ssp. *coloradensis* have been found along Lone Tree Creek, from the northwest corner of T13N R67W Section 31, to 5 km (3 mi) upstream to T13N R68W Section 26. Habitat within this reach is PEMC, containing primary constituent elements throughout. Section lines provide a readily identifiable boundary for proposed critical habitat on the western edge of this reach. Habitat containing primary constituent elements along Lone Tree Creek extends downstream to the confluence with Goose Creek within Section 31, and it is likely that plants occupy this reach or may do so in the future. The confluence with Goose Creek provides a readily identifiable boundary for proposed critical habitat on the eastern edge of this reach. Little is known about this subpopulation that was last surveyed over two decades ago. However, it is the only population within this creek drainage and occurs at the southernmost point of the plant's distribution within Wyoming. It is likely that genetic exchange has not occurred with other populations, and, therefore, that this population harbors some unique, locally adapted genotypes that may be important to the species' persistence.

Unit 8: Meadow Springs Ranch (Colorado)

Unit 8 consists of 707 ac (286 ha) within a wet meadow supported by groundwater within the Meadow Springs Ranch in Weld County, Colorado, under ownership of the City of Fort Collins, Colorado. Part of the ranch is used for sewage sludge treatment, and part is used for livestock grazing by a lease holder. Colonies of plants have been found throughout the grazed, subirrigated wetland meadow. Several small groups of *Gaura neomexicana* ssp. *coloradensis* have been found on Meadow Springs Ranch (T11N R67W Section 19), approximately 0.5 mi (0.8 km) south of Exit #293 on the east frontage road off of Interstate 25. This population occurs approximately 8 mi (13 km) from the southernmost population within Wyoming. This geographically and reproductively isolated population represents the only known naturally-

occurring population in Colorado. Therefore, this population represents a unique group of subpopulations at the periphery of the species' range, and this area is considered essential to the conservation of the species.

Land Ownership

The vast majority, approximately 90 percent, of proposed critical habitat is in private ownership. The private lands are primarily used for grazing and agriculture. Additionally there are small scattered tracts of State, county and city lands.

Effects of Critical Habitat Designation

Section 7 Consultation

Section 7 of the Act requires Federal agencies, including the Service, to ensure that actions they fund, authorize, or carry out are not likely to destroy or adversely modify critical habitat. In our regulations at 50 CFR 402.2, we define destruction or adverse modification as ''a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to: Alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical.'' However, in a March 15, 2001, decision of the United States Court Appeals for the Fifth Circuit (*Sierra Club* v. *U.S. Fish and Wildlife Service et al.*, F.3d 434), the court found our definition of adverse modification to be invalid. In response to this decision, we are reviewing the regulatory definition of adverse modification in relation to the conservation of the species.

Section 7(a) of the Act requires Federal agencies, including the Service, to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened and with respect to its critical habitat, if any is proposed or designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Section 7(a)(4) of the Act requires Federal agencies to confer with us on any action that is likely to jeopardize the continued existence of a proposed species or result in destruction or adverse modification of proposed critical habitat. Conference reports provide conservation recommendations to assist the agency in eliminating conflicts that may be caused by the proposed action. The conservation recommendations in a conference report are advisory. If a species is listed or critical habitat is designated, section 7(a)(2) requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of such a species or to destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. Through this consultation, the action agency ensures that the permitted actions do not destroy or adversely modify critical habitat.

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

Regulations at 50 CFR 402.16 require Federal agencies to 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 of consultation or conference with us on actions for which formal consultation has been completed, if those actions may affect designated critical habitat or adversely modify or destroy proposed critical habitat.

We may issue a formal conference report if requested by a Federal agency. Formal conference reports on proposed critical habitat contain an opinion that is prepared according to 50 CFR 402.14, as if critical habitat were designated. We may adopt the formal conference report as the biological opinion when the critical habitat is designated, if no substantial new information or changes in the action alter the content of the opinion (*see* 50 CFR 402.10(d)).

Activities on Federal lands that may affect *Gaura neomexicana* ssp. *coloradensis* or its critical habitat will require section 7 consultation. Activities on private or State lands requiring a permit from a Federal agency, such as a permit from the Army Corps under section 404 of the Clean Water Act, a section 10(a)(1)(B) permit from the Service, or some other Federal action, including funding (*e.g.*, Federal Highway Administration or Federal Emergency Management Agency funding), also will continue to be subject to the section 7 consultation process. Federal actions not affecting listed species or critical habitat and actions on non-Federal and private lands that are not federally funded, authorized, or permitted do not require section 7 consultation.

Section 4(b)(8) of the Act requires us to briefly evaluate and describe in any proposed or final regulation that designates critical habitat those activities involving a Federal action that may destroy or adversely modify such habitat, or that may be affected by such designation. Activities that may destroy or adversely modify critical habitat include those that appreciably reduce the value of critical habitat to *Gaura neomexicana* ssp. *coloradensis.* We note that such activities also may jeopardize the continued existence of the species.

Federal agencies already consult with us on activities in areas currently occupied by the species to ensure that their actions do not jeopardize the continued existence of the species. These actions include, but are not limited to:

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

(2) Regulation of water flows, damming, diversion, and channelization by any Federal agency;

(3) Road construction and maintenance, right-of-way designation, and regulation funded or permitted by the Federal Highway Administration;

(4) Voluntary conservation measures by private landowners funded by the Natural Resources Conservation Service;

(5) Licensing of construction of communication sites by the Federal Communications Commission;

(6) Funding of activities by the U.S. Environmental Protection Agency, Department of Energy, Federal Emergency Management Agency, Federal Highway Administration, or any other Federal agency;

(7) Permitting of natural gas pipeline rights-of-way by the Federal Energy Regulatory Commission; and,

(8) Management and research activities undertaken on the WAFB by the U.S. Department of Defense.

We consider all critical habitat units to be occupied by the species based on the most recent survey data collected for populations of *Gaura neomexicana* ssp. *coloradensis*. To ensure that their actions do not jeopardize the continued existence of the species, Federal agencies already consult with us on activities in areas currently occupied by the species or if the species may be affected by the action.

Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Endangered Species Act

Section 3(5)(A) of the Act defines critical habitat as the specific areas within the geographic 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. Therefore, areas within the geographic area occupied by the species that do not contain the features essential for the conservation of the species are not, by definition, critical habitat. Similarly, areas within the geographic area occupied by the species that do not require special management also are not, by definition, critical habitat. To determine whether an area requires special management, we first determine if the essential features located there generally require special management to address applicable threats. If those features do not require special management, or if they do in general but not for the particular area in question because of the existence of an adequate management plan or for some other reason, then the area does not require special management.

We consider a current plan to provide adequate management or protection if it meets three criteria: (1) The plan is complete and provides a conservation benefit to the species (*i.e.*, the plan must maintain or provide for an increase in the species' population, or the enhancement or restoration of its habitat within the area covered by the plan); (2) the plan provides assurances that the conservation management strategies and actions will be implemented (*i.e.*, those responsible for implementing the plan are capable of accomplishing the objectives, and have an implementation schedule or adequate funding for implementing the management plan); and (3) the plan provides assurances that the conservation strategies and measures will be effective (*i.e.*, it identifies biological goals, has provisions for reporting progress, and is of a duration sufficient to implement the plan and achieve the plan's goals and objectives).

Section 318 of fiscal year 2004 National Defense Authorization Act (Pub. L. 108–136) amended section 4 of the Act. This provision prohibits us from designating as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an INRMP prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if we determine in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation.

As described above, we identified habitat essential for the conservation of *Gaura neomexicana* ssp. *coloradensis* in Laramie and Platte Counties in Wyoming; Kimball County in Nebraska; and Weld County in Colorado. We have examined the INRMP for the WAFB to determine coverage for *G. n.* ssp. *coloradensis*. The INRMP identifies management issues related to conservation and enhancement of *G. n.* ssp. *coloradensis* and identifies goals and objectives that involve the protection of populations and habitat for this species. Some objectives for achieving those goals include: continue to participate in, and encourage development of, Cooperative Agreements and Memorandum of Understanding activities with Federal, State, and local government and support agencies; promote and support the scientific study and investigation of federally listed species management, conservation, and recovery; restrict public access in existing and potential habitat areas; and increase public education of Federally listed species through management actions, the WAFB Watchable Wildlife Program, and a Prairie Ecosystem Education Center (WAFB 2001). Based on the beneficial measures for *G. n.* ssp. *coloradensis* contained in the INRMP for WAFB, we have not included this area in the proposed designation of critical habitat for *Gaura neomexicana* ssp. *coloradensis* pursuant section 4(a)(3) of the Act. We will continue to work cooperatively with the Department of the Air Force to assist the WAFB in implementing and refining the programmatic recommendations contained in this plan that provide benefits to *Gaura neomexicana* ssp. *coloradensis*. The non-inclusion of WAFB demonstrates the important contributions that approved INRMPs have to the conservation of the species. As with HCP exclusions, a related benefit of excluding Department of Defense lands with approved INRMPs is to encourage continued development of partnerships with other stakeholders, including States, local governments, conservation organizations, and private landowners to develop adequate management plans that conserve and protect *Gaura neomexicana* ssp. *coloradensis* habitat. We found the INRMP provides benefits for *Gaura neomexicana* ssp. *coloradensis*.

