

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

[Docket No. FWS–R1–ES–2010–0071;  
FF09E21000 FXES1111090FEDR 223]

RIN 1018–BE61

**Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Slickspot Peppergrass (*Lepidium papilliferum*)**

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Final rule.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service or USFWS), finalize the designation of critical habitat for slickspot peppergrass (*Lepidium papilliferum*) under the Endangered Species Act of 1973 as amended (Act). In total, approximately 31,569 hectares (78,009 acres) in Ada, Elmore, Gem, Payette, and Owyhee Counties in Idaho fall within the boundaries of the final critical habitat designation. The effect of this final rule is to designate critical habitat for the slickspot peppergrass, which is a threatened species under the Act.

**DATES:** This rule is effective June 5, 2023.

**ADDRESSES:** This final rule is available on the internet at <https://www.regulations.gov>, under Docket No. FWS–R1–ES–2010–0071, and at <https://www.fws.gov/species/slickspot-peppergrass-lepidium-papilliferum>. Comments and materials we received, as well as supporting documentation we used in preparing this rule, are available for public inspection at <https://www.regulations.gov> under Docket No. FWS–R1–ES–2010–0071.

The coordinates or plot points or both from which the maps are generated are included in the decision file for this critical habitat designation and are available at <https://www.regulations.gov>, under Docket No. FWS–R1–ES–2010–0071, and at <https://www.fws.gov/species/slickspot-peppergrass-lepidium-papilliferum>. Additional supporting information that we developed for this critical habitat designation will be available on the Service’s website (<https://www.fws.gov/species/slickspot-peppergrass-lepidium-papilliferum>), at <https://www.regulations.gov>, or both.

**FOR FURTHER INFORMATION CONTACT:** Lisa Ellis, State Supervisor, U.S. Fish and Wildlife Service, Idaho Fish and Wildlife Office, 1387 S Vinnell Way, Room 368, Boise, ID 83709; telephone

208–378–5243. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

**SUPPLEMENTARY INFORMATION:**

**Executive Summary**

*Why we need to publish a rule.* Under the Act, any species that is determined to be an endangered or threatened species requires critical habitat to be designated, to the maximum extent prudent and determinable. Designations and revisions of critical habitat can only be completed only by issuing a rule through the Administrative Procedure Act rulemaking process. We reinstated slickspot peppergrass as a threatened species under the Act effective September 16, 2016 (81 FR 55058, August 17, 2016), published an updated revised proposed rule to designate critical habitat on July 23, 2020 (85 FR 44584), and are now finalizing our designation of critical habitat for the species.

*What this rule does.* This final rule designates critical habitat for slickspot peppergrass on approximately 31,569 hectares (ha) (78,009 acres (ac)) in Ada, Elmore, Gem, Payette, and Owyhee Counties in Idaho.

*The basis for our action.* Section 4(a)(3) of the Act requires the Secretary of the Interior (Secretary) to designate critical habitat concurrent with listing to the maximum extent prudent and determinable. Section 3(5)(A) of the Act defines critical habitat as (i) the specific areas within the geographic area occupied by the species, at the time it is listed, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protections; and (ii) specific areas outside the geographic area occupied by the species at the time it is listed, upon a determination by the Secretary that such areas are essential for the conservation of the species. Section 4(b)(2) of the Act states that the Secretary must make the designation on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impacts of specifying any particular area as critical habitat. Also, under section 4(b)(2) of the Act, the Secretary may exclude an area from

critical habitat if she determines that the benefits of such an exclusion outweigh the benefits of specifying such areas as part of critical habitat, unless she determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species.

The critical habitat we are designating in this rule, consisting of four units and seven subunits comprising 31,569 ha (78,009 ac) for slickspot peppergrass, constitutes our current best assessment of the areas that meet the definition of critical habitat for the species.

*Economic analysis.* In order to consider economic impacts, we previously prepared an analysis of the economic impacts of the proposed critical habitat designation and related factors. The final economic analysis, completed March 12, 2012, was based on the 2011 proposed critical habitat and concluded that critical habitat designation would not likely affect levels of economic activity or conservation measures being implemented within the proposed critical habitat area. The final economic analysis is available at <https://www.regulations.gov> under the docket number for this rulemaking, which is FWS–R1–ES–2010–0071.

**Previous Federal Actions**

On December 7, 2009, slickspot peppergrass was listed as a threatened species throughout its range (74 FR 52014, October 8, 2009). On May 10, 2011, we published a proposed rule to designate critical habitat for slickspot peppergrass (76 FR 27184). On August 8, 2012, the District Court of Idaho vacated the final rule listing slickspot peppergrass as a threatened species under the Act and remanded the rule to the Service for further consideration consistent with the Court’s opinion (*Gov. C.L. “Butch” Otter, et al. v. Ken Salazar, et al.*, Case No. 1:11–cv–00358–CWD [D. Idaho]). On February 12, 2014, we concurrently proposed reinstatement of threatened status for the species and a revised proposed designation of critical habitat (79 FR 8416 and 79 FR 8402, respectively). On August 17, 2016, we published a final rule reinstating threatened status for the species under the Act (81 FR 55058). On July 23, 2020, we published an updated revised proposed rule to designate critical habitat (85 FR 44584).

**Summary of Changes From the Proposed Rule**

Our July 23, 2020, revised proposed critical habitat rule (85 FR 44584) detailed changes from the previous

proposed and revised critical habitat rules (76 FR 27184, May 10, 2011; 79 FR 8402, February 12, 2014). Here, we summarize changes from our July 23, 2020, proposed rule (85 FR 44584) to this final rule resulting from the comments we received during the public comment period, as discussed below under Summary of Comments and Recommendations.

1. We added six new Element Occurrences (EOs) (recorded species locations) that were occupied at the time of listing but had not been evaluated in our proposed rule for physical or biological features (PBFs) essential to the conservation of the species. For this final rule, we determined that these six EOs contained one or more PBFs. See the Criteria and Methodology Used To Identify Critical Habitat section, below, for details.

2. In our proposed rule, we did not include E.O. 57 based on surveys that indicated it did not meet our PBF criteria. However, we re-evaluated the PBFs for E.O. 57 and determined that it contained one or more PBFs; therefore, we are including it in our final critical habitat designation. See the Criteria and Methodology Used to Identify Critical Habitat section, below, for details.

3. We included D-ranked EOs, which represent the lowest ranked occupied EOs. The E.O. alphabetical ranking system measures viability of a species or ecological integrity of the community and was developed by NatureServe (2002, 2020b). The Idaho Department of Fish and Game (IDFG) uses this system, and we relied on IDFG rankings to determine if EOs contained one or more PBFs. Our rationale for including D-ranked EOs is provided in the section Criteria and Methodology Used to Identify Critical Habitat, below.

4. We increased the buffer around EOs from 250 meters (m) (820 feet (ft)) to 500 m (1,640 ft). This increase is based on foraging distances of most of the important pollinators of slickspot peppergrass instead of using the foraging distance of a single pollinator (solitary bee), which was how we determined the buffer size in our proposed rule. We provided additional citations on foraging distances of the other pollinator species to support this increase in the section Physical or Biological Features Essential to the Conservation of the Species, below.

5. We excluded approximately 2,736 ha (6,761 ac) of State of Idaho land and 4,508 ha (11,141 ac) of private and municipal (county and city) land from our critical habitat designation under section 4(b)(2) of the Act, as detailed in Considerations of Impacts under Section 4(b)(2) of the Act, below.

6. We clarified our description of the PBFs to provide more context but did not change their meaning. A description of PBFs is in the section Physical or Biological Features Essential to the Conservation of the Species with additional discussion provided under Criteria and Methodology Used to Identify Critical Habitat, below.

7. We deleted “honeybees” from our description of PBF 4 under the *Summary of Essential Physical or Biological Features* and from paragraph (2)(iv) of the rule. Please see Physical or Biological Features Essential to the Conservation of the Species for additional information and citations.

8. We made small, nonsubstantive clarifications and corrections throughout this final rule to ensure consistency, clarify information, reduce redundancy, update scientific names of plants, and update or add new references.

The combined effect of the changes we have made from our July 23, 2020, proposed rule (85 FR 44584) to this final rule result in an increase from a proposed designation of critical habitat of 17,049 ha (42,129 ac) to a final designation of critical habitat of approximately 31,569 ha (78,009 ac). The reasons for this increase are mentioned in the list above and explained more thoroughly in the following sections of the preamble.

#### Supporting Documents

In 2011, we sought comments from five independent specialists to ensure that our proposed critical habitat designation was based on scientifically sound data and analyses regarding the 2011 proposed rule. We received responses from three of the individuals. In 2020, we completed a species status assessment (SSA) report for slickspot peppergrass. The SSA report represents a compilation of the best scientific and commercial data available concerning the status of the species, including the impacts of past, present, and future factors (both negative and beneficial) affecting the species.

In accordance with our joint policy on peer review published in the **Federal Register** on July 1, 1994 (59 FR 34270), and our August 22, 2016, memorandum updating and clarifying the role of peer review of listing actions under the Act, we sought peer review of the SSA report. In August 2018, we solicited expert opinion and received responses from four independent specialists with scientific expertise on slickspot peppergrass and its habitat regarding our draft SSA report. The purpose of peer review is to ensure that our critical habitat designations are based on

scientifically sound data, assumptions, and analyses. The peer reviewers generally concurred with our methods and conclusions, and provided additional information, clarifications, and suggestions to improve the SSA report. That information was incorporated into the final SSA that informed our proposed and final designation of critical habitat. We also considered all comments and information we received from the public during comment periods for previous proposals (76 FR 27184, May 10, 2011; 79 FR 8402, February 12, 2014; 85 FR 44584, July 23, 2020).

The final economic analysis (dated March 12, 2012), which documents the potential economic effects of the designation, considered all public comments and any new information as of 2011 (IEc 2012).

The final SSA report (USFWS 2020) and final economic analysis (IEc 2012) are available at <https://www.regulations.gov> under Docket No. FWS-R1-ES-2010-0071.

#### Summary of Comments and Recommendations

In our revised proposed rule published on July 23, 2020 (85 FR 44584), we requested that all interested parties submit written comments on the proposal by September 21, 2020. We also stated in the July 23, 2020, revised proposed rule (85 FR 44584) that comments submitted during the previous comment periods for the May 10, 2011, proposed rule (76 FR 27184) and the February 12, 2014, revised proposed rule (79 FR 8402) would be considered. For all comment periods, we reached out to appropriate Federal and State agencies, Tribes, scientific experts and organizations, and other interested parties and inviting them to comment on the proposal. Newspaper legal notices requesting public comments were published in the Idaho Statesman. We did not receive any requests for a public hearing during any of our comment periods.

During the first comment period (76 FR 27184, May 10, 2011), we received 16 comment letters addressing the proposed critical habitat designation for slickspot peppergrass. Of these comments, 3 were from peer reviewers and 13 were from public organizations or individuals. During the second comment period (79 FR 8402, February 12, 2014), we received 17 comment letters addressing the proposed critical habitat designation or the draft economic analysis. For the most recent comment period (85 FR 44584, July 23, 2020), we received 23 comment letters on the proposed rule to designate

critical habitat for slickspot peppergrass; the majority of commenters supported the designation of critical habitat. All substantive information provided during these comment periods was either incorporated directly into this final rule or is addressed below. Comments that we incorporated as changes in our revised proposed rules (79 FR 8402, February 12, 2014; 85 FR 44584, July 23, 2020) or into this final rule are not presented here or are addressed briefly. In addition, we received comments outside the scope of this rulemaking action such as comments related to threats (e.g., livestock grazing, wildfire, Owyhee harvester ants, nonnative invasive plants, inadequate management practices, pesticides, and off-road vehicle use), conservation measures identified in conservation plans (CCA, State of Idaho et al. 2006; CA, BLM 2014; INRMP, U.S. Air Force 2017), and management actions, or the lack thereof, that commenters believed were a threat to the conservation of slickspot peppergrass; we did not respond to comments that were outside the scope of this rulemaking. Comments regarding threats have been addressed in the slickspot peppergrass final listing rule (74 FR 52014, October 8, 2009), the reinstatement of the listing rule (81 FR 55058, August 17, 2016), and the SSA (USFWS 2020). We consolidated the comments by topic and provide a brief response, below.

#### Peer Reviewer Comments

We solicited expert opinion in 2011 from five appropriate and independent specialists regarding the May 10, 2011, proposed rule (76 FR 27184). We received input from three of the individuals. Since that time, we have implemented a standard practice of developing an SSA as the scientific foundation to inform our section 4 rulemaking (e.g., listing determinations and recovery plans). In 2018, we initiated the development of an SSA for slickspot peppergrass, and in August 2018, we solicited expert opinion from four independent specialists with scientific expertise on slickspot peppergrass and its habitat regarding our draft SSA report. These four individuals generally concurred with the information and conclusions in the draft SSA report, including our use of data from the Idaho Department of Fish and Game (IDFG) (Kinter and Miller 2016, entire). These data were used extensively in the development of the SSA and in our proposed and final critical habitat rules. Peer review comments are incorporated into the SSA report and this final rule as appropriate.

*Comment 1:* One peer reviewer and several commenters expressed concern that the proposed designation of critical habitat did not include D-ranked EOs, (representing the lowest quality extant slickspot peppergrass EOs). The reviewer stated that higher ranked EOs are likely more important to the conservation of slickspot peppergrass; however, the omission of the smaller EOs (which could be ranked lower) from the designation fails to recognize that these populations may harbor genetic variation important to the overall genetic variability of the species. This peer reviewer added that given the prospect of climate change and the continued deterioration of slickspot peppergrass habitat, maintaining and protecting the highest possible levels of genetic diversity may prove important to the long-term survival of the species. Another peer reviewer agreed that several EOs should be added to critical habitat.

*Our Response:* After careful consideration of the comments, we are adding D-ranked EOs to our critical habitat designation for this final rule. We present our rationale for adding D-ranked EOs in the Criteria and Methodology Used to Identify Critical Habitat section, below.

*Comment 2:* One peer reviewer recommended that we include at least a 250-m (820-ft) area surrounding slickspot peppergrass habitat to ensure that pollinators are able to maintain their populations. In addition, multiple commenters disagreed with information in the proposed rule (85 FR 44584, July 23, 2020) regarding using a 250-m (820-ft) pollinator buffer to reflect a “reasonable mid-point” for the foraging range of a solitary bee when the actual mid-point of the range cited in the proposed rule was 375 m (1,230 ft). Several commenters indicated that a larger buffer (e.g., 600-m buffer) would be necessary to include all potential pollinators that might benefit slickspot peppergrass. Conversely, one commenter stated that we should use the shortest flight distance (150 m (492 ft)) of a solitary bee cited in the proposed rule. Another commenter questioned our use of scientific literature (i.e., Steffan-Dewenter et al. 2002; Gathmann and Tscharntke 2002) that used research on solitary bees from study plots in Germany to extrapolate to solitary bees in southern Idaho. They went on to say that these cited works are not proven to be relevant to the sagebrush steppe where slickspot peppergrass is found and, therefore, not the “best science” relevant to the species.

*Our Response:* After considering comments and reviewing additional literature, we determined that increasing the buffer around occupied EOs is appropriate. To ensure habitat of sufficient quantity and quality is available to support nesting and egg laying, feeding, and reproduction of slickspot peppergrass’s pollinators, we increased the buffer around each EO from 250 m (820 ft) to 500 m (1,640 ft) based on our consideration of the foraging ranges of all important pollinators of slickspot peppergrass and not solely on the foraging range of a medium-sized solitary bee. Additional information and citations to support this increase in the buffer can be found in the section, Physical or Biological Features Essential to the Conservation of the Species, below.

Regarding our use of peer-reviewed literature based on research conducted in Germany, we used the best available scientific information on pollinator foraging ranges. Although the studies were conducted in Germany and not in sagebrush-steppe habitat, the information pertained to flight distances based on bee body size, which we can extrapolate to similarly sized bees occurring in sagebrush-steppe habitat.

*Comment 3:* One peer reviewer commented that the 250-m (820-ft) area around EOs may not adequately protect adjacent suitable slick spots to allow slickspot peppergrass populations to shift or expand as conditions allow within current EOs and recommended increasing the buffer to 500 m (1,640 ft). In addition, this reviewer and several commenters recommended including unoccupied slick spots that border proposed critical habitat areas. Another peer reviewer proposed including more of the identified slickspot peppergrass habitat (slick spots present) in the Mountain Home Area in Idaho as critical habitat. This same reviewer also stated their opinion that more habitat needs to be designated to address fragmentation, ensure pollination, and maintain genetic diversity.

*Our Response:* Based on the best scientific information available, we are designating EOs that are currently occupied by slickspot peppergrass (i.e., EOs B–D) as well as increasing the buffer around each occupied EO. The increased buffer will ensure habitat of sufficient quantity and quality is available to support the nesting, feeding, and reproduction for pollinators of slickspot peppergrass in occupied slick spots. We are not designating any areas outside the geographical area occupied by the species at the time of listing because we did not identify any

unoccupied areas that were essential for the conservation of the species.

*Comment 4:* One peer reviewer recommended we include two recently discovered EOs as critical habitat to allow for more connectivity. In addition, several commenters requested that new EOs found during surveys from 2017–2020 and reported by the Bureau of Land Management (BLM) be included in our critical habitat designation.

*Our Response:* After receiving several comments on newly identified EOs that were discovered during surveys by the BLM between 2016 and 2018, we identified nine EOs in IDFG's Idaho Fish and Wildlife Information System (IFWIS) database that were unranked. At our request, the IDFG reviewed all nine of the EOs. Six of the EOs (EOs 122 (Unit 3a), and 123, 124, 727, 728, 729 (Unit 4)) had enough associated information for the IDFG to conduct their ranking process. All six met our criteria for critical habitat as defined by the PBFs essential to the conservation of the species. EO 122 was occupied at the time of listing (2016). The other five EOs were found in 2017 and were likely occupied at the time of listing because these slick spots had not been surveyed prior to 2017, and slickspot peppergrass is not likely to colonize new areas to the extent to which these EOs were populated (number of plants ranged from 13 to 766 per EO) within a year. Therefore, all six EOs are included in our final critical habitat designation. We did not include the remaining three EOs (EOs 730, 731, and 732) in Unit 4 because they lacked enough information to be ranked according to IDFG's criteria, which we rely on to determine if an EO has one or more PBFs.

#### State Comments

*Comment 5:* The State of Idaho commented that in 2019 the IDFG relocated slickspot peppergrass at EO 114 and mapped additional plants about 3 kilometers (km) (1.9 miles (mi)) to the southeast based on a 1911 herbarium collection. Another commenter stated that the proposed critical habitat polygons imply that slickspot peppergrass populations do not exist in significant numbers outside the defined area. They went on to cite examples where additional occupied slick spots were found during IDFG surveys (Miller and Kinter 2018, pp. 5, 7; Miller and Kinter 2019, p. 5). The commenter further stated that unless we use supporting research to delineate critical habitat boundaries, any boundaries we designate would be arbitrary.

*Our Response:* For this final rule, we used the most current EO data from the IDFG (IFWIS July 2021). As discussed

above in our response to *Comment 4* and in Criteria and Methodology Used To Identify Critical Habitat, we also added six new EOs to our critical habitat designation that were in the IDFG database but had not been ranked by IDFG biologists. And while some uncertainty will always exist, the information used in this final rule represents the best available scientific information upon which to make a critical habitat designation for slickspot peppergrass. Further, survey and monitoring work for this species and its habitat will continue into the future and is not limited to critical habitat boundaries. Additional occupied habitat identified during future surveys would be considered during section 7 consultations if there is a Federal nexus (*i.e.*, any action funded, authorized (permitted), or carried out by a Federal agency) and in our recovery efforts for the species. Please refer to the Background section, below, for further discussion.

*Comment 6:* The State and one other commenter remarked that the proposed rule (85 FR 44584, July 23, 2020) states that for an EO to fulfill the criteria described in PBF 1, both the slick spot geological feature needs to be present (PBF 1(a)), and the site needs to contain sparse vegetation with absent, or limited to low to moderate, invasive nonnative plant cover (PBF 1(b)). The commenters stated that based on the habitat description associated with EOs ranked C and below, we are proposing to include some EOs that do not meet PBF 1(b). Without both of these features, the EO does not meet PBF 1 in its entirety and, therefore, does not meet our definition of an ecologically functional slick spot. In addition, the commenters stated that providing “one” PBF is not sufficient and if, for example, the slick spot is ecologically functional (PBF 1a and 1b) but is not surrounded by relatively intact sagebrush (PBF 2), then the interdependent habitat requirements are also not met.

*Our Response:* The IDFG EO rankings do not necessarily correlate directly to the PBFs. For example, as described in the *Summary of Essential Physical or Biological Features*, below, PBF 1(b) states that ecologically functional microsites or “slick spots” are characterized by sparse vegetation, with introduced, invasive, nonnative plant species cover absent or limited to low to moderate levels. However, the IDFG EO rankings do not directly measure invasive, nonnative plant cover within the actual slick spot. The assessments of condition were based mostly on the EO habitat surrounding the slick spots, which tended to be more invaded than

the slick spots. So, even if a habitat ranking was characterized as being moderately to highly invaded, the slick spots themselves often had very low amounts of invasive species (Kinter 2020, pers. comm.). Therefore, we used the IDFG EO rankings, which constitute the best available information that we have, as surrogates to help us determine which EOs provide the PBFs essential to the conservation of the species that may require special management considerations or protections. In addition, although some of the EOs with lower ranks (CD- and D-ranked EOs) often have PBFs with degraded conditions and may require special management considerations or protection, we determined that including these lower ranked EOs is essential to the conservation of the species. The Criteria and Methodology Used To Identify Critical Habitat section, below, of this final rule has been revised to reflect these clarifications.

As stated in the proposed rule (85 FR 44584, July 23, 2020), and in this final rule, areas are included in critical habitat if they contain one or more of the PBFs; PBFs do not have to occur simultaneously to constitute critical habitat for slickspot peppergrass.

*Comment 7:* The State and two commenters (Owyhee County Commissioners and a private landowner) stated that all EOs and sub-EOs that were assigned a condition or landscape factor rank of C, CD, or D based on either Miller and Kinter's Snake River Plain and Adjacent Foothills 2018 report or Miller and Kinter's Jarbidge Geographic Area 2019 report should not be designated as critical habitat. They added that the EO assessments in the 2018 and 2019 reports provide context to the 2016 rankings in many EOs and that these assessments should be used to determine whether an EO meets the PBF criteria. They further state that the 2018 and 2019 documents support the need to eliminate more areas of proposed critical habitat as not meeting PBFs. They also state that population size is not described as a PBF but is still one of three factors determining an EO rank in the IDFG assessment with some EOs most likely having a higher rating due to the population size, and not because of the quality of the habitat itself. The State of Idaho questioned if these habitats are essential for the conservation of the species, noting that the occupied status of these EOs is not in question, but whether the habitat truly meets the PBF criteria based on site conditions detailed in the 2018 and

2019 reports (Miller and Kinter 2018 and 2019, entire).

*Our Response:* For our July 23, 2020, revised proposed rule (85 FR 44584) for slickspot peppergrass, we relied on information provided by the IDFG that provided their most up-to-date assessments for slickspot EOs, including updated EO ranks (Kinter and Miller 2016, entire). Information contained in the 2016 report was from field surveys conducted from 2012 through 2016. Miller and Kinter's 2018 report includes the details of their field surveys from 2012 through 2016 for the Foothills and Snake River Plain Geographic Areas. Miller and Kinter's 2019 report also includes the details of their field surveys during the period 2014–2015 for the Jarbidge Geographic Area. The 2016 report was a summary of all field surveys and contained the updated EO ranks that were derived from data collected during the above-mentioned survey periods. While supplemental information was considered, the EO ranks reported in the 2016 report represent the best available scientific data from which we made our final critical habitat determination.

As the commenters noted, a portion of the EO ranking score was based on the EO/sub-EO size. While EO size is not identified as a specific PBF, population size does contribute to the resiliency of a species; therefore, we clarified in the Criteria and Methodology Used To Identify Critical Habitat section, below, that we used the IDFG rankings as surrogates to help us determine which EOs provide the PBFs essential to the conservation of the species that may need special management. Also, please see our response to *Comment 7*.

With respect to the State's comment regarding which EOs meet our definition of critical habitat, based on comments received during the public comment period on our revised proposed critical habitat rule (85 FR 44584, July 23, 2020), we reevaluated our criteria for determining which EOs contain PBFs and meet our definition of critical habitat. The proposed rule did not include EOs ranked D or lower; however, in this final rule we included all areas that were occupied at the time of listing that are ranked B–D (there are currently no EOs ranked A or AB). Our rationale for including D-ranked EOs is provided in the Criteria and Methodology Used To Identify Critical Habitat section, below.

*Comment 8:* The State of Idaho commented that, because private lands cannot be subject to management actions and conservation measures through the Endangered Species Act unless there is a Federal nexus resulting

in section 7 consultation, the proposed critical habitat rule (85 FR 44584, July 23, 2020) provides no new conservation measures across any of the sites, whether Federal, State, or privately owned. They also stated that management actions through section 7 consultation will not effectively address the threats of wildfires and invasive species on private lands. Lastly, they commented that designation of critical habitat on private land can lead to decreased land values and possibly expose slickspot peppergrass to threats that cannot be addressed by a section 7 consultation. Given these reasons, the State believes that the benefits of exclusion (from critical habitat designation) outweigh the benefits of inclusion on private land.

*Our Response:* As detailed in the Considerations of Impacts Under Section 4(b)(2) of the Act section of this document, below, based on our evaluation of the available information, we determined that the benefits of excluding private lands outweighed the benefits of including them in our critical habitat designation; therefore, we excluded private land from the final designation. Activities with a Federal nexus that may affect slickspot peppergrass plants on private land will still require section 7 consultation under the Act. Actions that may affect slickspot peppergrass plants on private lands without a Federal nexus do not require section 7 consultation with the Service.

As a conservation tool, a critical habitat designation ensures that when actions with a Federal nexus are proposed within critical habitat, the Federal action agency reviews the proposed action and, if needed, consults with the Service to determine if the action will adversely modify critical habitat. Critical habitat does not require a Federal agency or a private landowner proposing an action with a Federal nexus to perform any conservation actions, although the Service and the Federal action agency may identify conservation recommendations that can be voluntarily implemented.

*Comment 9:* The State of Idaho and multiple commenters stated that there are additional administrative costs of section 7 consultation that are incurred under critical habitat designation, including land-value depreciation. In addition, the State commented that the economic analysis did not consider economic impacts to livestock permittees from delaying the spring grazing season, indirectly eliminating grazing by lowering turnout and, therefore, opportunity costs to private and State endowment lands. Several

other commenters urged the Service to undertake an in-depth consideration of the potential impacts of the critical habitat designation on the economy of the affected areas. One commenter expressed concern that the economic analysis did not capture the potential significant impacts on affected livestock permittees of the implementation of existing livestock-grazing conservation measures.

