

Dated: August 1, 2023.

Casey Sixkiller,

Regional Administrator, Region 10.

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS-R2-ES-2023-0023;
FF09E21000 FXES1111090FEDR 234]

RIN 1018-BH13

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Sacramento Mountains Checkerspot Butterfly

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), propose to designate critical habitat for the Sacramento Mountains checkerspot butterfly (*Euphydryas anicia cloudcrofti*), a butterfly from New Mexico, under the Endangered Species Act of 1973, as amended (Act). In total, approximately 1,636.9 acres (662.4 hectares) in Otero County, New Mexico, fall within the boundaries of the proposed critical habitat designation. We also announce the availability of a draft economic analysis of the proposed designation of critical habitat for the Sacramento Mountains checkerspot butterfly.

DATES: We will accept comments received or postmarked on or before October 10, 2023. Comments submitted electronically using the Federal eRulemaking Portal (see ADDRESSES, below) must be received by 11:59 p.m. eastern time on the closing date. We must receive requests for a public hearing, in writing, at the address shown in **FOR FURTHER INFORMATION CONTACT** by September 25, 2023.

ADDRESSES: You may submit comments by one of the following methods:

(1) *Electronically:* Go to the Federal eRulemaking Portal: <https://www.regulations.gov>. In the Search box, enter FWS-R2-ES-2023-0023, which is the docket number for this rulemaking. Then, click on the Search button. On the resulting page, in the panel on the left side of the screen, under the Document Type heading, check the Proposed Rule box to locate this document. You may submit a comment by clicking on "Comment."

(2) *By hard copy:* Submit by U.S. mail to: Public Comments Processing, Attn: FWS-R2-ES-2023-0023, U.S. Fish and Wildlife Service, MS: PRB/3W, 5275 Leesburg Pike, Falls Church, VA 22041-3803.

We request that you send comments only by the methods described above. We will post all comments on <https://www.regulations.gov>. This generally means that we will post any personal information you provide us (see Information Requested, below, for more information).

Availability of supporting materials: For this proposed critical habitat designation, 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, along with other supporting materials, at <https://www.regulations.gov> at Docket No. FWS-R2-ES-2023-0023 and on the Service's website at <https://www.fws.gov/about/region/southwest>.

FOR FURTHER INFORMATION CONTACT: Shawn Sartorius, Field Supervisor, U.S. Fish and Wildlife Service, New Mexico Ecological Services Field Office, 2105 Osuna NE, Albuquerque, NM 87113; telephone 505-346-2525. 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, when we determine that any species is an endangered or threatened species, we are required to designate critical habitat, to the maximum extent prudent and determinable. Designations of critical habitat can be completed only by issuing a rule through the Administrative Procedure Act rulemaking process (5 U.S.C. 551 *et seq.*).

What this document does. We propose to designate critical habitat for the Sacramento Mountains checkerspot butterfly, which is listed as an endangered species under the Act.

The basis for our action. Under section 4(a)(3) of the Act, if we determine that a species is an endangered or threatened species we must, to the maximum extent prudent and determinable, designate critical habitat. Section 3(5)(A) of the Act

defines critical habitat as (i) 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 (I) essential to the conservation of the species and (II) which may require special management considerations or protections; and (ii) specific areas outside the geographical 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.

Information Requested

We intend that any final action resulting from this proposed rule will be based on the best scientific and commercial data available and be as accurate and as effective as possible. Therefore, we request comments or information from other governmental agencies, Native American Tribes, the scientific community, industry, or any other interested parties concerning this proposed rule. We particularly seek comments concerning:

- (1) Specific information on:
 - (a) The amount and distribution of Sacramento Mountains checkerspot butterfly habitat;
 - (b) Any additional areas occurring within the range of the species in Otero County, New Mexico, that should be included in the designation because they (i) are occupied at the time of listing and contain the physical or biological features that are essential to the conservation of the species and that may require special management considerations, or (ii) are unoccupied at the time of listing and are essential for the conservation of the species;
 - (c) Special management considerations or protection that may be needed in critical habitat areas we are proposing, including managing for the potential effects of climate change; and
 - (d) To evaluate the potential to include areas not occupied at the time of listing, we particularly seek comments regarding whether occupied areas are adequate for the conservation of the species. Additionally, please provide specific information regarding whether or not unoccupied areas would, with reasonable certainty, contribute to the conservation of the species and contain at least one physical or biological feature essential to the

conservation of the species. We also seek comments or information regarding whether areas not occupied at the time of listing qualify as habitat for the species.

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

(8) Any probable economic, national security, or other relevant impacts of designating any area that may be included in the final designation, and the related benefits of including or excluding specific areas.

(9) Information on the extent to which the description of probable economic impacts in the draft economic analysis is a reasonable estimate of the likely economic impacts and the description of the environmental impacts in the draft environmental assessment is complete and accurate and any additional information regarding probable economic impacts that we should consider.

(10) Whether any specific areas we are proposing for critical habitat designation should be considered for exclusion under section 4(b)(2) of the Act, and whether the benefits of potentially excluding any specific area outweigh the benefits of including that area under section 4(b)(2) of the Act, in particular for those on Tribal lands. We are considering the land owned by the Mescalero Apache Tribe in Unit 3 (Spud Patch Canyon) for exclusion. If you think we should exclude any additional areas, please provide information supporting a benefit of exclusion.

(11) Whether we could improve or modify our approach to designating critical habitat in any way to provide for greater public participation and understanding, or to better accommodate public concerns and comments.

Please include sufficient information with your submission (such as scientific journal articles or other publications) to allow us to verify any scientific or commercial information you include.

Please note that submissions merely stating support for, or opposition to, the action under consideration without providing supporting information, although noted, do not provide substantial information necessary to support a determination. Section 4(b)(2) of the Act directs that the Secretary shall designate critical habitat on the basis of the best scientific data available.

You may submit your comments and materials concerning this proposed rule by one of the methods listed in **ADDRESSES**. We request that you send comments only by the methods described in **ADDRESSES**.

If you submit information via <https://www.regulations.gov>, your entire submission—including any personal identifying information—will be posted on the website. If your submission is made via a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on <https://www.regulations.gov>.

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on <https://www.regulations.gov>.

Because we will consider all comments and information we receive during the comment period, our final designation may differ from this proposal. Based on the new information we receive (and any comments on that new information), our final designation may not include all areas proposed, may include some additional areas that meet the definition of critical habitat, or may exclude some areas if we find the benefits of exclusion outweigh the benefits of inclusion and exclusion will not result in the extinction of the species.

Public Hearing

Section 4(b)(5) of the Act provides for a public hearing on this proposal, if requested. Requests must be received by the date specified in **DATES**. Such requests must be sent to the address shown in **FOR FURTHER INFORMATION CONTACT**. We will schedule a public hearing on this proposal, if requested, and announce the date, time, and place of the hearing, as well as how to obtain reasonable accommodations, in the **Federal Register** and local newspapers at least 15 days before the hearing. We may hold the public hearing in person or virtually via webinar. We will announce any public hearing on our website, in addition to the **Federal Register**. The use of virtual public hearings is consistent with our regulations at 50 CFR 424.16(c)(3).

Previous Federal Actions

On January 25, 2022, we published a proposed rule in the **Federal Register** (87 FR 3739) to list the Sacramento Mountains checkerspot butterfly as an endangered species (16 U.S.C. 1531 *et seq.*). At the time of our proposal, we determined that designation of critical habitat was prudent but not determinable because we lacked specific information on the impacts of our designation. In our proposed listing rule, we stated we were in the process

of obtaining information on the impacts of the designation. We published the final listing rule on January 31, 2023. Please refer to the proposed and final listing rules (87 FR 3739, January 25, 2022; 88 FR 6177; January 31, 2023) for a detailed description of previous Federal actions concerning this butterfly.

Peer Review

An assessment team prepared a current condition assessment report for the Sacramento Mountains checkerspot butterfly. The assessment team was composed of Service biologists, in consultation with other species experts. The current condition assessment report represents a compilation of the best scientific and commercial data available concerning the status of the species, including the impacts of past and present 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 solicited independent scientific review of the information contained in the Sacramento Mountains checkerspot butterfly current condition assessment report. We sent the report to five independent peer reviewers and received three responses. Results of this structured peer review process can be found at <https://www.regulations.gov> at Docket No. FWS-R2-ES-2021-0069, which is the docket for the listing rules for the Sacramento Mountains checkerspot butterfly, or Docket No. FWS-R2-ES-2023-0023, which is the docket number for this rulemaking. In preparing this proposed rule, we incorporated the results of these reviews, as appropriate, into the current condition assessment report, which is the foundation for this proposed rule.

Background

The Sacramento Mountains checkerspot butterfly (butterfly) is a subspecies of the Anicia checkerspot, or variable checkerspot, in the Nymphalidae (brush-footed butterfly) family that is native to the Sacramento Mountains in south-central New Mexico. The Sacramento Mountains checkerspot butterfly inhabits high-altitude meadows in the upper-montane and subalpine zone at elevations between 2,380 and 2,750 meters (m) (7,800 and 9,000 feet (ft)) within the Sacramento Mountains, which is an isolated mountain range in south-central New Mexico (Service 2005 *et al.*, p. 9). The species requires host plants for

larvae, nectar sources for adults, and climatic moisture.

Since 1998, populations have been known from 10 meadow units on U.S. Forest Service (Forest Service) land (Forest Service 1999, p. 2). The meadows cover the occupied areas within the species' range and give the most accurate representation of species and habitat conditions available. These meadow units include Bailey Canyon, Pines Meadow Campground, Horse Pasture Meadow, Silver Springs Canyon, Cox Canyon, Sleepygrass Canyon, Spud Patch Canyon, Deerhead Canyon, Pumphouse Canyon, and Yardplot Meadow. The species has been extirpated from several of these meadows recently. The Yardplot Meadow was sold and developed, while suitable habitat in Horse Pasture Meadow was eliminated by logging (Forest Service 2017, p. 3) but has since become somewhat revegetated. No adults or caterpillars have been detected within Pumphouse Canyon since 2003, and the species has likely been extirpated at that site (Forest Service 2017, p. 3). In 2020, all 10 meadows were surveyed for butterflies and larvae; a total of 8 butterflies were detected in only Bailey Canyon and Pines Meadow Campground combined (Forest Service 2020a, p. 3), and no larval tents were found at any site (Forest Service 2020a, pp. 1–3; Hughes 2020, pers. comm.).

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 that are necessary to bring an endangered 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 likely 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 data available, those physical or biological features 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 current condition assessment report (Service 2022, entire) 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 the 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 (HCPs), or other species conservation planning efforts if new information available at the time of those 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 physical or biological features that are essential to the conservation of the species and which 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 absence of 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.

Summary of Essential Physical or Biological Features

We derive the specific physical or biological features essential to the conservation of Sacramento Mountains checkerspot butterfly from studies of the species’ habitat, ecology, and life history as described below. Additional information can be found in the current condition assessment report (Service 2022, entire; available on <https://www.regulations.gov> at Docket No. FWS-R2-ES-2023-0023).

The main larval host plant for the Sacramento Mountains checkerspot butterfly is the New Mexico beardtongue (*Penstemon neomexicanus*) (Ferris and Holland 1980, p. 7), also known as New Mexico penstemon. The larvae rely nearly entirely upon the New Mexico beardtongue during pre- and post-diapause. Because of the Sacramento Mountains checkerspot butterfly’s dependency on New Mexico beardtongue, it is vulnerable to any type of habitat degradation that reduces the host plant’s health and abundance (Service et al. 2005, p. 9). New Mexico beardtongue is a member of the Plantaginaceae, or figwort, family (Oxelman et al. 2005, p. 425). These perennial plants prefer wooded slopes or open glades in ponderosa pine and spruce/fir forests at elevations between 1,830 and 2,750 m (6,000 and 9,000 ft) (New Mexico Rare Plant Technical Council 1999, entire). New Mexico beardtongue is native to the Sacramento Mountains within Lincoln and Otero

Counties (Sivinski and Knight 1996, p. 289). The plant is perennial, has purple or violet-blue flowers, and grows to be half a meter tall (1.9 ft). New Mexico beardtongue occurs in areas with loose soils or where there has been recent soil disturbance, such as eroded banks and pocket gopher burrows (Pittenger and Yori 2003, p. ii).

The preferred adult nectar source is orange sneezeweed (*Hymenoxys hoopesii*), a native perennial forb (Service et al. 2005, p. 9). To contribute to the species’ viability, orange sneezeweed must bloom at a time that corresponds with the emergence of adult Sacramento Mountains checkerspot butterflies. Although orange sneezeweed flowers are most frequently used, the butterfly has been observed collecting nectar on various other native nectar sources (Service et al. 2005, pp. 9–10). If orange sneezeweed is not blooming during the adult flight period (*i.e.*, experiencing phenological mismatch), the butterfly’s survival and fecundity could decrease.