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

In our critical habitat designations, we use both the provisions outlined in sections 3(5)(A) and 4(b)(2) of the Act to evaluate those specific areas that are proposed for designation as critical habitat and those areas that are subsequently designated in a final rule. Lands we have found do not meet the definition of critical habitat under section 3(5)(A) or that we have excluded pursuant to section 4(b)(2) include those covered by the following types of plans if they provide assurances that the conservation measures they outline will be implemented and effective: (1) Legally operative HCPs that cover the species, (2) draft HCPs that cover the species and have undergone public review and comment (*i.e.*, pending HCPs), (3) Tribal conservation plans that cover the species, (4) State conservation plans that cover the species, and (5) National Wildlife Refuge System Comprehensive Conservation Plans. Currently, no legally operative or draft HCPs, Tribal conservation plans, State conservation plans, or National Wildlife Refuge System Comprehensive Conservation Plans cover *Gaura neomexicana* ssp. *coloradensis*.

Economic Analysis

An analysis of the economic impacts of proposing critical habitat for *Gaura neomexicana* ssp. *coloradensis* is being prepared. We will announce the availability of the draft economic analysis as soon as it is completed, at which time we will seek public review and comment. At that time, copies of the draft economic analysis will be available for downloading from the Internet at *http://mountainprairie.fws.gov/species/plants/cobutterfly/index.htm*, or by contacting

the Wyoming Fish and Wildlife Office directly (see **ADDRESSES** section).

Peer Review

In accordance with our joint policy published in the **Federal Register** on July 1, 1994 (59 FR 34270), we will seek the expert opinions of at least three appropriate and independent specialists regarding this proposed rule. The purpose of such review is to ensure that our critical habitat designation is based on scientifically sound data, assumptions, and analyses. We will send these peer reviewers copies of this proposed rule immediately following publication in the **Federal Register**. We will invite these peer reviewers to comment, during the public comment period, on the specific assumptions and conclusions regarding the proposed designation of critical habitat.

We will consider all comments and information received during the comment period on this proposed rule during preparation of a final rulemaking. Accordingly, the final decision may differ from this proposal.

Public Hearings

The Act provides for one or more public hearings on this proposal, if requested. Requests for public hearings must be made in writing at least 15 days prior to the close of the public comment period. We will schedule public hearings on this proposal, if any are requested, and announce the dates, times, and places of those hearings in the **Federal Register** and local newspapers at least 15 days prior to the first hearing.

Clarity of the Rule

Executive Order 12866 requires each agency to write regulations and notices that are easy to understand. We invite your comments on how to make this proposed rule easier to understand, including answers to questions such as the following: (1) Are the requirements in the proposed rule clearly stated? (2) Does the proposed rule contain technical jargon that interferes with the clarity? (3) Does the format of the proposed rule (grouping and order of the sections, use of headings, paragraphing, and so forth) aid or reduce its clarity? (4) Is the description of the notice in the **SUPPLEMENTARY INFORMATION** section of the preamble helpful in understanding the proposed rule? (5) What else could we do to make this proposed rule easier to understand?

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

Required Determinations

Regulatory Planning and Review

This document has not been reviewed by the Office of Management and Budget (OMB), in accordance with Executive Order 12866. The OMB makes the final determination of significance under Executive Order 12866. We are preparing a draft economic analysis of this proposed action, which will be available for public comment, to determine the economic consequences of designating the specific area as critical habitat.

Within these areas, the types of Federal actions or authorized activities that we have identified as potential concerns are listed above in the section on Section 7 Consultation.

The availability of the draft economic analysis will be announced in the **Federal Register** and in local newspapers so that it is available for public review and comments.

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

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

At this time, the Service lacks the available economic information necessary to provide an adequate factual basis for the required RFA finding. Therefore, the RFA finding is deferred until completion of the draft economic analysis prepared pursuant to section 4(b)(2) of the Act and Executive Order 12866. This draft economic analysis will provide the required factual basis for the RFA finding. Upon completion of the draft economic analysis, the Service will publish a notice of availability of the draft economic analysis of the proposed designation and reopen the public comment period for the proposed designation for an additional 30 days. The Service will include with the notice of availability, as appropriate, an initial regulatory flexibility analysis or a certification that the rule will not have a significant economic impact on a substantial number of small entities accompanied by the factual basis for that determination. The Service has concluded that deferring the RFA finding until completion of the draft economic analysis is necessary to meet the purposes and requirements of the RFA. Deferring the RFA finding in this manner will ensure that the Service makes a sufficiently informed determination based on adequate economic information and provides the necessary opportunity for public comment.

Executive Order 13211

On May 18, 2001, the President issued an Executive Order (13211) on regulations that significantly affect energy supply, distribution, and use. Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This proposed rule to designate critical habitat for *Gaura neomexicana* ssp. *coloradensis* is not a significant regulatory action under Executive Order 12866, and it is not expected to significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

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

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

(a) This rule will not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute or regulation that would impose an enforceable duty upon State, local, tribal governments, or the private sector and includes both ''Federal intergovernmental mandates'' and ''Federal private sector mandates.'' These terms are defined in 2 U.S.C. 658(5)–(7). ''Federal intergovernmental mandate'' includes a regulation that ''would impose an enforceable duty upon State, local, or tribal governments'' with two exceptions. It excludes ''a condition of federal assistance.'' It also excludes ''a duty arising from participation in a voluntary Federal program,'' unless the regulation ''relates to a then-existing Federal program

under which $500,000,000 or more is provided annually to State, local, and tribal governments under entitlement authority,'' if the provision would ''increase the stringency of conditions of assistance'' or ''place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding'' and the State, local, or tribal governments ''lack authority'' to adjust accordingly. (At the time of enactment, these entitlement programs were: Medicaid; AFDC work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement.) ''Federal private sector mandate'' includes a regulation that ''would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance; or (ii) a duty arising from participation in a voluntary Federal program.''

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

(b) We do not believe that this rule will significantly or uniquely affect small governments. A Small Government Agency Plan is not required. State, city and county lands comprise less than 10 percent of the total proposed designation; the other 90 percent is in private ownership. Small governments will not be affected at all unless they proposed an action requiring Federal funds, permits or other authorization. Any such activity will require that the involved Federal agency ensure that the action is not likely to adversely modify or destroy designated critical habitat. However, as discussed above, Federal agencies are currently required to ensure that such activity is not likely to jeopardize the species, and no further regulatory impacts from this proposed designation of critical habitat are anticipated. We will, however, further evaluate this issue as we conduct our economic analysis and revise this assessment if appropriate.

Takings

In accordance with Executive Order 12630, the rule does not have significant takings implications. A takings implication assessment is not required. The designation of critical habitat affects only Federal agency actions. The rule will not increase or decrease the current restrictions on private property concerning take of *Gaura neomexicana* ssp. *coloradensis*. Because there is no prohibition of take for this species, and the fact that critical habitat provides no incremental restrictions, we do not anticipate that property values will be affected by the proposed critical habitat designation. While real estate market values may temporarily decline following designation, due to the perception that critical habitat designation may impose additional regulatory burdens on land use, we expect any such impacts to be short term. Additionally, critical habitat designation does not preclude development of HCPs. Owners of areas that are included in the designated critical habitat will continue to have opportunity to use their property in ways consistent with the survival of *G. n.* ssp. *coloradensis*.

Federalism

In accordance with Executive Order 13132, the rule does not have significant Federalism effects. A Federalism assessment is not required. In keeping with DOI policy, we requested information from, and coordinated development of, this proposed critical habitat designation with appropriate State resource agencies in Wyoming, Colorado, and Nebraska. The designation of critical habitat in areas currently occupied by *Gaura neomexicana* ssp. *coloradensis* imposes no additional restrictions to those currently in place and, therefore, has little incremental impact on State and local governments and their activities. The designation may have some benefit to these governments in that the areas essential to the conservation of the species are more clearly defined, and the primary constituent elements of the habitat necessary to the survival of the species are specifically identified. While making this definition and identification does not alter where and what federally sponsored activities may occur, it may assist these local governments in long-range planning (rather than waiting for case-by-case section 7 consultations to occur).