*Our Response:* According to section 4(b)(1)(A) of the Act, the listing of a species as threatened or endangered is a decision made based "solely on the basis of the best scientific and commercial data available." However, in the case of designating critical habitat, the Act requires additional considerations under section 4(b)(2) including the economic, national security, and other impacts of designating a particular area as critical habitat. Because of this distinction, we must analyze the effects of a critical habitat designation separate from any effects that may result from the listing of a species. To do so, our guidelines for economic analyses of proposed critical habitat designations, developed in accordance with the recommendations set forth in Executive Order 12866 ("Regulatory Planning and Review"), describe the need to measure the benefits and costs of a rule against a baseline.

The analysis of economic impacts of a critical habitat designation involves evaluating the baseline condition under two scenarios: one with critical habitat and one without critical habitat. The impacts of critical habitat equal the difference, or "increment," between these two scenarios. This is known as an "incremental analysis." Measured differences may include changes in land or resource use, environmental quality, or time and effort expended on administrative and other activities by Federal landowners, Federal action agencies, State and local governments, or private third parties. Any differences that are attributable solely to critical habitat are considered an incremental impact of the designation. Most of the examples of impacts offered by commenters were effects attributable to other conservation measures for slickspot peppergrass that are already in place because of the listing of the species (e.g., delaying turnout of cattle when soils are saturated) and not due to critical habitat; such effects cannot be considered an impact of critical habitat.

Currently, and as described in our final economic analysis, we do not foresee a circumstance in which designation of critical habitat will change the outcome or alter the timing

of future Federal agency section 7 consultations. Any conservation measures implemented to minimize impacts to the species would likely be sufficient to also minimize impacts to critical habitat.

*Comment 10:* The State of Idaho commented that the Idaho Department of Lands (IDL) was part of the 2006 Candidate Conservation Agreement (CCA) for slickspot peppergrass ensuring habitat is protected on Idaho endowment lands, which negates the need for critical habitat designation. In addition, the State commented that even though the CCA has expired, the IDL continues to implement conservation measures outlined in the 2006 CCA.

*Our Response:* As described in our response to *Comment 9*, above, we have a statutory obligation to designate critical habitat for listed species, based on the identification of those areas occupied by the species at the time of listing, that provide the PBFs essential to the conservation of the species, and that may require special management considerations or protection. However, the Act additionally provides the Secretary discretion to exclude areas from the final designation if the benefits of excluding those areas outweigh those of including them (and if such exclusion will not result in the extinction of the species). As detailed in Considerations of Impacts Under Section 4(b)(2) of the Act below, following our review and evaluation of the best available information, including the new 2021 conservation agreement between the Service and the State of Idaho, we agree that the benefits of excluding areas on State of Idaho lands outweigh the benefits of including those areas in critical habitat, and we have excluded all State-owned lands from this final designation of critical habitat. This includes the State of Idaho endowment trust lands, management of which is entrusted to the State Board of Land Commissioners. The IDL is the administrative arm of the Board and carries out the executive directives of the Board to meet the constitutional trust mandate under article IX section 8 of the Idaho Constitution to use the trust lands for the support of State institutions.

*Comment 11:* The State of Idaho commented that several areas along Idaho Department of Transportation rights-of-way (ROWs) are critical to reduce the potential for fire starts from Interstate 84. They further stated that the proposed designated critical habitat within these ROWs puts large areas that have slickspot peppergrass outside of the ROW at risk by potentially affecting the ability to implement mowing and

other preventative measures needed to halt fire starts from the Interstate.

*Our Response:* Rights-of-way (ROW) on Federal lands are not excluded from critical habitat designation if they contain one or more of the PBFs described within the final rule and are part of an EO ranked B, BC, C, CD, or D or are within 500 m (1,640 ft) of those EOs. If an area is designated as critical habitat, and there is a Federal nexus associated with an ROW project, a section 7 consultation in this area would evaluate the presence of any PBFs and note whether there are effects from the action that may affect critical habitat. During emergency events, the primary objective of the responding agency must be to protect human life and property, and this objective takes precedence over normal consultation requirements. In such events, agencies can engage in emergency section 7 consultation with the Service to expedite recommendations for minimizing adverse effects to listed species and designated critical habitat areas that may be adversely affected by emergency response activities.

#### *Tribal Comments*

*Comment 12:* The Shoshone-Bannock Tribes asked that the Service consider ecological range characteristics, rather than simply presence of slickspot peppergrass, when designating critical habitat and cited examples (e.g., climate, elevation, soil characteristics, solar irradiance, and community species composition characteristics), as drivers for potential and occupied habitat. They indicated that this type of scientific analysis would not result in the small and highly fragmented critical habitat unit maps being proposed, and the analysis may help the Service identify new EOs. They added that slickspot peppergrass needs additional critical habitat outside the proposed critical habitat units to facilitate spread and colonization. Further, the Tribes and one additional commenter stated that surveys for additional habitat should continue, as well as high-quality and experimentally designed monitoring programs.

*Our Response:* Please see our responses to *Comments 1–3*. In response to the comment regarding more survey, monitoring, and analysis being needed, we recognize that critical habitat designated at a particular point in time may not include all of the habitat areas that we may later determine are necessary for the recovery of the species. We must make this designation on the basis of the information available at this time, and we may not delay our decision until more information about

the species and its habitat is available. This final rule expands on the proposed critical habitat by including areas with D-ranked EOs, which represent the lowest ranked occupied EOs, and increasing the buffer around EOs from 250 meters (m) (820 feet (ft)) to 500 m (1,640 ft) in order to provide habitat for all of the important pollinators of slickspot peppergrass.

While some uncertainty will always exist, the information used in this final rule represents the best available information upon which to make a critical habitat designation for slickspot peppergrass. It also does not preclude future survey, monitoring, and analyses for this species and its habitat, and it is not limited to critical habitat boundaries. We will be developing a recovery plan with input from stakeholders and partners that will establish priorities and measures to recover the species, and which will consider ecological range characteristics and address habitat fragmentation. During the recovery planning process, a range of conservation tools, data, and analyses will be used to determine how best to recover the species.

*Comment 13:* The Shoshone-Bannock Tribes commented that grazing should not be allowed within occupied habitat if necessary to protect the species from extinction. They stated that the best way to manage grazing use on public lands is to implement strong management goals and objectives that maintain high-quality biological soil crust communities and enhance degraded biological soil crust communities where they have been impacted from grazing and surface disturbances.

*Our Response:* We will be developing a recovery plan with input from stakeholders and partners that will establish priorities and measures to recover the species. These priorities will include measures to prevent or reduce habitat degradation and will set goals to facilitate the recovery of the species. Furthermore, the BLM's conservation agreement (BLM 2014) outlines conservation measures for ongoing actions authorized by the BLM including livestock grazing, rights-of-way activities, and military training. These conservation measures currently apply to slickspot peppergrass EOs and the surrounding area out to 805 m (2,641 ft).

#### *Public Comments*

*Comment 14:* One commenter stated that the Service failed to describe how many plants are present in each EO.

*Our Response:* We did not include the number of plants in the proposed rule (85 FR 44584, July 23, 2020) because we

did not rely solely on the number of plants in an EO. Instead, we followed an EO ranking method developed by NatureServe (NatureServe 2020*b*, entire) and used by the IDFG to rank EOs that combined measures of population size and habitat quality; therefore, we did not provide the number of plants in the EO descriptions.

*Comment 15:* One commenter expressed concern that designating slickspot peppergrass critical habitat for those EOs with rankings of CD or better continues to set the stage for additional habitat loss in future assessments. They followed with this example, “if an EO with a C ranking now is found to have a D rank in 3–5 years, it is not clear whether the USFWS would strip the critical habitat designation from the particular EO.”

*Our Response:* In this final rule, we are designating all occupied EOs ranked B–D as critical habitat. If, in subsequent years, an EO is no longer found to be occupied, and it no longer contains the essential PBFs, it would still be part of the critical habitat designation. A future section 7 consultation in this area would evaluate the presence of any PBFs and note whether or not there are effects from the action that may affect the critical habitat. If we revise the critical habitat designation in the future, we would take into consideration where the species is present (occupied habitat) and whether any PBFs are present in any area at the time of that revision.

*Comment 16:* One commenter stated that the 250-m (820-ft) area be a guideline rather than a fixed rule so that it could be reduced when it would include unsuitable habitat, such as roads, cropland, or ecological sites without slick spots. The commenter also remarked that crossing allotment boundaries when slick spots are not present in adjacent allotments needlessly complicates the management of the adjacent allotment.

*Our Response:* As described in this final rule, the designation of critical habitat does not include roads or other developed sites such as cropland, airports, and buildings. When determining critical habitat boundaries within this final rule, we made every effort to avoid including these types of developed areas because such lands lack the PBFs for slickspot peppergrass. The scale of the maps we prepared under the parameters for publication within the Code of Federal Regulations may not perfectly reflect the exclusion of such developed lands. However, any such lands inadvertently left inside critical habitat boundaries shown on the maps of this final rule have been excluded by

text in the rule and are not designated as critical habitat.

In reference to grazing allotment management, areas are included in critical habitat if they are occupied by slickspot peppergrass (*i.e.*, EOs B–D) or are within the additional 500-m (1,640-ft) pollinator buffer area of those EOs. Furthermore, we do not anticipate or foresee any changes to conservation measures currently in place for livestock use. When projects proposed on BLM lands may affect listed species or critical habitat, consultation with us is required under section 7(a)(2) of the Act. Currently, we do not foresee a circumstance in which critical habitat will change the outcome of future section 7 consultations as all areas designated as critical habitat are also included in BLM section 7 consultations addressing the effects of actions on the species.

*Comment 17:* One commenter stated that the polygons associated with Unit 2, Subunit 2a in Ada County are widely dispersed, covering multiple Sections, Townships, and Ranges and that designating the entire subunit as critical habitat made little sense considering the wide distribution of plant EOs and the significant amount of residential and commercial development that occupied the spaces between populations.

*Our Response:* The critical habitat units are based on geographically clustered EOs that meet our definition of critical habitat. Only occupied EOs and their associated buffers are being designated as critical habitat. In our proposed rules, we displayed critical habitat surrounded by rectangular polygons on our unit and subunit maps, which led to confusion about what was actually the designated critical habitat. In our final rule, we updated our maps by eliminating the rectangular polygons so that only critical habitat is displayed.

*Comment 18:* One commenter responded that the Service recently issued a proposed rule on defining habitat due, in part, to a decision by the U.S. Supreme Court in *Weyerhaeuser Co. v. U.S. FWS*, 139 S. Ct. 361 (2018) and was concerned that this proposed definition of habitat was not included in our July 23, 2020, revised proposed rule (85 FR 44584) for slickspot peppergrass.

*Our Response:* As stated in the revised regulations regarding the definition of habitat (85 FR 81411, December 16, 2020), these regulations apply only to critical habitat rulemakings for which a proposed rule is published after January 15, 2021. We published our revised proposed critical habitat rule for slickspot peppergrass on July 23, 2020 (85 FR 44584). Therefore, the revised regulations regarding the

definition of habitat do not apply to this final critical habitat rule for slickspot peppergrass. Furthermore, we rescinded the habitat definition on June 24, 2022 (87 FR 37757) with an effective date of July 25, 2022.

*Comment 19:* One commenter stated that critical habitat should not be designated for slickspot peppergrass because any “official designation” is meaningless for the preservation of the species in the face of its primary threats: fire and invasive species. The commenter added that slickspot peppergrass is a BLM- and State of Idaho-sensitive species and that areas containing slickspot peppergrass already receive priority status for fire-fighting activities; therefore, the designation of critical habitat will not increase BLM’s (and others’) ability or willingness to extinguish fires. The commenter concluded that because there would be no change in how the primary threats are managed, section 7 consultation is meaningless.

*Our Response:* We designate critical habitat by identifying the areas that are essential to the conservation of the species based on our understanding of the range of the species and the species’ essential PBFs. If an area meets those criteria for designating critical habitat, we develop proposed critical habitat unit designations. In addition, even if the designation of critical habitat will not increase an action agency’s ability to conserve the species, the designation itself is still prudent because the areas meet the definition of critical habitat and there are habitat-based threats within the critical habitat boundaries.

*Comment 20:* One commenter stated that the rulemaking should include a provision, to the extent permitted by the Act, that any EOs that are burned by wildfire, so that they no longer contain the necessary combinations of habitat PBFs, are automatically not considered to be critical habitat from the date of the fire and continuing until further rulemaking on the subject.

*Our Response:* Section 3 of the Act defines critical habitat, in part, as having PBFs that are essential to the conservation of the species, which may require special management considerations or protection. If an area is designated as critical habitat and is subsequently burned by wildfire such that it no longer contains the essential PBFs, it would still be part of the critical habitat designation but may need special management to restore some of the PBFs.

*Comment 21:* One commenter stated that there is no science demonstrating that any management considerations or methods of protections will significantly

affect the survivability of slickspot peppergrass populations. They stated that we lack information on the essential features to support slickspot peppergrass, and, without knowledge of the soil chemistry at a specific location, designation of critical habitat will be arbitrary since that area (*i.e.*, slick spot) may or may not contain the essential features.

The commenter also questioned what science there is to demonstrate that slickspot peppergrass pollination and seed production is different between adjacent sagebrush habitat and non-sagebrush habitat and requested information that substantiates the necessity to include adjacent sagebrush habitat in the critical habitat designation.

*Our Response:* As required by section 4(b)(2) of the Act, we used the best scientific data available in determining those specific areas within the geographic area occupied at the time of listing that contain the features essential to the conservation of slickspot peppergrass and that may require special management considerations or protection. We have reviewed and considered scientific and commercial data contained in numerous technical reports, peer-reviewed published journal articles, and other documents and based our determination of slickspot peppergrass PBFs (including ecologically functioning microsites) on the best available data regarding the plant's currently known habitat requirements (See Physical or Biological Features Essential to the Conservation of the Species, below, for more information). We acknowledge that not all slick spots contain slickspot peppergrass. Therefore, based on the best scientific information available to us at this time, we limited the critical habitat designation to areas known to be occupied by the species (including some adjacent sagebrush-steppe habitat to provide for ecosystem function). While we also acknowledge that slickspot peppergrass has been infrequently documented outside of slick spots, the vast majority of plants documented over the past 25 years of surveys and monitoring for the species are documented within slick spot microsite habitats. For more information on slick spot microsites, please see the 2009 listing rule (74 FR 52014, October 8, 2009) and the slickspot peppergrass SSA report (USFWS 2020, pp. 4, 6).

*Comment 22:* One commenter stated that the Service has not adequately considered a broad body of current data (including GIS data for native and nonnative vegetation, soils, development, etc.) available on the

degree and severity of habitat degradation that currently exists (citing information used by the BLM in their Land Use Plans), or used site-specific information on the current road, livestock, energy, or other infrastructure and management schemes that are being applied within the critical habitat designation. The commenter stated that the proposed rule designates "bits and pieces" of critical habitat, which the commenter states will promote additional fragmentation, make management of critical habitat difficult and less economically feasible, and encourage more harmful fences and other developments.

*Our Response:* Regarding the ecological setting of slickspot peppergrass, the species' habitat is inherently fragmented because it relies on isolated and non-contiguous slick spot habitats. We identified areas within the geographic range of slickspot peppergrass that were occupied at the time of listing and contain the PBFs essential to the conservation of the species that may require special management considerations or protection. Please see Criteria and Methodology Used to Identify Critical Habitat, below, for more details on how critical habitat was determined. Regarding the comment that we did not use site-specific information on the current road, livestock, energy, or other infrastructure and management schemes that are being applied within the critical habitat designation, and the commenter's statements regarding the BLM Land Use Plans, we will work with the BLM to avoid or minimize these potential impacts during future section 7 consultations, as appropriate, and recommend the BLM take these potential impacts into consideration when developing their management plans.

On Federal land, it is the responsibility of the appropriate land management agency to develop and implement resource management plans. Projects with a Federal nexus would require section 7 consultation under the adverse modification standard if they affected designated critical habitat (see the *Section 7 Consultation* section, below, for more discussion of this process). However, if project-related effects may occur, areas occupied by slickspot peppergrass would require section 7 consultation whether the area is designated as critical habitat or not. In addition, as part of developing and implementing a recovery strategy for a listed species, we consider site-specific management strategies important to the conservation of the species, and we also work with landowners, managers,

researchers, and others to develop and implement them, as appropriate, as part of the recovery process.

*Comment 23:* One commenter stated that projected and reasonably likely impacts of climate change on slickspot peppergrass are unknown, as is the response to climate change by slickspot peppergrass. The commenter added that future climate change is only a hypothesis based on non-validated models, which cannot be proven. Conversely, two other commenters stated that climate change is expected to exacerbate several of the primary threats to slickspot peppergrass, and it is essential that a much greater area (including occupied and unoccupied habitat and areas located at the highest elevations available) be protected to ensure the species' viability and aid efforts to buffer the species from adverse climate change impacts. They also stated that it is hypothesized that slick spots were created during the Pleistocene and are no longer being formed and, therefore, all remaining slick spots should be protected. The commenter also noted that climate change is not mentioned in the body of the July 23, 2020, revised proposed critical habitat rule (85 FR 44584).

*Our Response:* As described in our February 2020 slickspot peppergrass SSA report (USFWS 2020, pp. 79–83), it is possible that climate change has contributed to the downward trend in slickspot peppergrass population numbers observed over the past decade and the projected consequences of climate change could act to further exacerbate the primary threats of frequent wildfire and invasive, nonnative annual grasses on slickspot peppergrass throughout its range. After considering the best available information as well as the comments received, we are now including all occupied EOs ranked B–D and extending the buffer around EOs from 250 m (820 ft) to 500 m (1,640 ft). In addition, we are including six newly ranked EOs; five are located in the Jarbidge geographic area, which contains the highest elevation habitat. In Criteria and Methodology Used to Identify Critical Habitat, below, we provide our rationale for making these changes.

Regarding the comment about climate change not being addressed in our July 23, 2020, revised proposed rule (85 FR 44584), we have included a brief discussion in our Criteria and Methodology Used to Identify Critical Habitat section, below. Information identified in the SSA indicates that climate change has already amplified the effects of wildfire and invasive,



nonnative plants on slickspot peppergrass and may have been a factor in the continuing downward trend in slickspot peppergrass population numbers observed over the past decade. Habitat is often dynamic and species may move from one area to another over time, but most plant species cannot naturally shift their geographic ranges fast enough to keep up with predicted high projected rates of climate change. The Intergovernmental Panel on Climate Change (IPCC) projects changes to the global climate system in the 21st century will likely be greater than those observed in the 20th century (IPCC 2007, p. 45; IPCC 2014, pp. 10, 60). However, by designating critical habitat in all three geographic areas (Foothills, Snake River Plain, and Jarbidge) where the species occurs, including all B–D ranked EOs as well as the 500-m (1,640-ft) pollinator buffer around designated EOs, we determined that these areas will help support slickspot peppergrass under potential climate change scenarios in the future. A complete description of the potential effects from climate change and our evaluation of this threat is found in the October 8, 2009, final listing rule (74 FR 52014), the August 17, 2016, listing reinstatement rule (81 FR 55058), and our February 2020 slickspot peppergrass SSA report (USFWS 2020, pp. 79–83).

In addition, we recognize that critical habitat designated at a particular point in time may not include all of the habitat areas that we may later determine necessary for the recovery of the species. For these reasons, a critical habitat designation does not signal that habitat outside the designated area is unimportant or may not be required for recovery of the species. Areas that are important to the conservation of slickspot peppergrass, both inside and outside a critical habitat designation, would continue to be subject to: (1) Conservation actions implemented under section 7(a)(1) of the Act, (2) regulatory protections afforded by the requirement in section 7(a)(2) of the Act for Federal agencies to ensure their actions are not likely to jeopardize the continued existence of any endangered or threatened species, and (3) the prohibitions of section 9 of the Act if actions occurring in these areas may affect the species.

*Comment 24:* Two commenters did not support the section 4(a)(3)(B)(i) exemptions for the Mountain Home Air Force Base Juniper Butte Range and the Idaho National Guard Army OCTC due to the growing presence of military activity in southern Idaho, increasing threats from military uses, and potential spread of weeds from personnel

accessing sites. One of the commenters stated that the OCTC and the Juniper Butte Range should be included in the critical habitat designation.

*Our Response:* The National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108–136, 117 Stat. 1392) amended the Act, specifically, section 4(a)(3)(B)(i) (16 U.S.C. 1533(a)(3)(B)(i)) to provide that: “The Secretary shall not designate as critical habitat any lands or other geographic areas owned or controlled by the Department of Defense (DoD), or designated for its use, that are subject to an integrated natural resources management plan prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation.” Both the Mountain Home Air Force Base Juniper Butte Range (and associated emitter sites and rights-of-way) and the Idaho Army National Guard OCTC facilities have INRMPs prepared under section 101 of the Sikes Act. We determined that conservation efforts identified in these INRMPs are being implemented, are effective, and will provide a conservation benefit to slickspot peppergrass occurring in habitats within or adjacent to the identified lands. Examples of slickspot peppergrass conservation benefit within these INRMPs can be found in the Exemptions, *Application of Section 4(a)(3) of the Act* section below. Therefore, lands within these two installations are exempt from critical habitat designation under section 4(a)(3)(B)(i) of the Act, and we do not have the discretion to include them as the commenter recommends.

*Comment 25:* One commenter stated that the monetary and security costs to the Idaho Army National Guard and U.S. Air Force from designating slickspot peppergrass critical habitat in their training ranges is not captured in the 2012 final economic analysis.

*Our Response:* We exempted, under section 4(a)(3)(B)(i) of the Act, the Idaho Army National Guard’s Orchard Combat Training Center (OCTC) and U.S. Air Force’s Juniper Butte Range from the critical habitat designation based on development and implementation of approved INRMPs. Given these areas are exempt from critical habitat designation, there are no associated incremental costs of critical habitat designation to consider in the economic analysis. Therefore, any costs to the Idaho Army National Guard and U.S. Air Force are due to the listing of slickspot peppergrass, not designation of critical habitat, and thus will not be discussed in this final rule. Please see the

Exemptions, *Application of Section 4(a)(3) of the Act*, section of this final rule for further information.

*Comment 26:* One commenter stated that the economic analysis completed in March 2012 does not reflect accurate, timely, or most recently available data. The commenter recommended that we conduct a current economic analysis that takes a growing population, increased development, climate change, and the economics of restricting livestock grazing in and around critical habitat EOs into consideration. *Our Response:* In the 2020 revised proposed critical habitat rule and in the *Exclusions Based on Economic Impacts* section of this rule, we articulate the reason why the incremental economic impacts of our current revised proposed designation of critical habitat for slickspot peppergrass will be similar to levels described in the 2012 final economic analysis. The BLM indicated that any increase in cost associated with critical habitat section 7 compliance would be limited to increases in BLM staff costs, which have been minimal since 2012 when the economic analysis was completed, but not an increase in time needed to conduct section 7 compliance (Kershaw 2020, pers. comm.). Unless unforeseen changes occur to existing conservation measures or the management of land-use activities, the incremental impacts of critical habitat designation described in the 2012 final economic analysis would continue to be limited to additional administrative costs of section 7 consultations for Federal agencies, primarily BLM, associated with considering the potential for adverse modification of critical habitat.

In this final rule, we are also excluding State and private lands from designation of critical habitat. Therefore, there are no section 7 critical habitat consultation requirements on those lands, although they will still be subject to section 7 consultation on the species if there is a Federal nexus. Therefore, we still find that the conclusion of the 2012 final economic analysis applies to this final rule.

*Comment 27:* One commenter stated that Federal oversight is required to conserve slickspot peppergrass, and that State of Idaho or private lands should not be excluded given that the agreements typically relied upon are voluntary and unenforceable. This commenter also said that reluctance by private landowners to allow access to slickspot peppergrass habitat will only further ensure that no oversight is possible.

*Our Response:* The Act provides the Secretary with discretion to exclude

areas from the final designation if the benefits of excluding those areas outweigh those of including them (and if such exclusion will not result in the extinction of the species). As detailed in the Considerations of Impacts Under Section 4(b)(2) of the Act section, below, based on our review and evaluation of the best available information, we conclude that the benefits of excluding areas on State of Idaho and private lands outweigh the benefits of including those areas in critical habitat. We therefore excluded all State and private lands from the final critical habitat designation.

*Comment 28:* Two commenters stated that our revised proposed rule cited several documents (e.g., Gathmann and Tschardt 2002; Steffan-Dewenter et al. 2002; Kinter and Miller 2016) to support our findings, but our document did not provide a list of references. They recommended that these references be added when the revised proposed rule is finalized.

*Our Response:* All references cited in our revised proposed rules and our final rule are available on the internet at <https://www.regulations.gov> in Docket No. FWS-R1-ES-2010-0071 and upon request from the Idaho Fish and Wildlife Office. All references for our July 23, 2020, revised proposed rule (85 FR 44584), including the three references cited as examples in the comment above, can be found by going to <https://www.regulations.gov/document/FWS-R1-ES-2010-0071-0065> and downloading the "Download File". However, Gathmann and Tschardt (2002) was incorrectly cited as "Achim Gathmann, A. and T. Tschardt" and, therefore, was out of alphabetical order in our list of references. We corrected this mistake in our final rule references list.

*Comment 29:* Several commenters questioned whether the Service was following its own Information Quality Act procedures.

*Our Response:* We have reviewed and considered scientific and commercial data contained in numerous technical reports, published journal articles, and other documents. We must base our critical habitat designation for slickspot peppergrass on the best available scientific data. We acknowledge that uncertainties exist; however, section 4 of the Act mandates that we make our designation based on the best scientific information available at the time of our determination. We have designated critical habitat for slickspot peppergrass consistent with our Policy on Information Standards Under the Endangered Species Act (published in the **Federal Register** on July 1, 1994 (59

FR 34271)), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106-554; H.R. 5658)), and our associated Information Quality Guidelines, to ensure that our decision is based on the best scientific data available.

### Critical Habitat

#### Background

Critical habitat is defined in section 3 of the Act as:

(1) The specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the Act, on which are found those physical or biological features

(a) Essential to the conservation of the species, and

(b) Which may require special management considerations or protection; and

(2) Specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Our regulations at 50 CFR 424.02 define the geographical area occupied by the species as an area that may generally be delineated around species' occurrences, as determined by the Secretary (i.e., range). Such areas may include those areas used throughout all or part of the species' life cycle, even if not used on a regular basis (e.g., migratory corridors, seasonal habitats, and habitats used periodically, but not solely by vagrant individuals).