Before human intervention, the habitat of the Sacramento Mountains checkerspot butterfly was dynamic, with meadows forming and reconnecting due to natural wildfire regimes (Service et al. 2005, p. 21). These patterns would have facilitated natural dispersal and recolonization of meadow habitats following disturbance events, especially when there was high butterfly population density in adjacent meadows (Service et al. 2005, p. 21). Currently, spruce-fir forests punctuate suitable butterfly habitat (*i.e.*, mountain meadows), creating intrinsic barriers to butterfly dispersal and effectively isolating populations from one another (Pittenger and Yori 2003, p. 1). Preliminary genetic research suggested there is extremely low gene flow across the species’ range or between meadows surveyed (Ryan 2021, pers. comm.). If new sites are to become colonized or recolonized by the butterfly, meadow areas will need to be connected enough to allow dispersal from occupied areas. Therefore, habitat connectivity is needed for genetically healthy populations across the species’ range (Service 2022, p. 11).

We have determined that the following physical or biological features are essential to the conservation of the Sacramento Mountains checkerspot butterfly:

(1) Open meadow, grassland habitat within the larger mixed-conifer forest in high-altitude areas within the upper-montane and subalpine zones at elevations between 2,380 and 2,750 meters (m) (7,800 and 9,000 feet (ft))

within the Sacramento Mountains of southern New Mexico.

(2) The larval food plant (host plant), primarily New Mexico beardtongue (*Penstemon neomexicanus*), or other potential host plants such as other *Penstemon* species and tobacco root (*Valeriana edulis*), is present as:

(a) Patches of plants clustered together;

(b) Large, robust individual plants; and/or

(c) Stands of plants adjacent to other tobacco root plants.

(3) Access to nectar sources, primarily orange sneezeweed (*Hymenoxys hoopesii*), native Asteraceae species, and other native flowering plants.

(4) Habitat connectivity consisting of up to 890 m (2,920 ft) between populations or areas of suitable habitat to allow for dispersal and gene flow.

(5) Less than 5 percent canopy cover.

Special Management Considerations or Protection

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 activities influencing the Sacramento Mountains checkerspot butterfly and its habitat can be found in the proposed listing rule (87 FR 3739; January 25, 2022). It is possible all areas of critical habitat may require some level of management to address the current and future threats to the physical or biological features. The features essential to the conservation of this species may require special management considerations or protection to reduce the following threats: incompatible grazing by large ungulates, recreation, invasive and nonnative plants, climate change (*i.e.*, drought, altered precipitation regime), and altered fire regime. Management activities that could ameliorate these threats include, but are not limited to, erecting exclosures or other methods to remove browse pressure from large ungulates; growing and transplanting nectar sources, including orange sneezeweed, New Mexico beardtongue, and other native nectar sources; managing invasive plant species; reducing recreational use; and instituting fire management aimed at reducing tree stocking within forested areas surrounding meadows. These management activities may protect the physical or biological features for the species by improving and protecting

suitable habitat and connectivity throughout the range of the butterfly.

Criteria 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 proposing to designate critical habitat in areas within the geographical area occupied by the species at the time of listing. We also are proposing to designate specific areas outside the geographical area occupied by the species because we have determined that a designation limited to occupied areas would be inadequate to ensure the conservation of the species. Occupied areas are inadequate for the conservation of this species because the species needs to have sufficient quality and quantity of habitat for adequately resilient populations, numerous populations to create redundancy to survive catastrophic events, and enough genetic diversity to allow for adaptations to changing environmental conditions (representation) to achieve viability. Currently, the Sacramento Mountains checkerspot butterfly is extant in two locations, representing only two metapopulation units, which is insufficient to support a robust, functioning metapopulation structure and, therefore, the viability of the species. We are reasonably certain that the unoccupied areas will contribute to the conservation of the species and contain one or more of the physical or biological features and are, therefore, considered habitat for the species. Additionally, the unoccupied units qualify as “habitat” for the species because they contain the resources necessary (*i.e.*, open meadow, grassland habitat with nectar sources) to support the life processes of the Sacramento Mountains checkerspot butterfly.

To identify critical habitat units for the Sacramento Mountains checkerspot butterfly, we used a variety of sources for species data. We used literature published on the species (Ferris and Holland 1980, entire; Forest Service 1999, entire; Pittenger and Yori 2003, entire) and the conservation plan developed by the Service (2005, entire) to determine habitat needs and locations of the butterfly. We also relied on

annual Forest Service survey reports and data collected between 1999 and 2020 (Forest Service 1999, entire; Forest Service 2017, entire; Forest Service 2020a, entire) and associated mapping data (Forest Service 2020b, unpaginated) provided by the Forest Service for areas currently occupied by the Sacramento Mountains checkerspot butterfly and areas surveyed regularly. We supplemented this information with expert knowledge gathered during the development of the current condition assessment report (Service 2022, entire).

We determined that an area (in this case a meadow) was occupied at the time of listing for Sacramento Mountains checkerspot butterfly if:

(1) The meadow is located within the historical range of the species;

(2) The meadow contains at least physical or biological features (1) through (3), and (5), as described above under *Summary of Essential Physical or Biological Features*;

(3) Adults have been observed during surveys from 3 or more of the most recent consecutive years (2021 and earlier); and

(4) There is evidence of reproduction during one of the three most recent consecutive surveys (2021 and earlier).

Therefore, if meadows do not meet these criteria, we determined that those areas were unoccupied at the time of listing. The sources of data for our occupied proposed critical habitat units for the Sacramento Mountains checkerspot butterfly were the original digitized polygons provided by the Forest Service.

For areas outside the geographical area occupied by the species at the time of listing, we delineated critical habitat unit boundaries using the original digitized polygons provided by the Forest Service and the 2020 National Agricultural Imagery Program (NAIP) 0.6-meter imagery. We resampled the NAIP imagery to 1 meter using ESRI ArcGIS Pro and classified that data into two classes: open space or tree cover. We were then able to identify areas that had greater than 95 percent open canopy, as required by the species. Using the Focal Statistics results (95–100 percent) as a guide, we digitized new polygons at the 1:5000 scale and updated the original Forest Service polygons to include and connect areas that meet the definition of critical habitat for the Sacramento Mountains checkerspot butterfly.

In summary, for areas outside the geographical area occupied by the species at the time of listing, we delineated critical habitat unit boundaries using the following criteria:

(1) Areas within the historical range of the species (*i.e.*, areas where the butterfly was detected by Forest Service surveys, but not necessarily in the past 3 consecutive years).

(2) Areas with 95 percent or greater open canopy.

(3) Areas not currently occupied but presumed to be suitable habitat because they contain at least some of the essential physical or biological features.

(4) Habitat that provides connectivity due to its proximity between currently occupied and/or unoccupied areas.

When determining proposed 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 physical or biological features necessary for the Sacramento Mountains checkerspot butterfly. 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 proposed rule have been excluded by text in the proposed rule and are not proposed for designation as critical habitat. Therefore, if the critical habitat is finalized as proposed, a Federal action involving these lands

would not trigger section 7 consultation with respect to critical habitat and the requirement of no adverse modification unless the specific action would affect the physical or biological features in the adjacent critical habitat.

We propose to designate as critical habitat lands that we have determined are occupied at the time of listing (*i.e.*, currently occupied) and that contain one or more of the physical or biological features that are essential to support life-history processes of the species. We have determined that occupied areas are inadequate to ensure the conservation of the species. Therefore, we have also identified, and propose for designation as critical habitat, unoccupied areas that are essential for the conservation of the species.

Units are proposed for designation based on one or more of the physical or biological features being present to support the Sacramento Mountains checkerspot butterfly's life-history processes. Some units contain all of the identified physical or biological features and support multiple life-history processes. Some units contain only some of the physical or biological features necessary to support the Sacramento Mountains checkerspot butterfly's particular use of that habitat.

The proposed critical habitat designation is defined by the map or

maps, as modified by any accompanying regulatory text, presented at the end of this document under Proposed Regulation Promulgation. We include more detailed information on the boundaries of the critical habitat designation in the preamble of this document. 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-R2-ES-2023-0023 and on our internet site <https://www.fws.gov/about/region/southwest>.

Proposed Critical Habitat Designation

We are proposing nine units as critical habitat for the Sacramento Mountains checkerspot butterfly. The critical habitat areas we describe below constitute our current best assessment of areas that meet the definition of critical habitat for the Sacramento Mountains checkerspot butterfly. The nine areas we propose as critical habitat are: (1) Bailey Canyon; (2) Pines Meadow Campground; (3) Spud Patch Canyon; (4) Silver Springs Canyon; (5) Horse Pasture Meadow; (6) Sleepygrass Canyon; (7) Pumphouse Canyon; (8) Deerhead Canyon; and (9) Cox Canyon. Table 1 shows the proposed critical habitat units, the approximate area, land ownership, and occupancy of each unit.

TABLE 1—PROPOSED CRITICAL HABITAT UNITS FOR SACRAMENTO MOUNTAINS CHECKERSPOT BUTTERFLY
[Area estimates reflect all land within critical habitat unit boundaries, including areas being considered for exclusion]

| Unit name | Occupied | Land ownership* acres (hectares) | | | Total |
|----------------------------------|-----------|--|---------------|------------------|--------------------|
| | | Federal | Tribal | Private | |
| 1. Bailey Canyon | Yes | 200.5 (81.1) | ..... | ..... | 200.5 (81.1) |
| 2. Pines Meadow Campground | Yes | 62.2 (25.2) | ..... | 0.2 (0.08) | 62.4 (25.2) |
| 3. Spud Patch Canyon | No | 203.9 (82.5) | 22.4 (9.1) | 50.9 (20.6) | 277.2 (112.2) |
| 4. Silver Springs Canyon | No | 132.9 (53.8) | ..... | 70.5 (28.5) | 203.4 (82.3) |
| 5. Horse Pasture Meadow | No | 82.4 (33.4) | ..... | ..... | 82.4 (33.4) |
| 6. Sleepygrass Canyon | No | 123.5 (50.0) | ..... | 100.0 (40.5) | 223.5 (90.5) |
| 7. Pumphouse Canyon | No | 134.4 (54.4) | ..... | 2.2 (0.9) | 136.6 (55.3) |
| 8. Deerhead Canyon | No | 22.1 (8.9) | ..... | 11.0 (4.5) | 33.1 (13.4) |
| 9. Cox Canyon | No | 132.1 (53.5) | ..... | 285.7 (115.6) | 417.8 (169.0) |
| Total ..... | ..... | 1,093.9 (442.7) | 22.4 (9.1) | 520.5 (210.6) | 1,636.9 (662.4) |

* **Note:** Area sizes may not sum due to rounding.

We present brief descriptions of all units, and reasons why they meet the definition of critical habitat for the Sacramento Mountains checkerspot butterfly, below. All areas in the unoccupied units (Units 3 through 9) meet the definition of critical habitat because they are outside the geographical area occupied by the species at the time of listing, were

historically occupied by the Sacramento Mountains checkerspot butterfly, and are essential for the conservation of the species (see each unit description below for details). Units 3 through 9 qualify as habitat for the species because they contain the resources necessary (*i.e.*, open meadow, grassland habitat with nectar sources) to support the life processes of the Sacramento Mountains

checkerspot butterfly. The Forest Service is assessing the unoccupied meadows to prioritize them for habitat restoration efforts that would benefit the Sacramento Mountains checkerspot butterfly. Once restored, these areas will be used to establish future occupancy via translocations and reintroductions. Establishing new populations in suitable habitat through captive rearing

and reintroduction or translocation is part of our recovery planning efforts for the Sacramento Mountains checkerspot butterfly. Individuals from extant meadows (Bailey Canyon and Pines Meadow Campground) may be translocated to currently unoccupied meadows once they contain suitable habitat. Additionally, captive rearing efforts are ongoing from which we plan to reintroduce individuals to restored meadows. We are reasonably certain that these areas will contribute to the conservation of the Sacramento Mountains checkerspot butterfly because these areas were historically occupied by the species and, since the species is currently restricted to two canyon systems, it is necessary to expand the existing population into other areas to reach recovery. Furthermore, we are working closely with the Forest Service, where a majority of the proposed critical habitat falls on Forest Service-managed lands, to ensure conservation measures and habitat restoration are conducted and ongoing in all areas possible to support the species for translocations and reintroductions. Additionally, the threats specified in each unit (see descriptions below), can be managed in ways to ensure survival and future reproduction of reintroduced populations. Site-specific reasons that we are reasonably certain that each area will contribute to the conservation of the species are explained below.

Unit 1: Bailey Canyon

Unit 1 consists of approximately 200.5 ac (81.1 ha) and is in the Sacramento Ranger District in the northwestern portion of the butterfly's range. The unit is occupied and is located entirely on the Lincoln National Forest. This unit contains physical or biological features (1) through (3) and (5), as described above under *Summary of Essential Physical or Biological Features*.