Civil Justice Reform

In accordance with Executive Order 12988, the Office of the Solicitor has determined that the rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order. We have proposed designating critical habitat in accordance with the provisions of the Act. This proposed rule uses standard property descriptions and identifies the primary constituent elements within the designated areas to assist the public in understanding the habitat needs of *Gaura neomexicana* ssp. *coloradensis*.

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

This rule does not contain any new collections of information that require approval by OMB under the Paperwork Reduction Act. This rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act

It is our position 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 Act. 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 *Gaura neomexicana* ssp. *coloradensis*, 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 will undertake a NEPA analysis for critical habitat designation and notify the public of the availability of the draft environmental assessment for this proposal when it is finished.

Government-to-Government Relationship With Tribes

In accordance with the President Clinton's memorandum of April 29,

1994, ''Government-to-Government Relations with Native American Tribal Governments'' (59 FR 22951), Executive Order 13175, and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with federally-recognized Tribes on a government-to-government basis. We have determined that there are no tribal lands essential for the conservation of *Gaura neomexicana* ssp. *coloradensis*. Consequently, we have not proposed the designation of critical habitat on Tribal lands and have not undertaken consultation with any federally-recognized Tribes.

References Cited

A complete list of all references cited in this rulemaking is available upon request from the Field Supervisor, Wyoming Field Office (*see* **ADDRESSES** section).

Author

The primary author of this package is Tyler Abbott (*see* **ADDRESSES** section).

List of Subjects in 50 CFR Part 17

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

Proposed Regulation Promulgation

Accordingly, we propose to 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. In § 17.12(h), revise the entry for *Gaura neomexicana* ssp. *coloradensis* under ''FLOWERING PLANTS'' to read as follows:

§ 17.12 Endangered and threatened plants.

* * * * *

(h) * * *

Species		Historic range	Family	Status	When listed	Critical habitat	Special rules
Scientific name	Common name						
FLOWERING PLANTS							
*	*	*	*	*	*		*
Gaura neomexicana ssp. *coloradensis*.	Colorado butterfly plant.	U.S.A. (WY, NE, CO).	Onagraceae-Evening Primrose.	T	704	17.96(a)	NA
*	*	*	*	*	*		*

3. In § 17.96(a), amend paragraph (a) by adding an entry for *Gaura neomexicana* ssp. *coloradensis* in alphabetical order under Family Onagraceae to read as follows:

§ 17.96 Critical habitat—plants.

(a) * * *

Family Onagraceae: *Gaura neomexicana* ssp. *coloradensis* (Colorado butterfly plant)

(1) Critical habitat units are depicted for Laramie County, Wyoming; Kimball County, Nebraska; and Weld County, Colorado, on the maps below.

(2) The primary constituent elements of critical habitat for *Gaura neomexicana* ssp. *coloradensis* are the habitat components that provide:

(i) Subirrigated, alluvial soils on level or low-gradient floodplains and drainage bottoms at elevations of 5,000 to 6,400 feet (1,524 to 1,951 meters).

(ii) A mesic moisture regime, intermediate in moisture between wet, streamside communities dominated by sedges, rushes, and cattails, and dry upland shortgrass prairie.

(iii) Early- to mid-succession riparian (streambank or riverbank) plant communities that are open and without dense or overgrown vegetation (including hayed fields, grazed pasture, other agricultural lands that are not plowed or disced regularly, areas that have been restored after past aggregate extraction, areas supporting recreation trails, and urban/wildland interfaces).

(iv) Hydrological and geological conditions that serve to create and maintain stream channels, floodplains, floodplain benches, and wet meadows that support patterns of plant communities associated with G. n. ssp. coloradensis.

(3) Critical habitat does not include man-made structures existing on the effective date of this rule and not containing one or more of the primary constituent elements, such as buildings, roads, parking lots, other paved areas, lawns, other urban and suburban landscaped areas, regularly plowed or disced agricultural areas.

(4) The critical habitat is based on U.S. Geological Survey 7.5″ quadrangle maps (Borie, Bristol Ridge, Bristol Ridge NE, Burns, Bushnell, Carr West, Cheyenne North, C S Ranch, Double L Ranch, Durham, Farthing Ranch, Hillsdale, Hirsig Ranch, Indian Hill, J H D Ranch, Lewis Ranch, Moffett Ranch, Nimmo Ranch, Pine Bluffs, P O Ranch, Round Top Lake) and corresponding U.S. Fish and Wildlife Service National Wetlands Inventory maps. Critical habitat includes areas occupied by *Gaura neomexicana* ssp. *coloradensis* based upon the most current maps of surveyed subpopulations. Critical habitat also includes adjacent areas, upstream and downstream, containing suitable hydrologic regimes, soils, and vegetation communities to allow for seed dispersal between populations and maintenance of the seed bank. To ease identification of the critical habitat, the boundaries follow section lines and major geographical features where feasible. The outward extent of critical habitat is 300 feet (91 meters) from the center line of the stream edge (as defined by the ordinary high-water mark). This amount of land will support the full range of primary constituent elements essential for persistence of *G. n.* ssp. *coloradensis* populations and should adequately protect the plant and its habitats from secondary impacts of nearby disturbance.

(5) **Note:** Index Map follows:

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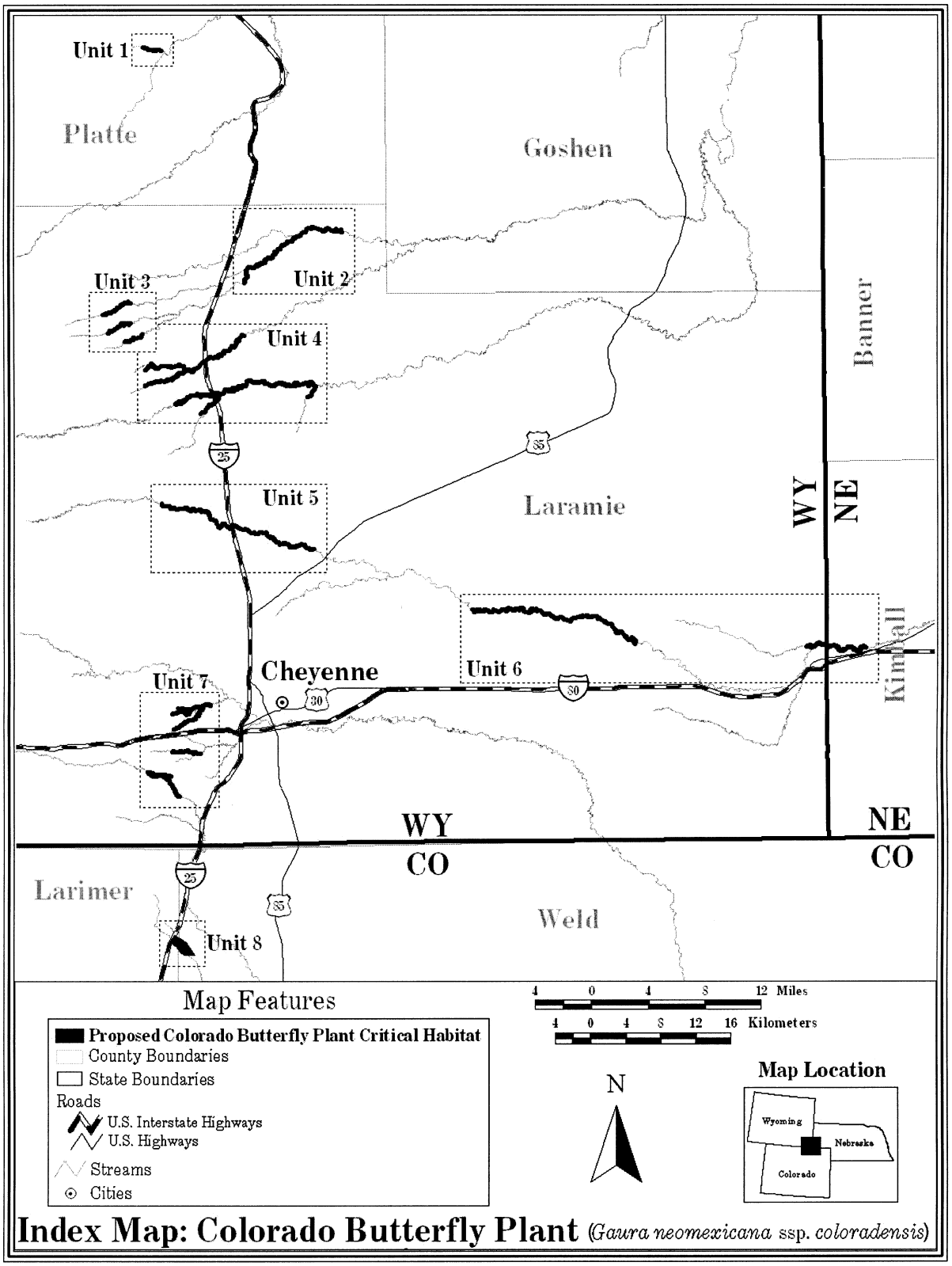
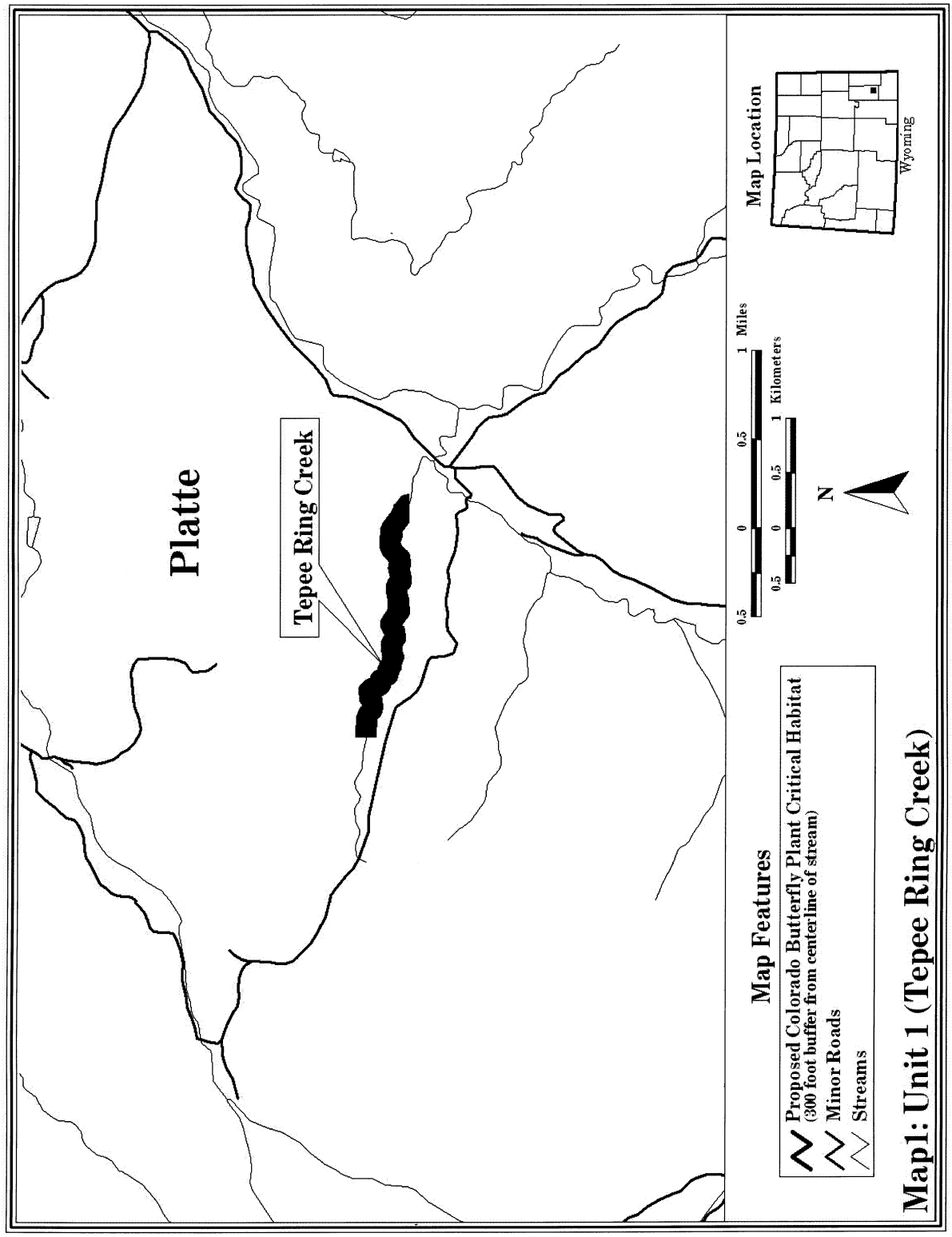


Index Map: Colorado Butterfly Plant (*Gaura neomexicana* ssp. *coloradensis*)

(6) Unit 1: Tepee Ring Creek, Platte County, Wyoming.

(i) This unit consists of 1.5 mi (2.4 km) of Tepee Ring Creek bounded by the western edge of Sec. 2, T21N R68W, extending downstream including S2 S2 of Sec. 2; downstream to SW4SW4 Sec. 1, bounded by the southern line of Sec. 1.

(ii) **Note:** Map 1 (Unit 1) follows:

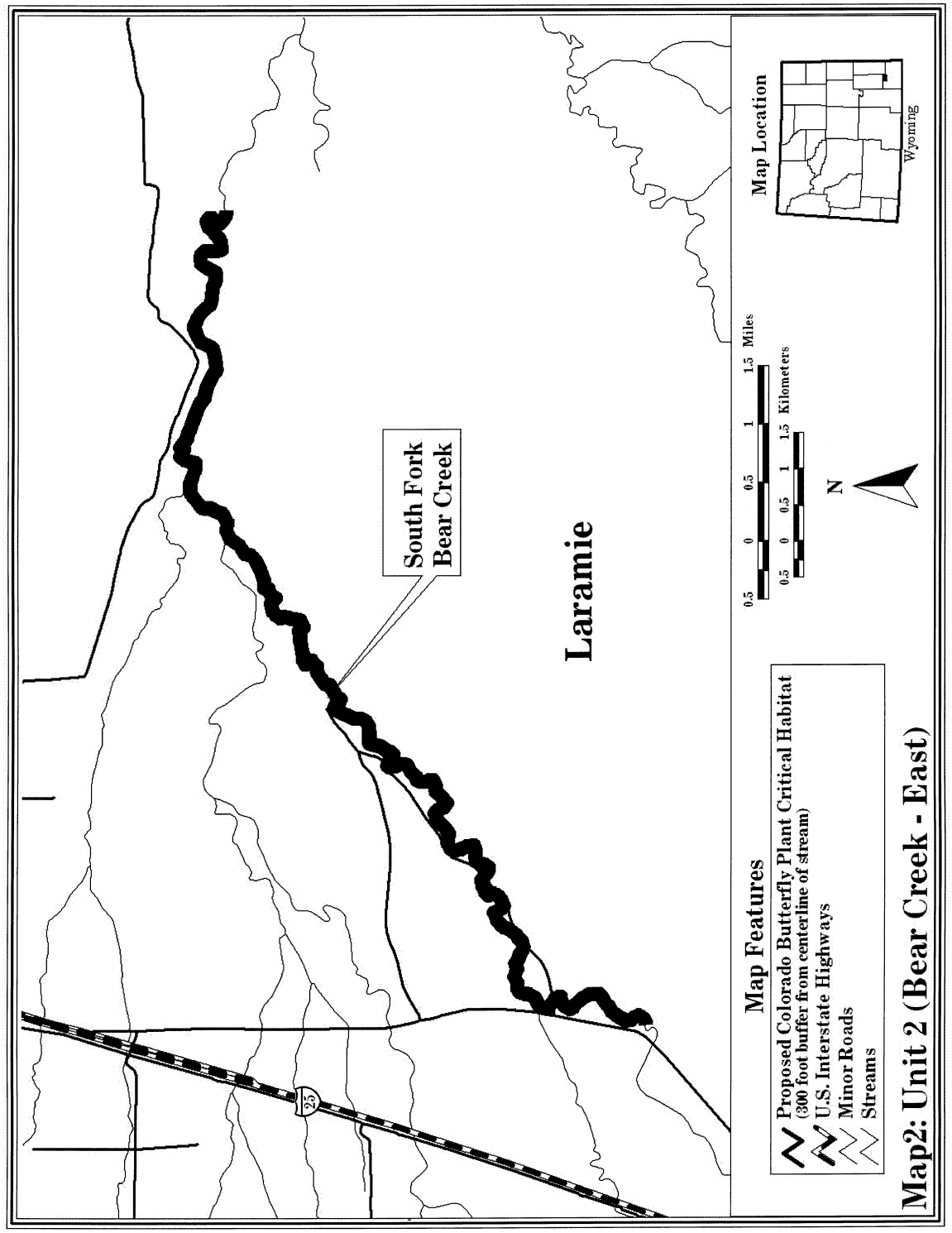


Map1: Unit 1 (Tepee Ring Creek)

(7) Unit 2: Bear Creek East, Laramie County, Wyoming.