Conservation, as defined under section 3 of the Act, means to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

Critical habitat receives protection under section 7 of the Act through the requirement that Federal agencies ensure, in consultation with the Service, that any action they authorize, fund, or carry out is not likely to result in the destruction or adverse modification of

critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation also does not allow the government or public to access private lands. Such designation does not require implementation of restoration, recovery, or enhancement measures by non-Federal landowners. Where a landowner requests Federal agency funding or authorization for an action that may affect a listed species or critical habitat, the Federal agency would be required to consult with the Service under section 7(a)(2) of the Act. However, even if the Service were to conclude that the proposed activity would result in destruction or adverse modification of the critical habitat, the Federal action agency and the landowner are not required to abandon the proposed activity, or to restore or recover the species; instead, they must implement "reasonable and prudent alternatives" to avoid destruction or adverse modification of critical habitat.

Under the first prong of the Act's definition of critical habitat, areas within the geographical area occupied by the species at the time it was listed are included in a critical habitat designation if they contain physical or biological features (1) which are essential to the conservation of the species and (2) which may require special management considerations or protection. For these areas, critical habitat designations identify, to the extent known using the best scientific and commercial data available, those PBFs that are essential to the conservation of the species (such as space, food, cover, and protected habitat).

Under the second prong of the Act's definition of critical habitat, we can designate critical habitat in areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific data available. Further, our Policy on Information Standards Under the Endangered Species Act (published in the **Federal Register** on July 1, 1994 (59 FR 34271)), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106-554; H.R. 5658)), and our associated Information Quality Guidelines provide criteria, establish procedures, and provide guidance to ensure that our decisions

are based on the best scientific data available. They require our biologists, to the extent consistent with the Act and with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat.

When we are determining which areas should be designated as critical habitat, our primary source of information is generally the information from the SSA report and information developed during the listing process for the species. Additional information sources may include any generalized conservation strategy, criteria, or outline that may have been developed for the species; the recovery plan for the species; articles in peer-reviewed journals; conservation plans developed by States and counties; scientific status surveys and studies; biological assessments; other unpublished materials; or experts' opinions or personal knowledge.

Habitat is dynamic, and species may move from one area to another over time. We recognize that critical habitat designated at a particular point in time may not include all of the habitat areas that we may later determine are necessary for the recovery of the species. For these reasons, a critical habitat designation does not signal that habitat outside the designated area is unimportant or may not be needed for recovery of the species. Areas that are important to the conservation of the species, both inside and outside the critical habitat designation, will continue to be subject to: (1) Conservation actions implemented under section 7(a)(1) of the Act; (2) regulatory protections afforded by the requirement in section 7(a)(2) of the Act for Federal agencies to ensure their actions are not likely to jeopardize the continued existence of any endangered or threatened species; and (3) the prohibitions found in section 9 of the Act. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. These protections and conservation tools will continue to contribute to recovery of this species. 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 at the time of these planning efforts calls for a different outcome.

#### *Physical or Biological Features Essential to the Conservation of the Species*

In accordance with section 3(5)(A)(i) of the Act and regulations at 50 CFR 424.12(b), in determining which areas we will designate as critical habitat from within the geographical area occupied by the species at the time of listing, we consider the PBFs that are essential to the conservation of the species and that may require special management considerations or protection. The regulations at 50 CFR 424.02 define "physical or biological features essential to the conservation of the species" as the features that occur in specific areas and that are essential to support the life-history needs of the species, including, but not limited to, water characteristics, soil type, geological features, sites, prey, vegetation, symbiotic species, or other features. A feature may be a single habitat characteristic or a more complex combination of habitat characteristics. Features may include habitat characteristics that support ephemeral or dynamic habitat conditions. Features may also be expressed in terms relating to principles of conservation biology, such as patch size, distribution distances, and connectivity. For example, physical features essential to the conservation of the species might include gravel of a particular size required for spawning, alkaline soil for seed germination, protective cover for migration, or susceptibility to flooding or fire that maintains necessary early-successional habitat characteristics. Biological features might include prey species, forage grasses, specific kinds or ages of trees for roosting or nesting, symbiotic fungi, or a particular level of nonnative species consistent with conservation needs of the listed species. The features may also be combinations of habitat characteristics and may encompass the relationship between characteristics or the necessary amount of a characteristic essential to support the life history of the species.

In considering whether features are essential to the conservation of the species, we may consider an appropriate quality, quantity, and spatial and temporal arrangement of habitat characteristics in the context of the life-history needs, condition, and status of the species. These characteristics 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, or rearing (or development) of offspring; and habitats that are protected from disturbance.

With rare exception, slickspot peppergrass occurs only in slick spot microsites scattered within the greater, semiarid, sagebrush-steppe ecosystem of southwestern Idaho. Slick spots provide habitats that are representative of the historical, geographical, and ecological distribution of slickspot peppergrass, and provide nutrients and water for reproduction, germination, and seed dispersal. The restricted distribution of slickspot peppergrass is likely due to its adaptation to the specific conditions within these slick spot habitats. Slick spots are distinguished from the surrounding sagebrush habitat as having the following characteristics: microsites where water pools when rain falls (Fisher et al. 1996, pp. 2, 4); sparse native vegetation; distinct soil layers with a columnar or prismatic structure, higher alkalinity and clay content, and natric (sodic, high sodium) properties (Fisher et al. 1996, pp. 15–16; Meyer and Allen 2005, pp. 3–5, 8; Palazzo et al. 2008, p. 378); and reduced levels of organic matter and nutrients due to lower biomass production (Meyer and Quinney 1993, pp. 3, 6; Fisher et al. 1996, p. 4). Although the low permeability of slick spots appears to help hold moisture (Moseley 1994, p. 8), once the thin crust dries out, the survival of slickspot peppergrass seedlings depends on the ability of the plant to extend the taproot into the argillic horizon (soil layer with high clay content) to extract moisture from the deeper natric zone (Fisher et al. 1996, p. 13).

Ecologically functional slick spots have the following three primary layers: the surface silt layer, the middle restrictive layer, and an underlying moist clay layer. Although slick spots can appear homogeneous on the surface, the actual depth of the silt and restrictive layer can vary throughout the slick spot (Meyer and Allen 2005, Tables 9, 10, and 11). The top two layers (surface silt and restrictive) of slick spots are normally very thin; the surface silt layer varies in thickness from 0.25 to 3 centimeters (cm) (0.1 to 1.2 inches (in)) in slick spots known to support slickspot peppergrass, and the restrictive layer varies in thickness from 1 to 3 cm (0.4 to 1.2 in) (Meyer and Allen 2005, p. 3). Fisher et al. (1996, p. 4) describe the smooth surface layer of slick spots as crustlike, with prominent vesicular pores. Below the surface layer, the soil clay content increases abruptly and creates a strongly structured, finely textured boundary (horizon) formed by the concentration of silicate clay materials, known as an argillic horizon.

Slick spot soil profiles are distinctive and distinguished from the surrounding

soil matrix by very thin surface layers that form prominently vesicular crusts, natric-like argillic horizons that occur just below the soil surface, and by increasingly saline and sodic conditions with depth (Fisher et al. 1996, pp. 11, 16). Disturbances that alter the physical properties of slick spot soil layers, such as deep disturbance and the addition of organic matter, may lead to destruction and permanent loss of slick spots. Slick spot soils are especially susceptible to mechanical disturbances when wet (Rengasamy et al. 1984, p. 63; Seronko 2004, in litt., entire). Such disturbances disrupt the soil layers important to slickspot peppergrass seed germination and seedling growth and alter hydrological function.

The biological soil crust, also known as a microbiotic crust or cryptogamic crust, is another component of quality habitat for slickspot peppergrass. Such crusts are commonly found in semiarid and arid ecosystems, and are formed by living organisms, primarily bryophytes (mosses), lichens, algae, and cyanobacteria (blue-green algae), that bind together surface soil particles (Moseley 1994, p. 9; Johnston 1997, p. 4). Microbiotic crusts play an important role in stabilizing the soil and preventing erosion, increasing the availability of nitrogen and other nutrients in the soil, and regulating water infiltration and evaporation levels (Johnston 1997, pp. 8–10). In addition, an intact crust appears to aid in preventing the establishment of invasive plants (Brooks and Pyke 2001, p. 4; Serpe et al. 2006, pp. 174, 176). These crusts are sensitive to disturbances that disrupt crust integrity, such as compression due to livestock trampling or off-road vehicle use and are also vulnerable to damage by fire. Recovery from disturbance is possible but occurs very slowly (Johnston 1997, pp. 10–11).

The native, semiarid sagebrush-steppe habitat of southwestern Idaho where slickspot peppergrass is found can be divided into two plant associations, each dominated by the shrub Wyoming big sagebrush (*Artemisia tridentata* ssp. *wyomingensis*): (1) Wyoming big sagebrush—Thurber's needlegrass (*Achnatherum thurberianum*); and (2) Wyoming big sagebrush—bluebunch wheatgrass (*Pseudoroegneria spicata*) habitat types. The perennial bunchgrasses Sandberg's bluegrass (*Poa secunda*) and bottlebrush squirreltail (*Elymus elymoides*) are commonly found in the understory of these habitats, and basin big sagebrush (*Artemisia tridentata* ssp. *tridentata*), gray or rubber rabbitbrush (*Ericameria nauseosus*), yellow rabbitbrush (*Chrysothamnus viscidiflorus*), strict

buckwheat (*Eriogonum strictum*), bitterbrush (*Purshia tridentata*), and little-leaved horsebrush (*Tetradymia glabrata*) form a lesser component of the shrub community. Under relatively undisturbed conditions, the understory is populated by a diversity of perennial bunchgrasses and forbs, including species such as Indian ricegrass (*Achnatherum hymenoides*), common yarrow (*Achillea millefolium*), varileaf phacelia (*Phacelia heterophylla*), Pursh's milkvetch (*Astragalus purshii*), longleaf phlox (*Phlox longifolia*), and purple threeawn (*Aristida purpurea* var. *longiseta*).

Slickspot peppergrass is primarily an outcrossing species requiring pollen from separate plants for more successful fruit production; it exhibits low seed set in the absence of insect pollinators (Robertson 2003, p. 9; Robertson and Klemash 2003, p. 338; Robertson and Ulappa 2004, p. 1707; Billinge 2006, p. 40; Robertson et al. 2006, p. 40; Billinge and Robertson 2008, pp. 1005–1006). Insects from 25 families have been observed on slickspot peppergrass flowers (Robertson and Klemash, 2003, pp. 335–336). Of those 25 insect families, the primary slickspot peppergrass pollinators include several families of bees (Anthophoridae, Apidae, Colletidae, Halictidae, Sphecidae, and Vespidae), flies (Bombyliidae, Syrphidae, Calliphoridae, and Tachinidae), beetles (Cerambycidae, Dermestidae, Melyridae), and moths (Gelechiidae) (Robertson and Hannon 2003, p. 6; Robertson and Klemash 2003, p. 336; Robertson and Leavitt 2011, p. 384).

Pollinators need a diversity of native plants with overlapping bloom times to provide flowers for foraging throughout their active season; nesting and egg-laying sites (e.g., bare ground, hollow stems, bunchgrasses); sheltered, undisturbed places for overwintering; and connected habitat patches (The Xerces Society 2018, pp. 15–17). In our proposed rule, we used a 250-meter (m) (820-foot (ft)) pollinator use area around each E.O. based on a foraging range of the solitary bee. However, we received several comments supporting an expansion of the pollinator-use buffer area to 500-m (1,640 ft) to account for the foraging range of all the associated pollinators noted in the above paragraph. After a thorough review of all the pollinator species for slickspot peppergrass, we agreed that each E.O. should be surrounded by a 500-m (1,640-ft) pollinator-use area to ensure that sufficient habitat and a diversity of native flowering plants are available to support the pollinator community

required for the viability of slickspot peppergrass populations.

To determine the size of the pollinator-use area or buffer, we evaluated the pollinators of slickspot peppergrass and the distance that those pollinators were likely to fly in search of food. Although slickspot peppergrass is pollinated by a variety of insects, its primary pollinators are composed of families of small- to medium-sized solitary bees and flies, and larger, thread-waisted sphecid wasps (Sphecidae), meloid beetles, moths, and butterflies (Robertson and Leavitt 2011, pp. 384–385; Robertson 2020, pers. comm.). Flight distances are generally correlated with body size in bees; larger bees can fly farther than smaller bees (Gathmann and Tscharrnke 2002, entire; Greenleaf et al. 2007, pp. 592–594; Kendall et al. 2022, p. 4). While researchers have reported that some solitary bee species, particularly larger bodied ones, are capable of foraging greater than 1 kilometer (km) (0.6 mile (mi)) (Zurbuchen et al. 2010, pp. 671–672), the majority of these species are central-place foragers (i.e., remain close to their nest), thus foraging distances tend to be 500 m (1,640 ft) or less (Steffan-Dewenter 2003, p. 1041; BLM 2012, p. 19; Danforth et al. 2019, p. 207; O'Neill 2019, pp. 108–109; Antoine and Forrest 2021, p. 152). Syrphid flies, which are not central-place foragers, have been documented carrying pollen up to 400 m (1,312 ft) (Rader et al. 2011, pp. 522–525). Other noncentral-place foragers like moths and butterflies are capable of foraging over larger areas and could use areas within EOs and their associated buffers and beyond. Therefore, we find that a 500-m (1,640-ft) buffer is adequate for flies, moths, and butterflies, as well as the solitary bee pollinators of slickspot peppergrass.

In addition, honeybees were identified as a pollinator of slickspot peppergrass in our 2020 proposed rule (85 FR 44584). However, they are a nonnative species and compete for floral resources with native insect pollinators and spread diseases to native bees (Cane and Tepedino 2017, entire; Wojcik et al. 2018, pp. 827–829; Alger et al. 2019, pp. 5–7; Iwasaki and Hogendoorn 2022, pp. 7–8). Because of the potential negative impact they may have on the diverse native pollinator community associated with slickspot peppergrass, we do not consider them essential to the conservation of the species in this final rule.

The areas designated as critical habitat will ensure maintenance and continuity of foraging and nesting habitats for insect pollinators adjacent to occupied slick spots, thus promoting

a healthy pollinator community. This healthy pollinator community, in turn, helps to increase seed viability and production of slickspot peppergrass and is essential for maintaining genetic diversity in the species over the long term. In addition, the provision of sufficient native sagebrush-steppe habitat protects slickspot peppergrass from wildfire, nonnative plant invasions, and colonization by Owyhee harvester ants (see our final listing rule (74 FR 52014, October 8, 2009), the reinstatement of the listing rule (81 FR 55058, August 17, 2016), and the SSA (USFWS 2020) for a description of these threats), and it helps to maintain local ecosystem characteristics within the larger landscape, which are crucial for protecting the species and its persistent seed bank. The seed bank is an essential feature of slickspot peppergrass's biology because it provides the species with resilience in the face of stochastic impacts and variation in environmental conditions.

#### *Summary of Essential Physical or Biological Features*

Based on our current knowledge of habitat characteristics required to sustain the species' life-history processes, we determine that the PBFs essential to the conservation of slickspot peppergrass are:

(1) Ecologically functional microsites or "slick spots" that are characterized by:

(a) A high sodium and clay content, and a three-layer soil profile, which allows for successful seed germination, seedling growth, and maintenance of the seed bank. The surface horizon consists of a thin, silty, vesicular, pored (small cavity) layer that forms a physical crust (the silt layer). The subsoil horizon is a restrictive clay layer with an abrupt (referring to an abrupt change in texture) boundary with the surface layer, that is natric or natric-like in properties (a type of argillic (clay-based) horizon with distinct structural and chemical features) (the restrictive layer). The second argillic subsoil layer (that is less distinct than the upper argillic horizon) retains moisture through part of the year (the moist clay layer); and

(b) Sparse vegetation with invasive, nonnative plant species cover absent or limited to low to moderate levels.

(2) Relatively intact, native Wyoming big sagebrush (*Artemisia tridentata* ssp. *wyomingensis*) vegetation assemblages, represented by native bunchgrasses, shrubs, and forbs, within 500 m (1,640 ft) of slickspot peppergrass element occurrences to protect slick spots and slickspot peppergrass from disturbance from wildfire, slow the invasion of slick

spots by nonnative plant species and native harvester ants, and provide the habitats needed by slickspot peppergrass' pollinators.

(3) A diversity of native plants whose blooming times overlap to provide pollinator species with flowers for foraging throughout the seasons and to provide nesting and egg-laying sites; appropriate nesting materials; and sheltered, undisturbed places for hibernation and overwintering of pollinator species. In order for genetic exchange of slickspot peppergrass to occur, pollinators must be able to move freely between slick spots. Alternative pollen and nectar sources (other plant species within the surrounding sagebrush vegetation) are needed to support pollinators during times when slickspot peppergrass is not flowering, when distances between slick spots are long, and in years when slickspot peppergrass is not a prolific flowerer.

(4) Sufficient pollinators for successful fruit and seed production, particularly pollinator species of the sphecid and vespidae wasp families, species of the bombyliid and tachnid fly families, and halictid bee species, most of which are solitary insects that nest outside of slick spots in the surrounding sagebrush-steppe vegetation, both in the ground and within the vegetation.

#### **Special Management Considerations or Protections**

When designating critical habitat, we assess whether the specific areas within the geographical area occupied by the species at the time of listing contain features which are essential to the conservation of the species and which may require special management considerations or protection. A detailed discussion of the threats affecting the PBFs essential to the conservation of slickspot peppergrass, and that may require special management consideration or protection, can be found in the final listing rule published in the **Federal Register** on October 8, 2009 (74 FR 52014), the 2016 final rule reinstating threatened status for the species under the Act (81 FR 55058, August 17, 2016), in the recently completed SSA report (USFWS 2020, pp. 59–83, 85–103), and in the latest 5-year review (USFWS 2021).

The primary threats to the PBFs for slickspot peppergrass include the following direct and indirect effects: the current wildfire regime (*i.e.*, increasing frequency, size, and duration), invasive, nonnative plant species (*e.g.*, cheatgrass), and habitat loss and fragmentation due to agricultural and urban development. One of the indirect threats experienced by slickspot

peppergrass is the negative impact on insect pollinators caused by conversion and fragmentation of native habitats due to invasive, nonnative plant species and various forms of development. Another indirect threat is the potential increase in seed predation by Owyhee harvester ants resulting from the conversion of sagebrush-steppe to grasslands. Livestock pose a threat to slickspot peppergrass, primarily through mechanical damage to individual plants and slick spot habitats; however, current livestock management conditions and associated conservation measures address this potential threat such that it does not pose a significant risk to the viability of the species as a whole.

In the 2009 listing rule (74 FR 52014, October 8, 2009), climate change in and of itself was not considered to represent a significant range-wide threat to slickspot peppergrass; however, it was acknowledged that climate change potentially plays an important supporting role in intensifying the primary threats to the species. Information identified in the SSA (USFWS 2020, pp. 79–82) indicated that climate change has already amplified the effects of wildfire and invasive, nonnative plants on slickspot peppergrass, and through its influence on invasive, nonnative annual grass spread, climate change may have been a factor in the continuing downward trend in slickspot peppergrass population numbers observed over the past decade. Other, less significant factors that have the potential to impact the species include the effects from rangeland revegetation projects, wildfire management practices, recreation, and military use.

All areas of critical habitat may require some level of management to address current and future threats to slickspot peppergrass and to maintain or restore the PBFs. Special management to protect the features essential to the conservation of slickspot peppergrass from the effects of the current wildfire regime may include preventing or restricting the establishment of invasive, nonnative plant species, post-wildfire restoration with native plant species, and reducing the likelihood of wildfires affecting the nearby plant community components. Rapid response to wildfires from local and government fire agencies can potentially limit the size of wildfires and the spread of wildfire into slickspot peppergrass habitat. For fires that do occur in critical habitat, post-fire restoration plans can identify ways to limit invasive, nonnative vegetation and restore habitat using native plants.

Special management to protect the features essential to the conservation of

slickspot peppergrass from the effects of invasive, nonnative unseeded plant species and seeded nonnative plants (also referred to as “highly competitive nonnative seeded plants” (USFWS 2020, p. 68)) may include the following: (1) protecting remnant blocks of native vegetation, (2) educating the public about invasive, nonnative species, (3) supporting research and funding for nonnative plant species control and native species restoration, (4) preventing or restricting the establishment of nonnative plant species, (5) washing vehicles prior to travel into areas containing slickspot peppergrass, and (6) reducing the likelihood of wildfires.

Special management to protect the features essential to the conservation of slickspot peppergrass from the effects of livestock use may include conservation measures and actions to minimize the effects of livestock use on these lands. Existing conservation plans and land use plans contain numerous measures to avoid, mitigate, and monitor the effects of livestock use on slickspot peppergrass. For example, livestock-grazing conservation measures are implemented through the conservation agreement between the Bureau of Land Management (BLM) and the Service (BLM 2014, pp. 8–12) and the Mountain Home Air Force Base Integrated Natural Resources Management Plan (INRMP; U.S. Air Force 2017, p. 192). Existing conservation measures include prescribing a minimum distance for the placement of salt and water troughs, identifying livestock use restrictions to reduce trampling of slick spots during wet periods, constructing fences, or potentially modifying current livestock use. We recognize the potential for negative impacts to slickspot peppergrass populations and slick spots that may result from seasonal, localized trampling events. However, under current management conditions, we do not consider livestock use to pose a significant threat to slickspot peppergrass. We encourage the continued implementation of conservation measures and associated monitoring to ensure potential impacts of livestock trampling to slickspot peppergrass are avoided or minimized.

Special management to protect the features essential to the conservation of slickspot peppergrass from the effects of residential and agricultural development may include the following: (1) creating managed plant reserves and open spaces, (2) limiting disturbances to and within suitable habitats, (3) increasing compliance inspections with livestock grazing permit holders, (4) requiring project fencing with adjacent construction activities, (5) disallowing

new roads, and (6) evaluating the need for, and conducting, restoration efforts or revegetation of native plants in open spaces, plant preserves, or disturbed areas.

Special management to protect the features essential to the conservation of slickspot peppergrass from the effects of Owyhee harvester ant seed predation are addressed under the special management considerations for the current wildfire regime and invasive nonnative plants.

Finally, the protection of pollinators and their habitat is essential to the conservation of slickspot peppergrass. General pollinator management practices include: (1) maintaining a diversity of native plants with overlapping bloom times to provide flowers for foraging throughout the pollinators’ active season, (2) nesting and egg-laying sites (e.g., bare ground, hollow stems, bunchgrasses, and larval host plants), (3) sheltered, undisturbed places for overwintering, (4) a landscape free of pesticides and high levels of pathogens, and (5) connected habitat patches (The Xerces Society 2018, pp. 15–17).

The designation of critical habitat does not imply that lands outside of critical habitat do not play an important role in the conservation of slickspot peppergrass. Activities with a Federal nexus that may affect those areas outside of critical habitat, such as development, agricultural, or road construction activities, are still subject to review under section 7 of the Act if they may affect slickspot peppergrass.

#### **Criteria and Methodology Used To Identify Critical Habitat**

As required by section 4(b)(2) of the Act, we use the best scientific data available to designate critical habitat. In accordance with the Act and our implementing regulations at 50 CFR 424.12(b), we review available information pertaining to the habitat requirements of the species and identify specific areas within the geographical area occupied by the species at the time of listing and any specific areas outside the geographical area occupied by the species to be considered for designation as critical habitat. We are not designating any areas outside the geographical area occupied by the species at the time of listing because we did not identify any unoccupied areas that were essential for the conservation of the species and, therefore, met the definition of critical habitat.

We delineated critical habitat units within the three geographic areas where slickspot peppergrass occurs in order to represent genetic variability across the

species’ range. These areas include the Foothills, the Snake River Plain, and the Jarbidge (USFWS 2020, p. 5). Each critical habitat unit contains polygons of critical habitat consisting of slickspot peppergrass populations known as Element Occurrences (EO) and associated pollinator buffers that extend 500 m (1,640 ft) from the outer edge of the EOs. EOs are based on the standards and methods developed by NatureServe (NatureServe 2002, entire; NatureServe 2020a, entire; NatureServe 2020b, entire) and adopted by the Idaho Department of Fish and Game (IDFG). Slickspot peppergrass EOs are groups of plants that occur within 1 km (0.6 mi) of each other. Therefore, an EO can consist of one occupied slick spot or several occupied slick spots aggregated into one EO providing they are within the 1-km (0.6 mi) distance of one another. IDFG botanists track EOs and enter them into the Idaho Fish and Wildlife Information System (IFWIS), which is managed by the IDFG. The IDFG uses NatureServe guidance (NatureServe 2020b) to rank slickspot peppergrass EOs. Information used to inform the rankings was based on a systematic assessment of field data collected from summer 2012 through spring 2016 (Kinter and Miller 2016), plus data provided to the IDFG by the BLM for surveys from 2016 to 2018.

As per the NatureServe guidance, IDFG botanists ranked slickspot peppergrass EOs based on three factors: size, condition, and landscape context (Kinter and Miller 2016, p. 3). Possible EO ranks include A, B, C, D, E, F, H, or X; higher rankings (the highest rank is A) indicate sites with greater habitat quality and larger population sizes, which we infer are more likely to persist and sustain the species. Rankings of B, BC, C, CD, and D refer to states of decreased abundance and quality of detectable plants, native plant community, habitat condition, and overall landscape context within 1 km (0.6 mi) of occupied slick spots. Areas ranked E are those records with confirmed slickspot peppergrass presence but for which no additional habitat information is available. Rankings of F indicate areas where slickspot peppergrass was previously found, but no individuals were found when last visited by a qualified surveyor. Areas ranked H indicate historical occurrences where old location information is too vague to allow the EO to be found again. Rankings of X denote extirpated occurrences due to habitat destruction associated with development or agricultural conversion.

We based our criteria for the identification of critical habitat on IDFG's EO rankings. EO rankings are used for assessing estimated viability or probability of persistence as well as for prioritizing conservation planning or actions (NatureServe 2020b, p. 2, 12). IDFG botanists ranked each EO and sub-EO (a smaller, distinct area within the EO that is delineated for localized management) based on measures of habitat quality (EO and sub-EO condition and surrounding landscape context) and species abundance. Weighted calculations used by the IDFG to determine the ranking of each EO and sub-EO were as follows:

- 33 percent of the EO ranking score was based on the EO/sub-EO size (highest number of plants observed in at least 1 of up to the past 6 years of available IDFG data);
- 45 percent of the EO ranking score was based on habitat condition within EOs/sub-EOs as documented during IDFG recent field reviews; and
- 22 percent of the EO ranking score was based on habitat condition of the landscape within 1 km (0.6 mi) of EOs/sub-EOs as documented during IDFG recent field reviews.