Threats that are occurring in this area include incompatible grazing by large ungulates, recreation, invasive and nonnative plants, climate change, and altered fire regime. The Forest Service is actively managing this unit by surveying for the butterfly during the active period, erecting exclosures to allow habitat to recover, and planting New Mexico beardtongue and other native nectar sources. This unit may require special management considerations to control invasive plant species, reduce recreational use, and reduce or remove browse pressure from large ungulates.

Unit 2: Pines Meadow Campground

Unit 2 consists of approximately 62.4 ac (25.2 ha) and is located in the northwestern portion of the butterfly's range. The unit is primarily in the Sacramento Ranger District. The unit is occupied and contains all of the physical or biological features described above under *Summary of Essential Physical or Biological Features*.

Threats that are occurring in this area include incompatible grazing by large ungulates, recreation, invasive and nonnative plants, climate change, and altered fire regime. The Forest Service is actively managing some areas of this unit by surveying for the butterfly during the species' active period and erecting exclosures to allow habitat to recover. This unit may require special management considerations to control invasive plant species, reduce recreational use, and reduce or remove browse pressure from large ungulates.

Unit 3: Spud Patch Canyon

Unit 3 consists of a total of approximately 277.2 ac (112.2 ha) and is located in the northeastern portion of the butterfly's historical range. The unit is primarily within the Sacramento Ranger District. This unit contains physical or biological features (1) through (3) and (5), as described above under *Summary of Essential Physical or Biological Features*. This unit is unoccupied and is essential for the conservation of the species because it contains most of the physical or biological features essential to the species and was historically occupied by the species. This unit would provide a suitable reintroduction site for the species and once established, would increase the species redundancy and representation by serving as a separate source population should any catastrophic events impact the other meadows proposed for designation as critical habitat. The Forest Service is currently conducting riparian restoration in this area, which will help expand and revitalize habitat for the Sacramento Mountains checkerspot butterfly through the reestablishment of native plant species. Because this unit is mostly located on Federal land and would contribute to metapopulation dynamics and genetic rescue should a population be reestablished, we are reasonably certain that the unit will contribute to the conservation of the species.

Threats that are occurring in this area include incompatible grazing by large ungulates, recreation, invasive and nonnative plants, climate change, and altered fire regime. The Forest Service is

surveying for adult butterflies annually in some of the areas on the Lincoln National Forest in this unit. Within this unit, a total of 22.4 ac (9.1 ha) of land owned by the Mescalero Apache Tribe is being considered for exclusion.

Unit 4: Silver Springs Canyon

Unit 4 consists of approximately 203.4 ac (82.3 ha) in the north-central portion of the butterfly's historical range and lies to the northeast of the village of Cloudcroft. The unit is partly within the Sacramento Ranger District and is unoccupied. This unit contains physical or biological features (1), (3), and (5), as described above under *Summary of Essential Physical or Biological Features*. This unit is essential for the conservation of the species because it contains most of the physical or biological features essential to the conservation of the species and would increase species redundancy and representation by serving as a separate population from the other meadows proposed for designation as critical habitat if a population is reestablished in this areas in the future, contributing to metapopulation dynamics while enhancing connectivity between meadows with recently detected butterflies and meadows that contain suitable habitat. Because this unit is primarily on federally owned lands and abuts areas that are currently occupied by the Sacramento Mountains checkerspot butterfly, we are reasonably certain that the unit will contribute to the conservation of the species.

Threats that are occurring in this area include incompatible grazing by large ungulates, recreation, invasive and nonnative plants, climate change, and altered fire regime. The Forest Service is also surveying the areas on the Lincoln National Forest in this unit annually for adult butterflies.

Unit 5: Horse Pasture Meadow

Unit 5 consists of approximately 82.4 ac (33.4 ha) and is located in the central portion of the butterfly's historical range. It lies to the east of the village of Cloudcroft. This unit is unoccupied, contains all of the physical or biological features described above under *Summary of Essential Physical or Biological Features*, and is entirely on the Lincoln National Forest in the Sacramento Ranger District. This unit is essential for the conservation of the species because it contains all of the physical or biological features essential to the conservation of the species and would increase species redundancy by serving as a separate population from other meadows proposed for designation as critical habitat should a

population be reestablished in this area in the future, contributing to metapopulation dynamics while enhancing connectivity between meadows with recently detected butterflies and meadows that contain suitable habitat. Because this unit abuts an area that is currently occupied by the Sacramento Mountains checkerspot butterfly, we are reasonably certain that the unit will contribute to the conservation of the species.

Threats that are occurring in this area include incompatible grazing by large ungulates, recreation, invasive and nonnative plants, climate change, and altered fire regime. Suitable habitat in Horse Pasture Meadow was previously eliminated by logging to create a helicopter pad. The butterfly has not been detected in this unit since construction of the helicopter pad, which was constructed for helicopters that transport people and supplies to fight forest fires. The helicopter pad is no longer there, and there is open meadow habitat. This unit has been somewhat revegetated, and New Mexico beardtongue and nectar sources now exist in this area. Additional habitat restoration techniques could be used to restore butterfly habitat in this area. Forest Service is planning to actively manage this former habitat to encourage species recovery.

Unit 6: Sleepygrass Canyon

Unit 6 consists of approximately 223.5 ac (90.5 ha) and is located in the central portion of the butterfly's historical range, east of the village of Cloudcroft. This unit is unoccupied; 55.3 percent of the unit is located on the Lincoln National Forest in the Sacramento Ranger District, and 44.7 percent is located on privately owned land. This unit contains all of the physical or biological features described above under *Summary of Essential Physical or Biological Features*. This unit is essential for the conservation of the species because it contains all of the physical or biological features and would increase species redundancy by serving as a separate population from other meadows proposed for designation as critical habitat should a population be reestablished in this area in the future, while enhancing connectivity between meadows with recently detected butterflies and meadows that contain suitable habitat. Because this unit would contribute to metapopulation dynamics should a population be reestablished, is located partially on Federal land, and abuts two other areas that contain several of the essential physical or biological features for the Sacramento Mountains

checkerspot butterfly, we are reasonably certain that the unit will contribute to the conservation of the species.

Threats that are occurring in this area include incompatible grazing by large ungulates, recreation, invasive and nonnative plants, climate change, and altered fire regime. Forest Service is surveying areas on the Lincoln National Forest in this unit annually for adult butterflies.

Unit 7: Pumphouse Canyon

Unit 7 consists of a total of approximately 136.6 ac (55.3 ha) and is located in the southern portion of the butterfly's range, southeast of the village of Cloudcroft. The unit is unoccupied and contains physical or biological features (1) through (3) and (5), as described above under *Summary of Essential Physical or Biological Features*. This unit is essential for the conservation of the species because it contains several of the physical or biological features essential to the conservation of the species and would increase species redundancy and representation by, while enhancing connectivity between meadows with recently detected butterflies and meadows that contain suitable habitat, and serving as a separate population from other meadows proposed for designation as critical habitat should a population be reestablished in this area in the future. Because this unit abuts an area that contains several of the essential physical or biological features for the Sacramento Mountains checkerspot butterfly, and is located mostly on Federal lands, we are reasonably certain that the unit will contribute to the conservation of the species.

A portion of this unit is part of an active grazing allotment. The Forest Service consults on active grazing allotment permits every 5 years. Threats that are occurring in this area include incompatible grazing by large ungulates (including livestock), recreation, invasive and nonnative plants, climate change, and altered fire regime. The Forest Service restored this area using invasive species management, and native habitat has already been established. The Forest Service is also surveying the portions of this unit located on the Lincoln National Forest for adult butterflies annually.

Unit 8: Deerhead Canyon

Unit 8 consists of approximately 33.1 ac (13.4 ha) and is southeast of the village of Cloudcroft in the southern portion of the butterfly's historical range. This unit is unoccupied and contains physical or biological features

(1) through (3) and (5), as described above under *Summary of Essential Physical or Biological Features*. This unit is essential for the conservation of the species because it contains most of the physical or biological features essential to the conservation of the species, and would increase species redundancy and representation by serving as a separate source population should any catastrophic events impact the other meadows proposed for designation as critical habitat should a population be reestablished in this area in the future, while enhancing connectivity between meadows with suitable habitat. Because this unit is mostly located on Federal land and would contribute to metapopulation dynamics and genetic rescue if a population were to be reestablished in this area, we are reasonably certain that the unit will contribute to the conservation of the species.

Threats that are occurring in this area include incompatible grazing by large ungulates, recreation, invasive and nonnative plants, climate change, and altered fire regime. The Forest Service is surveying the portions of this unit on the Lincoln National Forest for adult butterflies annually.

Unit 9: Cox Canyon

Unit 9 consists of approximately 417.8 ac (169.0 ha) and is located in the southern portion of the butterfly's historical range, south of the village of Cloudcroft. This unit is unoccupied; 31.62 percent is located on the Lincoln National Forest, and 68.38 percent is located on privately owned land. This unit contains physical or biological features (1) through (3) and (5), as described above under *Summary of Essential Physical or Biological Features*. This unit is essential for the conservation of the species because it contains most of the physical or biological features essential to the conservation of the species and would increase species redundancy and representation by serving as a separate source population from other meadows proposed for designation as critical habitat if a population were to be reestablished here, while enhancing connectivity between meadows with recently detected butterflies and meadows that contain suitable habitat. Because this unit would contribute to metapopulation dynamics should a population be reestablished, we are reasonably certain that the unit will contribute to the conservation of the species.

Threats that are occurring in this area include incompatible grazing by large ungulates, recreation, invasive and

nonnative plants, climate change, and altered fire regime. Forest Service is surveying the portions of this unit on the Lincoln National Forest for adult butterflies annually.

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. In addition, section 7(a)(4) of the Act requires Federal agencies to confer with the Service on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under the Act or result in the destruction or adverse modification of proposed critical habitat.

We published a final rule revising the 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 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.

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 Service 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 reinitiate 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: (a) if the amount or extent of taking specified in the incidental take statement is exceeded; (b) 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; (c) 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 written concurrence; or (d) if a new species is listed or critical habitat designated that may be affected by the identified action. The reinitiation requirement applies only to actions that remain subject to some discretionary Federal involvement or control. As provided in 50 CFR 402.16, the requirement to reinitiate consultations for new species listings or critical habitat designation does not apply to certain agency actions (*e.g.*,

land management plans issued by the Bureau of Land Management in certain circumstances.

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 for the conservation of the listed species. As discussed above, the role of critical habitat is to support the physical or biological features 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:

(1) Actions that would remove or alter Sacramento Mountains checkerspot butterfly’s native food plants (New Mexico beardtongue, orange sneezeweed, and other native nectar sources), or tobacco root. Such activities could include, but are not limited to, grading, leveling, plowing, mowing, burning, herbicide or pesticide spraying, incompatible grazing, or otherwise disturbing non-forested openings that result in the death of or injury to eggs, larvae, or adult Sacramento Mountains checkerspot butterflies. These activities could significantly impair or eliminate the habitat necessary for the taxon’s breeding, foraging, sheltering, or other essential life functions.

(2) Actions that would alter the soil structure on which native food plants are dependent. Such activities could include, but are not limited to, erosion control activities, such as the installation of structures or vegetation and grading for construction purposes. These activities could significantly impair or eliminate the habitat that is essential for the survival and reproduction of Sacramento Mountains checkerspot butterfly’s native food plants.

Exemptions

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

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 geographical 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 (INRMP) prepared under section 101 of the Sikes Act Improvement Act of 1997 (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. No DoD lands with a completed INRMP are within the proposed critical habitat designation.

Consideration 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 designated 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 (hereafter, the “2016 Policy”); 81 FR 7226, February 11, 2016), 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).

In considering whether to exclude a particular area from the designation, we identify the benefits of including the area in the designation, identify the benefits of excluding the area from the designation, and evaluate whether the benefits of exclusion outweigh the benefits of inclusion. If the analysis indicates that the benefits of exclusion outweigh the benefits of inclusion, the Secretary may exercise discretion to exclude the area only if such exclusion would not 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. In our final rules, we explain any decision to exclude areas, as well as decisions not to exclude, to demonstrate that the decision is reasonable. We describe below the process that we use for taking into consideration each category of impacts and any initial analyses of the relevant impacts.

Consideration of Economic Impacts

Section 4(b)(2) of the Act and its implementing regulations require that we consider the economic impact that may result from a designation of critical habitat. To assess the probable economic impacts of a designation, we must first evaluate specific land uses or activities and projects that may occur in the area of the critical habitat. We then must evaluate the impacts that a specific critical habitat designation may have on restricting or modifying specific land uses or activities for the benefit of the species and its habitat within the areas proposed. We then identify which conservation efforts may be the result of the species being listed under the Act versus those attributed solely to the designation of critical habitat for this particular species. The probable economic impact of a proposed critical habitat designation is analyzed by comparing scenarios both “with critical habitat” and “without critical habitat.”