(i) This unit consists of 11 mi (18 km) of the South Fork of the Bear Creek. Includes: T19N R67W, NW4 NW4 of Sec. 36; W2 SW4 Sec. 25; NW4 Sec. 25; NE4 Sec. 25; downstream into T19N R66W, S2 SW4 Sec. 19; N2 SE4 Sec. 19; NW4 Sec. 20; SE4 SW4 Sec. 17; SE4 Sec. 17; S2 NW4 Sec. 16; N2 NE4 Sec. 16; SE4SE4SE4 Sec. 9; SW4 Sec. 10; S2 NE4 Sec. 10; SW4NE4 Sec. 11; NE4SW4; N2 SE4 Sec. 11; N2 S2 Sec. 12.

(ii) **Note:** Map 2 (Unit 2) follows:



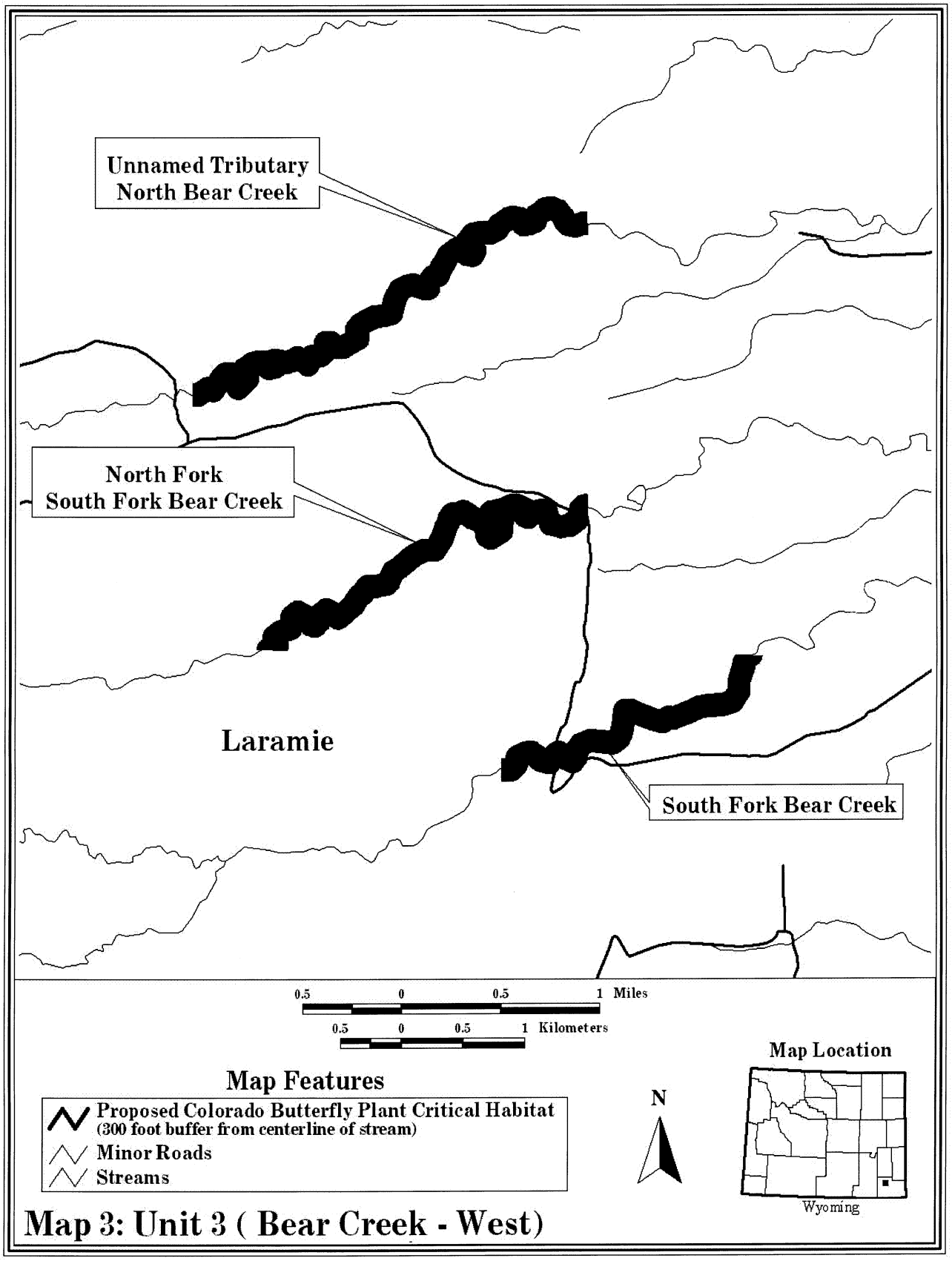
(8) Unit 3: Bear Creek West, Laramie County, Wyoming.

(i) Reach 1 consists of 2.9 stream mi (4.7 km) of an unnamed south tributary of North Bear Creek in the valley between North Bear Creek and the North Fork of the South Fork Bear Creek. Includes: T18N R68W, N2 SW4 Sec. 8; downstream to NW4NW4SE4 Sec. 8; SE4NE4 Sec. 8; NW4NW4 Sec. 9; SE4SW4 Sec. 4; S2 SE4 Sec. 4.

(ii) Reach 2 consists of 2.6 stream mi (4.2 km) of the North Fork of the South Fork Bear Creek, upstream of Nimmo Reservoir No. 9. Includes: T18N R68W, SE4SW4 Sec. 17; downstream to N2SW4SE4 Sec. 17; NW4SE4SE4 Sec. 17; S2 NE4SE4 Sec. 17; NW4SW4 Sec. 16; SE4NW4 Sec. 16; S2 NE4 Sec. 16.

(iii) Reach 3 consists of 1.7 stream mi (2.8 km) of the South Fork Bear Creek. Includes: T18N R68W, N2 N2 SE4 Sec. 21; downstream to S2 NW4 Sec. 22; NW4SW4NE4 Sec. 22; SE4NW4NE4 Sec. 22; W2 NE4NE4 Sec. 22.

(iv) **Note:** Map 3 (Unit 3) follows:

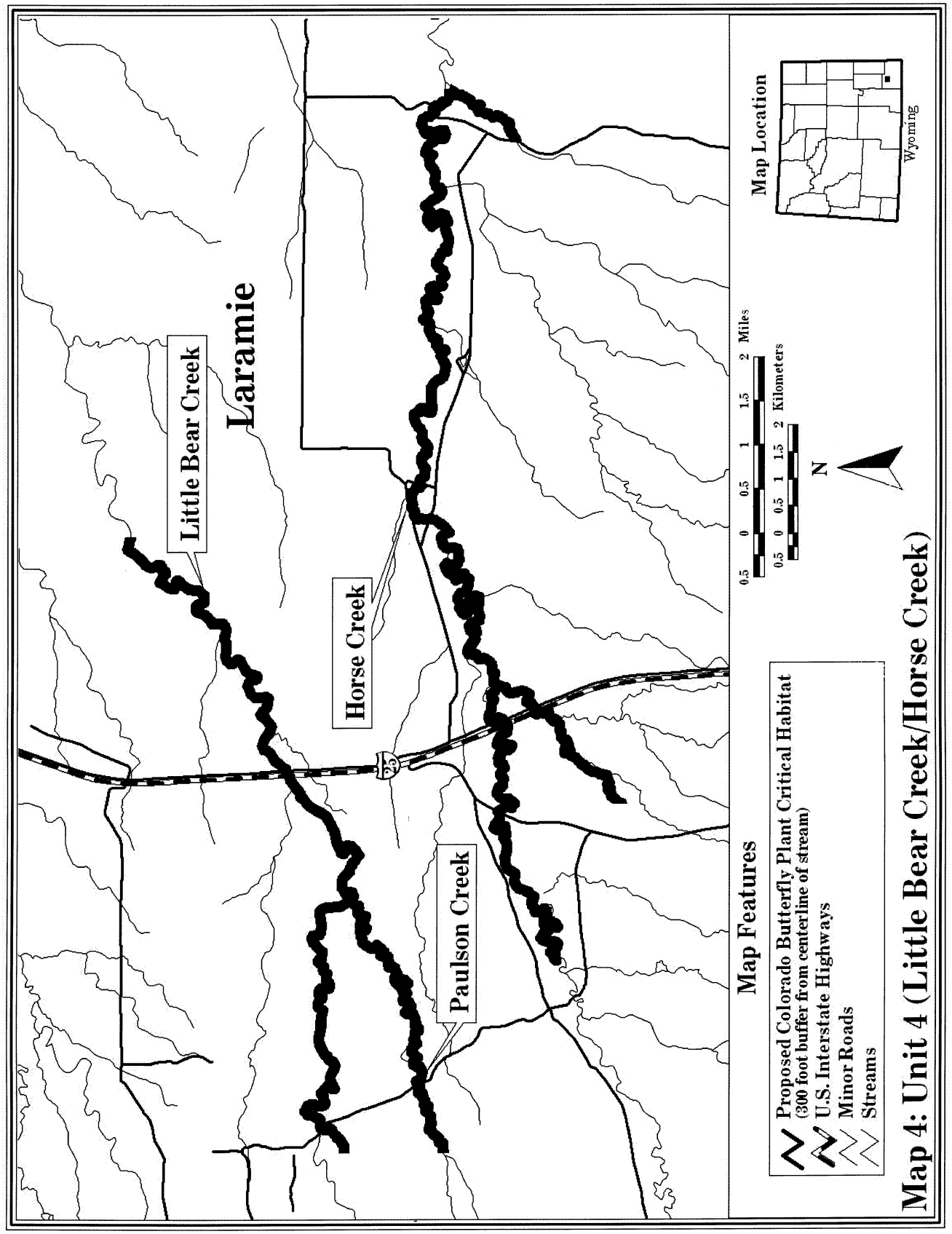

Unnamed Tributary
North Bear Creek
North Fork
South Fork Bear Creek
Laramie
South Fork Bear Creek
0.5 0 0.5 1 Miles
0.5 0 0.5 1 Kilometers
Map Location
Map Features
Proposed Colorado Butterfly Plant Critical Habitat
(300 foot buffer from centerline of stream)
Minor Roads
Streams
N
Wyoming
Map 3: Unit 3 (Bear Creek - West)

(9) Unit 4: Little Bear Creek/ Horse Creek, Laramie County, Wyoming.

(i) Reach 1 consists of 15.6 stream mi (25.1 km) of Little Bear Creek, which includes approximately 5 stream mi (8 km) of the Paulson Branch tributary. Little Bear Creek includes: T18N R68W, NW4NW4SW4 Sec. 35; downstream to N2 Sec. 35; N2 Sec. 36. T18N R67W, N2 Sec. 31; downstream to N2 SW4 Sec. 32; NE4 Sec. 32; NW4NW4NW4 Sec. 33; S2 Sec. 28; NW4SW4 Sec. 27; S2 SE4NW4 Sec. 27; NE4 Sec. 27; SW4 Sec. 28; SE4SE4NW4 Sec. 28; NE4 Sec. 28. Paulson Branch includes—T18N R68W, N2 SW4 Sec. 2; downstream to S2 NE4 Sec. 2; N2 Sec. 1; T18N 67W, NW4NW4 Sec. 6; SE4SW4 Sec. 31; SE4 Sec. 31.

(ii) Reach 2 consists of 36.1 stream mi (58.1 km) of Horse Creek, including approximately 2.5 stream mi (4.0 km) of an unnamed tributary entering from the south just downstream of Brunyansky Draw; and approximately 1.0 mi (1.6 km) of an unnamed tributary entering on the far eastern end just east of, and parallel to, Indian Hill Road. Includes—T17N R67W, S2 SW4 Sec. 7; downstream to SE4 Sec. 7; NW4SW4 Sec. 8; S2 N2 Sec. 8; S2 N2 Sec. 9; NW4 Sec. 10; N2 NE4 Sec. 10; S2 S2 SE4 Sec. 3; N2 N2 NW4 Sec. 11; S2 Sec. 2; NW4SW4 Sec. 1; S2 N2 Sec. 1; T17N R66W, S2 NW4 Sec. 6; downstream to N2 SE4 Sec. 6; NW4SW4 Sec. 5; SE4NW4 Sec. 5; SW4NE4 Sec. 5; N2 SE4 Sec. 5; N2 S2 Sec. 4; S2 NE4 Sec. 4; NW4SW4 Sec. 3; S2 N2 Sec. 3; N2 SE4 Sec. 3; W2 SW4 Sec. 2; NE4 Sec. 10.

(iii) **Note:** Map 4 (Unit 4) follows:

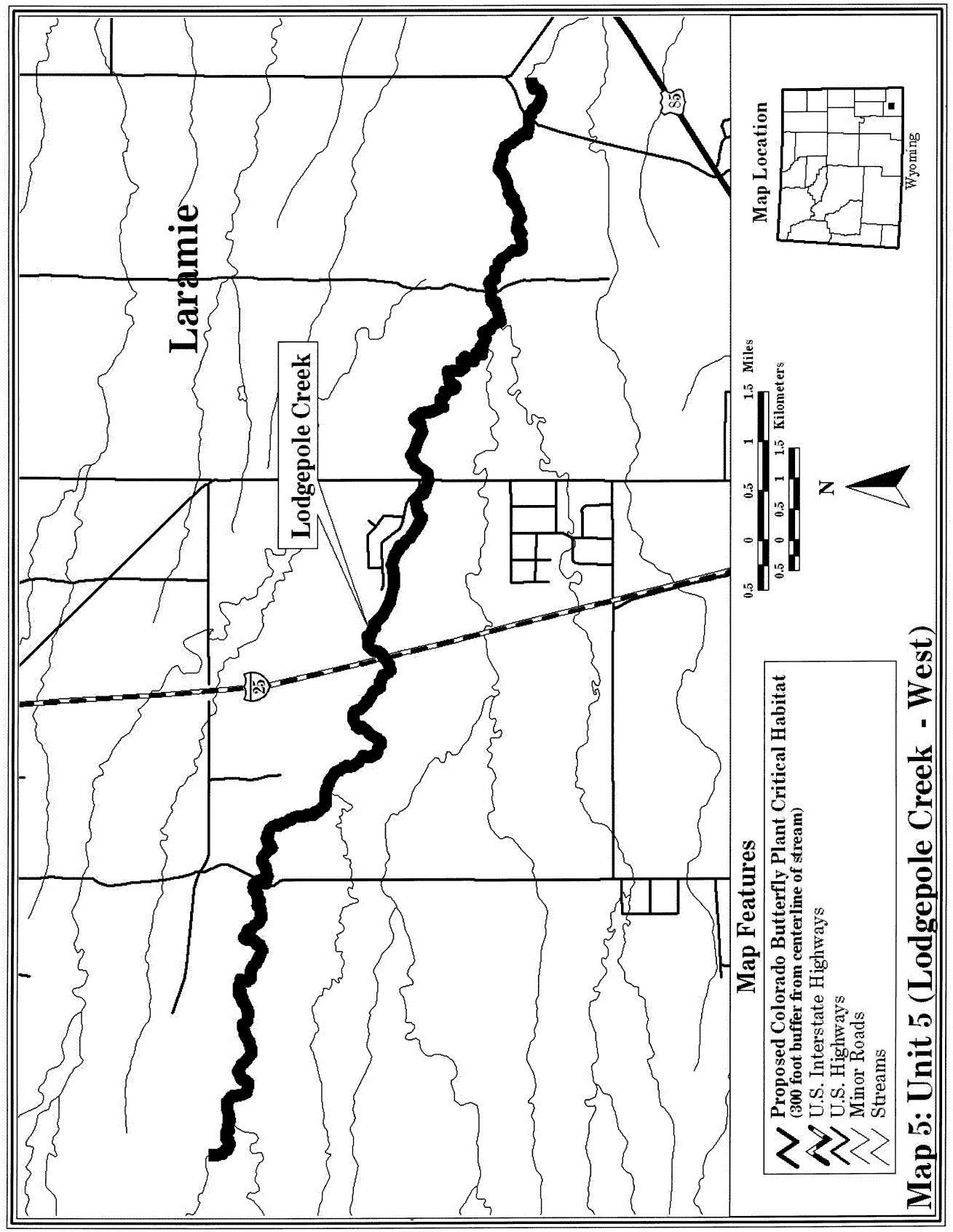


Map 4: Unit 4 (Little Bear Creek/Horse Creek)

(10) Unit 5: Lodgepole Creek West, Laramie County, Wyoming.