These IDFG rankings do not necessarily correlate directly to the PBFs. For example, as described above in *Summary of Essential Physical or Biological Features*, PBF 1(b) states that ecologically functional microsites or "slick spots" are characterized by sparse vegetation, with introduced, invasive, nonnative plant species cover absent or limited to low to moderate levels. However, the IDFG rankings do not directly measure invasive, nonnative plant cover within the actual slick spot. The assessments of condition were based mostly on the EO habitat surrounding the slick spots, which tended to be more invaded than the slick spots. So, even if a habitat ranking was characterized as moderately to highly invaded, the slick spots themselves often had very low amounts of invasive species (Kinter 2020, pers. comm.). Therefore, we used the IDFG rankings, which constitute the best available information, as surrogates to help us determine which EOs provided the PBFs essential to the conservation of the species (*i.e.*, the EOs most likely to provide for populations of slickspot peppergrass that will contribute to the conservation and recovery of the species).

Based on comments received during the public comment period on our revised proposed critical habitat rule (85 FR 44584, July 23, 2020), we reevaluated our criteria for determining which EOs contain PBFs and meet our

definition of critical habitat. The proposed rule included slickspot peppergrass EOs with IDFG rankings of B, BC, C, and CD as designated critical habitat. However, in this final rule, we also included all areas that were occupied at the time of listing that are ranked D. Although some of the EOs with D rankings often have PBFs with degraded conditions and may need special management, we determined that including these lower ranked EOs is essential to the conservation of the species in part because we no longer have any excellent (A-ranked) or excellent to good (AB ranked) EOs, and we need these lower ranked EOs to increase the redundancy of populations across the species' range. Since 2006, there have been no A- or AB-ranked EOs of slickspot peppergrass (Kinter and Miller 2016, p. 8; Colket et al. 2006, p. 11; IFWIS database (IDFG Database 2021)). Ultimately, we conclude that every EO included in critical habitat was occupied at the time of listing and has one or more of the PBFs sufficient to justify designation.

Slickspot peppergrass is a species endemic to southwest Idaho with a relatively small geographic range and limited, finite habitat. Slick spot microsites are believed to have formed during the Pleistocene, and current climate conditions may not allow for the formation of new slick spots; therefore, the loss of slick spot microsites within the range of slickspot peppergrass seems to be permanent (USFWS 2020, pp. 6–7). A statistical analysis of 11 years of range-wide monitoring data demonstrated that across all three geographic areas, slickspot peppergrass is declining (Bond 2017, p. 11), and without new tools and management to reduce or ameliorate the primary threats (increased wildfire and invasive plants) to the species, slickspot peppergrass is predicted to continue to decline into the future (USFWS 2020, pp. 121, 124–130).

In addition, we expect climate change to magnify the severity and scope of the primary threats of changing wildfire regimes and invasive nonnative plants to slickspot peppergrass, thereby reducing resiliency, representation, and redundancy of slickspot peppergrass populations rangewide (USFWS 2020, pp. 79–82). In the 2009 listing rule (74 FR 52014, October 8, 2009), we did not consider climate change to represent a significant range-wide threat to slickspot peppergrass. However, information identified in the SSA indicates that climate change has already amplified the effects of wildfire and invasive, nonnative plants on slickspot peppergrass. Through its influence on the spread of invasive,

nonnative annual grasses, climate change may have been a factor in the continuing downward trend in slickspot peppergrass population numbers observed over the past decade.

Elevations for slickspot peppergrass populations range from a low of 756 m (2,480 ft) at EO 68 south of New Plymouth, Idaho, in the Foothills geographic area to a high of 1,654 m (5,425 ft) at EO 97 south of the Juniper Butte Range in the Jarbidge geographic area. Both extremes of low- and high-elevation areas contain slickspot peppergrass populations assessed by IDFG as having good population viability (B-ranked), although the lower elevation populations of the Foothills geographic area are smaller in area and more isolated, likely due to more fragmented habitats. The current higher fragmentation levels and projected future increased risk for wildfire and invasive, nonnative plants (particularly cheatgrass) make lower elevation populations more vulnerable to the effects of climate change than the higher elevation populations in the Jarbidge geographic area because these threats are likely to be amplified in lower elevation areas as temperatures increase. Most plant species cannot naturally shift their geographic ranges fast enough to keep up with predicted high projected rates of climate change in most landscapes. However, by designating critical habitat in all three geographic areas (Foothills, Snake River Plain, and Jarbidge) where the species occurs, including all B–D ranked EOs as well as the 500-m (1,640-ft) pollinator buffer around designated EOs, we have determined that these areas will help support slickspot peppergrass under potential climate change scenarios in the future.

We also continue to include areas that may have been partially degraded in the past by threats such as wildfire. The Act defines critical habitat as the specific areas within the geographical area occupied by the species, at the time it is listed, on which are found those physical or biological features essential to the conservation of the species and which may require special management considerations or protections. A combination of special management activities such as habitat enhancement or threat-reduction actions may be appropriate to maintain (and possibly increase) slickspot-peppergrass population resiliency and species persistence over time. Including lower ranked EOs (CD and D) will help ensure we retain the flexibility to consider various paths to recovery. In summary, after considering the best available information, we determined that all

occupied slickspot peppergrass EOs ranked B–D contain one or more of the physical or biological features essential to the conservation of the species and, therefore, meet our definition of critical habitat.

We have determined that 113 EOs (42 B-ranked, 2 BC-ranked, 33 C-ranked, 7 CD-ranked, and 29 D-ranked) meet our criteria for critical habitat designation. These 113 EOs reflect the merging of 2 C-ranked EOs (EOs 19 and 41) into B-ranked EO 18, the addition of CD-ranked EOs 23 and 57 that were not included in the proposed rule (85 FR 44584, July 23, 2020), and the addition of 6 new EOs. These six EOs include EO 122 (Unit 3a; C rank) and EOs 123, 124, 727, 728, and 729 (Unit 4, B rank). These EOs were ranked by the IDFG after publication of our July 23, 2020, revised proposed rule (85 FR 44584) and meet our definition of critical habitat. EO 122 was occupied at the time of listing (2016). The other five EOs were found in 2017 and were likely occupied at the time of listing because these slick spots had not been surveyed prior to 2017, and slickspot peppergrass is not likely to colonize new areas to the extent to which these EOs were populated (number of plants ranged from 13 to 766 per EO) within a year. Therefore, all six EOs are included in our final critical habitat designation.

In the 2009 final listing rule (74 FR 52014, October 8, 2009), we described the total area of known EOs (that is, area covered by the EOs themselves) as being approximately 6,500 hectares (ha) (16,000 acres (ac)). This area reflected only the known locations of individuals of the plant, as recognized in the IDFG IFWIS database as of 2009, and is a small portion of the overall geographic range of the species. In the May 10, 2011, proposed critical habitat rule (76 FR 27184), we described in detail the criteria used to identify critical habitat, including a 250-m (820-ft) buffer around EO polygons to provide areas for pollinator support and to minimize disturbance to the plant's habitat. We have since reassessed the size of the pollinator buffer and, in this final rule, we are increasing the buffer around EOs to 500 m (1,640 ft) (see the section Physical or Biological Features Essential to the Conservation of the Species, above, for details).

In this final rule, we used Geographic Information System (GIS) software (ESRI ArcGIS 10.7.1) to more precisely map

areas that meet the definition of critical habitat rather than the mapping methodology we used in our 2011 and 2014 proposed rules (76 FR 27184, May 10, 2011; 79 FR 8402, February 12, 2014), which used the Public Land Survey System Quarter-Quarter section method. The GIS-based method involves delineation of B- through D-ranked slickspot peppergrass EOs surrounded by 500-m (1,640-ft) pollinator buffers to create polygons of slickspot peppergrass critical habitat. In contrast, critical habitat maps in 2011 and 2014 were created by selecting all Quarter-Quarter sections that intersected with B- through CD-ranked EOs or their surrounding 250-m (820-ft) pollinator buffers. The use of Quarter-Quarter sections, which represent land survey boundaries rather than biologically based boundaries, resulted in large areas outside of the GIS-generated polygons being included as proposed critical habitat in the 2011 proposed critical habitat rule (76 FR 27184, May 10, 2011) and the 2014 revised proposed critical habitat rule (79 FR 8402, Feb. 12, 2014). Use of GIS-based information represents a more precise method of delineating critical habitat that does not include extraneous areas.

The use of B- through D-ranked EO polygons and their surrounding 500-m (1,640-ft) pollinator buffers to create a more biologically sound critical habitat designation method is feasible, and is consistent with current Service regulations (77 FR 25611, May 1, 2012; 81 FR 7414, Feb. 11, 2016; 84 FR 45020, August 27, 2019) as well as with other Service critical habitat rules (e.g., White Bluffs bladderpod (78 FR 76995, December 20, 2013), Webber's ivesia (79 FR 32126, June 3, 2014), beardless chinchweed (86 FR 31830, June 15, 2021)).

When determining final critical habitat boundaries, we made every effort to avoid including developed areas such as lands covered by buildings, pavement, and other structures because such lands lack PBFs necessary for slickspot peppergrass. These areas lacking PBFs were identified in GIS using aerial imagery from the ArcGIS World Imagery layer, aerial imagery from Google Earth Pro, and the 2019 National Agricultural Imagery Program (NAIP) Idaho layer, which has a spatial resolution of a 60-centimeter ground sample distance. Areas that lacked PBFs were then

manually clipped out of our critical habitat polygons. The scale of the maps we prepared under the parameters for publication within the Code of Federal Regulations may not reflect the exclusion of such developed lands. Any such lands inadvertently left inside critical habitat boundaries shown on the maps of this final rule have been excluded by text in the final rule and are not designated as critical habitat. Therefore, a Federal action involving these lands will not trigger section 7 consultation with respect to critical habitat and the requirement of no adverse modification, unless the specific action will affect the PBFs in the adjacent critical habitat.

Therefore, we are designating as critical habitat lands that we determined were occupied at the time of listing (*i.e.*, currently occupied) and that contain one or more of the PBFs that are essential to support life-history processes of the species, and that may require special management considerations or protections. The four units each contain one or more of the physical or biological features that support multiple life-history processes for slickspot peppergrass.

The final critical habitat designation is defined by the map or maps, as modified by any accompanying regulatory text, and presented at the end of this document under Regulation Promulgation. We will make the coordinates or plot points or both on which each map is based available to the public on <https://www.regulations.gov> at Docket No. FWS–R1–ES–2010–0071, and on our internet site here: <https://www.fws.gov/species/slickspot-peppergrass-lepidium-papilliferum>.

#### Final Critical Habitat Designation

We are designating approximately 31,569 ha (78,009 ac) of critical habitat in four units and seven subunits for slickspot peppergrass. The four units are the: (1) Payette and Gem Counties Unit, (2) Gem and Ada Counties Unit, (3) Ada and Elmore Counties Unit, and (4) Owyhee County Unit. Table 1 shows the critical habitat units and the approximate area of each unit. All units are considered occupied at the time of listing. The critical habitat areas we describe below constitute our current best assessment of areas that meet the definition of critical habitat for slickspot peppergrass.



TABLE 1—CRITICAL HABITAT UNITS FOR SLICKSPOT PEPPERGRASS  
 [Area estimates reflect all critical habitat within critical habitat unit or subunit boundaries.]

Unit	Subunit	Federal land in hectares (acres)		Total land in hectares (acres)
		Bureau of Land Management	Bureau of Reclamation	
1—Payette and Gem Counties		695 (1,718)	9 (23)	704 (1,741)
2—Gem and Ada Counties	2a	874 (2,160)	0	874 (2,160)
	2b	5,423 (13,401)	0	5,423 (13,401)
	2c	657 (1,623)	0	657 (1,623)
	2d	1,689 (4,173)	18 (45)	1,707 (4,218)
	Unit 2 Total	8,643 (21,357)	18 (45)	8,661 (21,402)
3—Ada and Elmore Counties	3a	1,502 (3,711)	52 (128)	1,554 (3,839)
	3b	1,821 (4,502)	32 (80)	1,854 (4,582)
	3c	2,453 (6,062)	32 (80)	2,485 (6,142)
	Unit 3 Total	5,777 (14,275)	117 (288)	5,894 (14,563)
4—Owyhee County		16,310 (40,303)	0	16,310 (40,303)
Total		31,424 (77,652)	144 (356)	31,569 (78,009)

Notes: Area sizes may not sum due to rounding.

We present brief descriptions of all final critical habitat units, identify the EOs included in each, and provide the reasons why they meet the definition of critical habitat for slickspot peppergrass, below.

Unit 1: Payette and Gem Counties

Critical habitat in Unit 1 (Payette and Gem Counties Unit) consists of 704 ha (1,741 ac) located in portions of Payette and Gem Counties within the Foothills geographic area. The northern boundary of Unit 1 is approximately 7.0 km (4.3 mi) south of New Plymouth, Idaho. This unit contains five slickspot peppergrass EOs: 66, 68, 69, 70, and 114, all of which were occupied at the time of the species' listing. All designated critical habitat is federally managed by either the BLM Four Rivers Field Office area (695 ha (1,718 ac)) or the Bureau of Reclamation (BOR) (9 ha (23 ac)). We have excluded 76 ha (188 ac) of private land from portions of all five EOs in this unit (see *Exclusions Based on Other Relevant Impacts*, below). Unit 1 critical habitat polygons contain all PBFs: slick spot microsites, suitable vegetation composition and structure, sufficient habitat components to support insect pollinators, and insect pollinators to allow for sufficient fruit and seed production. Unit 1 is important to the conservation of the species because it contains the northernmost occurrences for slickspot peppergrass and potentially has the highest numbers of individual plants. This unit helps to maintain the geographic range of the species and provide opportunity for

population growth. In Unit 1, special management considerations or protection of the PBFs may be required to address the threats posed by the current wildfire regime, invasive nonnative plant species, and incompatible livestock use. These threats are being addressed or coordinated with our partners, including the BLM and BLM livestock permittees, to implement needed actions for species recovery.

Unit 2: Gem and Ada Counties

Critical habitat in Unit 2 (Gem and Ada Counties Unit) consists of 8,661 ha (21,402 ac) divided into four subunits: 2a, 2b, 2c, and 2d. This unit contains 26 slickspot peppergrass EOs split among the 4 subunits. All designated critical habitat in this unit is federally managed by the BLM (8,643 ha (21,357 ac)) and BOR (18 ha (45 ac)). All subunits contain the PBFs essential to the conservation of the species, as described in more detail below. This unit is important to the conservation of slickspot peppergrass because it contains a large remaining intact area of sagebrush-steppe habitat that has experienced little impact from wildfire.

Subunit 2a

Subunit 2a lies within the Foothills geographic area and contains the city of Eagle, Idaho, and the southern boundary of the subunit is approximately 1.8 km (1.1 mi) northwest of Boise, Idaho. Subunit 2a contains five EOs: 52, 56, 76, 108 and 118, all of which were occupied at the time of the species' listing.

Approximately 874 ha (2,160 ac) of subunit 2a are federally managed by the BLM. We have excluded 1,572 ha (3,886 ac) of private land and 41 ha (102 ac) of State land from portions of EOs 52, 56, 76, 108, and 118 and wholly from EOs 12, 23, 36, 38, 65, and 107 (see *Exclusions Based on Other Relevant Impacts*, below). Subunit 2a is important to the conservation of the species because it contains several large populations of slickspot peppergrass in the Foothills area. This subunit helps to maintain the geographic range of the species and provide opportunity for population growth. Subunit 2a critical habitat polygons contain one or more PBFs: slick spot microsites, suitable vegetation composition and structure, sufficient habitat components to support insect pollinators, and insect pollinators to allow for sufficient fruit and seed production. In Subunit 2a, special management considerations or protection of the PBFs may be required to address the threats posed by the current wildfire regime, invasive nonnative plant species, and incompatible livestock use. These threats are being addressed or coordinated with our partners, including the BLM and BLM livestock permittees, to implement needed actions for species recovery.

Subunit 2b

The northern boundary of Subunit 2b is approximately 3.2 km (2.0 mi) south of Kuna, Idaho, within the Snake River Plain geographic area. Critical habitat in Subunit 2b comprises 5,423 ha (13,401

ac) of federally managed BLM land and contains eight EOs: 18, 24, 25, 42, 43, 57, 58, and 105, all of which were occupied at the time of the species' listing. We have excluded 64 ha (159 ac) of private land and 171 ha (423 ac) of State land from portions of EOs 18 and 25 (see *Exclusions Based on Other Relevant Impacts*, below). BLM lands in Subunit 2b are within the Morley Nelson Snake River Birds of Prey National Conservation Area. This subunit is important to the conservation of the species because it contains EO 18, which supports high numbers of individual plants. Subunit 2b helps to maintain the geographic range of the species and provide opportunity for population growth. Although impacted from past fires, Subunit 2b critical habitat polygons contain one or more PBFs: slick spot microsites, suitable vegetation composition and structure, sufficient habitat components to support insect pollinators, and insect pollinators to allow for sufficient fruit and seed production. In Subunit 2b, special management considerations or protection of the PBFs may be required to address the threats posed by the current wildfire regime, invasive nonnative plant species, and incompatible livestock use. These threats are being addressed or coordinated with our partners, including the BLM and BLM livestock permittees, to implement needed actions for species recovery.

#### Subunit 2c

The northern boundary of Subunit 2c is approximately 6.0 km (3.7 mi) southwest of Boise, Idaho, within the Snake River Plain geographic area. It contains four EOs: 32, 48, 49, and 102, all of which were occupied at the time of the species' listing. Critical habitat in Subunit 2c consists of approximately 657 ha (1,623 ac) of BLM land within the Four Rivers Field Office area. We have excluded 793 ha (1,959 ac) of private land and 149 ha (367 ac) of State land from portions of EOs 32, 48, 49, and 102 and wholly from EOs 22, 64, and 101 (see *Exclusions Based on Other Relevant Impacts*, below). Subunit 2c is important to the conservation of the species because it provides for connectivity between the species' populations at the eastern and western portions of the species' range. This subunit helps to maintain the geographic range of the species and provide opportunities to expand populations. Subunit 2c critical habitat polygons contain one or more PBFs: slick spot microsites, suitable vegetation composition and structure, sufficient habitat components to support insect

pollinators, and insect pollinators to allow for sufficient fruit and seed production. In Subunit 2c, special management considerations or protection of the PBFs may be required to address the threats posed by the current wildfire regime, invasive nonnative plant species, and incompatible livestock use. These threats are being addressed or coordinated with our partners, including the BLM and BLM livestock permittees, to implement needed actions for species recovery.

#### Subunit 2d

The northern boundary of subunit 2d is approximately 23.0 km (14.3 mi) southeast of Boise, Idaho, within the Snake River Plain geographic area. Subunit 2d contains nine EOs: 27, 28, 54, 67, 72, 77, 103, 104, and 119, all of which were occupied at the time of the species' listing. Critical habitat in Subunit 2d consists of approximately 1,707 ha (4,218 ac) of land managed by the BLM (1,689 ha (4,173 ac)) and the BOR (18 ha (45 ac)). We have excluded 112 ha (277 ac) of private land and 1,182 ha (2,921 ac) of State land from portions of EOs 27, 54, 67, 72, 77, 103, and 104 (see *Exclusions Based on Other Relevant Impacts*, below).

Subunit 2d is located, in part, within the boundary of the BLM Morley Nelson Snake River Birds of Prey National Conservation Area. This subunit helps to maintain the geographic range of the species and provide an opportunity to expand slickspot peppergrass populations. Subunit 2d critical habitat polygons contain one or more PBFs: slick spot microsites, suitable vegetation composition and structure, sufficient habitat components to support insect pollinators, and insect pollinators to allow for sufficient fruit and seed production. In Subunit 2d, special management considerations or protection of the PBFs may be required to address the threats posed by the current wildfire regime, invasive nonnative plant species, and incompatible livestock use. These threats are being addressed or coordinated with our partners, including the BLM and BLM livestock permittees, to implement needed actions for species recovery.

#### Unit 3: Ada and Elmore Counties

Critical habitat in Unit 3 (Ada and Elmore Counties Unit) consists of 5,996 ha (14,816 ac) within the Snake River Plain geographic area that is managed by the BLM (5,845 ha (14,444 ac)) and the BOR (150 ha (372 ac)). It contains three subunits: 3a, 3b, and 3c. This unit is composed of 26 slickspot peppergrass

EOs. All subunits contain the PBFs essential to the conservation of the species, as described in more detail below. Unit 3 is important to the conservation of the species because it contains EOs with higher quality habitat, represents a substantial portion of the species' range, and contains several EOs with high numbers of slickspot peppergrass plants.

#### Subunit 3a

The northern boundary of Subunit 3a is approximately 6.3 km (3.9 mi) south of Mayfield, Idaho, while the southern boundary is approximately 19.6 km (12.2 mi) northwest of Mountain Home, Idaho. Subunit 3a is composed of seven EOs: 15, 20, 30, 31, 60, 112, and 122, all of which were occupied at the time of the species' listing. Critical habitat in Subunit 3a consists of approximately 1,554 ha (3,839 ac) of land managed by the BLM (1,502 ha (3,711 ac)) and the BOR (52 ha (128 ac)). We have excluded 1,059 ha (2,618 ac) of private land from portions of all seven EOs in this unit (see *Exclusions Based on Other Relevant Impacts*, below). Subunit 3a is bisected by Interstate 84 and old Highway 30; past burns and associated drill-seeding of crested wheatgrass (*Agropyron cristatum*) are evident in portions of this subunit. This subunit contains PBFs essential to the conservation of slickspot peppergrass. Subunit 3a is important to the conservation of the species because it contains some EOs supporting high numbers of slickspot peppergrass plants. This subunit helps to maintain the geographic range of the species and provide opportunity for population growth. Subunit 3a critical habitat polygons contain one or more PBFs: slick spot microsites, suitable vegetation composition and structure, sufficient habitat components to support insect pollinators, and insect pollinators to allow for sufficient fruit and seed production. Special management considerations or protection of the PBFs may be required in Subunit 3a to address the threats posed by the current wildfire regime, invasive nonnative plant species, incompatible livestock use, and off-road vehicle use. These threats are being addressed or coordinated with partners, including the BLM and BLM livestock permittees, to implement needed actions for species recovery.

#### Subunit 3b

The boundaries of Subunit 3b include the city of Mountain Home, Idaho, while the northern boundary is approximately 55.7 km (34.6 mi) southeast of Boise, Idaho. Subunit 3b is composed of 14 EOs: 10, 21, 29, 50, 51,

61, 62, 111, 113, 115, 116, 117, 120, and 121, all of which were occupied at the time of the species' listing. Critical habitat in Subunit 3b consists of approximately 1,957 ha (4,835 ac) of land managed by the BLM (1,890 ha (4,671 ac)) and the BOR (66 ha (164 ac)). We have excluded 185 ha (458 ac) of private land and 134 ha (330 ac) of State land from portions of EOs, 21, 50, 61, 62, 115, and 121 (see *Exclusions Based on Other Relevant Impacts*, below). BLM lands within Subunit 3b are located within both the Four Rivers Field Office area and the Morley Nelson Birds of Prey National Conservation Area. Subunit 3b is important to the conservation of the species because it provides connectivity between other units across the range of the species. This subunit helps to maintain the geographic range of the species and provide opportunity for population growth. Subunit 3b critical habitat polygons contain one or more PBFs: slick spot microsites, suitable vegetation composition and structure, sufficient habitat components to support insect pollinators, and insect pollinators to allow for sufficient fruit and seed production. Subunit 3b contained substantial biological soil crust cover and relatively low cheatgrass cover; however, a wildfire that occurred in the area in 2012 (USFWS 2013, p. 3) likely reduced habitat quality in the subunit. In Subunit 3b, special management considerations or protection of the PBFs may be required to address the threats posed by the current wildfire regime, invasive nonnative plant species, and incompatible livestock use. These threats are being addressed or coordinated with our partners, including the BLM and BLM livestock permittees, to implement needed actions for species recovery.

#### Subunit 3c

The southern boundary of Subunit 3c is approximately 1.6 km (1.0 mi) northeast of Hammett, Idaho, while the western boundary is 19.6 km (12.2 mi) southeast of Mountain Home, Idaho. This subunit is composed of four EOs: 8, 26, 63, and 106, all of which were occupied at the time of the species' listing. Critical habitat in Subunit 3c consists of approximately 2,485 ha (6,142 ac) of land managed by the BLM (2,453 ha (6,062 ac)) and the BOR (32 ha (80 ac)). We have excluded 643 ha (1,589 ac) of private land from portions of EOs 8, 26, and 63 (see *Exclusions Based on Other Relevant Impacts*, below). BLM lands in Subunit 3c are primarily within the Four Rivers Field Office area. Subunit 3c is important to the conservation of the species because

it contains the most northeastern occurrences for slickspot peppergrass and has two EOs (8 and 26) with large numbers of plants. This subunit helps to maintain the geographic range of the species and provide opportunity for population growth. Subunit 3c critical habitat polygons contain one or more PBFs: slick spot microsites, suitable vegetation composition and structure, sufficient habitat components to support insect pollinators, and insect pollinators to allow for sufficient fruit and seed production. Biological soil crust cover is high in some areas of the subunit. In Subunit 3c, special management considerations or protection of the PBFs may be required to address the threats posed by the current wildfire regime, invasive nonnative plant species, incompatible livestock use, and recreational use. These threats are being addressed or coordinated with our partners, including the BLM and BLM livestock permittees, to implement needed actions for species recovery.

#### Unit 4: Owyhee County

Critical habitat in Unit 4 (Owyhee County Unit) consists of 16,310 ha (40,303 ac) of land managed by the BLM within the Jarbidge geographic area. The northern boundary of Unit 4 is approximately 83.8 km (52.1 mi) south of Mountain Home, Idaho, while the eastern boundary is 52.0 km (32.3 mi) west of Rogerson, Idaho. This unit is important to the conservation of slickspot peppergrass because it contains the largest amount of contiguous habitat with little fragmentation or development, helps to maintain the geographic range of the species, and provides an opportunity for population growth. In addition, it contains the most high-elevation habitat, which will be more resilient to climate change. This unit is composed of 24 EOs (EOs 73, 74, 75, 78, 79, 80, 81, 83, 84, 85, 87, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 123, 124) and 22 sub-EOs (sub-EOs 700, 701, 702, 703, 704, 705, 706, 708, 709, 712, 715, 716, 717, 719, 720, 721, 722, 725, 726, 727, 728, 729), which are components of the EO 16 metapopulation. The EO 16 metapopulation is a "parent" EO to all sub-EOs numbered 700 or greater. Each of these EOs and sub-EOs were occupied at the time of the species' listing. We have excluded 3 ha (7 ac) of private land and 1,059 ha (2,618 ac) of State land from portions of EOs 74, 75, 80, 83, 84, 85, 96, 97, 124, and sub-EOs 700–729 (see *Exclusions Based on Other Relevant Impacts*, below). Unit 4 critical habitat polygons contain all PBFs: slick spot microsites, suitable vegetation composition and structure, sufficient

habitat components to support insect pollinators, and insect pollinators to allow for sufficient fruit and seed production. In Unit 4, special management considerations or protection of the PBFs may be required to address the threats posed by the current wildfire regime, invasive nonnative plant species, and incompatible livestock use. These threats are being addressed or coordinated with our partners, including the BLM and BLM livestock permittees, to implement needed actions for species recovery (portions of Unit 4 contain past drill-seedings of crested wheatgrass and other highly competitive nonnative species).