The “without critical habitat” scenario represents the baseline for the analysis, which includes the existing regulatory and socio-economic burden imposed on landowners, managers, or other resource users potentially affected by the designation of critical habitat (e.g., under the Federal listing as well as other Federal, State, and local regulations). Therefore, the baseline represents the costs of all efforts attributable to the listing of the species under the Act (i.e., conservation of the species and its habitat incurred regardless of whether 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 would not be expected without 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 use when evaluating the benefits of inclusion and exclusion of particular areas from the final designation of critical habitat should we choose to conduct a discretionary 4(b)(2) exclusion analysis.

Executive Orders (E.O.s) 12866 and 13563 direct Federal agencies to assess the costs and benefits of available regulatory alternatives in quantitative (to the extent feasible) and qualitative terms. Consistent with the E.O. regulatory analysis requirements, our effects analysis under the Act may take into consideration impacts to both directly and indirectly affected entities, where practicable and reasonable. If sufficient data are available, we assess to the extent practicable the probable impacts to both directly and indirectly affected entities Section 3(f) of E.O. 12866 identifies four criteria when a regulation is considered a “significant regulatory action” and requires additional analysis, review, and approval if met. The criterion relevant here is whether the designation of critical habitat may have an economic effect of \$200 million or more in any given year (section 3(f)(1)). Therefore, our consideration of economic impacts uses a screening analysis to assess whether a designation of critical habitat for Sacramento Mountains checkerspot butterfly is likely to exceed the economically significant threshold.

For this particular designation, we developed an incremental effects memorandum (IEM) considering the probable incremental economic impacts that may result from this proposed designation of critical habitat. The information contained in our IEM was then used to develop a screening analysis of the probable effects of the designation of critical habitat for the Sacramento Mountains checkerspot butterfly (IEc 2023, entire). We began by conducting a screening analysis of the proposed designation of critical habitat in order to focus our analysis on the key factors that are likely to result in incremental economic impacts. The purpose of the screening analysis is to filter out particular geographical areas of critical habitat that are already subject to such protections and are, therefore, unlikely to incur incremental economic impacts. In particular, the screening analysis considers baseline costs (i.e., absent critical habitat designation) and includes any probable incremental economic impacts where land and water use may already be subject to conservation plans, land management plans, best management practices, or regulations that protect the habitat area as a result of the Federal listing status of the species. Ultimately, the screening analysis allows us to focus our analysis on evaluating the specific areas or sectors that may incur probable incremental economic impacts as a result of the designation.

The presence of the listed species in occupied areas of critical habitat means that any destruction or adverse modification of those areas is also likely to jeopardize the continued existence of the species. Therefore, designating occupied areas as critical habitat typically causes little if any incremental impact above and beyond the impact of listing the species. As a result, we generally focus the screening analysis on areas of unoccupied critical habitat (unoccupied units or unoccupied areas within occupied units). Overall, the screening analysis assesses whether designation of critical habitat is likely to result in any additional management or conservation efforts that may incur incremental economic impacts. This screening analysis combined with the information contained in our IEM constitute what we consider to be our draft economic analysis (DEA) of the proposed critical habitat designation for the Sacramento Mountains checkerspot butterfly; our DEA is summarized in the narrative below.

As part of our screening analysis, we considered the types of economic activities that are likely to occur within the areas likely affected by the critical habitat designation. In our evaluation of the probable incremental economic impacts that may result from the proposed designation of critical habitat for the Sacramento Mountains checkerspot butterfly, first we identified, in the IEM dated November 3, 2022, probable incremental economic impacts associated with the following categories of activities: (1) Fire management (*i.e.*, fuels reduction projects, controlled burns); (2) habitat restoration (*i.e.*, growing and planting native plants, building and maintaining enclosures, selective watering); (3) erosion control; (4) invasive plant management; (5) recreation management; (6) road construction and maintenance; and (7) grazing. We considered each industry or category individually. Additionally, we considered whether their activities have any Federal involvement. Critical habitat designation generally will not affect activities that do not have any Federal involvement; under the Act, designation of critical habitat affects only activities conducted, funded, permitted, or authorized by Federal agencies. In areas where the Sacramento Mountains checkerspot butterfly is present, Federal agencies are already required to consult with the Service under section 7 of the Act on activities they fund, permit, or implement that may affect the species. If we finalize this proposed critical habitat designation,

Federal agencies would be required to consider the effects of their actions on the designated habitat, and if the Federal action may affect critical habitat, our consultations will include an evaluation of measures to avoid the destruction or adverse modification of critical habitat.

In our IEM, we attempted to clarify the distinction between the effects that would result from the species being listed and those attributable to the critical habitat designation (*i.e.*, difference between the jeopardy and adverse modification standards) for the Sacramento Mountains checkerspot butterfly's critical habitat. The IEM outlines our rationale concerning this limited distinction between baseline conservation efforts and incremental impacts of the designation of critical habitat for this species. This evaluation of the incremental effects has been used as the basis to evaluate the probable incremental economic impacts of this proposed designation of critical habitat.

The proposed critical habitat designation for the Sacramento Mountains checkerspot butterfly includes approximately 1,636.9 acres (662.4 hectares) in nine units in Otero County, New Mexico. Two of the units are occupied, and seven of the units are unoccupied, by the Sacramento Mountains checkerspot butterfly. The unoccupied areas comprise 84 percent of the total proposed critical habitat area. Approximately 32 percent of the total proposed designation is located on private lands, 67 percent on Federal lands, and 1 percent on Tribal lands.

For the areas that are occupied by the species (16 percent of the proposed critical habitat designation), the economic impacts of designating critical habitat under section 7 of the Act are likely limited to additional administrative efforts to consider adverse modification under section 7. This is because any activities occurring in these areas and that require Federal approval or funding will be subject to section 7 consultation requirements regardless of critical habitat designation because the species may be present and any recommended project modifications to avoid adversely modifying critical habitat are the same as those needed to avoid jeopardizing the species.

For the areas unoccupied by the species (84 percent of the proposed critical habitat designation), incremental section 7 costs may include the administrative costs of consultation, as well as the costs of developing and implementing conservation measures for the species. This may include invasive species management activities, feral horse/large ungulate management

activities (including fencing), and other land management activities by the Forest Service on the Lincoln National Forest. On private lands, consultation activities and related conservation actions are anticipated to be limited. Because a portion of Unit 3 (Spud Patch Canyon) is on Mescalero Apache Tribal land, we are considering that area for exclusion. Therefore, the probable economic impact may be less than anticipated for this unit.

The overall incremental costs of critical habitat designation for the Sacramento Mountains checkerspot butterfly are anticipated to be less than \$117,000 per year during the next 10 years. In total, fewer than one programmatic consultation, one formal consultation, two informal consultations, and six technical assistance efforts are anticipated to occur annually in proposed critical habitat areas. The incremental administrative costs of consultations are approximately \$32,000 per year (2022 dollars). Project modifications in unoccupied habitat for the Sacramento Mountains checkerspot butterfly have the potential to increase conservation in these areas, resulting in an incremental benefit. Data limitations preclude our ability to monetize these benefits; however, project modifications are unlikely to exceed \$200 million in a given year. Data limitations impede our ability to confidently estimate the total incremental costs of establishing critical habitat for the Sacramento Mountains checkerspot butterfly. However, available information suggests it is unlikely that the incremental costs will reach \$200 million in a given year based on the estimated annual number of consultations and per-unit consultation costs. The designation is unlikely to trigger additional requirements under State or local regulations and is not expected to affect property values.

We are soliciting data and comments from the public on the DEA discussed above. During the development of a final designation, we will consider the information presented in the DEA and any additional information on economic impacts we receive during the public comment period to determine whether any specific areas should be excluded from the final critical habitat designation under the authority of section 4(b)(2) of the Act, our implementing regulations at 50 CFR 424.19, and the 2016 Policy. We may exclude an area from critical habitat if we determine that the benefits of excluding the area outweigh the benefits of including the area, provided the exclusion will not result in the extinction of this species.

Consideration of National Security Impacts

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), then national-security or homeland-security concerns are not a factor in the process of determining what areas meet the definition of “critical habitat.” However, the Service must still consider impacts on national security, including homeland security, on those lands or areas not covered by section 4(a)(3)(B)(i) because section 4(b)(2) requires the Service to consider those impacts whenever it designates critical habitat. Accordingly, if DoD, Department of Homeland Security (DHS), or another Federal agency has requested exclusion based on an assertion of national-security or homeland-security concerns, or we have otherwise identified national-security or homeland-security impacts from designating particular areas as critical habitat, we generally have reason to consider excluding those areas.

However, we cannot automatically exclude requested areas. When DoD, DHS, or another Federal agency requests exclusion from critical habitat on the basis of national-security or homeland-security impacts, we must conduct an exclusion analysis if the Federal requester provides information, including a reasonably specific justification of an incremental impact on national security that would result from the designation of that specific area as critical habitat. That justification could include demonstration of probable impacts, such as impacts to ongoing border-security patrols and surveillance activities, or a delay in training or facility construction, as a result of compliance with section 7(a)(2) of the Act. If the agency requesting the exclusion does not provide us with a reasonably specific justification, we will contact the agency to recommend that it provide a specific justification or clarification of its concerns relative to the probable incremental impact that could result from the designation. If we conduct an exclusion analysis because the agency provides a reasonably specific justification or because we decide to exercise the discretion to conduct an exclusion analysis, we will defer to the expert judgment of DoD, DHS, or another Federal agency as to:

- (1) Whether activities on its lands or waters, or its activities on other lands or

waters, have national-security or homeland-security implications; (2) the importance of those implications; and (3) the degree to which the cited implications would be adversely affected in the absence of an exclusion. In that circumstance, in conducting a discretionary section 4(b)(2) exclusion analysis, we will give great weight to national-security and homeland-security concerns in analyzing the benefits of exclusion.

In preparing this proposal, we have determined that the lands within the proposed designation of critical habitat for the Sacramento Mountains checkerspot butterfly are not owned or managed by the DoD or DHS, and, therefore, we anticipate no impact on national security or homeland security.

Consideration of 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. 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 HCPs, safe harbor agreements (SHAs), or candidate conservation agreements with assurances (CCAAs)—or whether there are non-permitted conservation agreements and partnerships that may be impaired by designation of, or exclusion from, critical habitat. In addition, we look at whether Tribal conservation plans or partnerships, Tribal resources, or government-to-government relationships of the United States with Tribal entities may be affected by the designation. We also consider any State, local, social, or other impacts that might occur because of the designation.

When analyzing other relevant impacts of including a particular area in a designation of critical habitat, we weigh those impacts relative to the conservation value of the particular area. To determine the conservation value of designating a particular area, we consider a number of factors, including, but not limited to, the additional regulatory benefits that the 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.

In the case of the Sacramento Mountains checkerspot butterfly, the benefits of critical habitat include public awareness of the presence of the Sacramento Mountains checkerspot butterfly and the importance of habitat protection, and, where a Federal nexus exists, increased habitat protection for the Sacramento Mountains checkerspot butterfly due to protection from destruction or adverse modification of critical habitat. Continued implementation of an ongoing management plan that provides conservation equal to or more than the protections that result from a critical habitat designation would reduce those benefits of including that specific area in the critical habitat designation.

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.

Tribal Lands

Several Executive Orders, Secretary’s Orders, and policies concern working with Tribes. These guidance documents generally confirm our trust responsibilities to Tribes, recognize that Tribes have sovereign authority to control Tribal lands, emphasize the importance of developing partnerships with Tribal governments, and direct the Service to consult with Tribes on a government-to-government basis.

A joint Secretary’s Order that applies to both the Service and NMFS—Secretary’s Order 3206, *American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act* (June 5, 1997) (S.O. 3206)—is the most comprehensive of the various guidance documents related to Tribal relationships and Act implementation, and it provides the most detail directly relevant to the designation of critical habitat. In addition to the general direction discussed above, the appendix to S.O. 3206 explicitly recognizes the right of Tribes to participate fully in any listing process that may affect Tribal rights or Tribal trust resources; this includes the designation of critical habitat. Section 3(B)(4) of the appendix requires the Service to consult with affected Tribes, “when considering the designation of critical habitat in an area that may impact Tribal trust resources, Tribally-

owned fee lands, or the exercise of Tribal rights.” That provision also instructs the Service to avoid including Tribal lands within a critical habitat designation unless the area is essential to conserve a listed species, and it requires the Service to “evaluate and document the extent to which the conservation needs of the listed species can be achieved by limiting the designation to other lands.”

Our implementing regulations at 50 CFR 424.19 and the 2016 Policy are consistent with S.O. 3206. When we undertake a discretionary exclusion analysis under section 4(b)(2) of the Act, in accordance with S.O. 3206, we consult with any Tribe whose Tribal trust resources, tribally owned fee lands, or Tribal rights may be affected by including any particular areas in the designation. We evaluate the extent to which the conservation needs of the species can be achieved by limiting the designation to other areas and give great weight to Tribal concerns in analyzing the benefits of exclusion.