(i) This unit consists of approximately 15 stream mi (24 km) west along Lodgepole Creek from State highway 85. Includes: T16N R68W, N2 Sec. 24; downstream to T16N R67W, S2 N2 Sec. 19; S2 N2 Sec. 20; N2 S2 Sec. 20; N2 SW4 Sec. 21; W2 SE4 Sec. 21; N2 NE4 Sec. 28; W2 NW4 Sec. 27; N2 S2 Sec. 27; SW4NE4 Sec. 27; S2 Sec. 26; S2 SW4 Sec. 25; N2 NE4 Sec. 36; T16N R66W, N2 Sec. 31; downstream to SW4NW4 Sec. 32; SW4 Sec. 32; S2 SE4 Sec. 32; SW4SW4 Sec. 33; SE4SE4 Sec. 33; S2 SW4 Sec. 34; T15N R66W, N2 N2 Sec. 4; downstream to NE4NW4 Sec. 3; N2 NE4 Sec. 3; NW4 Sec. 2; SE4 Sec. 2.

(ii) **Note:** Map 5 (Unit 5) follows:



Map 5: Unit 5 (Lodgepole Creek - West)

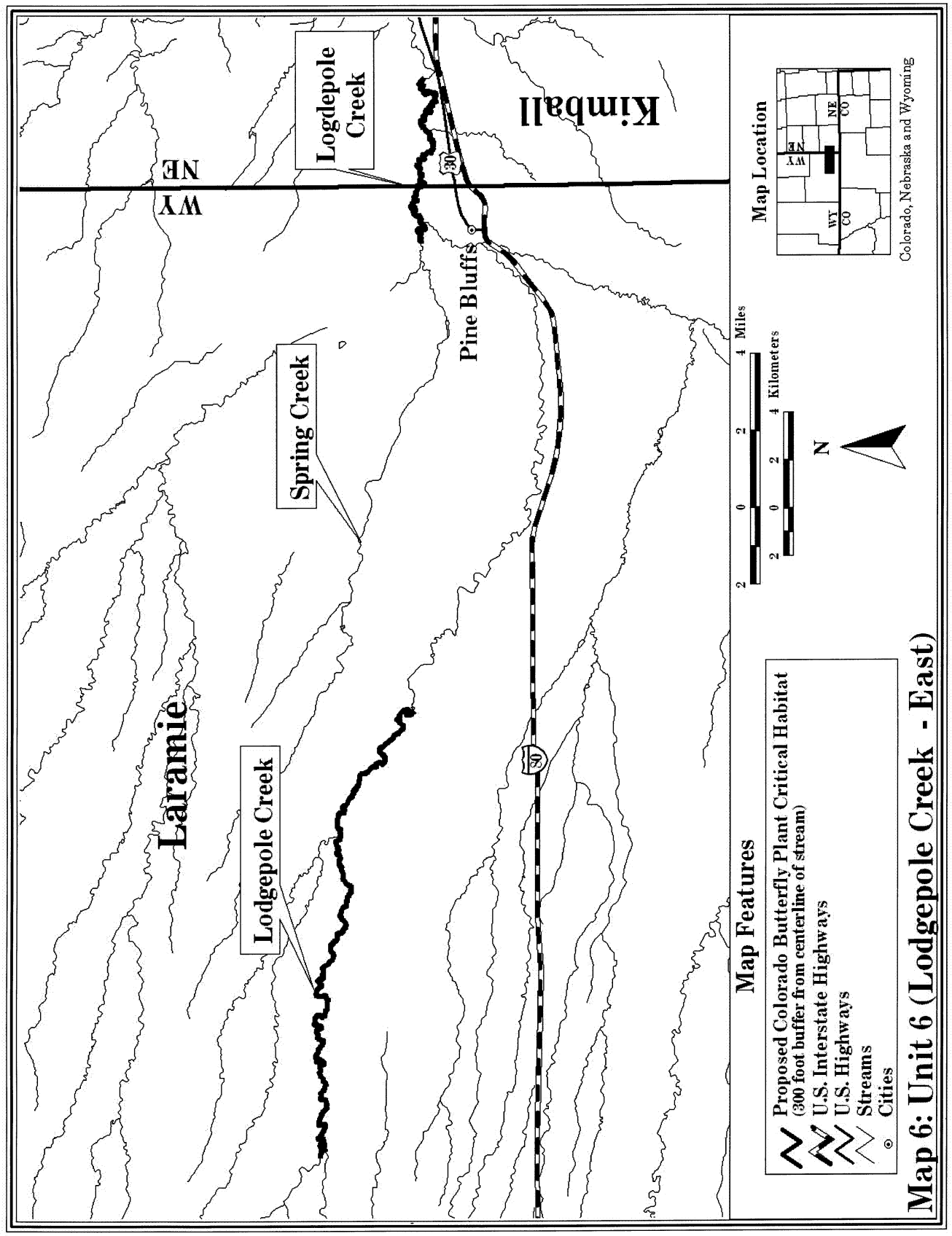
(11) Unit 6: Lodgepole Creek East, Laramie County, Wyoming and Kimball County, Nebraska.

(i) Reach 1 consists of 16.9 mi (27.2 km) of Lodgepole Creek from approximately 3 mi (5 km) northwest of the town of Hillsdale on the west end of the reach, downstream to Thomas Reservoir No. 2, approximately 2.5 mi (4.0 km) northeast of the town of Burns. Includes: T15N R64W, NE4SW4 Sec. 27; downstream to N2 N2 SE4 Sec. 27; S2 S2 NE4 Sec. 27; N2 S2 Sec. 26; S2 S2 N2 Sec. 26; S2 N2 Sec. 25; NW4SW4 Sec. 25; N2 N2 SE4 Sec. 25; T15N R63W, S2 N2 Sec. 30; downstream to NE4NE4SE4 Sec. 30; N2 SW4 Sec. 29; SE4SE4NW4 Sec. 29; S2 NE4 Sec. 29; S2 Sec. 28; S2 S2 Sec. 27; N2 N2 Sec. 34; N2 N2 Sec. 35; S2 SE4SE4 Sec. 26; S2 S2 Sec. 25; T15N R62W, SW4SW4 Sec. 30; downstream to N2 Sec. 31; SW4 Sec. 32; T14N R62W, NE4NE4NW4 Sec. 5; downstream to N2 NE4 Sec. 5; NW4 Sec. 4; SW4SW4NE4 Sec. 4; S2 Sec. 4.

(ii) Reach 2 consists of 1.4 mi (2.3 km) of Lodgepole Creek in Wyoming from north of the town of Pine Bluffs extending downstream approximately 5.5 stream mi (8.9 km) beyond the Wyoming State line into Kimball County, Nebraska. This reach also includes approximately 1.0 stream mi (1.6 km) of Spring Creek in Wyoming, west of the point of merging with Lodgepole Creek. In Wyoming, includes: T14N R60W, N2 NW4 Sec. 10; downstream to NW4NE4 Sec. 10; S2 S2 SE4 Sec. 3; SW4SW4 Sec. 2; NE4NW4 Sec. 11.

(iii) In Nebraska, includes: T14N R59W, N2 N2 SE4 Sec. 11; downstream to S2 S2 NE4 Sec. 11; S2 S2 NW4 Sec. 12; S2 Sec. 12. T14N R58W, S2 Sec. 7; downstream to S2 Sec. 8.

(iv) **Note:** Map 6 (Unit 6) follows:



Map 6: Unit 6 (Lodgepole Creek - East)