### Effects of Critical Habitat Designation

#### Section 7 Consultation

Section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that any action they fund, authorize, or carry out is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of designated critical habitat of such species.

We published a final regulation with a revised definition of "destruction or adverse modification" on August 27, 2019 (84 FR 44976). Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the value of critical habitat as a whole for the conservation of a listed species.

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. Examples of actions that are subject to the Act's section 7 consultation process are actions on State, Tribal, local, or private lands that require a Federal permit (such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or a permit from the Service under section 10 of the Act) or that involve some other Federal action (such as funding from the Federal Highway Administration, Federal Aviation Administration, or the Federal Emergency Management Agency). Federal actions not affecting listed species or critical habitat—and actions on State, Tribal, local, or private lands that are not federally funded, authorized, or carried out by a Federal agency—do not require section 7 consultation. The Bureau of Land Management has conducted section 7 compliance on slickspot peppergrass

proposed critical habitat since it was initially proposed in 2011.

Compliance with the requirements of section 7(a)(2) is documented through our issuance of:

(1) A concurrence letter for Federal actions that may affect, but are not likely to adversely affect, listed species or critical habitat; or

(2) A biological opinion for Federal actions that may affect, and are likely to adversely affect, listed species or critical habitat.

When we issue a biological opinion concluding that a project is likely to jeopardize the continued existence of a listed species and/or destroy or adversely modify critical habitat, we provide reasonable and prudent alternatives to the project, if any are identifiable, that would avoid the likelihood of jeopardy and/or destruction or adverse modification of critical habitat. We define “reasonable and prudent alternatives” (at 50 CFR 402.02) as alternative actions identified during consultation that:

(1) Can be implemented in a manner consistent with the intended purpose of the action,

(2) Can be implemented consistent with the scope of the Federal agency’s legal authority and jurisdiction,

(3) Are economically and technologically feasible, and

(4) Would, in the Director’s opinion, avoid the likelihood of jeopardizing the continued existence of the listed species and/or avoid the likelihood of destroying or adversely modifying 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 set forth requirements for Federal agencies to reinstate formal consultation on previously reviewed actions. These requirements apply when the Federal agency has retained discretionary involvement or control over the action (or the agency’s discretionary involvement or control is authorized by law) and, subsequent to the previous consultation: (1) if the amount or extent of taking specified in the incidental take statement is exceeded; (2) if new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered; (3) if the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the

biological opinion; or (4) if a new species is listed or critical habitat designated that may be affected by the identified action.

In such situations, Federal agencies sometimes may need to request reinitiation of consultation with us, but the regulations also specify some exceptions to the requirement to reinitiate consultation on specific land management plans after subsequently listing a new species or designating new critical habitat. See the regulations for a description of those exceptions.

#### *Application of the “Destruction or Adverse Modification” Standard*

The key factor related to the destruction or adverse modification determination is whether implementation of the proposed Federal action directly or indirectly alters the designated critical habitat in a way that appreciably diminishes the value of the critical habitat as a whole for the conservation of the listed species. As discussed above, the role of critical habitat is to support PBFs essential to the conservation of a listed species and provide for the conservation of the species.

Section 4(b)(8) of the Act requires us to briefly evaluate and describe, in any proposed or final regulation that designates critical habitat, activities involving a Federal action that may violate section 7(a)(2) of the Act by destroying or adversely modifying such habitat, or that may be affected by such designation.

Activities that we may, during a consultation under section 7(a)(2) of the Act, consider likely to destroy or adversely modify critical habitat include, but are not limited to: Actions that would remove a significant number of slick spot microsites, a significant portion of remnant native sagebrush steppe habitat, or a significant amount of pollen and nectar source plants, and actions that would result in significant ground disturbance. Such activities could include, but are not limited to, residential and commercial development, infrastructure projects, and conversion to agricultural fields. These activities could permanently eliminate or reduce the habitat necessary for the growth and reproduction of slickspot peppergrass.

#### **Exemptions**

##### *Application of Section 4(a)(3) of the Act*

The Sikes Act Improvement Act of 1997 (Sikes Act) (16 U.S.C. 670a) required each military installation that includes land and water suitable for the conservation and management of

natural resources to complete an integrated natural resources management plan (INRMP) by November 17, 2001. An INRMP integrates implementation of the military mission of the installation with stewardship of the natural resources found on the base. Each INRMP includes:

(1) An assessment of the ecological needs on the installation, including the need to provide for the conservation of listed species;

(2) A statement of goals and priorities;

(3) A detailed description of management actions to be implemented to provide for these ecological needs; and

(4) A monitoring and adaptive management plan.

Among other things, each INRMP must, to the extent appropriate and applicable, provide for fish and wildlife management; fish and wildlife habitat enhancement or modification; wetland protection, enhancement, and restoration where necessary to support fish and wildlife; and enforcement of applicable natural resource laws.

The National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108–136) amended the Act to limit areas eligible for designation as critical habitat. Specifically, section 4(a)(3)(B)(i) of the Act (16 U.S.C. 1533(a)(3)(B)(i)) provides that: “The Secretary shall not designate as critical habitat any lands or other geographic areas owned or controlled by the Department of Defense (DoD), 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 the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation.”

We consult with the military on the development and implementation of INRMPs for installations with listed species. We analyzed INRMPs developed by military installations located within the range of the proposed critical habitat designation for slickspot peppergrass to determine if they met the criteria for exemption from critical habitat under section 4(a)(3) of the Act. The following areas are designated for the use of DoD with completed, Service-approved INRMPs.

##### *Approved INRMPs*

Military activities within the range of slickspot peppergrass include ordnance-impact areas, training activities, and military development. Military-training activities occur at, or near, four EOs: three at the OCTC in the Snake River Plain area, and a portion of one EO at the U.S. Air Force Juniper Butte Range

in the Jarbidge area. INRMPs have been developed and implemented for both the Juniper Butte Range and the OCTC that include conservation measures for a suite of species including slickspot peppergrass. The INRMPs provide management direction and conservation measures to address or eliminate the effects from military-training exercises on slickspot peppergrass and its habitat. Both the Idaho Army National Guard (Kinter et al. 2014, p. i) and the U.S. Air Force (Conley 2018, p. 3) conduct annual monitoring to ensure impacts to the species due to training activities are either avoided or minimized. In addition, the Sikes Act requires that INRMPs and its effects be regularly reviewed every five years by the Service and appropriate state agencies.

#### Idaho Army National Guard—Orchard Combat Training Center

The Idaho Army National Guard's OCTC on the Snake River Plain has had an INRMP in place since 1991. Subsequent revisions and reviews were completed in 1997, 2004, and 2013 and included conservation benefits for slickspot peppergrass. Because the last INRMP revision was in 2013, the Idaho Army National Guard is in the process of reviewing and renewing the INRMP. In the meantime, OCTC is currently managed under an Operational INRMP that includes continued implementation of all slickspot peppergrass conservation measures from the 2013 INRMP until the INRMP revision and review is completed (Stitt 2022, in litt., entire).

In addition, the Idaho Army National Guard is adding approximately 11,505 ha (28,430 ac) of land to the OCTC under the revised INRMP (Stitt 2022, in litt., entire; IDARNG 2021, p. 1). This new area is called the Simco Training Area and contains 124 ha (307 ac) of land that meets the definition of slickspot peppergrass critical habitat but is exempted under the Operational INRMP (Stitt 2022, in litt., entire). These lands will be managed to avoid or minimize impacts on slickspot peppergrass, slick spot microsites, and sagebrush-steppe habitats.

With the addition of the Simco Training Area land, the OCTC contains 4,898 ha (12,102 ac) of occupied slickspot peppergrass habitat and represents a majority of the highest quality, occupied slickspot peppergrass habitat in the Snake River Plain area. The continuing high quality of this habitat indicates the conservation measures are effective in maintaining generally intact, native-plant vegetation and limiting anthropogenic disturbances on the OCTC (Sullivan and Nations 2009, p. 91).

The INRMP for the OCTC provides a framework for managing natural resources. Conservation measures included in the INRMP help the Idaho Army National Guard avoid or minimize impacts on slickspot peppergrass, slick spot microsites, and sagebrush-steppe habitat, while allowing for the continued implementation of the Idaho Army National Guard's mission. These measures include management actions such as restricting off-road motorized vehicle use, intensive wildfire suppression efforts, and the restriction of ground-operated military training to areas where the plants are not found. For example, the INRMP includes objectives for maintaining and improving slickspot peppergrass habitat and restoring areas damaged by wildfire. The plan specifies that the OCTC will use native species and broadcast seeding, collecting, and planting small amounts of native seed not commercially available, and will monitor the success of seeding efforts (Idaho Army National Guard (IDARNG) 2013, pp. 104, 107–108). Since 1991, the OCTC, using historical records, has restored several areas using native seed and vegetation that was present prior to past wildfires.

The Idaho Army National Guard continues to use restoration methods that avoid or minimize impacts to slickspot peppergrass or its habitat, with an emphasis on maintaining representation of species that were present in presettlement times (IDARNG 2013, p. 34). Since 1987, the Idaho Army National Guard has demonstrated that efforts to suppress wildfire, along with the use of native species with minimal ground-disturbing activities, are effective in reducing the wildfire threat, as well as in reducing rates of spread of nonnative, invasive species associated with wildfire management activities (IDARNG 2013, p. 34). In 2008, the Idaho Army National Guard also initiated maintenance on a series of identified fuel breaks on the OCTC. These fuel breaks are designed to act as barriers to prevent fires ignited by military training activities from spreading into adjacent slickspot peppergrass habitat (BLM 2008, p. 20).

Based on the above considerations, and in accordance with section 4(a)(3)(B)(i) of the Act, we have determined that the identified lands are subject to the Idaho Army National Guard's OCTC INRMP and that conservation efforts identified in the INRMP are being actively implemented, are effective, and will provide a benefit to slickspot peppergrass occurring in habitats within or adjacent to the OCTC. Therefore, lands within this installation

are exempt from critical habitat designation under section 4(a)(3)(B)(i) of the Act. Through use of GIS-based critical habitat designation methodology, we determined that 4,898 ha (12,102 ac) of habitat within the OCTC currently meet our definition of critical habitat; however, we are not including these 4,898 ha (12,102 ac) of habitat in the final critical habitat designation because of this exemption.

#### Mountain Home Air Force Base—Juniper Butte Range

The U.S. Air Force, Mountain Home Air Force Base, which includes the Juniper Butte Range in the Jarbidge area, has an INRMP that has been in place for this military training facility since 2004. The Mountain Home Air Force Base 2017 INRMP remains active (Echeverria 2022, pers. comm.). The U.S. Air Force manages occupied slickspot peppergrass habitat within the Juniper Butte Range. Conservation measures and implementation actions for slickspot peppergrass include reseeding disturbed areas with native vegetation, eradicating noxious weeds prior to their spreading, cleaning vehicles and equipment to remove nonnative invasive plants, avoiding pesticide use within 8 m (25 ft) of slick spots, and delaying livestock turnout onto the range if slick spot microsites are saturated (U.S. Air Force 2017, pp. 183–185, 189, 191–192, 200). The INRMP contains specific measures developed to minimize the impacts from military training at the local level, or general measures designed to improve the ecological condition of native, sagebrush-steppe vegetation at a landscape scale, inclusive of areas supporting slickspot peppergrass, while allowing for the continued implementation of the Air Force mission. For example, the U.S. Air Force has a number of ongoing efforts to address wildfire prevention and suppression on the entire 4,913 ha (12,141 ac) Juniper Butte Range. Prevention measures that are implemented on the Juniper Butte Range include reducing standing fuels and weeds, planting fire-resistant vegetation in areas with a higher potential for ignition sources, such as along roads, and using wildfire indices to determine when to restrict military activities when the wildfire hazard rating is extreme (U.S. Air Force 2017, pp. 215–218). As a result of implementing these measures, the threat from wildfire to slickspot peppergrass associated with U.S. Air Force training activities has been effectively reduced within the Juniper Butte Range.

Based on the above considerations, and in accordance with section

4(a)(3)(B)(i) of the Act, we have determined that the identified lands are subject to the U.S. Air Force INRMP for the Juniper Butte Range (Mountain Home Air Force Base) and that conservation efforts identified in the INRMP are being implemented, are effective, and will provide a conservation benefit to slickspot peppergrass occurring in habitats within or adjacent to the Juniper Butte Range. Therefore, lands within this installation are exempt from critical habitat designation under section 4(a)(3)(B)(i) of the Act. Through use of our current GIS-based critical habitat mapping methodology, 4,150 ha (10,256 ac) within the Juniper Butte Range currently meet our definition of critical habitat; however, we are not including these 4,150 ha (10,256 ac) of habitat in the final critical habitat designation because of this exemption.

#### Considerations of Impacts Under Section 4(b)(2) of the Act

Section 4(b)(2) of the Act states that the Secretary shall designate and make revisions to critical habitat 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. The Secretary may exclude an area from critical habitat based on economic impacts, impacts on national security, or any other relevant impacts. Exclusion decisions are governed by the regulations at 50 CFR 424.19 and the Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act, 81 FR 7226 (Feb. 11, 2016) (2016 Policy)—both of which were developed jointly with the National Marine Fisheries Service (NMFS). We also refer to a 2008 Department of the Interior Solicitor's opinion entitled "The Secretary's Authority to Exclude Areas from a Critical Habitat Designation under Section 4(b)(2) of the Endangered Species Act" (M-37016). We explain each decision to exclude areas, as well as decisions not to exclude, to demonstrate that the decision is reasonable. The Secretary may exclude an area from critical habitat if she determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless she determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species. In making the determination to exclude a particular area, the statute on its face, as well as the legislative history, are clear that the Secretary has broad

discretion regarding which factor(s) to use and how much weight to give to any factor.

We describe below the process that we undertook for taking into consideration each category of impacts and our analyses of the relevant impacts.

#### Exclusions Based on Economic Impacts

Section 4(b)(2) of the Act and the implementing regulations require that we consider the economic impact that may result from a designation of critical habitat. In order to consider economic impacts, we prepared an incremental effects memorandum (IEM) and screening analysis which, together with our narrative and interpretation of effects, we consider our economic analysis of the critical habitat designation and related factors (Industrial Economics (IEc) 2011). We made the draft analysis, dated July 22, 2011, available for public review and comment from October 26, 2011, through December 12, 2011 (76 FR 66250). Following the close of the comment period, we developed a final analysis (FEA, dated March 12, 2012) of the potential economic effects of the designation, taking into consideration the public comments and any new information (IEc 2012). In developing this final revised critical habitat designation, we found that the economic impacts will be similar to levels described in the 2012 FEA. Our rationale regarding the applicability of the 2012 FEA to this final critical habitat designation is described in further detail below.

The intent of the FEA is to evaluate the potential economic impacts associated with the designation of critical habitat for slickspot peppergrass. The analysis first describes existing conservation plans and other provisions that provide protection to slickspot peppergrass and its habitat. We consider these existing protections and conservation measures already in place—whether due to the listed status of the species, other statutory or regulatory provisions, or ongoing voluntary efforts—to be "baseline" protections for slickspot peppergrass that would contribute to both costs and conservation of the species even absent the designation of critical habitat. We analyze the incremental economic impact of the final critical habitat designation by comparing scenarios both "with critical habitat" and "without critical habitat." The "without critical habitat" scenario is the "baseline" for the incremental analysis. The baseline, therefore, represents the impacts that would occur regardless of

whether or not critical habitat is designated. The "with critical habitat" scenario describes the incremental impacts associated specifically with the designation of critical habitat for the species. The incremental conservation efforts and associated impacts are those not expected to occur absent the designation of critical habitat for the species. In other words, the incremental costs are those attributable solely to the designation of critical habitat above and beyond the baseline costs; these are the costs we consider in the final designation of critical habitat.

The FEA also addresses how potential economic impacts are likely to be distributed, including an assessment of any local or regional impacts of habitat conservation, and the potential effects of conservation activities on government agencies, private businesses, and individuals. The FEA measures the extent to which the designation may reduce economic efficiency associated with residential and commercial development and public projects and activities, such as economic impacts on transportation projects, Federal lands, small entities, and the energy industry. Decisionmakers can use this information to assess whether the effects of the designation might unduly burden a particular group or economic sector. Finally, the FEA considers potential economic impacts to activities from 2012 through 2031 (IEc 2012, p. 4–1). The FEA focuses analysis of the potential impacts on the following categories of activity:

- (1) Wildfire and invasive nonnative species management;
- (2) Commercial and residential development;
- (3) Utility and transportation activities; and
- (4) Livestock use.

The analysis concludes that critical habitat designation of slickspot peppergrass is not likely to affect levels of economic activity or conservation measures being implemented within the proposed critical habitat areas. The incremental impacts of critical habitat designation for slickspot peppergrass will likely be limited to additional administrative costs of section 7 consultations associated with considering the potential for adverse modification of critical habitat. The total value incremental impacts of critical habitat for slickspot peppergrass were estimated to be \$161,000 (IEc 2012, p. 4–1). Therefore, the incremental costs associated with critical habitat are unlikely to exceed \$100 million in any single year and, therefore, would not be significant (see *Executive Order (E.O.) 12866 Regulatory Planning and Review*).

The primary reason critical habitat is unlikely to generate economic impacts beyond administrative costs of consultation is that approximately 99 percent of the critical habitat is Federal land managed by the BLM, which is a party to a binding conservation agreement established for the purpose of slickspot peppergrass conservation. All projects and activities on these public lands within the critical habitat designation are already subject to section 7 consultation for slickspot peppergrass. The BLM currently consults for slickspot peppergrass on projects within 805 m (2,641 ft) around occupied slickspot peppergrass areas and implements conservation measures within these areas. As such, the BLM is currently implementing conservation within an area larger than the 500-m (1,640-ft) buffer area around occupied EOs that are included in the final critical habitat designation (IEc 2012, p. 3–3). Even though our final designation has changed since the FEA was published in 2012, we do not expect the changes to have any meaningful practical effect on consultation costs because the BLM, as the primary Federal action agency, continues to conduct section 7 consultation on the potential effects of their actions on the species to an additional 302 m (991 ft) beyond the 500-m (1,640-ft) final critical habitat buffer. As stated in the FEA, we do not expect additional conservation efforts as a result of designation of critical habitat since the conservation measures currently specified in the BLM's conservation agreement are being applied across BLM lands and are sufficiently protective to avoid adverse modification of slickspot peppergrass habitat (IEc 2012, p. ES–6). The BLM has indicated that any increase in cost associated with critical habitat section 7 compliance would be limited to increases in BLM staff costs, which have been minimal since 2012 when the economic analysis was completed, but not an increase in time needed to conduct section 7 compliance (Kershaw 2020, pers. comm.). Therefore, the conclusions of the 2012 final economic analysis still apply to the final designation of critical habitat.

In addition, the FEA notes that across the entire area proposed for critical habitat designation, project proponents and land managers are already aware of the presence of the listed slickspot peppergrass EOs and the requirement to consult on projects with a Federal nexus that may affect the species or its habitat. The IDFG IFWIS database has mapped slickspot peppergrass habitat, and this information is made available to

landowners and project proponents. In addition, previous proposed slickspot peppergrass critical habitat rules, which included maps of occupied EOs, along with a current range map, are available on the Service's website at <https://www.fws.gov/species/slickspot-peppergrass-lepidium-papilliferum>. Proponents of activities with a Federal nexus are, therefore, already undertaking section 7 consultations that consider potential impacts on slickspot peppergrass (IEc 2012, p. ES–6).

Non-Federal lands are excluded from the final critical habitat designation. Therefore, section 7 consultation of slickspot peppergrass critical habitat is not required on these lands, and thus there is no incremental impact of the designation of slickspot peppergrass critical habitat on non-Federal lands. Potential impacts from projects with a Federal nexus that may affect slickspot peppergrass plants on non-Federal land will continue to be subject to section 7 consultation to ensure that those projects do not jeopardize the continued existence of the species. Given that all projects and activities occurring on public lands within critical habitat are already subject to section 7 consultation for the species, and non-Federal lands have been excluded from final critical habitat designation, we conclude that the incremental impacts of our final designation of critical habitat for slickspot peppergrass will similarly be limited to the additional administrative costs of section 7 consultations associated with considering the potential for adverse modification of critical habitat, and that administrative costs of section 7 consultations will not appreciably change from levels described in the 2012 final economic analysis.

We considered the economic impacts of the critical habitat designation. The Secretary is not exercising her discretion to exclude any areas from this designation of critical habitat for slickspot peppergrass based on economic impacts.

A copy of the FEA with supporting documents may be obtained by contacting the Idaho Fish and Wildlife Office (see **ADDRESSES**) or by downloading from the internet at <https://www.regulations.gov> (search for docket number FWS–R1–ES–2010–0071).

#### *Exclusions Based on Impacts on National Security and Homeland Security*

Section 4(a)(3)(B)(i) of the Act may not cover all DoD lands or areas that pose potential national-security concerns (e.g., a DoD installation that is

in the process of revising its INRMP for a newly listed species or a species previously not covered). If a particular area is not covered under section 4(a)(3)(B)(i), national-security or homeland-security concerns are not a factor in the process of determining what areas meet the definition of "critical habitat." Nevertheless, when designating critical habitat under section 4(b)(2), we must consider impacts on national security, including homeland security, on lands or areas not covered by section 4(a)(3)(B)(i). Accordingly, we will always consider excluding from the designation areas for which DoD, Department of Homeland Security (DHS), or another Federal agency has requested exclusion based on an assertion of national-security or homeland-security concerns. All lands within the designation of critical habitat for slickspot peppergrass owned or managed by DoD or DHS are already exempted from the designation under section 4(a)(3)(B)(i). Consequently, the designation of critical habitat for the slickspot peppergrass will not have an impact on national security or homeland security.

#### *Exclusions Based on Other Relevant Impacts*

Under section 4(b)(2) of the Act, we consider any other relevant impacts, in addition to economic impacts and impacts on national security discussed above. Other relevant impacts may include, but are not limited to, impacts to Tribes, States, local governments, public health and safety, community interests, the environment (such as increased risk of wildfire or pest and invasive species management), Federal lands, and conservation plans, agreements, or partnerships. To identify other relevant impacts that may affect the exclusion analysis, we consider a number of factors, including whether there are permitted conservation plans covering the species in the area, such as habitat conservation plans, safe harbor agreements, or candidate conservation agreements with assurances (CCAAs), or whether there are non-permitted conservation agreements and partnerships that would be encouraged by designation of, or exclusion from, critical habitat. In addition, we look at the existence of Tribal conservation plans and partnerships and consider the government-to-government relationship of the United States with Tribal entities. We also consider any social impacts that might occur because of the designation.

When identifying the benefits of inclusion for an area, we consider the additional regulatory benefits that area would receive due to the protection

from destruction or adverse modification as a result of actions with a Federal nexus, the educational benefits of mapping essential habitat for recovery of the listed species, and any benefits that may result from a designation due to State or Federal laws that may apply to critical habitat.

When identifying the benefits of exclusion, we consider, among other things, whether exclusion of a specific area is likely to result in conservation, or in the continuation, strengthening, or encouragement of partnerships. In addition, continued implementation of an ongoing management plan that provides equal to or more conservation than a critical habitat designation would reduce the benefits of including that specific area in the critical habitat designation.

We evaluate the existence of a conservation plan when considering the benefits of inclusion. We consider a variety of factors, including, but not limited to, whether the plan is finalized; how it provides for the conservation of the essential PBFs; whether there is a reasonable expectation that the conservation management strategies and actions contained in a management plan will be implemented into the future; whether the conservation strategies in the plan are likely to be effective; and whether the plan contains a monitoring program or adaptive management to ensure that the conservation measures are effective and can be adapted in the future in response to new information.

After identifying the benefits of inclusion and the benefits of exclusion, we carefully weigh the two sides to evaluate whether the benefits of exclusion outweigh those of inclusion. If our analysis indicates that the benefits of exclusion outweigh the benefits of inclusion, we then determine whether exclusion would result in extinction of the species. If exclusion of an area from critical habitat will result in extinction, we will not exclude it from the designation.

Based on the information provided by entities seeking exclusion, as well as additional public comments we received, and the best scientific data available, we evaluated whether certain lands in our four final critical habitat units are appropriate for exclusion from the final designation under section 4(b)(2) of the Act. If the analysis indicates that the benefits of excluding lands from the final designation outweigh the benefits of designating those lands as critical habitat, then the Secretary may exercise her discretion to exclude the lands from the final designation. In the paragraphs below, we provide a detailed balancing analysis

of the areas being excluded under section 4(b)(2) of the Act.

*Private or Other Non-Federal Conservation Plans or Agreements and Partnerships, in General*

We sometimes exclude specific areas from critical habitat designations based in part on the existence of private or other non-Federal conservation plans or agreements and their attendant partnerships. A conservation plan or agreement describes actions that are designed to provide for the conservation needs of a species and its habitat and may include actions to reduce or mitigate negative effects on the species caused by activities on or adjacent to the area covered by the plan. Conservation plans or agreements can be developed by private entities with no Service involvement or in partnership with the Service.

We evaluate a variety of factors to determine how the benefits of any exclusion and the benefits of inclusion are affected by the existence of private or other non-Federal conservation plans or agreements and their attendant partnerships when we undertake a discretionary section 4(b)(2) exclusion analysis. A non-exhaustive list of factors that we will consider for non-permitted plans or agreements is shown below. These factors are not required elements of plans or agreements, and all items may not apply to every plan or agreement.

(i) The degree to which the plan or agreement provides for the conservation of the species or the essential physical or biological features (if present) for the species.

(ii) Whether there is a reasonable expectation that the conservation management strategies and actions contained in a management plan or agreement will be implemented.

(iii) The demonstrated implementation and success of the chosen conservation measures.

(iv) The degree to which the record of the plan supports a conclusion that a critical habitat designation would impair the realization of benefits expected from the plan, agreement, or partnership.

(v) The extent of public participation in the development of the conservation plan.

(vi) The degree to which there has been agency review and required determinations (e.g., State regulatory requirements), as necessary and appropriate.

(vii) Whether National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*) compliance was required.

(viii) Whether the plan or agreement contains a monitoring program and adaptive management to ensure that the conservation measures are effective and can be modified in the future in response to new information.

For the slickspot peppergrass, we have evaluated these factors with respect to Idaho State Endowment Lands and to private lands.

*Idaho State Endowment Lands:* In the July 23, 2020, revised proposed rule (85 FR 44584), we identified approximately 1,200 ha (2,965 ac) of State of Idaho Endowment (State) lands as critical habitat in Units 2, 3, and 4. In this final rule, we considered comments received on the proposed rule and used the best available science to identify critical habitat, which resulted in 2,736 ha (6,761 ac) of State land meeting our definition of critical habitat.