However, S.O. 3206 does not override the Act’s statutory requirement of designation of critical habitat. As stated above, we must consult with any Tribe when a designation of critical habitat may affect Tribal lands or resources. The Act requires us to identify areas that meet the definition of “critical habitat” (*i.e.*, areas occupied at the time of listing that contain the essential physical or biological features that may require special management considerations or protection and unoccupied areas that are essential to the conservation of a species), without regard to land ownership. While S.O. 3206 provides important direction, it expressly states that it does not modify the Secretary’s statutory authority under the Act or other statutes. The proposed critical habitat designation includes Mescalero Apache Tribal lands.

Mescalero Apache Tribal Resources— The Mescalero Apache Tribe owns 22.4 ac (9.1 ha) of land in the Spud Patch Canyon Unit (Unit 3). The Mescalero Apache Tribe does not have any conservation plans regarding the Sacramento Mountains checkerspot butterfly. We solicited information from the Mescalero Apache Tribe within the range of the Sacramento Mountains checkerspot butterfly to inform the development of the current condition assessment report, but we did not receive a response. We also provided the Mescalero Apache Tribe the opportunity to review a draft of the current condition assessment report and provide input prior to making our final determination on the status of the Sacramento Mountains checkerspot

butterfly. The Mescalero Apache Tribe is a valued partner in endangered species conservation within the State of New Mexico. We have recently invited the Mescalero Apache Tribe to participate in conducting surveys for the Sacramento Mountains checkerspot butterfly on Forest Service land. We recognize and endorse their fundamental right to provide for Tribal resource management activities and we will continue to coordinate with the Mescalero Apache Tribe on this rulemaking.

Summary of Exclusions Considered Under 4(b)(2) of the Act

We are considering excluding the following areas under section 4(b)(2) of the Act from the final critical habitat designation for the Sacramento Mountains checkerspot butterfly: 22.4 ac (9.1 ha) of land owned by the Mescalero Apache Tribe in Unit 3 of the Spud Patch Canyon Unit based on Tribal resources and government-to-government relationships of the United States with Tribal entities. We specifically solicit comments on the inclusion or exclusion of such areas. If through this proposed rule’s public comment period (see **DATES**, above) we receive information that we determine indicates that there are potential economic, national security, or other relevant impacts from designating particular areas as critical habitat, then as part of developing the final designation of critical habitat, we will evaluate that information and may conduct a discretionary exclusion analysis to determine whether to exclude those areas under authority of section 4(b)(2) of the Act and our implementing regulations at 50 CFR 424.19. If we receive a request for exclusion of a particular area and after evaluation of supporting information we do not exclude, we will fully describe our decision in the final rule for this action.

Required Determinations

Clarity of the Rule

We are required by E.O.s 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

- (1) Be logically organized;
- (2) Use the active voice to address readers directly;
- (3) Use clear language rather than jargon;
- (4) Be divided into short sections and sentences; and
- (5) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in **ADDRESSES**. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

Regulatory Planning and Review—Executive Orders 12866, 13563, and 14094

Executive Order 14094 reaffirms the principles of E.O. 12866 and E.O. 13563 and states that regulatory analysis should facilitate agency efforts to develop regulations that serve the public interest, advance statutory objectives, and are consistent with E.O. 12866, E.O. 13563, and the Presidential Memorandum of January 20, 2021 (Modernizing Regulatory Review). Regulatory analysis, as practicable and appropriate, shall recognize distributive impacts and equity, to the extent permitted by law. 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 final rule in a manner consistent with these requirements.

E.O. 12866, as reaffirmed by E.O. 13563 and E.O. 14094, provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB) will review all significant rules. OIRA has determined that this rule is not significant.

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 whether 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 as understood in light of 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 would be directly regulated if we adopt the proposed critical habitat designation. The RFA does not require evaluation of the potential impacts to entities not directly regulated. Moreover, Federal agencies are not small entities. Therefore, because no small entities would be directly regulated by this rulemaking, the Service certifies that, if made final as proposed, the proposed critical habitat

designation will not have a significant economic impact on a substantial number of small entities.

In summary, we have considered whether the proposed designation would result in a significant economic impact on a substantial number of small entities. For the above reasons and based on currently available information, we certify that, if made final, the proposed critical habitat designation will not have a significant economic impact on a substantial number of small business entities. Therefore, an initial 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 this proposed critical habitat designation would significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action, and no statement of energy effects is required.

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

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

(1) This proposed rule would 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 are not likely to 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 that this rule would 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. Therefore, 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 the Sacramento Mountains checkerspot butterfly in a takings implications assessment. The Act does not authorize the Service 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 for the proposed designation of critical habitat for the Sacramento Mountains checkerspot butterfly, and it concludes that, if adopted, this designation of critical habitat 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 proposed 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 proposed critical habitat designation with, appropriate State resource agencies. 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, the proposed rule does not have substantial direct effects either on the States, or on the relationship between the Federal government and the States, or on the distribution of powers and responsibilities among the various levels of government. The proposed 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 physical or biological features 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 would 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 E.O. 12988 (Civil Justice Reform), the Office of the Solicitor has determined that the rule would not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the Order. We have proposed designating critical habitat in accordance with the provisions of the Act. To assist the public in understanding the habitat needs of the species, this proposed rule identifies the physical or biological features essential to the conservation of the species. The proposed areas of critical habitat are presented on maps, and the proposed 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 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.)

Regulations adopted pursuant to section 4(a) of the Act are exempt from the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 et seq.) and do not require an environmental analysis under NEPA. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This includes listing, delisting, and reclassification rules, as well as critical habitat designations. In a line of cases starting with *Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. 1995), the courts have upheld this position.

However, when any of the areas that meet the definition of “critical habitat” for the species are in States within the Tenth Circuit, such as that of the

Sacramento Mountains checkerspot butterfly, we undertake a NEPA analysis for that critical habitat designation consistent with the Tenth Circuit ruling in *Catron County Board of Commissioners v. U.S. Fish and Wildlife Service*, 75 F.3d 1429 (10th Cir. 1996). We invite the public to comment on the extent to which this proposed critical habitat designation may have a significant impact on the human environment or fall within one of the categorical exclusions for actions that have no individual or cumulative effect on the quality of the human environment. We will complete our analysis, in compliance with NEPA, before finalizing this proposed rule.

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), E.O. 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 federally recognized Tribes on a government-to-government basis. In accordance with Secretary’s 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 solicited information from the Mescalero Apache Nation within the range of the Sacramento Mountains checkerspot butterfly to inform the development of the current condition assessment report, but we did not receive a response. We will continue to work with Tribal entities during the development of a final rule for the designation of critical habitat for the Sacramento Mountains checkerspot butterfly.

References Cited

A complete list of references cited in this rulemaking is available on the internet at <https://www.regulations.gov> and upon request from the New Mexico Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Authors

The primary authors of this proposed rule are the staff members of the Fish

and Wildlife Service’s Species Assessment Team and the New Mexico Ecological Services Field Office.

List of Subjects in 50 CFR Part 17

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

Proposed Regulation Promulgation

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

PART 17—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; 1531–1544; and 4201–4245, unless otherwise noted.

■ 2. In § 17.95, amend paragraph (i) by adding an entry for “Sacramento Mountains Checkerspot Butterfly (Euphydryas anicia cloudcrofti)” following the entry for “Quino Checkerspot Butterfly (Euphydryas editha quino)” to read as follows:

§ 17.95 Critical habitat—fish and wildlife.

* * * * *

(i) Insects.

* * * * *

Sacramento Mountains Checkerspot Butterfly (Euphydryas anicia cloudcrofti)

(1) Critical habitat units are depicted for Otero County, New Mexico, on the maps in this entry.

(2) Within these areas, the physical or biological features essential to the conservation of the Sacramento Mountains checkerspot butterfly consist of the following components:

(i) Open meadow, grassland habitat within the larger mixed-conifer forest in high-altitude areas within the upper-montane and subalpine zones at elevations between 2,380 and 2,750 meters (m) (7,800 and 9,000 feet (ft)) within the Sacramento Mountains of southern New Mexico.

(ii) The larval food plant (host plant), primarily New Mexico beardtongue (Penstemon neomexicanus), or other potential host plants such as other Penstemon species and tobacco root (Valeriana edulis), is present as:

- (A) Patches of plants clustered together;
(B) Large, robust individual plants; and/or
(C) Stands of plants adjacent to other tobacco root plants.

(iii) Access to nectar sources, primarily orange sneezeweed (Hymenoxis hoopesii), native Asteraceae species, and other native flowering plants.

(iv) Habitat connectivity consisting of less than 890 m (2,920 ft) between populations or areas of suitable habitat to allow for dispersal and gene flow.

(v) Less than 5 percent canopy cover.

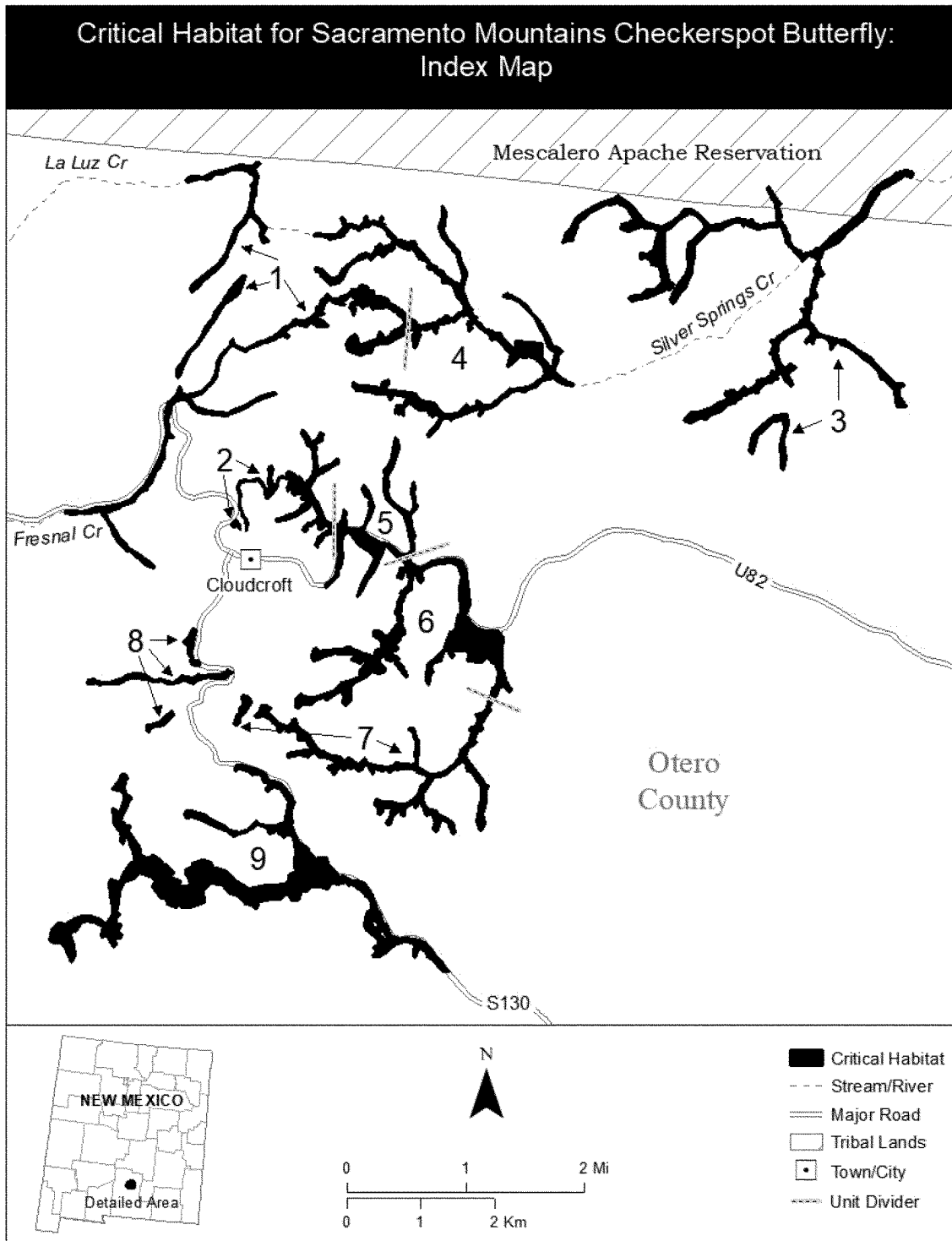
(3) Critical habitat does not include manmade structures (such as buildings, aqueducts, runways, roads, and other paved areas) and the land on which they are located existing within the legal boundaries on the effective date of the final rule.