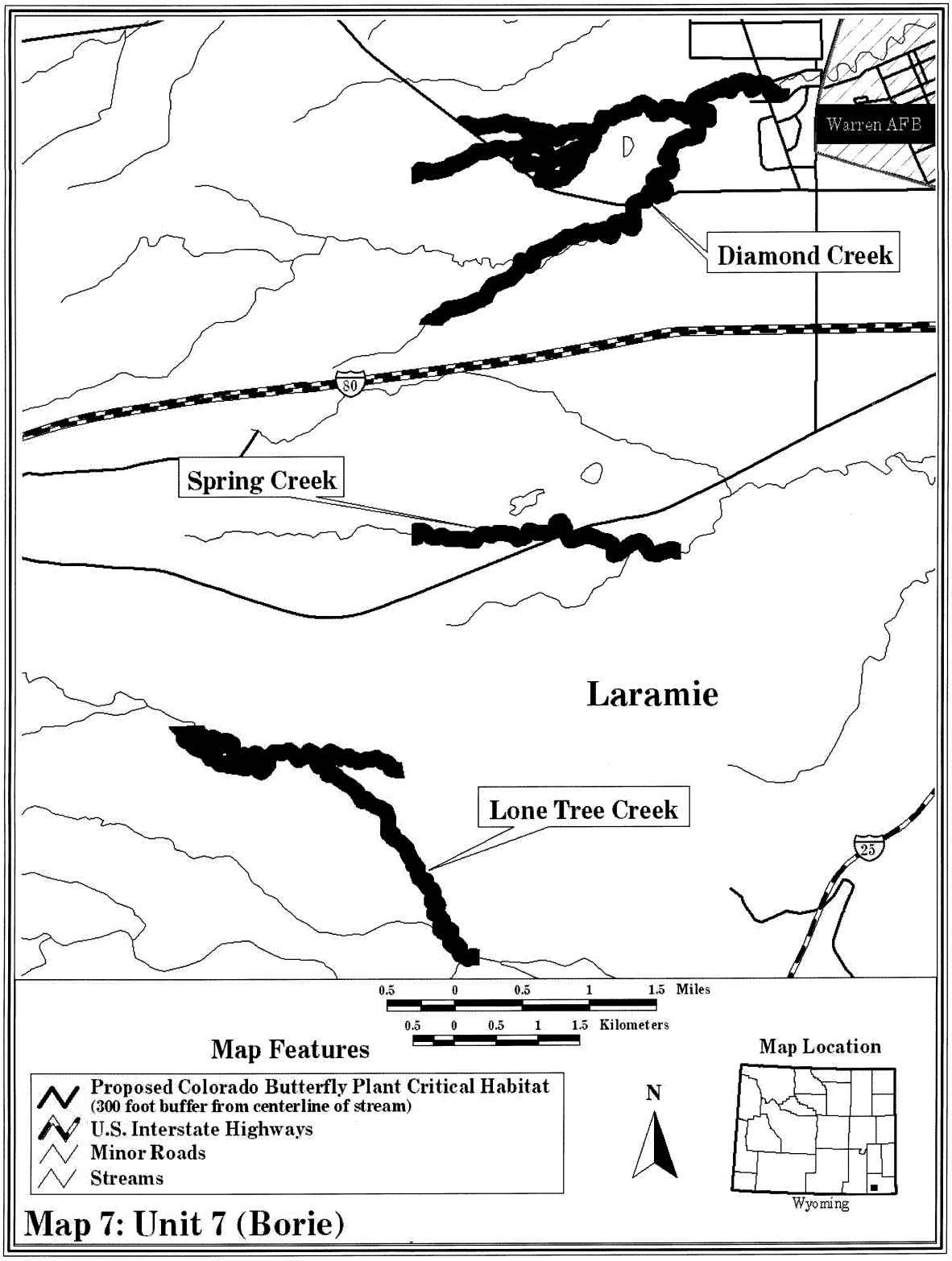
(12) Unit 7: Borie, Laramie County, Wyoming.

(i) Reach 1 consists of 9.4 stream mi (15.1 km) along Diamond Creek west of F.E. Warren Air Force Base and other smaller tributaries merging from the north. Includes: T14N R67W, N2 Sec. 33; upstream to NW4SW4 Sec. 33; S2 NE4 Sec. 32; E2 SE4 Sec. 32; SW4 Sec. 32; S2 Sec. 31; T13N R67W, N2 Sec. 5; upstream to NW4NW4SW4 Sec. 5; S2 Sec. 6.

(ii) Reach 2 consists of 2.5 stream mi (4.0 km) of Spring Creek. Includes: T13N R67W, N2 S2 Sec. 18; downstream to N2 S2 Sec. 17; SW4NW4 Sec. 17.

(iii) Reach 3 consists of 4.4 stream mi (7.1 km) of Lone Tree Creek, and approximately 1.0 mi (1.6 km) of an unnamed tributary to the north of Lone Tree Creek. Includes: T13N R68W, N2 NE4 Sec. 26; downstream to NE4NE4NW4 Sec. 26; N2 Sec. 25; SE4 Sec. 25; T13N R67W, NW4 Sec. 31; downstream to NE4SW4 Sec. 31.

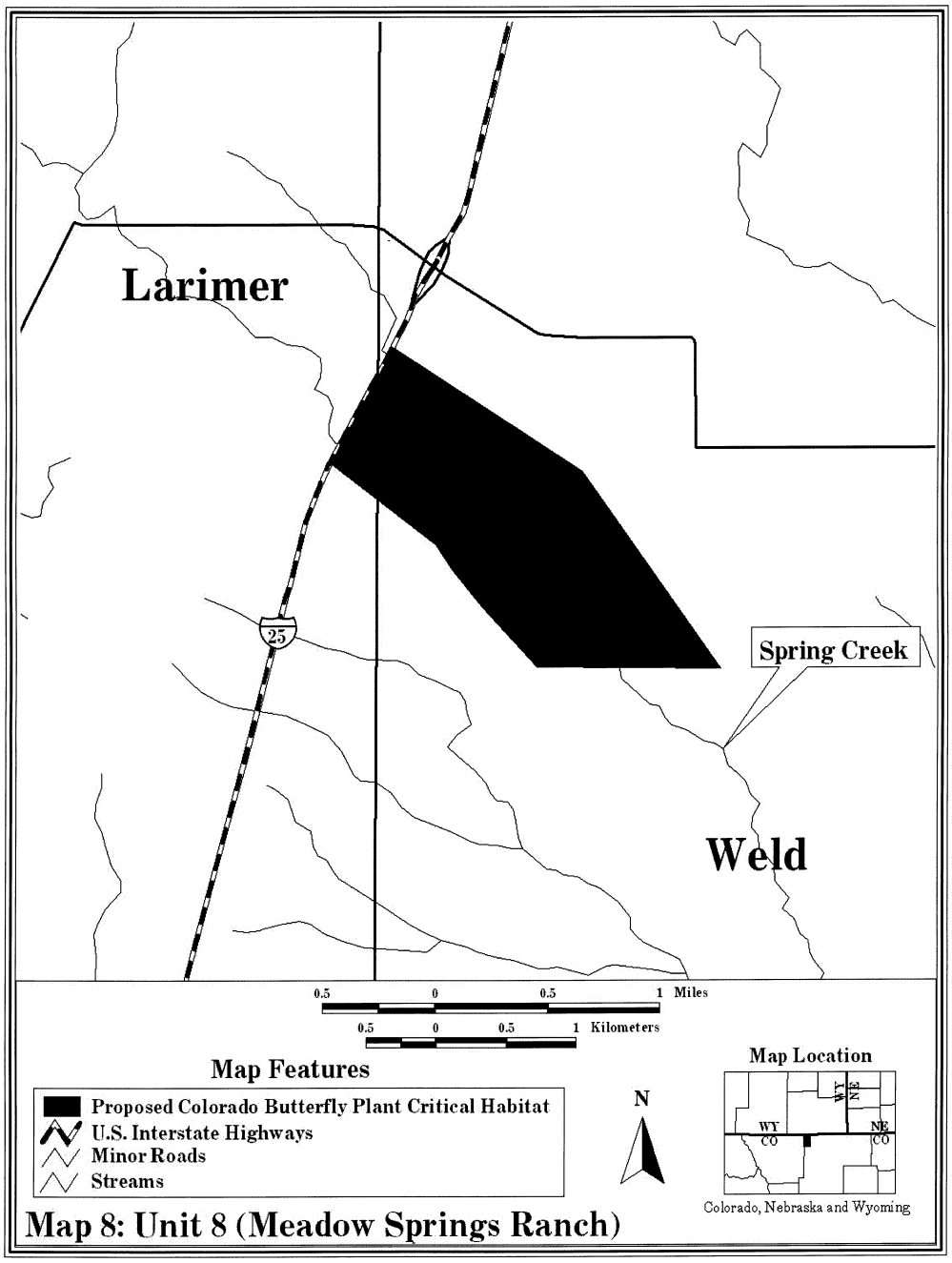
(iv) **Note:** Map 7 (Unit 7) follows:


Warren AFB
Diamond Creek
80
Spring Creek
Laramie
Lone Tree Creek
25
0.5 0 0.5 1 1.5 Miles
0.5 0 0.5 1 1.5 Kilometers
Map Features
Proposed Colorado Butterfly Plant Critical Habitat
(300 foot buffer from centerline of stream)
U.S. Interstate Highways
Minor Roads
Streams
N
Map Location
Wyoming
Map 7: Unit 7 (Borie)

(13) Unit 8: Meadow Springs Ranch, Weld County, Colorado.

(i) This unit consists of 707 ac (286 ha) within the Meadow Springs Ranch, Weld County, Colorado. Includes: T11N R68W, E2SE4 Sec. 24; NW4NW4 Sec 25; T11N R67W, SW4 Sec. 19; S2 SE4 Sec. 19; N2 Sec. 30; SE4 Sec. 30; NE4SW4 Sec. 30; W2 NW4 Sec. 29; SW4 Sec. 29; SW4SE4 Sec. 29.

(ii) **Note:** Map 8 (Unit 8) follows:



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Dated: July 29, 2004.

Craig Manson,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 04–17576 Filed 8–5–04; 8:45 am]

BILLING CODE 4310–55–C