In response to our May 10, 2011, proposed critical habitat rule (76 FR 27184), we received a request from the State of Idaho to exclude State lands covered by their candidate conservation agreement (CCA). The BLM, State of Idaho Governor's Office of Species Conservation (OSC), IDFG, IDL, Idaho National Guard, and several nongovernmental cooperators signed a CCA in 2003 (State of Idaho et al. 2003, entire) and renewed the plan in 2006 (State of Idaho et al. 2006, entire). The Service did not sign the CCA but provided technical advice towards its development (State of Idaho et al. 2006, entire). Finally, this 2006 CCA should not be confused with CCAs developed between the Service and Federal partners, or with a candidate conservation agreement with assurances that is developed between the Service and non-Federal entities.

The CCA as signed in 2006 included range-wide efforts intended to achieve the following goals: address the need to maintain and enhance slickspot peppergrass habitat; reduce intensity, frequency, and size of natural- and human-caused wildfires; minimize loss of habitat associated with wildfire suppression activities; reduce the potential for invasion by nonnative plant species after wildfire; minimize habitat loss associated with rehabilitation and restoration techniques; minimize the establishment of invasive nonnative species; minimize habitat loss or degradation from off-highway vehicle use; mitigate the negative effects of military training and other associated activities on the OCTC; and minimize the impact of ground disturbances caused by livestock trampling saturated soils (State of Idaho et al. 2006, p. 3). Some specific conservation measures the BLM and



State of Idaho have implemented to help reduce, and continue to reduce, the risk of livestock-related disturbances include working with livestock permittees to place salt and supplements to draw livestock away from EOs, avoiding livestock trailing through EOs when soils are saturated, delaying livestock turnout when soils are saturated, and confining vehicle use to established roads and tracks within EOs (USFWS 2020, p 101).

In the July 23, 2020, revised proposed critical habitat rule (85 FR 44584), we requested information with respect to the ongoing implementation of the 2006 CCA and the performance or completion of any additional activities that provide for the conservation of slickspot peppergrass under the CCA. Based on current information and any information submitted during the comment period, we stated we would consider whether to exclude under section 4(b)(2) of the Act State lands that are covered by the CCA. During the comment period, the State of Idaho (OSC and IDL) stated that IDL continues to implement conservation measures outlined in the 2006 CCA on State lands designated as revised proposed critical habitat (OSC 2020, p. 6). To memorialize the State of Idaho's commitment to implementing ongoing conservation measures on State lands, the State of Idaho (IDL and OSC) and the Service entered into a new conservation agreement in 2021 for the continued conservation of slickspot peppergrass on State lands managed by IDL (USFWS et al. 2021, entire).

The purpose of the new conservation agreement is to "provide a framework for communication, coordination, cooperation, and implementation of conservation actions between the Service, OSC and IDL for the conservation of slickspot peppergrass and its habitat on State endowment lands managed by IDL" (USFWS et al. 2021, p. 1). Roles and responsibilities of IDL under this conservation agreement include addressing the primary threats of wildfire and invasive annual grasses to slickspot peppergrass through the support of Rangeland Fire Protection Associations (RFPAs) and the implementation of fuel-management activities, such as through grazing, fuel breaks, and post-fire restoration activities; including terms and conditions in grazing leases within slickspot peppergrass habitat to minimize impacts from livestock grazing; and working adaptively with the Service, OSC, and other partners to address habitat and management concerns for the species. The OSC has committed to continue addressing the

primary threats to slickspot peppergrass through supporting RFPAs' fuel management activities; working with grazing permittees, private landowners, and citizens of Idaho; and working adaptively with IDL, the Service, and other partners to support slickspot peppergrass recovery efforts. We have committed to assist OSC and IDL with monitoring as staffing and funding allows; to maintain close communication to share management concerns, latest science, and funding opportunities; and to continue working adaptively with IDL, OSC, and other partners to support slickspot peppergrass recovery efforts. The agreement will be reviewed by all parties at least once every five years, and the parties will sign an addendum to document their review.

**Benefits of Inclusion—Idaho State Lands:** As discussed above, the primary benefit that the species receives when the Service includes State lands in critical habitat is the statutory mandate that Federal actions must avoid the destruction or adverse modification of critical habitat. In the case of slickspot peppergrass, we found it unlikely that activities outside of Federal lands (e.g., development on State, local, or private lands) will have a Federal nexus to trigger section 7 consultation (IEc 2012, p. 4–4). In addition, since all habitat proposed for designation is occupied by the species, even if section 7 consultation were to occur, we anticipate critical habitat will not affect the outcome of these consultations. Because such a consultation would not change the conservation measures requested, any conservation measures would be required as a result of the species' listing status and the critical habitat designation would require no additional measures (IEc 2012, p. 4–4). Therefore, we find there is limited, if any, regulatory benefit to the species from inclusion of State lands due to protection from adverse modification or destruction as a result of actions with a Federal nexus.

The educational benefit of mapping the habitat essential for the recovery of slickspot peppergrass on State lands is limited. The economic analysis on the proposed designation reports, "As the location of occupied habitat for the species on private lands is well-known, having been mapped by the Idaho Natural Heritage Program, it is unlikely that critical habitat will provide new information to local land managers and developers regarding the presence of the species" (IEc 2012, p. 4–14). Because the State is already aware of the presence of slickspot peppergrass and its conservation needs on their lands

and is already implementing positive conservation actions for the benefit of the species, we conclude there is little, if any, educational benefit from designating critical habitat for this species on State lands. Furthermore, we are not aware of any additional State, County, or Federal conservation benefits to the species that would be triggered by the critical habitat designation. Based on the above, we conclude there is, at best, a very limited conservation benefit to including the 2,736 ha (6,761 ac) of Idaho State lands within the designation of critical habitat for slickspot peppergrass.

**Benefits of Exclusion—Idaho State Lands:** The State of Idaho requested that we exclude lands owned and managed by the IDL. They stated that the proposed critical habitat designation for slickspot peppergrass has the potential to negatively impact the ability of the Department of Lands to achieve its mission (which per their website is to manage Idaho's endowment assets to maximize long-term financial returns to public schools and other trust beneficiaries and to provide professional assistance to the citizens of Idaho to use, protect, and sustain their natural resources (IDL 2022, no pagination). They argue that their mission would be affected by reducing the current economic activities of State endowment trust lands and limiting future opportunities for activities. The State further claims that, because all of the State endowment lands within the critical habitat area are leased for grazing, the State would realize a loss of revenue from the impacted lands based on an assumption that the BLM would ban or restrict grazing by requiring additional fencing or limiting turnout, resulting in an inability to lease their trust lands at their current value (OSC 2011, pp. 3, 14–15). The State was a signatory to the now-expired 2006 CCA for slickspot peppergrass and has affirmed that it is carrying out conservation actions outlined in the 2006 CCA for the benefit of the species on their lands (IEc 2012, p. 3–6; OSC 2020, p. 6). The State of Idaho (IDL and OSC) entered into a new conservation agreement with the Service in 2021 to further conservation for slickspot peppergrass on land under the jurisdiction of the IDL (USFWS et al. 2021, entire); the new agreement is similar to the 2006 CCA.

Our economic analysis of the proposed designation of critical habitat for slickspot peppergrass does not support the State's argument in full. The State was a signatory to the CCA for slickspot peppergrass and has affirmed that it is carrying out the conservation

measures provided therein on their lands (IEc 2012, p. 3–6; OSC 2020, p. 6). The CCA provides livestock management measures that we considered adequate to offset the threat that grazing might pose to the species (74 FR 52014, October 8, 2009, p. 52040). As noted above, we found it is unlikely that activities outside of Federal lands would trigger a section 7 consultation. However, in the event that such a nexus should occur, we note that any recommended measures would be made for the conservation of the species regardless of the critical habitat designation and would thus be considered baseline protections for the species. In other words, any such measures would not be attributable to effects of critical habitat but on the listed species itself (IEc 2012, p. 3–14). In contrast to the assertion of the State regarding potential lost revenue due to grazing restrictions as a result of critical habitat, the economic analysis confirmed that the BLM is in agreement that including within the critical habitat designation lands managed by the State’s Department of Lands would not affect the types of conservation measures implemented to avoid impacts of livestock use on slickspot peppergrass and its habitat (IEc 2012, p. 3–13). Examples of negative impacts of critical habitat provided by the State, such as delayed turnout of cattle, are impacts that are attributable to conservation measures already in place for the protection of the species and, therefore, are not attributable to critical habitat. The economic analysis indicated that the costs of critical habitat designation are limited to the additional administrative costs of section 7 consultations associated with considering the potential for adverse modification of critical habitat and does not identify any impact on the economic activities of State trust lands or revenues associated with grazing leases that may be attributable to the designation (IEc 2012, p. ES–5).

We do agree, however, that there is some potential for reduction in value of the State’s trust lands for future exchange, due to the perception that such lands may be encumbered by additional regulatory restrictions due to the designation of critical habitat. The final economic analysis of the designation states, “In some cases, the public may perceive that critical habitat designation may result in limitations on private property uses above and beyond those associated with anticipated conservation efforts and regulatory uncertainty described above. Public attitudes about the limits or restrictions

that critical habitat may impose can cause real economic effects to property owners, regardless of whether such limits are actually imposed” (IEc 2012, p. 2–10). The avoidance of any potential reduction in the value of State trust lands could be a benefit of exclusion from critical habitat.

In addition, in weighing the benefits of inclusion versus exclusion, we considered the value of our conservation partnership with the State of Idaho. They have demonstrated success by partnering with public and private entities to further conservation in Idaho for a variety of fish and wildlife species (Uriarte 2021, pers. comm.). These efforts include, but are not limited to, helping to develop a CCA and conservation agreement for slickspot peppergrass (State of Idaho et al. 2006, entire; USFWS et al. 2021, entire); leading the Sage-grouse Actions Team to strategically put State legislative funding and partner funding on the ground for the conservation of the greater sage-grouse (*Centrocercus urophasianus*); and working closely with IDL and nine RFPAs to provide State legislative funding to ensure these organizations have the necessary equipment for early, initial attack and wildfire suppression efforts.

The State was an active signatory to the CCA for slickspot peppergrass between the State (IDL and OSC), BLM, Idaho National Guard, and private landowners (State of Idaho et al. 2006, entire). This 2006 CCA contains measures intended to address the need to maintain and enhance slickspot peppergrass habitat by minimizing the impact to the species from wildfires, implementing rehabilitation and restoration techniques, managing invasive nonnative species, and limiting off-highway vehicle use and livestock use (State of Idaho et al. 2006, p. 3). Since 2006, the CCA appears to have reduced the impacts of livestock use on slickspot peppergrass (USFWS 2020, pp. 100–101) but has been less effective at reducing or eliminating the most significant threats to the species from wildfire and invasive annual grasses (USFWS 2020, p. 165). The State of Idaho confirms that they continue to implement conservation measures of the CCA on State lands proposed for critical habitat designation (IEc 2012, p. 3–6; OSC 2020, p. 6). In addition, in the State’s comments submitted on the proposed rule (85 FR 44584, July 23, 2020), they highlight the importance of the conservation measures implemented through the CCA, particularly regarding livestock management.

In 2021, OSC, IDL, and the Service entered into a conservation agreement to

further conservation for slickspot peppergrass on IDL lands (USFWS et al. 2021, entire). This conservation agreement contains conservation measures targeted to reduce threats to slickspot peppergrass that would not be implemented if not for this conservation agreement or a Federal nexus requiring section 7 consultation. This conservation agreement also builds upon conservation measures in the 2006 CCA by identifying additional roles and responsibilities for IDL, OSC, and the Service to more effectively address the primary threats of wildfire and annual invasive grasses to slickspot peppergrass (USFWS et al. 2021, entire). Lastly, the conservation agreement emphasizes continued communication, coordination, cooperation, and implementation of slickspot peppergrass conservation measures by the Service, OSC, and IDL. On State lands, these protections are equal to or better than what the designation of critical habitat would provide, as described above under “Benefits of Inclusion.” Exclusion of these State lands from critical habitat will help maintain and strengthen our conservation partnership with the State of Idaho and may foster future partnerships for the benefit of other species as well.

Based on the above, we find that the exclusion of State lands from the final designation would have the following benefits:

- Avoidance of any possible reduction in the value of State trust lands due to public perception of increased potential for regulatory restrictions due to critical habitat;
- Continued implementation of conservation measures provided in the 2021 conservation agreement for slickspot peppergrass, including but not limited to minimizing the impact of ground disturbance by livestock, minimizing the establishment of nonnative plant species, and reducing the intensity, frequency, and size of natural and human-caused fires;
- The opportunity to build upon a positive conservation partnership with the State, by recognizing the efforts the State contributes to the conservation of slickspot peppergrass;
- Laying the foundation for future partnerships with the State that would benefit other listed or candidate species, such as the greater sage-grouse; and
- Increasing the potential for understanding and acceptance of proposed critical habitat designations for other species in the State of Idaho.

Based on the above considerations, we conclude there are important benefits to be gained by excluding the 2,736 ha (6,761 ac) of State lands within

the designation of critical habitat for slickspot peppergrass.

*Benefits of Exclusion Outweigh the Benefits of Inclusion—Idaho State Lands:* We reviewed and evaluated the benefits of inclusion and the benefits of exclusion of State lands identified in the proposed designation of critical habitat for slickspot peppergrass; the benefits of inclusion for the species are minimal. As noted in *Exclusions Based on Economic Impacts*, we do not anticipate additional regulatory protections from critical habitat designation through a Federal nexus on these State lands (IEC 2012, pp. 4–4, C–2). As the State is already aware of the presence of slickspot peppergrass on their lands, the educational value of critical habitat is minimal (IEC 2012, p. 4–4), particularly since the State participates in conservation measures for the protection of the species through the conservation agreement (USFWS et al. 2021, entire). We do not find evidence of any significant benefits to inclusion of State lands in the designation.

We find that the benefits of exclusion, on the other hand, are significant. The benefits that would stem from the exclusion of State lands would be to alleviate any concerns that State trust lands could decline in value due to perceived regulatory restrictions, as well as to strengthen our conservation partnership with the State by recognizing their efforts toward conservation of slickspot peppergrass through implementation of the conservation measures provided in the conservation agreement. The exclusion of State trust lands could lay the groundwork for future partnerships for the benefit of other species in conservation need. Because of the importance of State trust lands to the State of Idaho, and the relevant impact of critical habitat to our relationship with the State and other current and future conservation partnerships, we have determined that the benefits of excluding these State lands outweigh the benefits of including them in the designation of critical habitat.

*Exclusion Will Not Result in Extinction of the Species—Idaho State Lands:* We have determined that the exclusion of 2,736 ha (6,761 ac) of habitat from the final designation of critical habitat for slickspot peppergrass will not result in extinction of the species. Although these lands were identified as critical habitat because they contain PBFs essential to the conservation of the species, State lands comprised approximately 7 percent of the proposed designation and the remaining land in the final designation is sufficient for the conservation of the

species. Furthermore, critical habitat is one tool in the suite of tools that together provide for conservation of listed species under the Act. Most of the current and ongoing interagency conservation efforts for the species are focused on management of Federal lands, which contain the vast majority of occupied slickspot peppergrass habitat. The consultation requirements of section 7(a)(2) and the attendant requirement to avoid jeopardy to slickspot peppergrass for projects with a Federal nexus will provide significant protection to the species, particularly since approximately 86 percent of its occupied habitat is on Federal lands managed by the BLM. In addition, the State of Idaho is a signatory to the 2021 conservation agreement, which provides protective measures to the species on their lands regardless of critical habitat. Therefore, based on the above discussion, the Secretary is exercising her discretion to exclude approximately 2,736 ha (6,761 ac) of habitat from this final critical habitat designation.

*Private Lands:* In our July 23, 2020, revised proposed critical habitat rule (FR 85 44584), we identified 1,122 ha (2,773 ac) of private land, including municipal land (county and city), that met the definition of critical habitat. In this final rule, we considered comments received on the proposed rule and used the best scientific information available to identify critical habitat, which resulted in identification of 4,508 ha (11,141 ac) of privately owned land that meets the definition of critical habitat. The majority of the land that met the definition of critical habitat (approximately 86 percent) was under Federal ownership. In our July 23, 2020, revised proposed critical habitat rule (85 FR 44584), we considered applying section 4(b)(2) of the Act to exclude currently occupied private and municipal lands (hereafter private lands). We also requested specific information concerning any current signed conservation or management plans on private lands that we should consider to inform an exclusion analysis under section 4(b)(2).

During the public comment period for our July 23, 2020, revised proposed critical habitat rule (85 FR 44584), the State of Idaho commented that a critical habitat designation provides no new conservation measures across any land ownership. In addition, they stated that designating private land as critical habitat can cause land values to decrease and possibly expose slickspot peppergrass to threats that cannot be addressed by a section 7 consultation. For these reasons, the State of Idaho expressed the view that the benefits of

exclusion outweigh the benefits of including private land in the final critical habitat designation for slickspot peppergrass (OSC 2020, p. 2).

Since publication of our July 23, 2020, revised proposed rule (85 FR 44584) to designate critical habitat for slickspot peppergrass, we entered into a Memorandum of Understanding (MOU) with the State of Idaho's OSC to provide non-Federal landowners (private and municipal) an opportunity to enter into voluntary conservation agreements for slickspot peppergrass (USFWS and OSC 2021, entire). These conservation agreements can serve to memorialize existing conservation efforts and outline commitments to maintain suitable habitat for the species on specified lands into the future.

*Benefits of Inclusion—Private Lands:* The primary benefit that slickspot peppergrass would receive from inclusion of private lands in the critical habitat designation is the statutory mandate that Federal actions (or actions with a Federal nexus) avoid the destruction or adverse modification of critical habitat. However, in the case of slickspot peppergrass, we found it unlikely that activities outside of Federal lands (e.g., development on State, local, or private lands) will have a Federal nexus to trigger section 7 consultation (IEC 2012, p. 4–4). Given that there has been only one section 7 consultation on private lands associated with Federal permitting and we have no information to indicate a projected increase in federally funded activities on these lands, we anticipate that there is a low likelihood of section 7 consultations concerning slickspot peppergrass on private lands in the future. Should additional section 7 consultations occur after this final critical habitat designation, we expect that critical habitat would not likely affect the outcome of future consultations as we do not foresee any differences in recommended conservation measures for units designated as critical habitat and those occupied by the species (IEC 2012, pp. 4–4 and 4–5). Therefore, we find there is little regulatory benefit to the species on private lands from inclusion due to protection from adverse modification or destruction of critical habitat as a result of actions with a Federal nexus.

Any educational benefit of mapping the habitat essential for the recovery of slickspot peppergrass on private lands is likely minimal and may in fact serve as a conservation disincentive. The economic analysis on the proposed designation reports, “As the location of occupied habitat for the species on private lands is well-known, having

been mapped by the Idaho Natural Heritage Program, it is unlikely that critical habitat will provide new information to local land managers and developers regarding the presence of the species” (IEc 2012, p. 4–14). Therefore, we expect very little educational benefit to result from the designation of critical habitat on private lands.

Based on the above, we conclude there is little, if any, conservation benefit to including the 4,508 ha (11,141 ac) of privately owned lands within the designation of critical habitat for slickspot peppergrass.

*Benefits of Exclusion—Private Lands:* Slickspot peppergrass was the subject of a CCA between the State of Idaho, BLM, the Idaho Army National Guard, and private landowners (State of Idaho et al. 2006, entire). The CCA was developed prior to the listing of the species to provide the opportunity for adaptive management for slickspot peppergrass on Federal, State, and private lands, with the goal of maintaining and enhancing slickspot peppergrass habitat; reducing the intensity, frequency, and size of fires; reducing the potential for invasion from nonnative plant species; minimizing the impact of ground disturbance caused by livestock trampling events when soils are saturated; and other provisions.

This CCA garnered interest from private landowners. Twenty individual nongovernmental cooperators/permittees were signatories to this CCA, along with representatives from the BLM, State of Idaho, and Idaho National Guard (State of Idaho et al. 2006, pp. 138–141). Six individual private landowners signed on through Memorandum of Agreements (MOAs) under the CCA covering 6,898 ha (17,045 ac). These MOAs detailed specific conservation measures to implement on enrolled private lands (State of Idaho et al. 2006, p. 162), which included monitoring, livestock and pasture management, and invasive weed control (State of Idaho et al. 2006, pp. 282–285). The CCA and its conservation measures, since expired, were developed in an effort to preclude the need to list slickspot peppergrass.

As stated above, the Service and State of Idaho recently entered into a new MOU in 2021 whose purpose is to provide non-Federal landowners (private and municipal) the opportunity to enter into voluntary conservation agreements for slickspot peppergrass that can serve to memorialize existing conservation efforts and outline commitments to maintain suitable habitat for slickspot peppergrass on specified lands into the future. This MOU contains roles and responsibilities

for the Service and the State of Idaho, including outreach, providing technical assistance to landowners, maintaining membership on the slickspot peppergrass Technical Team, and exploring funding sources to obtain financial assistance to implement conservation actions on private and municipal lands. The MOU also contains responsibilities for monitoring to document and report success, along with adaptive management that ensures current science is incorporated into management. In addition, there is a non-exhaustive list of proven and effective Best Management Practices for conserving slickspot peppergrass and its habitat that can be included in individual conservation agreements with private and municipal landowners (USFWS and OSC 2021, entire; USFWS 2020, p. 101). Therefore, we find that a conservation benefit would accrue to slickspot peppergrass over time by encouraging voluntary participation in the measures provided in the MOU and landowner-specific conservation agreements.

In addition, we considered the value of our conservation partnership with private landowners within the range of the slickspot peppergrass in our weighing of the benefits of inclusion versus exclusion. Private landowners have demonstrated success by partnering with public and private entities to further conservation in Idaho for a variety of wildlife and fish species (Uriarte 2021, pers. comm.).

In addition, we considered the value of our conservation partnership with the State of Idaho in our weighing of benefits of inclusion versus exclusion of private lands. The State of Idaho has been instrumental in working with private landowners on various conservation efforts throughout Idaho. These partnering efforts include, but are not limited to, helping to develop the 2006 CCA for slickspot peppergrass; leading the Sage-grouse Actions Team to strategically put State legislative funding and partner funding on the ground for the conservation of the greater sage-grouse; and working closely with IDL and nine RFPAs to provide State legislative funding to ensure these organizations have the necessary equipment and coordination for initial attack and wildfire suppression efforts (Uriarte 2021, pers. comm.).

The final economic analysis of the designation states, “In some cases, the public may perceive that critical habitat designation may result in limitations on private property uses above and beyond those associated with anticipated conservation efforts and regulatory uncertainty described above. Public

attitudes about the limits or restrictions that critical habitat may impose can cause real economic effects to property owners, regardless of whether such limits are actually imposed” (IEc 2012, p. 2–10). Although the economic analysis concluded that any real economic impacts to private landowners are unlikely given the low probability of a Federal nexus occurring on their lands, it is clear from comments we received that critical habitat is nonetheless perceived as an example of Federal Government intrusion into private property rights in the State of Idaho. As described above, we find that successful conservation partnerships with private landowners are integral to the achievement of recovery for the slickspot peppergrass and designation of critical habitat could be detrimental to those efforts. Therefore, we conclude that the exclusion of private lands from slickspot peppergrass critical habitat will achieve greater benefits than designating critical habitat by encouraging continued conservation of the species as well as future conservation efforts due to the perceived avoidance of a regulatory burden.

Based on the above, we have determined that the exclusion of private lands from the final designation would have several potentially significant benefits:

- Demonstrating the Service’s good-faith effort to recognize the value of voluntary conservation partnerships by excluding private lands from critical habitat, and encouraging future partnerships that would benefit other listed or candidate species, such as the greater sage grouse;
- The conservation benefit that would accrue to slickspot peppergrass over time by encouraging voluntary participation in the measures provided in the MOU;
- The opportunity to maintain and build positive conservation partnerships with private landowners, by recognizing the efforts these parties may contribute to the conservation of slickspot peppergrass; and
- Improving the perception of the Service as not imposing unnecessary regulatory burdens on private landowners, potentially increasing the understanding and acceptance of proposed critical habitat designations for other species in the State of Idaho.

We conclude that there are important conservation benefits that may be gained by excluding the 4,508 ha (11,141 ac) of privately owned lands within the designation of critical habitat for slickspot peppergrass, stemming

primarily from the encouragement of future conservation partnerships.

*Benefits of Exclusion Outweigh the Benefits of Inclusion—Private Lands:* We reviewed and evaluated the benefits of inclusion and the benefits of exclusion of privately owned lands identified in the proposed designation of critical habitat for slickspot peppergrass. As articulated above, the benefits of inclusion for the species are minimal at best. We expect that critical habitat would not likely affect the outcome of future consultations as we do not foresee any differences in recommended conservation measures for units designated as critical habitat and those occupied by the species. Therefore, we do not anticipate any regulatory protections stemming from a Federal nexus on private lands through designation of critical habitat. As most landowners likely are already aware of the presence of slickspot peppergrass on their lands, the educational value of critical habitat is minimal. In addition, as many private landowners view the presence of a listed species on their property as a liability, information to this effect may even be a conservation disincentive. Therefore, we consider any possible benefits of inclusion to be minimal.

The benefits of exclusion, on the other hand, are significant. Exclusion of these private lands would help build landowner trust, encourage increased cooperation with private landowners, encourage implementation of any ongoing and new voluntary measures identified in the MOU for the conservation of slickspot peppergrass,

and potentially enable us to pursue future conservation partnerships on privately owned lands—not only for slickspot peppergrass, but for other candidate or listed species in the State of Idaho as well.

Some of the comments received during the public comment period indicated strong support for the exclusion of these lands from the final critical habitat designation. We are committed to fostering working relationships with communities, including these private landowners, to foster the conservation of slickspot peppergrass and other threatened and endangered species. Therefore, in consideration of the relevant impact to our relationship with these private landowners and other current and future conservation partnerships, and for other reasons mentioned above, we determined that the benefits of excluding these lands outweigh the benefit of including them in the designation of critical habitat for the slickspot peppergrass.

*Exclusion Will Not Result in Extinction of the Species—Private Lands:* We determined that the exclusion of 4,508 ha (11,141 ac) of habitat from the final designation of critical habitat for slickspot peppergrass will not result in the extinction of the species. Although these lands were identified as critical habitat because they contain PBFs essential to the conservation of the species, private lands comprise less than 12 percent of the areas that meet the definition of critical habitat. Most of the current and ongoing interagency conservation efforts

for the species are focused on management of Federal lands, where approximately 86 percent of the habitat occupied by slickspot peppergrass occurs. The consultation requirements of section 7(a)(2) and the attendant requirement to avoid jeopardy to slickspot peppergrass for projects with a Federal nexus will provide significant protection to the species even after excluding these areas. In addition, conservation of slickspot peppergrass through implementation of the MOU with the State of Idaho and private landowners will provide more effective conservation for the species than a critical habitat designation. Therefore, based on the discussion above, the Secretary is exercising her discretion to exclude approximately 4,508 ha (11,141 ac) of habitat from this final critical habitat designation.