(4) Data layers defining map units were created using U.S. Department of Agriculture, Forest Service shapefiles delimiting the known range of the species based on surveys. Then additional areas were mapped using satellite imagery of meadow habitat within the appropriate elevation (2,380 to 2,750 m (7,800 to 9,000 feet)). 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/about/region/southwest, at https://www.regulations.gov at Docket No. FWS–R2–ES–2023–0023, and at the field office responsible for this designation. 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:

Figure 1 to Sacramento Mountains Checkerspot Butterfly (Euphydryas anicia cloudcrofti) paragraph (5)

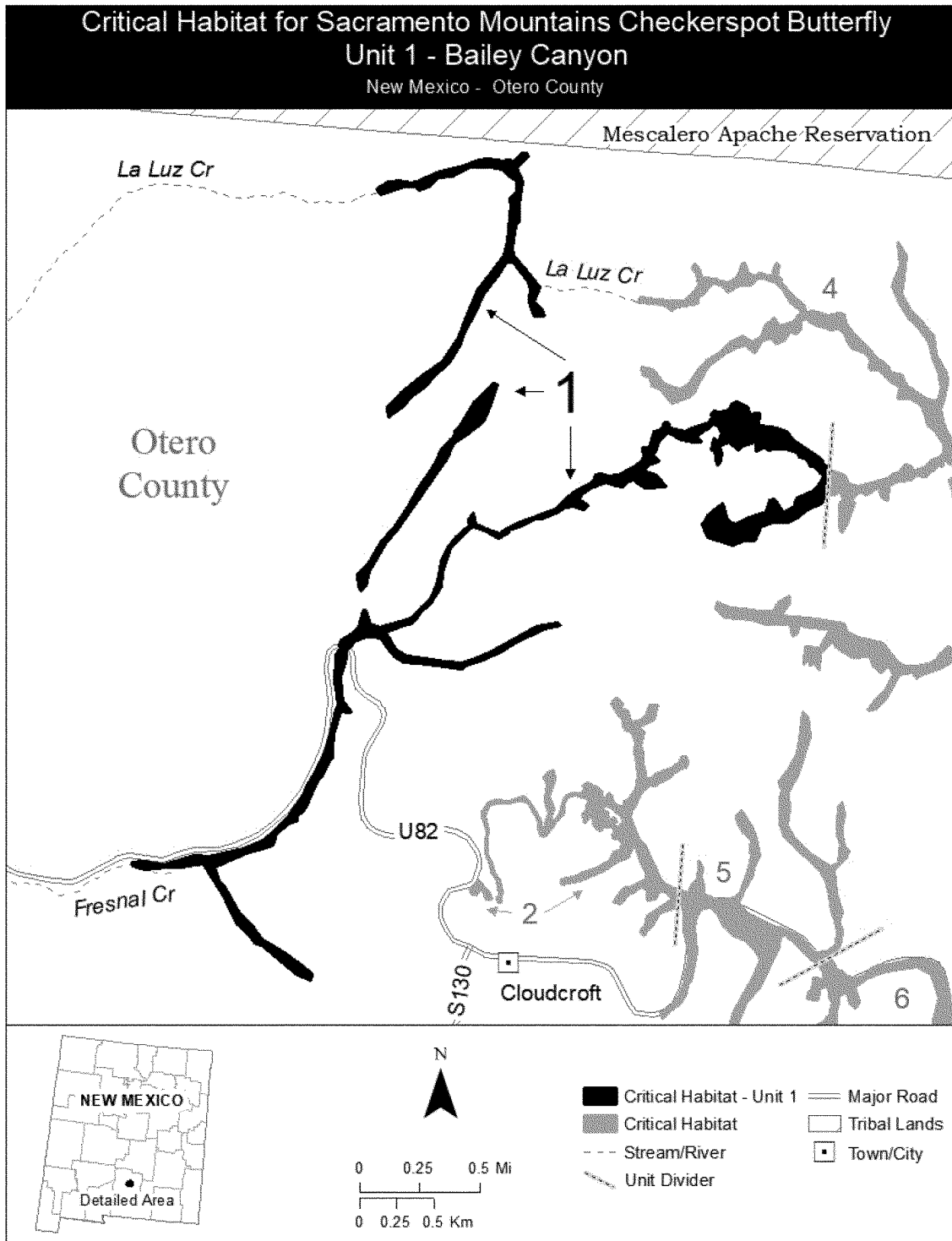
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(6) Unit 1: Bailey Canyon; Otero County, New Mexico.

(i) Unit 1 consists of 200.5 ac (81.1 ha) in Otero County and is composed of lands entirely in Federal ownership.
 (ii) Map of Unit 1 follows:

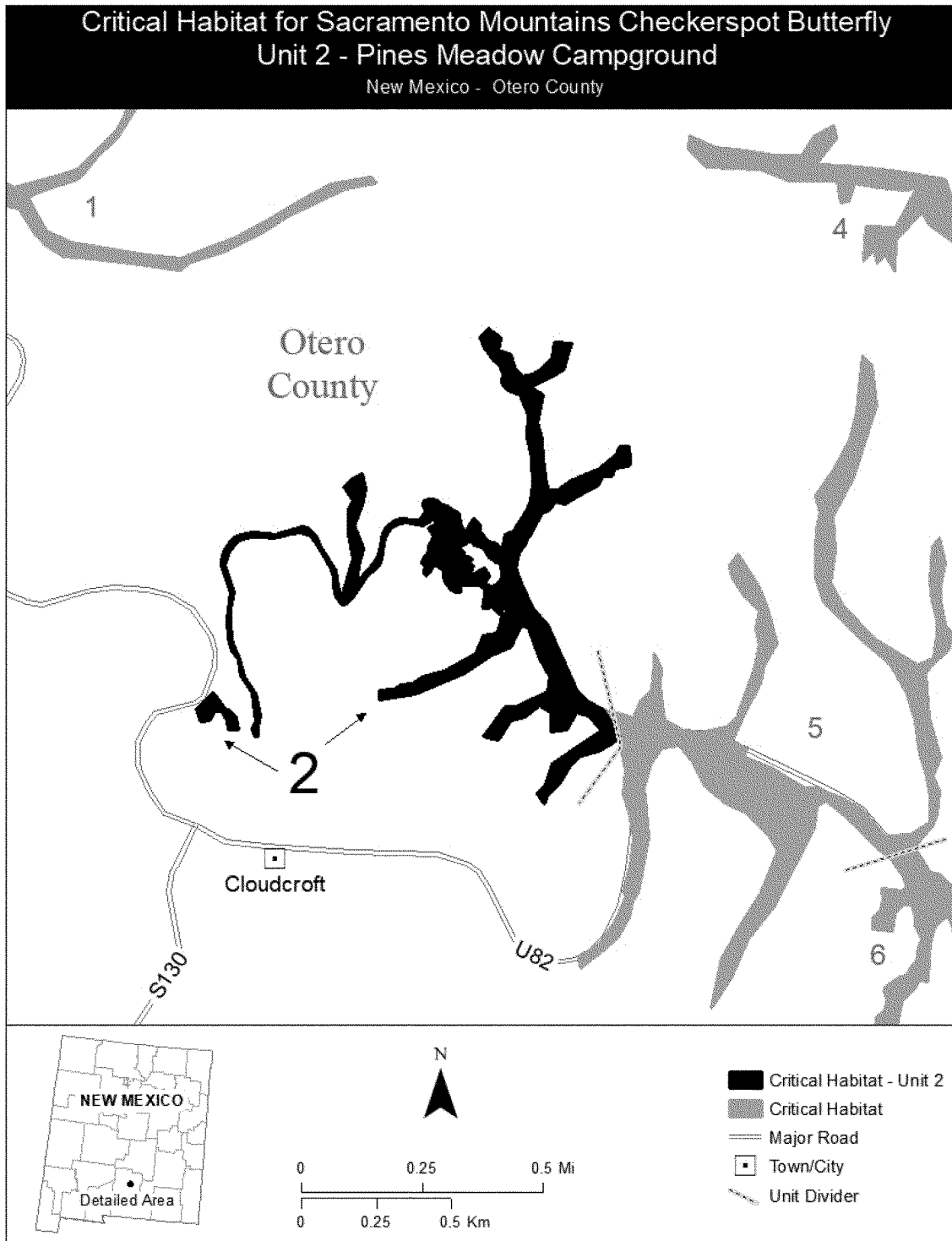
Figure 2 to Sacramento Mountains Checkerspot Butterfly (*Euphydryas anicia cloudcrofti*) paragraph (6)(ii)



(7) Unit 2: Pines Meadow Campground; Otero County, New Mexico.

(i) Unit 2 consists of 62.4 ac (25.2 ha) in Otero County and is composed of lands in Federal (62.2 ac (25.2 ha)) and private (0.2 ac (0.08 ha)) ownership.

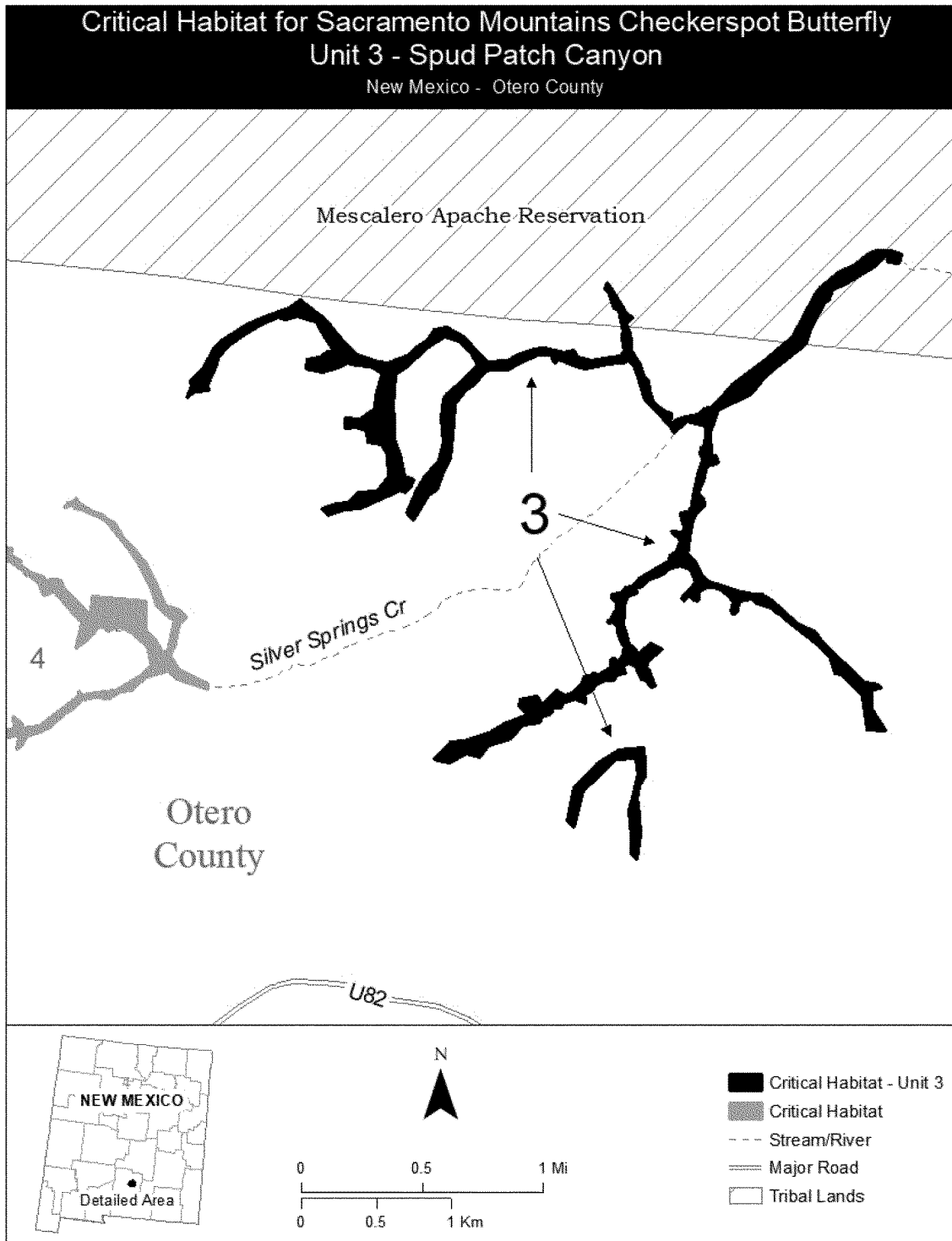
(ii) Map of Unit 2 follows: Figure 3 to Sacramento Mountains Checkerspot Butterfly (*Euphydryas anicia cloudcrofti*) paragraph (7)(ii)