*Summary of Exclusions*

As discussed above, based on the information provided by entities seeking exclusion, as well as any additional public comments received, we evaluated whether certain lands in the proposed critical habitat were appropriate for exclusion from this final designation pursuant to section 4(b)(2) of the Act. We have determined that certain areas totaling 7,265 hectares, or 17,956 acres, within the critical habitat units were appropriate for exclusion from this final designation. Table 2 shows the areas we are excluding from critical habitat designation for slickspot peppergrass.

TABLE 2—AREAS EXCLUDED FROM CRITICAL HABITAT DESIGNATION FOR SLICKSPOT PEPPERGRASS

Critical habitat unit	Critical habitat subunit	Ownership in hectares (acres)		Totals
		State of Idaho	Private	
1—Payette and Gem Counties .....		0	76 (188)	76 (188)
2—Gem and Ada Counties .....	2a	41 (102)	1,573 (3,886)	1,614 (3,988)
	2b	171 (423)	64 (159)	235 (582)
	2c	149 (367)	793 (1,959)	942 (2,326)
	2d	1,182 (2,921)	112 (277)	1,294 (3,198)
3—Ada and Elmore Counties .....	3a	0	1,059 (2,618)	1,059 (2,618)
	3b	134 (330)	185 (458)	319 (788)
	3c	0	643 (1,589)	643 (1,589)
4—Owyhee County .....		1,059 (2,618)	3 (7)	1,062 (2,625)
Total .....		2,736 (6,761)	4,508 (11,141)	7,244 (17,902)

**Notes:** Area sizes may not sum due to rounding. All excluded areas meet the definition of critical habitat.

**Required Determinations**

*Regulatory Planning and Review (Executive Orders 12866 and 13563)*

Executive Order 12866 provides that the Office of Information and Regulatory

Affairs (OIRA) in the Office of Management and Budget will review all significant rules. OIRA has determined that this rule is not significant.

Executive Order (E.O.) 13563 reaffirms the principles of E.O. 12866

while calling for improvements in the nation’s regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The

Executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

*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 of 1996 (SBREFA; 5 U.S.C. 801 *et seq.*), 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 certification statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities.

According to the Small Business Administration, small entities include small organizations such as independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; and small businesses (13 CFR 121.201). Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than \$5 million in annual sales, general and heavy construction businesses with less than \$27.5 million in annual business, special trade contractors doing less than \$11.5 million in annual business, and agricultural businesses with annual sales less than \$750,000. To determine if potential economic impacts to these small entities are significant, we considered the types of activities that might trigger regulatory impacts under this designation as well as types of project modifications that may result. In general, the term “significant economic

impact” is meant to apply to a typical small business firm’s business operations.

Under the RFA, as amended, and following recent court decisions, Federal agencies are required to evaluate the potential incremental impacts of rulemaking on those entities directly regulated by the rulemaking itself; in other words, the RFA does not require agencies to evaluate the potential impacts to indirectly regulated entities. The regulatory mechanism through which critical habitat protections are realized is section 7 of the Act, which requires Federal agencies, in consultation with the Service, to ensure that any action authorized, funded, or carried out by the Agency is not likely to destroy or adversely modify critical habitat. Therefore, under section 7, only Federal action agencies are directly subject to the specific regulatory requirement (avoiding destruction and adverse modification) imposed by critical habitat designation. Consequently, it is our position that only Federal action agencies will be directly regulated by this designation. There is no requirement under the RFA to evaluate the potential impacts to entities not directly regulated. Moreover, Federal agencies are not small entities. Therefore, because no small entities will be directly regulated by this rulemaking, we certify that this critical habitat designation will not have a significant economic impact on a substantial number of small entities.

During the development of this final rule, we reviewed and evaluated all information submitted during the comment period on the July 23, 2020, proposed rule (85 FR 44584) that may pertain to our consideration of the probable incremental economic impacts of this critical habitat designation. Based on this information, we affirm our certification that this critical habitat designation will not have a significant economic impact on a substantial number of small entities, and a regulatory flexibility analysis is not required.

*Energy Supply, Distribution, or Use—Executive Order 13211*

Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) requires agencies to prepare statements of energy effects when undertaking certain actions. In our economic analysis, we did not find that the designation of this critical habitat would significantly affect energy supplies, distribution, or use. Furthermore, although it does include

areas where powerlines and power facility construction and maintenance may occur in the future, it will not produce a Federal mandate of \$100 million or greater in any year, that is, it is not a ‘significant regulatory action’ under the Unfunded Mandates Reform Act. Therefore, this action is not a significant energy action, and no statement of energy effects is required.

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

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

(1) 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, or 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; Aid to Families with Dependent Children 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 that receive Federal funding, assistance, or permits, or that 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 onto State governments.

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

#### *Takings—Executive Order 12630*

In accordance with E.O. 12630 (Government Actions and Interference with Constitutionally Protected Private Property Rights), we have analyzed the potential takings implications of designating critical habitat for slickspot peppergrass in a takings implications assessment. The Act does not authorize us to regulate private actions on private lands or confiscate private property as a result of critical habitat designation. Designation of critical habitat does not affect land ownership, or establish any closures, or restrictions on use of or access to the designated areas. Furthermore, the designation of critical habitat does not affect landowner actions that do not require Federal funding or permits, nor does it preclude development of habitat conservation programs or issuance of incidental take permits to permit actions that do require Federal funding or permits to go forward. However, Federal agencies are prohibited from carrying out, funding, or authorizing actions that would destroy or adversely modify critical habitat. A takings implications assessment has been completed and concludes that this designation of critical habitat for slickspot peppergrass does not pose significant takings implications for lands within or affected by the designation.

#### *Federalism—Executive Order 13132*

In accordance with E.O. 13132 (Federalism), this rule does not have significant federalism effects. A federalism summary impact statement is not required. In keeping with Department of the Interior and Department of Commerce policy, we requested information from, and coordinated development of this critical habitat designation with, appropriate State resource agencies in Idaho. From a federalism perspective, the designation of critical habitat directly affects only the responsibilities of Federal agencies. The Act imposes no other duties with respect to critical habitat, either for States and local governments, or for anyone else. As a result, this rule does not have substantial direct effects either on the States, or on the relationship between the national government and the States, or on the distribution of powers and responsibilities among the various levels of government. The critical habitat designation may have some benefit to these governments because the areas that contain the features essential to the conservation of the species are more clearly defined, and the PBFs of the habitat necessary for the conservation of the species are specifically identified. This information does not alter where and what federally sponsored activities may occur. However, it may assist State and local governments in long-range planning because they no longer have to wait for case-by-case section 7 consultations to occur.

Where State and local governments require approval or authorization from a Federal agency for actions that may affect critical habitat, consultation under section 7(a)(2) of the Act will be required. While non-Federal entities that receive Federal funding, assistance, or permits, or that 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.

#### *Civil Justice Reform—Executive Order 12988*

In accordance with Executive Order 12988 (Civil Justice Reform), the Office of the Solicitor has determined that the final rule does not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the Order. We are designating critical habitat in accordance with the provisions of the Act. To assist the

public in understanding the habitat needs of the species, this rule identifies the elements of PBFs essential to the conservation of the species. The designated areas of critical habitat are presented on maps, and the rule provides several options for the interested public to obtain more detailed location information, if desired.

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

This rule does not contain information collection requirements, and a submission to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.) is not required. We may not conduct or sponsor and you are not required to respond to a collection of information unless it displays a currently valid OMB control number.

#### *National Environmental Policy Act (42 U.S.C. 4321 et seq.)*

It is our position that, outside the jurisdiction of the U.S. Court of Appeals for the Tenth Circuit, we do not need to prepare environmental analyses pursuant to the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 et seq.) 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 position was upheld by the U.S. Court of Appeals for the Ninth Circuit (*Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. 1995), cert. denied 516 U.S. 1042 (1996)).

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

In accordance with the President’s memorandum of April 29, 1994 (Government-to-Government Relations with Native American Tribal Governments; 59 FR 22951), Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments), and the Department of the Interior’s manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with Tribes in developing programs for healthy ecosystems, to acknowledge that Tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and

to make information available to Tribes. We have determined that no Tribal lands fall within the boundaries of the final critical habitat for slickspot peppergrass, so no Tribal lands would be affected by the critical habitat designation.

**References Cited**

A complete list of references cited in this rulemaking is available on the internet at <https://www.regulations.gov> in Docket No. FWS-R1-ES-2010-0071 and upon request from the Idaho Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

**Authors**

The primary authors of this rulemaking are the staff members of the Idaho Fish and Wildlife Office.

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

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

**Regulation Promulgation**

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

**PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS**

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

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

■ 2. Amend § 17.12, in paragraph (h) in the List of Endangered and Threatened Plants, by revising the entry for “*Lepidium papilliferum*” to read as follows:

**§ 17.12 Endangered and threatened plants.**

\* \* \* \* \*  
(h) \* \* \*

Scientific name	Common name	Where listed	Status	Listing citations and applicable rules
FLOWERING PLANTS				
<i>Lepidium papilliferum</i> .....	Slickspot peppergrass ....	Wherever found .....	T	74 FR 52014, 10/8/2009; 81 FR 55058, 8/17/2016; 50 CFR 17.96(a). <sup>CH</sup>
*	*	*	*	*

■ 3. Amend § 17.96(h), by adding an entry for “Family Brassicaceae: *Lepidium papilliferum* (slickspot peppergrass)” after the entry for “Family Brassicaceae: *Leavenworthia texana* (Texas golden gladdress)” to read as follows:

**§ 17.96 Critical habitat—plants.**

(a) *Flowering plants.*

\* \* \* \* \*

Family Brassicaceae: *Lepidium papilliferum* (Slickspot Peppergrass)

(1) Critical habitat units are depicted for Ada, Elmore, Gem, Owyhee, and Payette, Counties, Idaho, on the maps in this entry.

(2) Within these areas, the specific physical or biological features (PBFs) essential to the conservation of slickspot peppergrass consist of four components:

(i) Ecologically functional microsites or “slick spots” that are characterized by:

(A) A high sodium and clay content, and a three-layer soil profile, which allows for successful seed germination, seedling growth, and maintenance of the seed bank. The surface horizon consists of a thin, silty vesicular, pored (small cavity) layer that forms a physical crust (the silt layer). The subsoil horizon is a restrictive clay layer, with an abrupt (referring to an abrupt change in texture) boundary with the surface layer, that is natric or natric-like in properties (a type of argillic (clay-based) horizon with distinct structural and chemical features); this is the restrictive layer. The second argillic subsoil layer (that is

less distinct than the upper argillic horizon) retains moisture through part of the year (the moist clay layer).

(B) Sparse vegetation, with invasive, nonnative plant species cover absent or limited to low to moderate levels.

(ii) Relatively intact, native Wyoming big sagebrush (*Artemisia tridentata* ssp. *wyomingensis*) vegetation assemblages, represented by native bunchgrasses, shrubs, and forbs, within 500 m (1,640 ft) of slickspot peppergrass element occurrences to protect slick spots and slickspot peppergrass from disturbance from wildfire, slow the invasion of slick spots by nonnative plant species and native harvester ants, and provide the habitats needed by slickspot peppergrass’ pollinators.

(iii) A diversity of native plants whose blooming times overlap to provide pollinator species with flowers for foraging throughout the seasons and to provide nesting and egg-laying sites; appropriate nesting materials; and sheltered, undisturbed places for hibernation and overwintering of pollinator species. In order for genetic exchange of slickspot peppergrass to occur, pollinators must be able to move freely between slick spots. Alternative pollen and nectar sources (other plant species within the surrounding sagebrush vegetation) are needed to support pollinators during times when slickspot peppergrass is not flowering, when distances between slick spots are long, and in years when slickspot peppergrass is not a prolific flowerer.

(iv) Sufficient pollinators for successful fruit and seed production, particularly pollinator species of the sphecid and vespidae wasp families, species of the bombyliid and tachnid fly families, and halictid bee species, most of which are solitary insects that nest outside of slick spots in the surrounding sagebrush-steppe vegetation, both in the ground and within the vegetation.

(3) Critical habitat does not include human-made structures (such as buildings, aqueducts, runways, roads, and other paved areas), cultivated agricultural fields, areas dominated by turf grass such as parks, and the land on which they are located existing within the legal boundaries on June 5, 2023.

(4) Data layers defining map units were developed using ESRI ArcGIS 10.7.1 mapping software along with various spatial layers. Feature class data for element occurrences (EOs) were derived from the Idaho Department of Fish and Game’s Idaho Fish and Wildlife Information System (IFWIS) database (July 2021). EOs were depicted as points or polygons in the IFWIS database, and an E.O. could consist of one or more points or polygons. For ArcGIS analyses, we dissolved a 500-m (1,640-ft) exterior insect pollinator buffer on each point or polygon that comprised an E.O. and calculated acreages based on these dissolved, buffered polygons. Overlapping polygons were merged to prevent a double count of critical habitat hectares. Critical habitat polygon outlines are exaggerated (using 1- or 2-point size,



depending on map scale) to allow for better visibility. The critical habitat polygons were then overlaid upon aerial imagery, including the ArcGIS World Imagery layer, aerial imagery from Google Earth Pro, and the 2019 National Agricultural Imagery Program Idaho layer, which has a spatial resolution of a 60-centimeter ground sample distance.

(i) Lands that visually lacked the necessary PBFs were manually removed from the critical habitat polygons; any such lands inadvertently left inside critical habitat boundaries shown on the

maps of this final rule are excluded by this text and are not designated as critical habitat. Areas that lack PBFs include land covered in human-made structures (such as buildings, roads, runways, and other paved areas), cultivated farmland, and riparian areas.

(ii) The maps in this entry, as modified by any accompanying regulatory text, establish the boundaries of the critical habitat designation. The coordinates or plot points or both on which each map is based are available to the public at the Service's internet

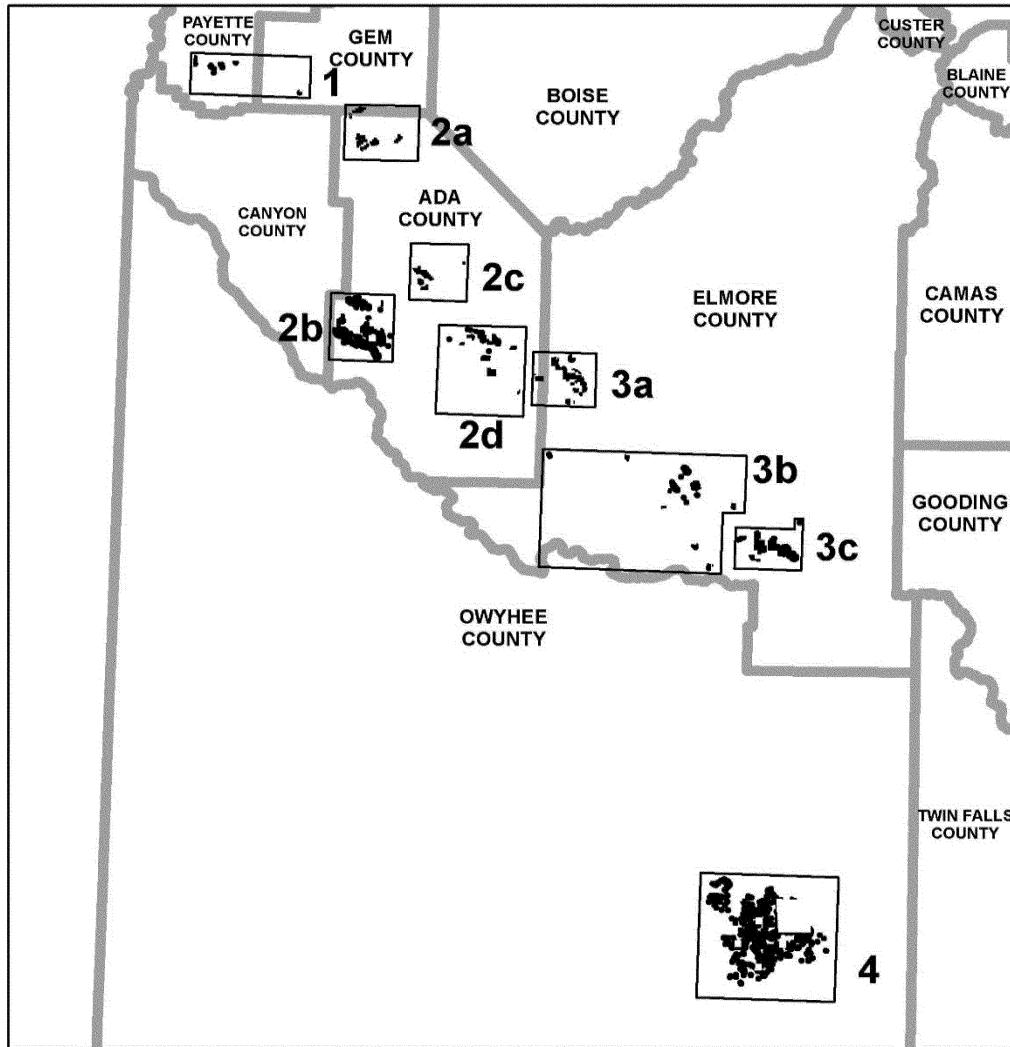
site at <https://www.fws.gov/species/slickspot-peppergrass-lepidium-papilliferum>, at <https://www.regulations.gov> at Docket No. FWS-R1-ES-2010-0071, and at the Idaho Fish and Wildlife Office. You may obtain field office location information by contacting one of the Service regional offices, the addresses of which are listed at 50 CFR 2.2.

(5) Index map follows:

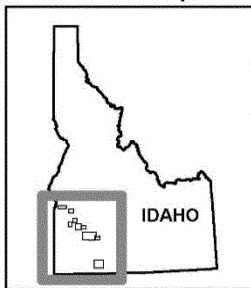
**BILLING CODE 4333-15-P**

Figure 1 to *Lepidium papilliferum*  
(slickspot peppergrass) paragraph (5)

Critical Habitat for *Lepidium papilliferum* (slickspot peppergrass)



Locator Map



● *Lepidium papilliferum* Critical Habitat  
 □ County

0 10 20 Miles  
 0 10 20 Kilometers



(6) *Unit 1*: Payette and Gem Counties, Idaho.

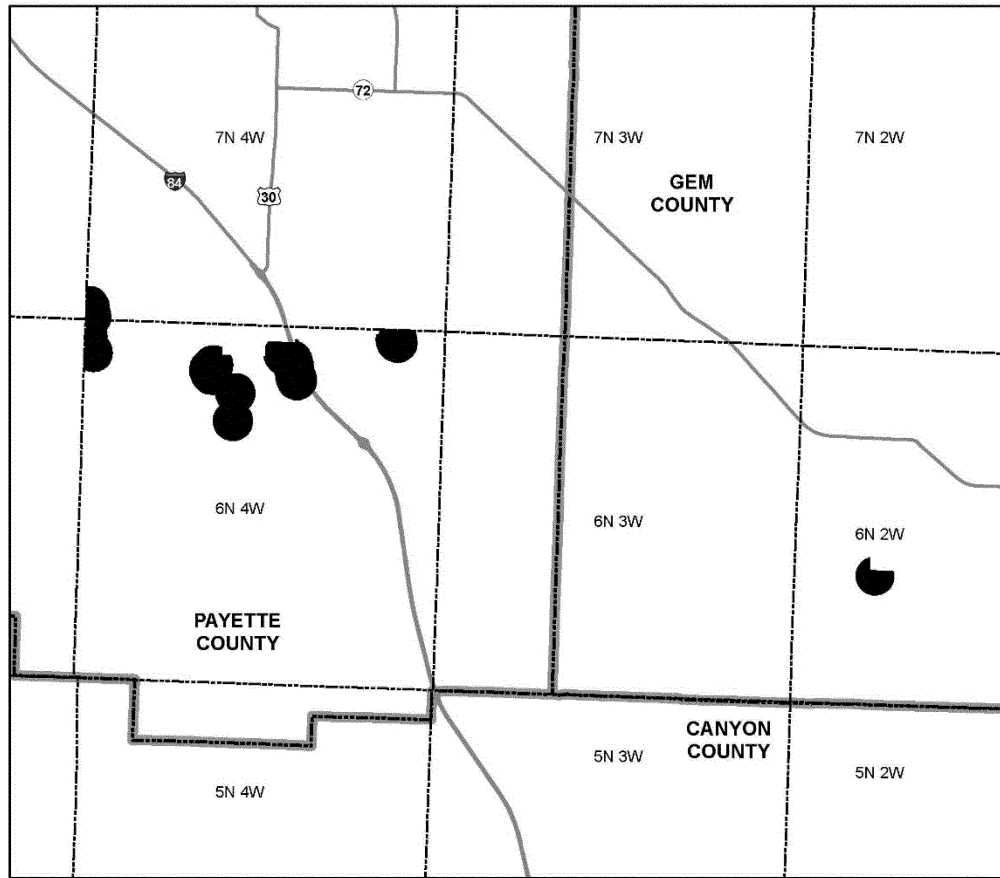
(i) *General Description*: Unit 1 contains 704 ha (1,741 ac) of critical habitat in Payette and Gem Counties,

Idaho, consisting of Bureau of Land Management (BLM) land in the Four Rivers Field Office area (695 ha (1,718 ac)) and Bureau of Reclamation (BOR) land (9 ha (23 ac)).

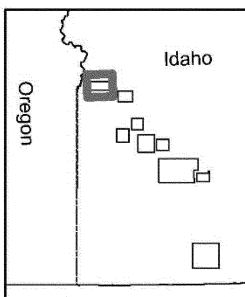
(ii) Map of Unit 1 follows:





Figure 2 to *Lepidium papilliferum* (slickspot peppergrass) paragraph (6)(ii)

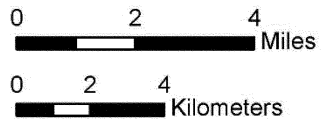
# Critical Habitat for *Lepidium papilliferum* (slickspot peppergrass) Unit 1



Locator Map



-  *Lepidium papilliferum* Critical Habitat
-  Township
-  Roadway
-  County



(7) Unit 2: Gem and Ada Counties, Idaho.

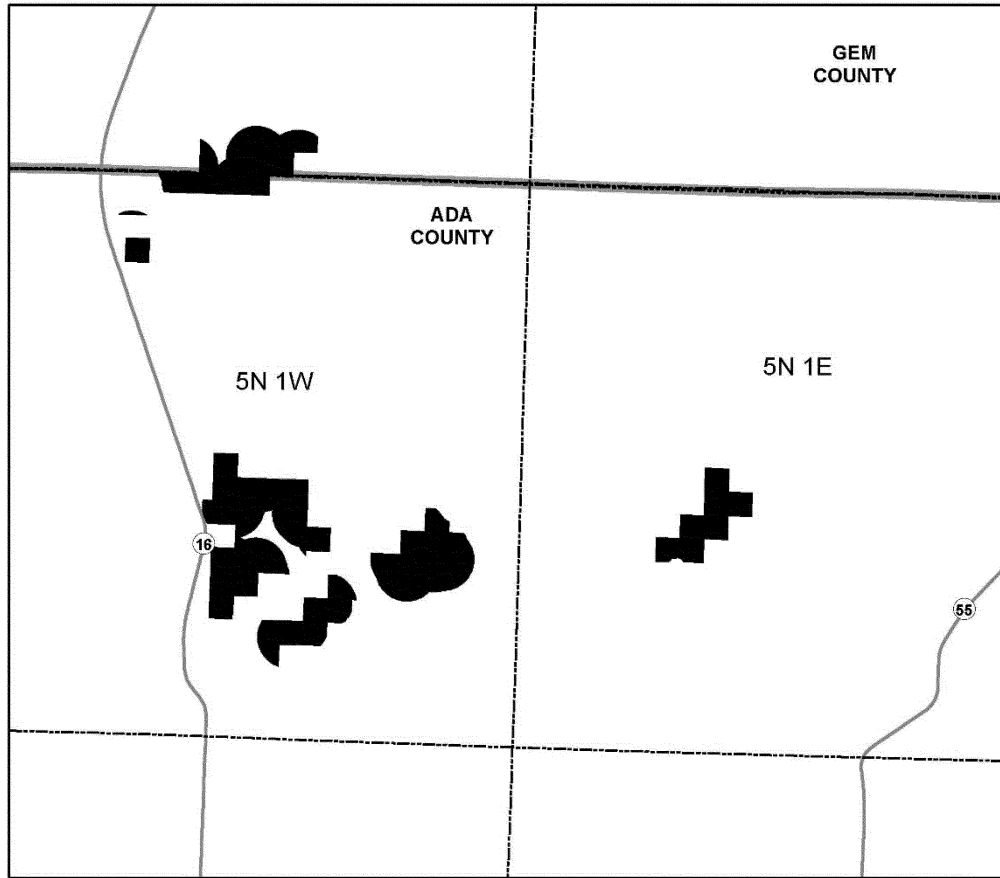
(i) Subunit 2a General Description: Subunit 2a contains 874 ha (2,160 ac) of

critical habitat on BLM land in Gem and Ada Counties, Idaho.