(8) Unit 3: Spud Patch Canyon; Otero County, New Mexico.
 (i) Unit 3 consists of 277.2 ac (112.2 ha) in Otero County and is composed of

lands in Federal (203.9 ac (82.5 ha)), Tribal (22.4 ac (9.1 ha)), and private (50.9 ac (20.6 ha)) ownership.
 (ii) Map of Unit 3 follows:

Figure 4 to Sacramento Mountains checkerspot butterfly (*Euphydryas anicia cloudcrofti*) paragraph (8)(ii)



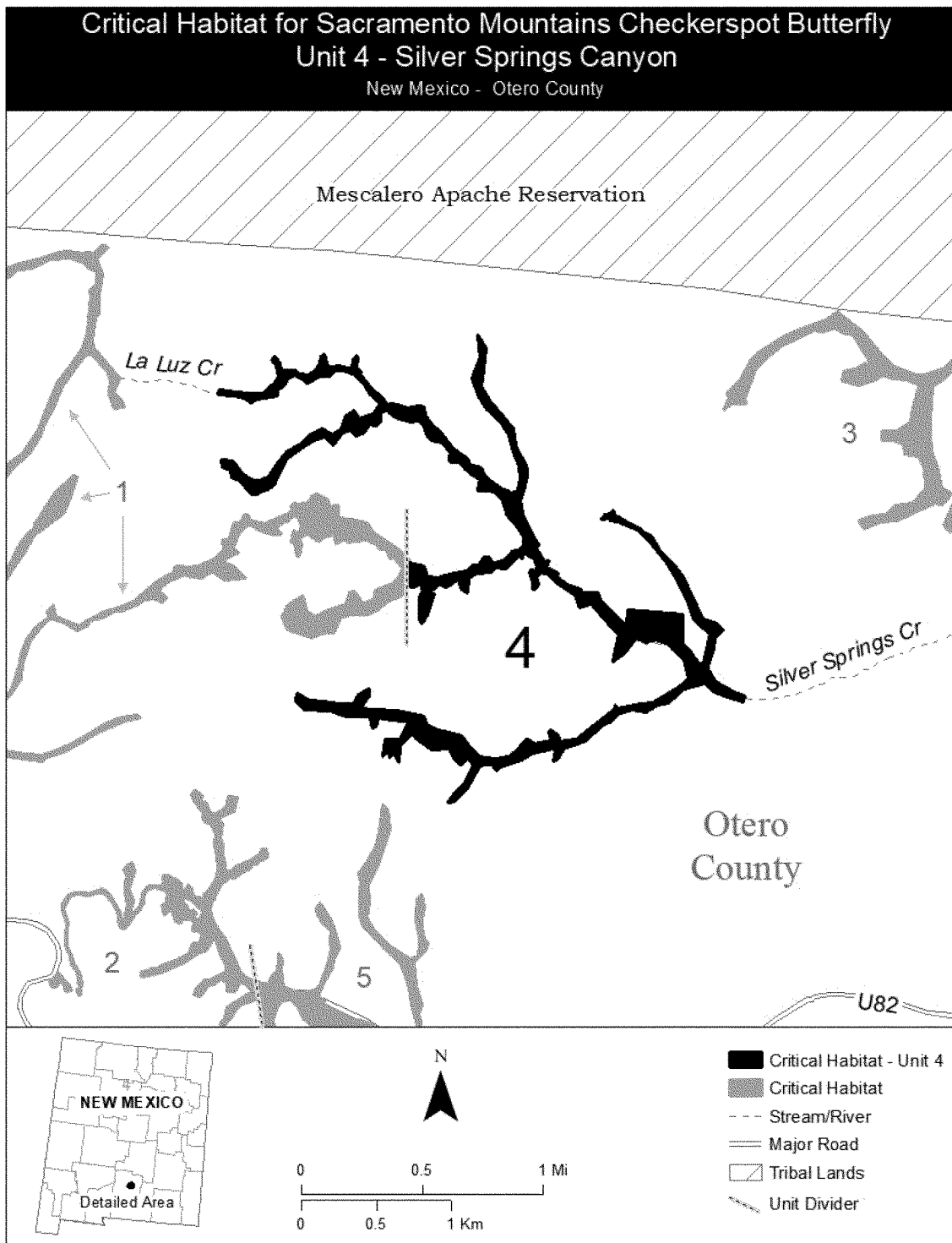
(9) Unit 4: Silver Springs Canyon; Otero County, New Mexico.

(i) Unit 4 consists of 203.4 ac (82.3 ha) in Otero County and is composed of

lands in Federal (132.9 ac (53.8 ha)) and private (70.5 ac (28.5 ha)) ownership.

(ii) Map of Unit 4 follows:

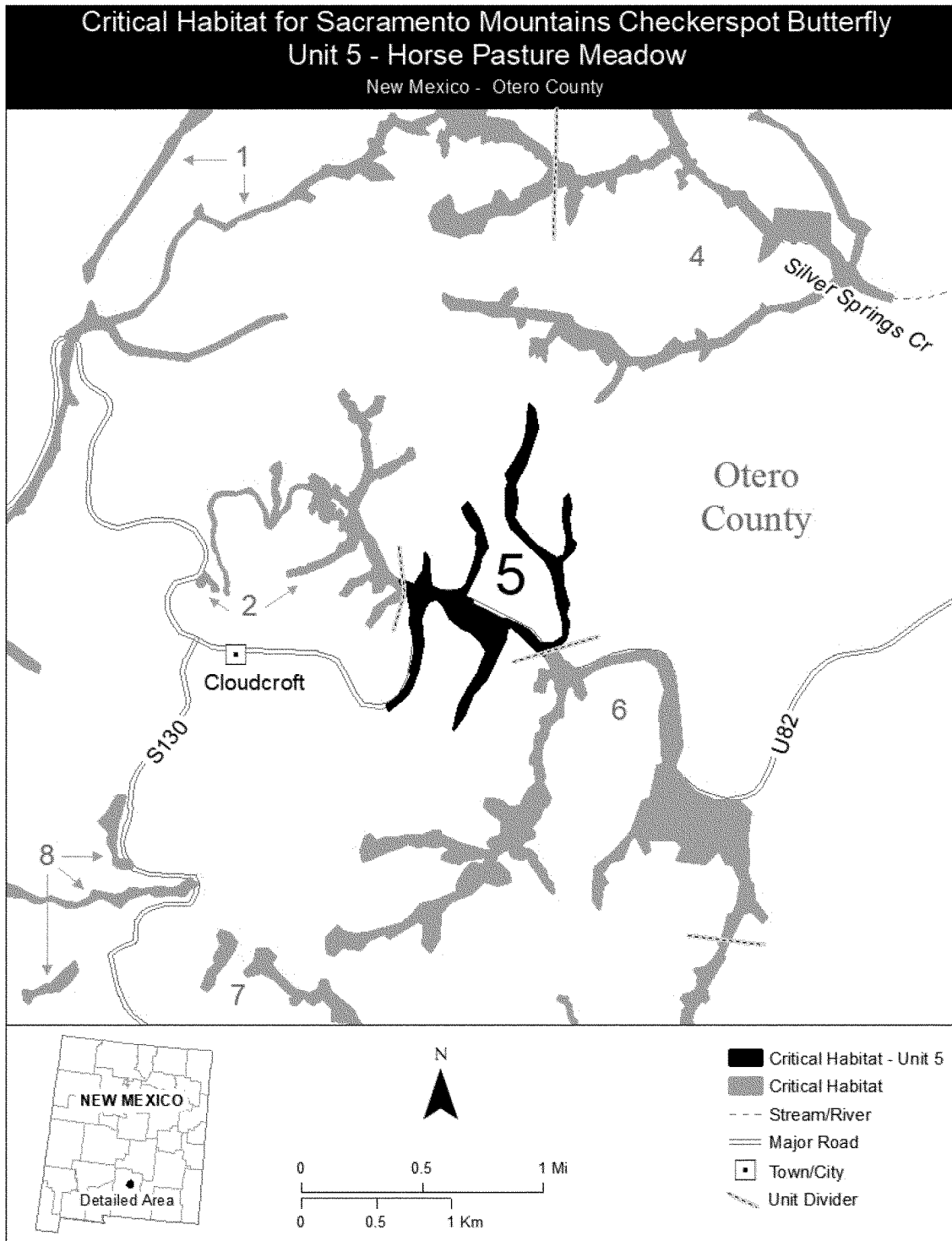
Figure 5 to Sacramento Mountains checkerspot butterfly (*Euphydryas anicia cloudcrofti*) paragraph (9)(ii)



(10) Unit 5: Horse Pasture Meadow; Otero County, New Mexico.

(i) Unit 5 consists of 82.4 ac (33.4 ha) in Otero County and is composed of lands entirely in Federal ownership.
 (ii) Map of Unit 5 follows:

Figure 6 to Sacramento Mountains checkerspot butterfly (*Euphydryas anicia cloudcrofti*) paragraph (10)(ii)



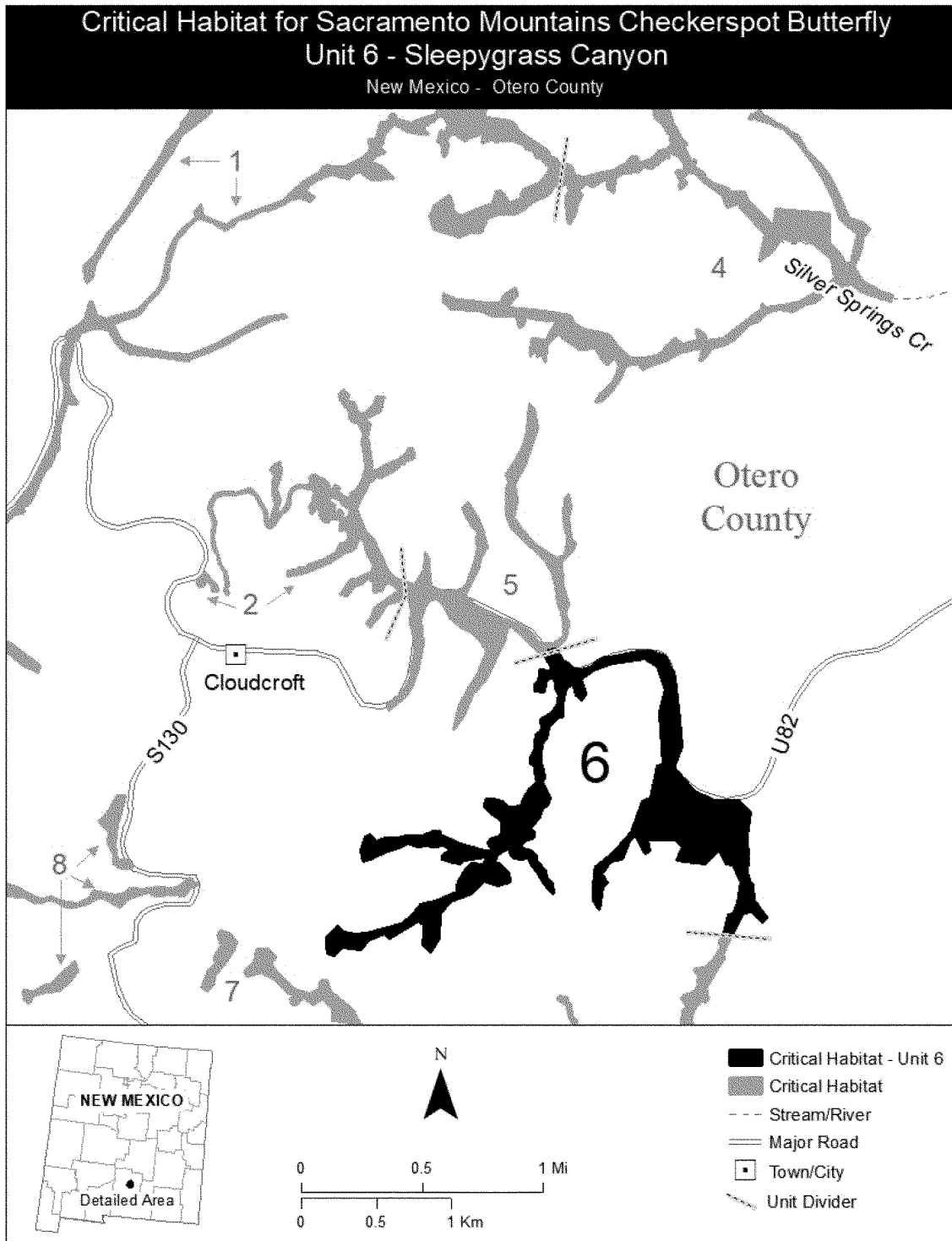
(11) Unit 6: Sleepygrass Canyon; Otero County, New Mexico.

(i) Unit 6 consists of 223.5 ac (90.5 ha) in Otero County and is composed of

lands in Federal (123.5 ac (50.0 ha)) and private (100.0 ac (40.5 ha)) ownership.