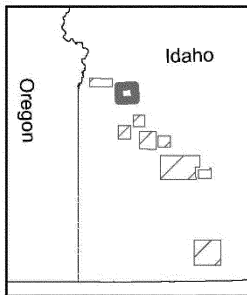
(ii) Map of Unit 2, Subunit 2a follows:





Figure 3 to *Lepidium papilliferum* (slickspot peppergrass) paragraph (7)(ii)

### Critical Habitat for *Lepidium papilliferum* (slickspot peppergrass) Unit 2 - Subunit a



Locator Map



-  *Lepidium papilliferum* Critical Habitat
-  Township
-  Roadway
-  County

0 1 2 Miles

0 1.5 3 Kilometers

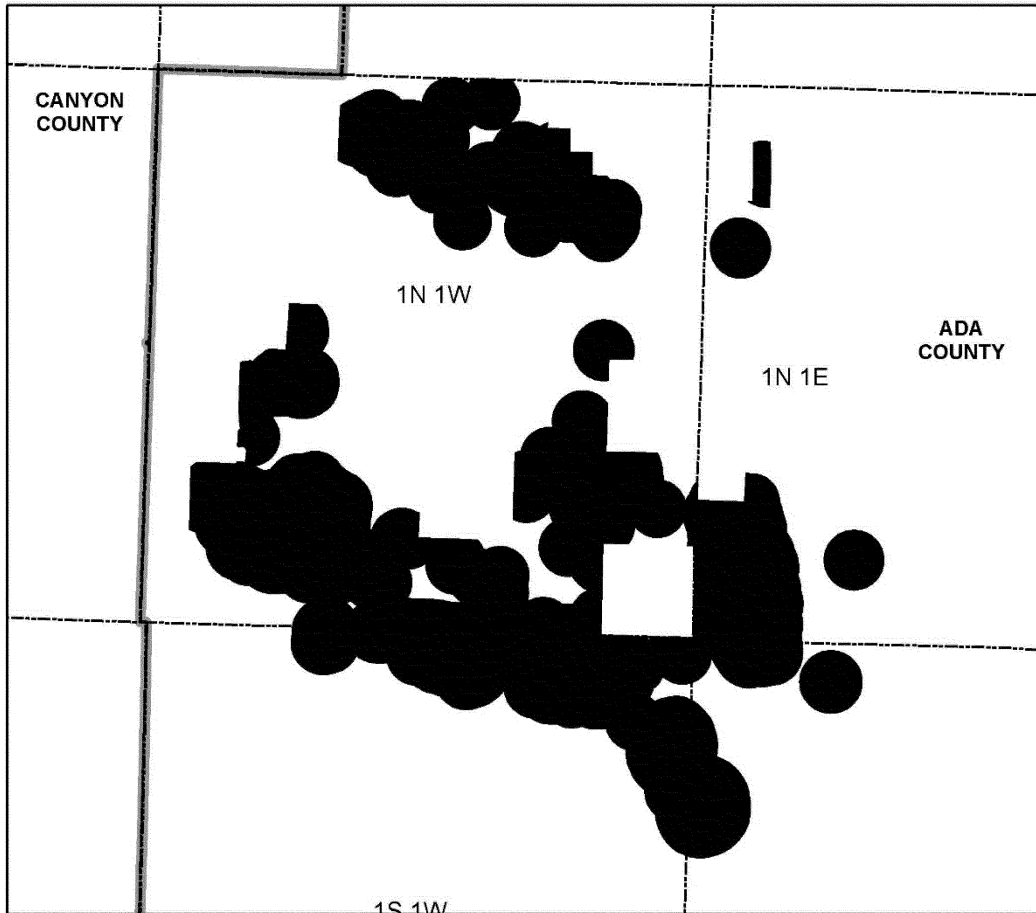


(iii) *Subunit 2b General Description:* Subunit 2b contains 5,423 ha (13,401 ac) of critical habitat in Ada County, Idaho, within the BLM's Morley Nelson Snake

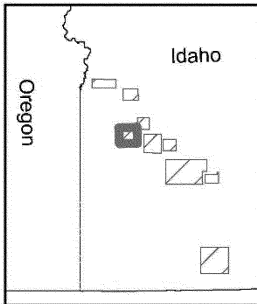
River Birds of Prey National Conservation Area south of Kuna, Idaho.  
(iv) Map of Unit 2, Subunit 2b follows:




Figure 4 to *Lepidium papilliferum* (slickspot peppergrass) paragraph (7)(iv)

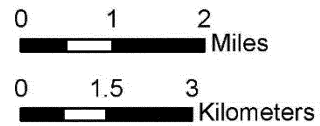
# Critical Habitat for *Lepidium papilliferum* (slickspot peppergrass) Unit 2 - Subunit b



Locator Map



-  *Lepidium papilliferum* Critical Habitat
-  Township
-  County

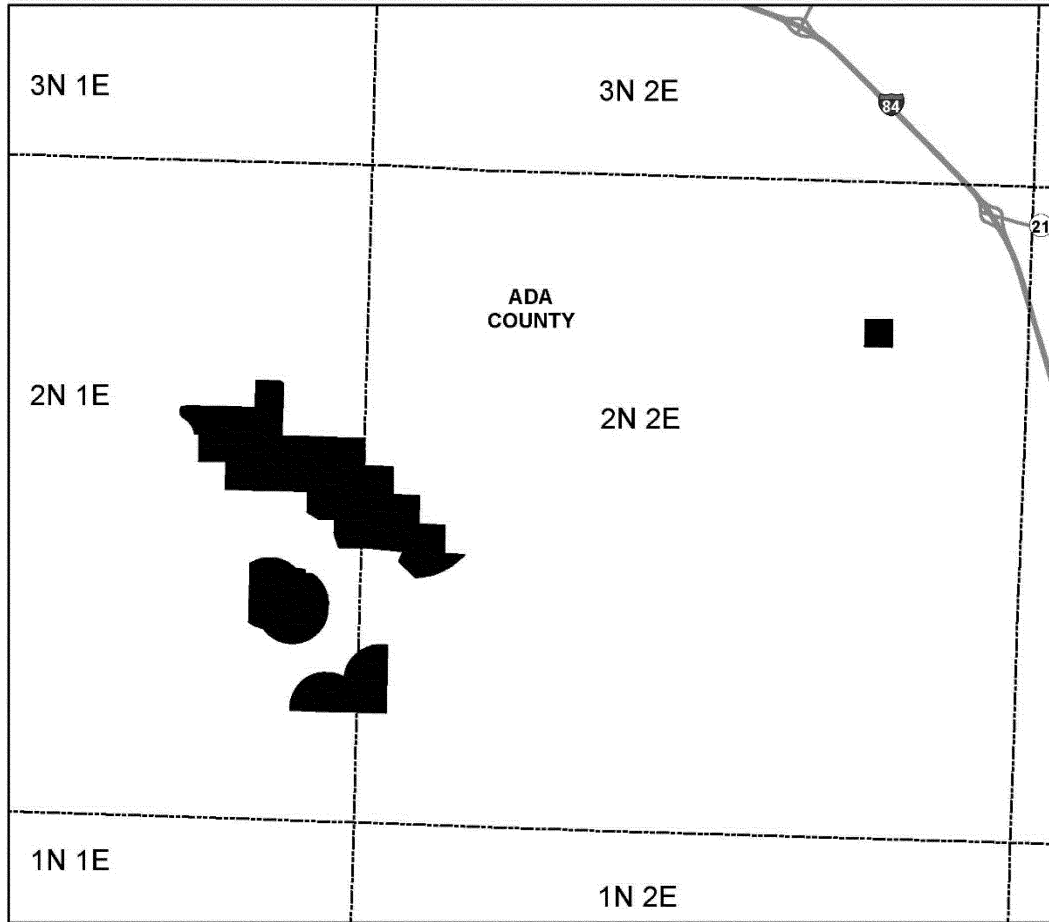


(v) *Subunit 2c General Description:* Subunit 2c contains 657 ha (1,623 ac) of critical habitat in Ada County, Idaho, on

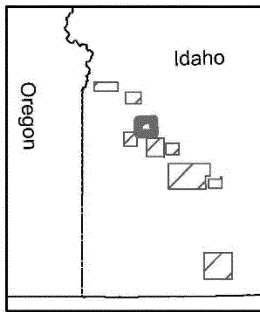
BLM land within the Four Rivers Field Office area.  
(vi) Map of Unit 2, Subunit 2c follows:

Figure 5 to *Lepidium papilliferum* (slickspot peppergrass) paragraph (7)(vi)

## Critical Habitat for *Lepidium papilliferum* (slickspot peppergrass) Unit 2 - Subunit c



**Locator Map**



- Lepidium papilliferum* Critical Habitat
- Township
- Roadway

0 1 2 Miles

0 1 2 Kilometers

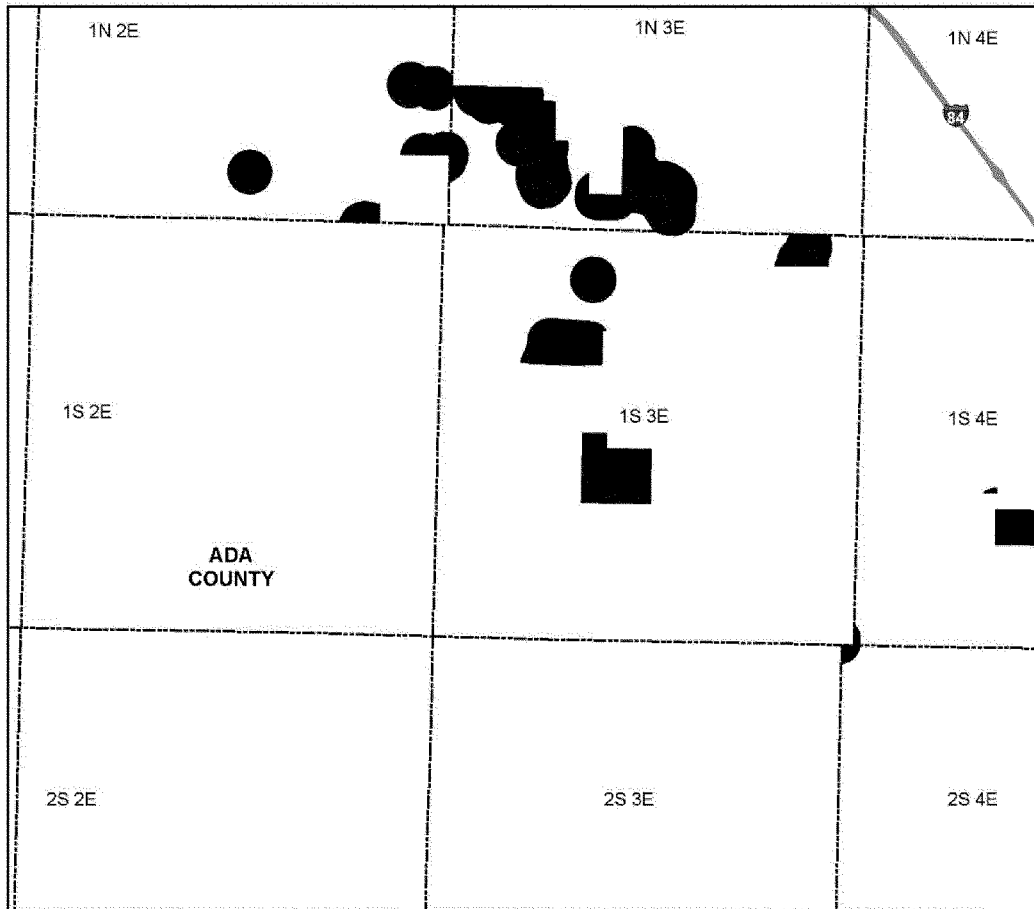


(vii) *Subunit 2d General Description:* Subunit 2d contains 1,707 ha (4,218 ac) of critical habitat in Ada County, Idaho, consisting of BLM land (1,689 ha (4,173 ac)) and BOR land (18 ha (45 ac)).

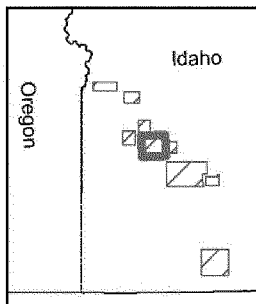
Critical habitat within Subunit 2d is adjacent to the Idaho Army National Guard-administered Orchard Combat Training Center (formerly known as the Orchard Training Area).




(viii) Map of Unit 2, Subunit 2d follows:  
Figure 6 to *Lepidium papilliferum* (slickspot peppergrass) paragraph (7)(viii)

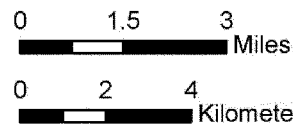
# Critical Habitat for *Lepidium papilliferum* (slickspot peppergrass) Unit 2 - Subunit d



Locator Map



-  *Lepidium papilliferum* Critical Habitat
-  Township
-  Roadway



(8) *Unit 3*: Ada and Elmore Counties, Idaho.

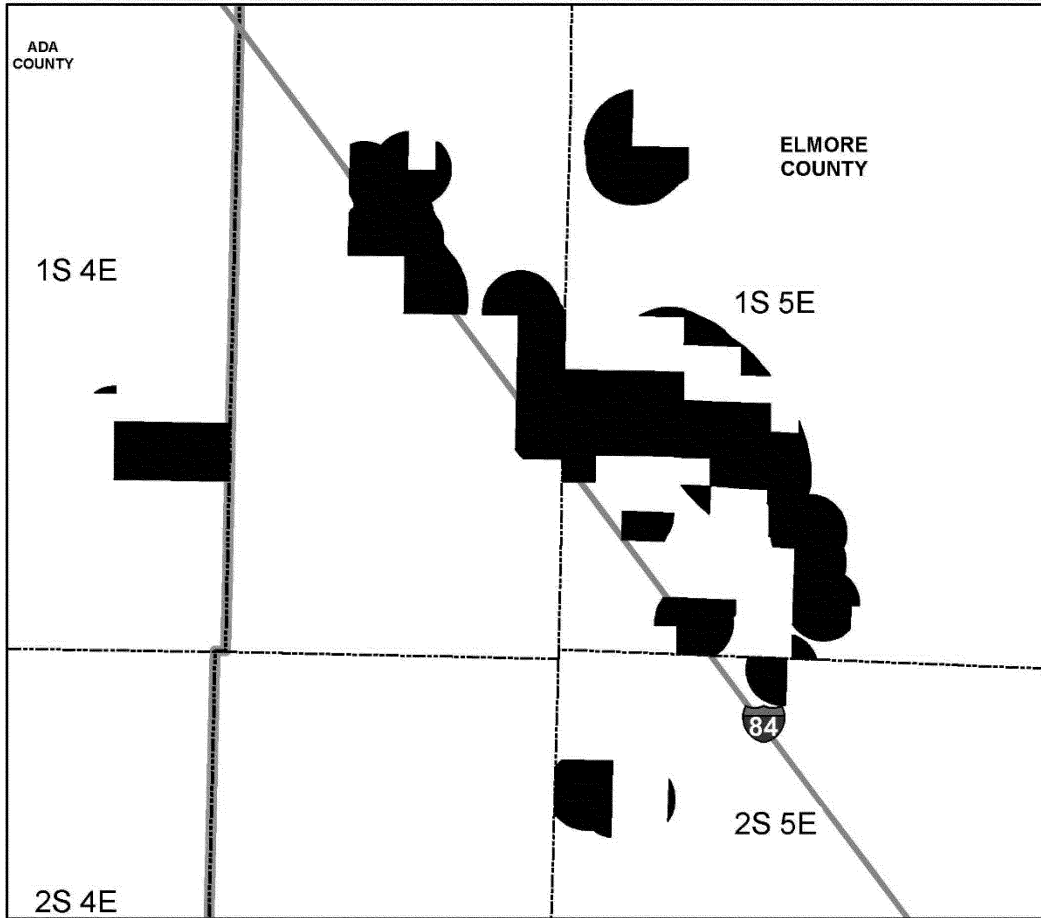
(i) *Subunit 3a General Description*: Subunit 3a contains 1,554 ha (3,839 ac) of critical habitat in Ada and Elmore

Counties, Idaho, consisting of BLM, Four Rivers Field Office area land (1,502 ha (3,711 ac)) and BOR land (52 ha (128 ac)).

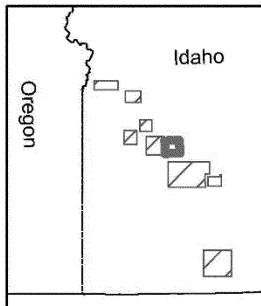
(ii) Map of Unit 3, Subunit 3a follows:

Figure 7 to *Lepidium papilliferum* (slickspot peppergrass) paragraph (8)(ii)

## Critical Habitat for *Lepidium papilliferum* (slickspot peppergrass) Unit 3 - Subunit a



Locator Map



- Lepidium papilliferum* Critical Habitat
- Township
- Roadway
- County



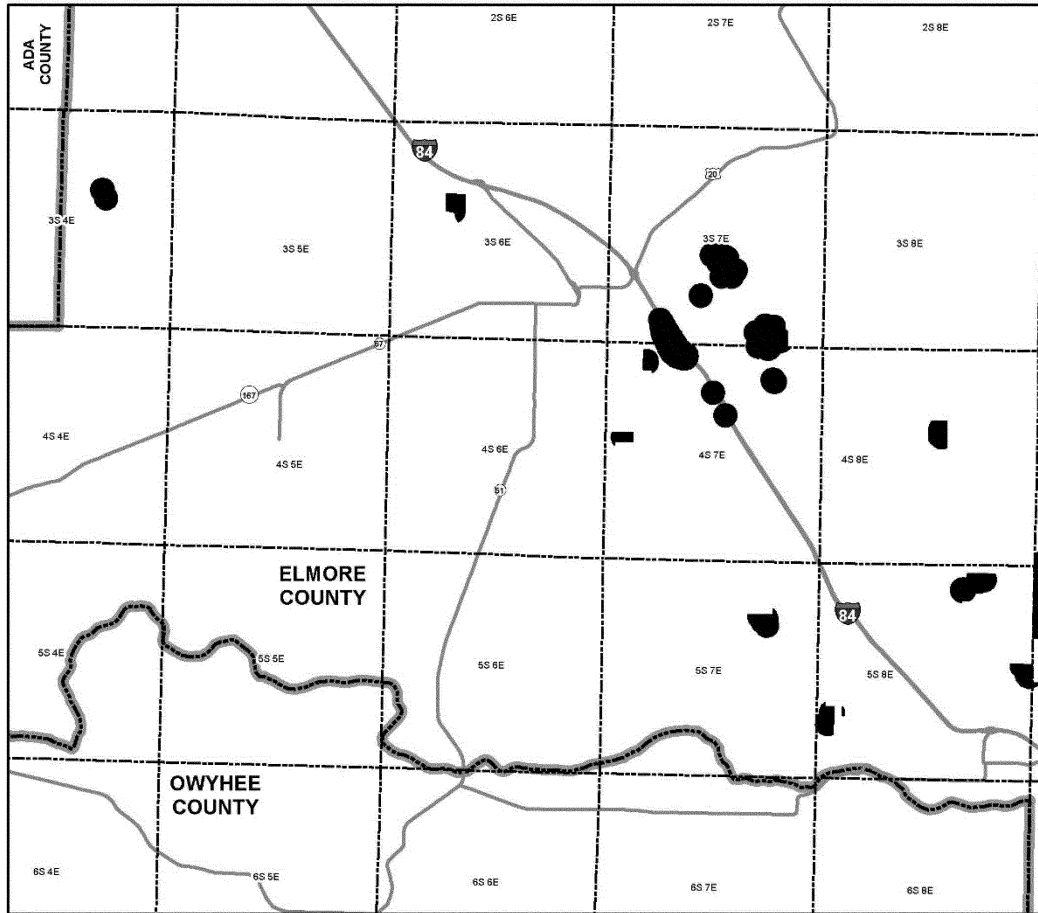
(iii) *Subunit 3b General Description:* Subunit 3b contains 1,957 ha (4,835 ac) of critical habitat in Elmore County, Idaho, consisting of BLM land (1,890 ha (4,671 ac)) and BOR land (66 ha (164

ac)). BLM land includes the Four Rivers Field Office area and the Morley Nelson Birds of Prey National Conservation Area.

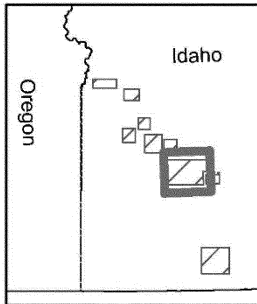
(iv) Map of Unit 3, Subunit 3b follows:  
Figure 8 to *Lepidium papilliferum* (slickspot peppergrass) paragraph (8)(iv)







# Critical Habitat for *Lepidium papilliferum* (slickspot peppergrass) Unit 3 - Subunit b



Locator Map



-  *Lepidium papilliferum* Critical Habitat
-  Township
-  Roadway
-  County

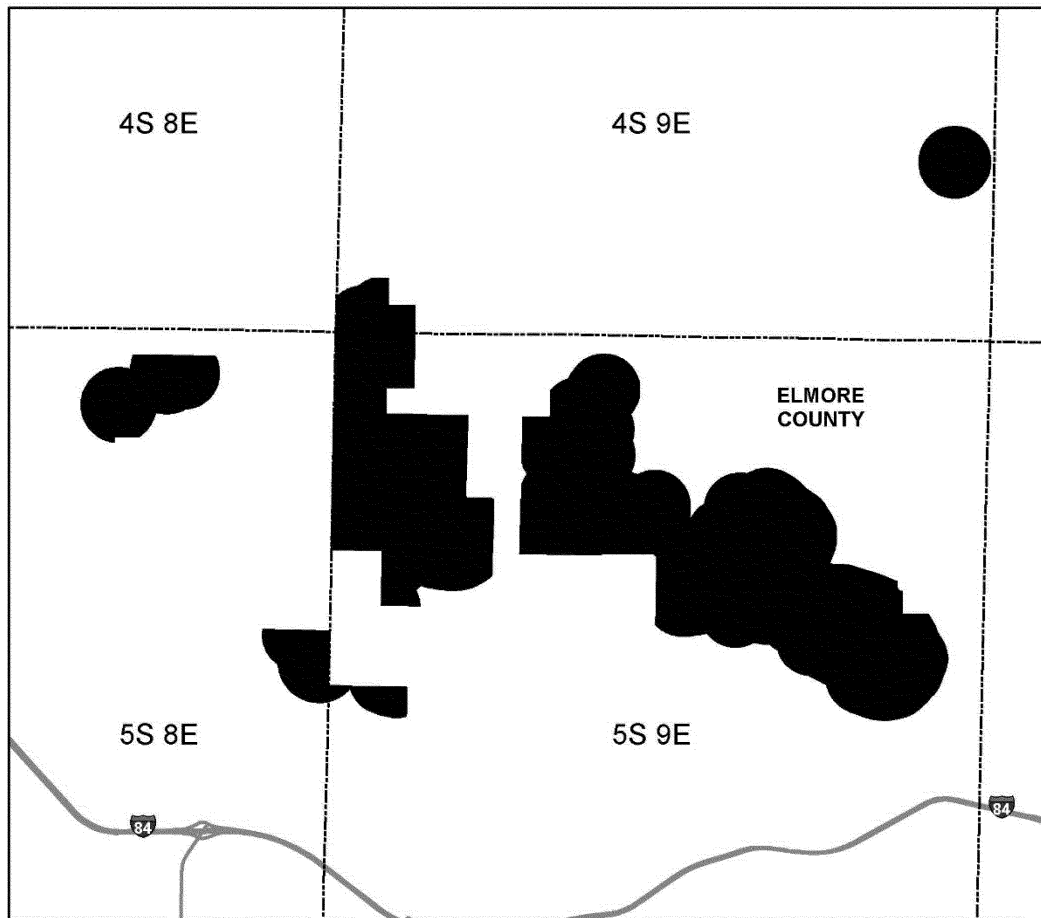


(v) *Subunit 3c General Description:* Subunit 3c contains 2,485 ha (6,142 ac) of critical habitat in Elmore County, Idaho consisting of consisting of BLM

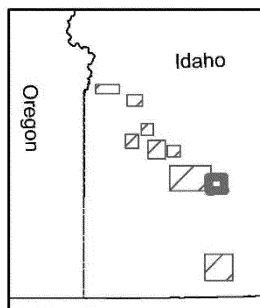
land (2,453 ha (6,062 ac)) and BOR land (32 ha (80 ac)).  
(vi) Map of Unit 3, Subunit 3c follows:

Figure 9 to *Lepidium papilliferum* (slickspot peppergrass) paragraph (8)(vi)

## Critical Habitat for *Lepidium papilliferum* (slickspot peppergrass) Unit 3 - Subunit c



Locator Map



- Lepidium papilliferum* Critical Habitat
- Township
- Roadway



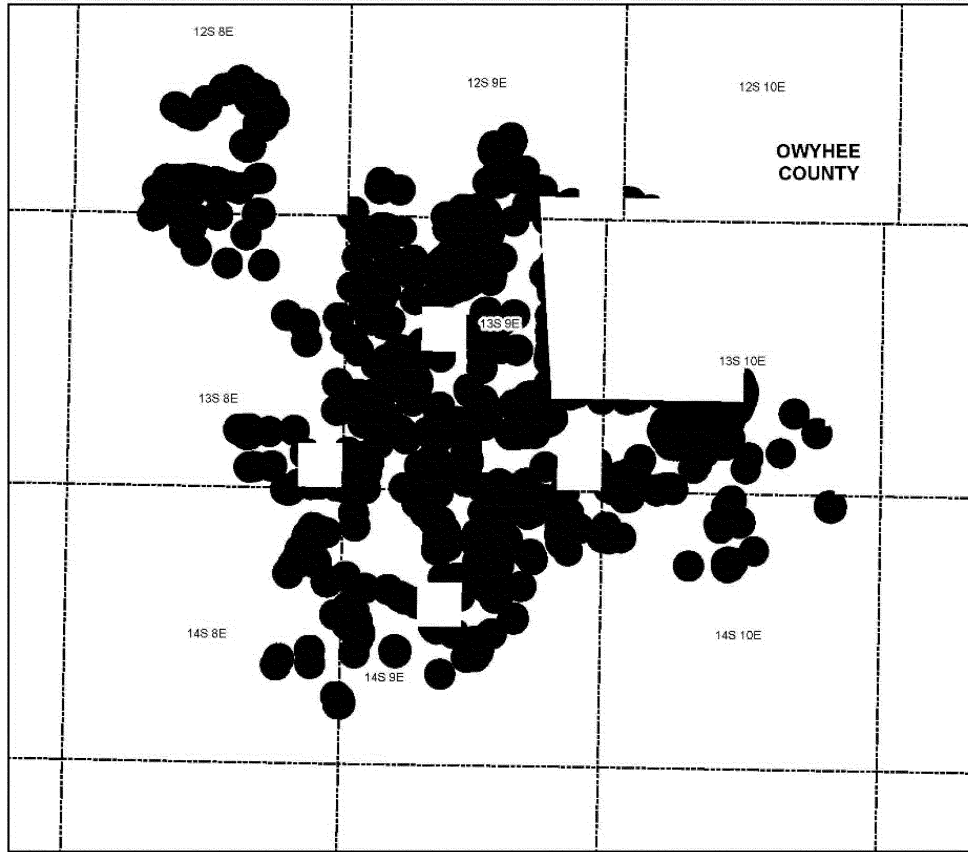
(9) Unit 4: Owyhee County, Idaho.  
(i) General description: Unit 4 contains 16,310 ha (40,303 ac) of critical habitat in Owyhee County, Idaho,

within the BLM Jarbidge Field Office area.

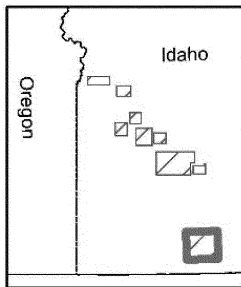
(ii) Map of Unit 4 follows:



Figure 10 to *Lepidium papilliferum* (slickspot peppergrass) paragraph (9)(ii)

# Critical Habitat for *Lepidium papilliferum* (slickspot peppergrass) Unit 4



Locator Map



 *Lepidium papilliferum* Critical Habitat  
 Township



\* \* \* \* \*

**Martha Williams,**  
 Director, U.S. Fish and Wildlife Service.  
 [FR Doc. 2023-09219 Filed 5-3-23; 8:45 am]  
 BILLING CODE 4333-15-C