(ii) Map of Unit 6 follows:

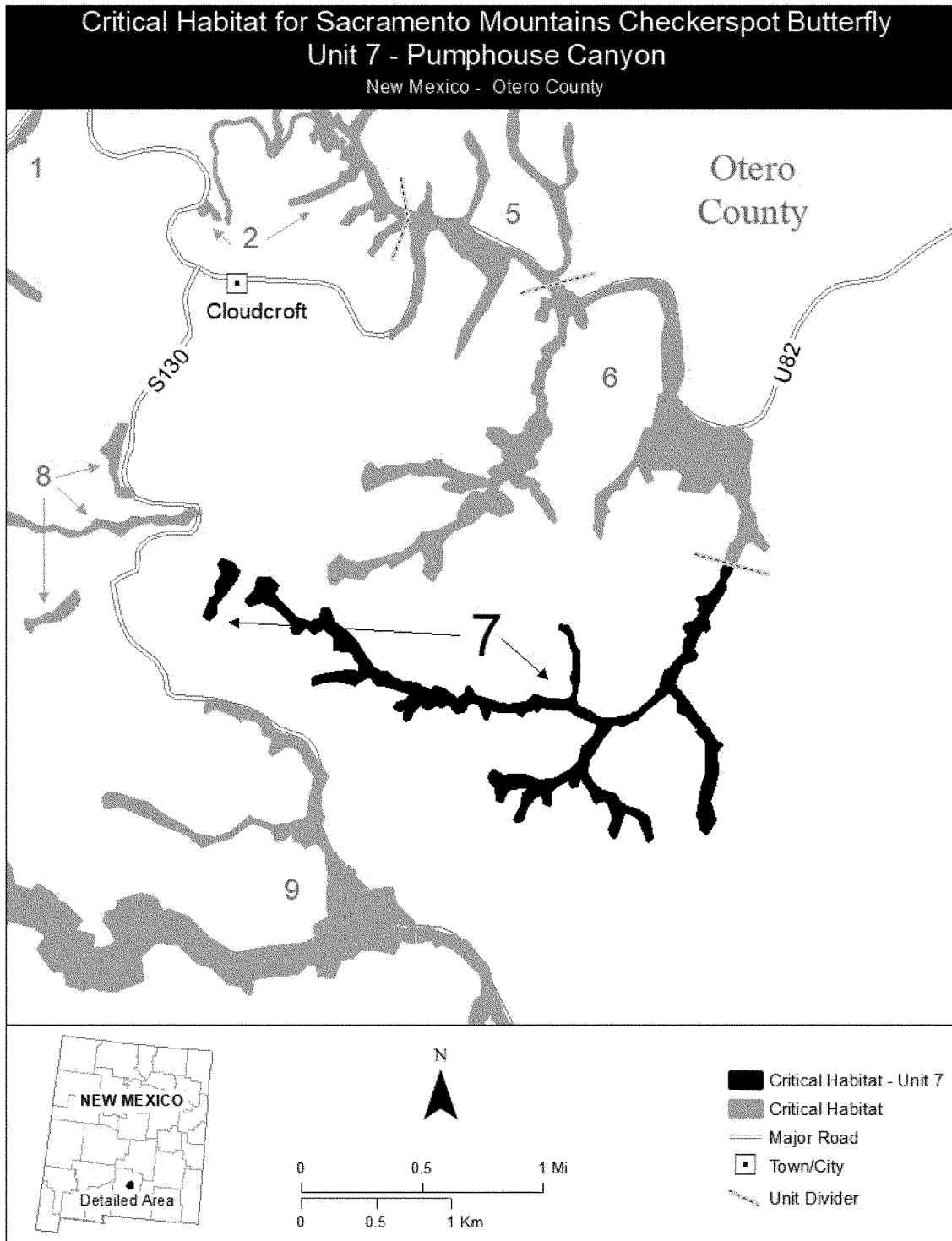
Figure 7 to Sacramento Mountains checkerspot butterfly (*Euphydryas anicia cloudcrofti*) paragraph (11)(ii)



(12) Unit 7: Pumphouse Canyon; Otero County, New Mexico.
 (i) Unit 7 consists of 136.6 ac (55.3 ha) in Otero County and is composed of

lands in Federal (134.4 ac (54.4 ha)) and private (2.2 ac (0.9 ha)) ownership.
 (ii) Map of Unit 7 follows:

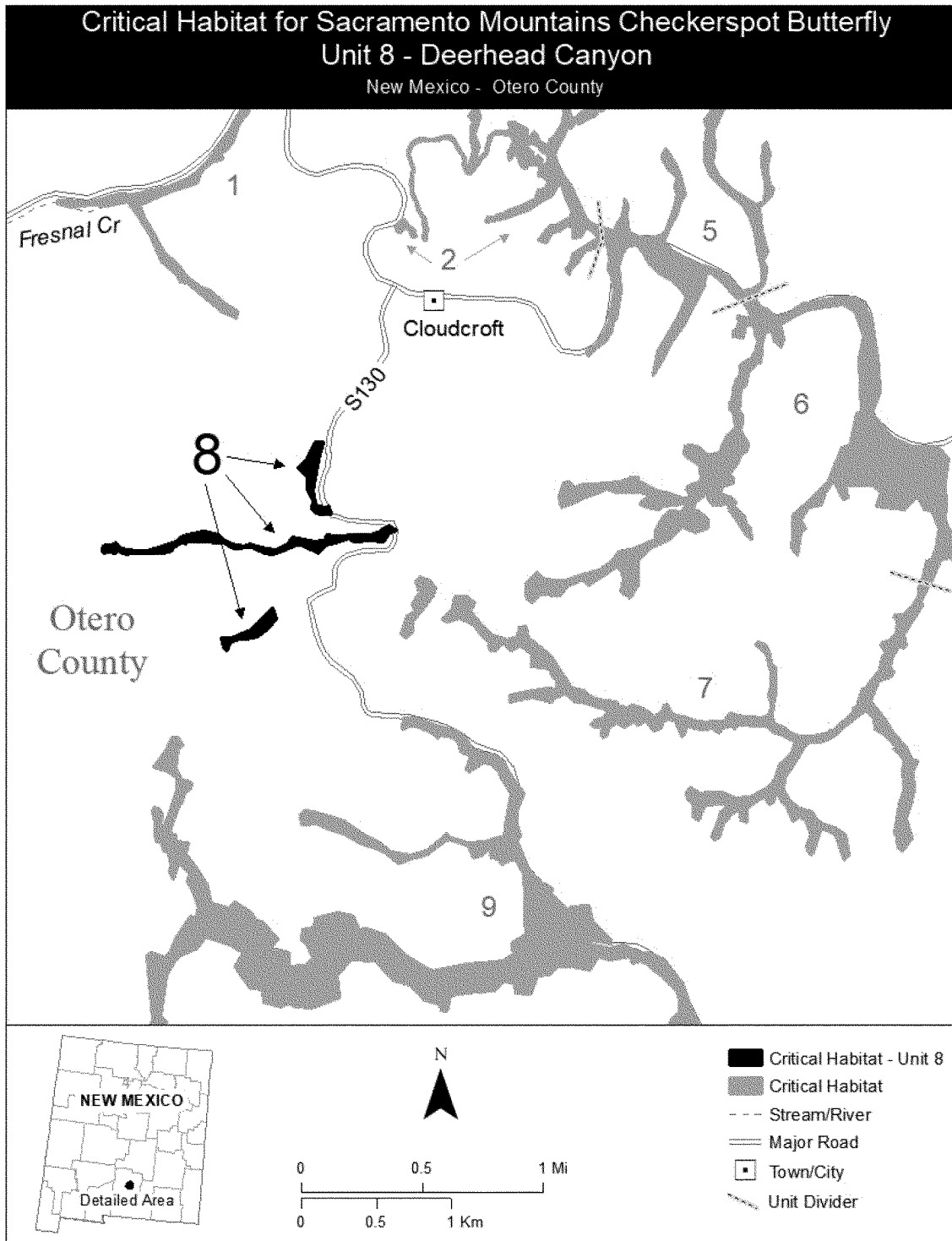
Figure 8 to Sacramento Mountains checkerspot butterfly (*Euphydryas anicia cloudcrofti*) paragraph (12)(ii)



(13) Unit 8: Deerhead Canyon; Otero County, New Mexico.
 (i) Unit 8 consists of 33.1 ac (13.4 ha) in Otero County and is composed of

lands in Federal (22.1 ac (8.9 ha)) and private (11.0 ac (4.5 ha)) ownership.
 (ii) Map of Unit 8 follows:

Figure 9 to Sacramento Mountains checkerspot butterfly (*Euphydryas anicia cloudcrofti*) paragraph (13)(ii)

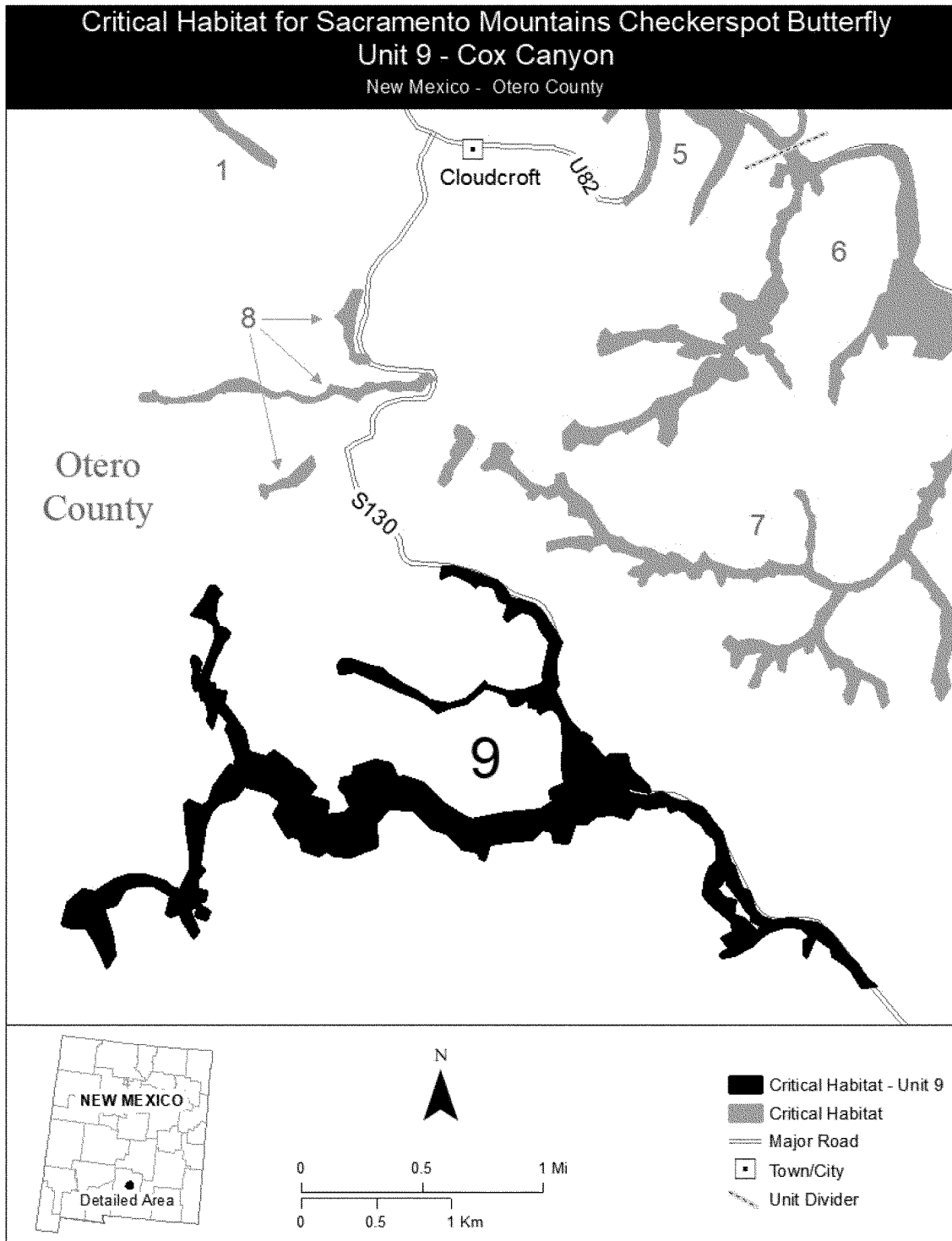


(14) Unit 9: Cox Canyon; Otero County, New Mexico.
 (i) Unit 9 consists of 417.8 ac (169.0 ha) in Otero County and is composed of

lands in Federal (132.1 ac (53.5 ha)) and private (285.7 ac (115.6 ha)) ownership.

(ii) Map of Unit 9 follows:

Figure 10 to Sacramento Mountains checkerspot butterfly (*Euphydryas anicia cloudcrofti*) paragraph (14)(ii)



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Martha Williams,
Director, U.S. Fish and Wildlife Service.
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