

sources under the Clean Air Act as amended in 1990 (CAA or the Act).

**DATES:** Any comments must arrive by August 21, 2000.

**ADDRESSES:** Mail comments to Andy Steckel, Rulemaking Office Chief (AIR-4), U.S. Environmental Protection Agency, Region IX, 75 Hawthorne Street, San Francisco, CA 94105-3901.

You can inspect copies of the submitted SIP revisions and EPA's technical support document (TSD) at our Region IX office during normal business hours. You may also see copies of the submitted SIP revisions at the following locations:

California Air Resources Board,  
Stationary Source Division, Rule  
Evaluation Section, 2020 "L" Street,  
Sacramento, CA 95812.

Ventura County Air Pollution Control  
District, 669 County Square Dr., 2nd  
Fl., Ventura, CA 93003-5417.

**FOR FURTHER INFORMATION CONTACT:** Yvonne Fong, Rulemaking Office (AIR-4), U.S. Environmental Protection Agency, Region IX, (415) 744-1199.

**SUPPLEMENTARY INFORMATION:** This proposal addresses the following local rules: VCAPCD Rules 74.6.1, 74.6.2, and 74.6.3. In the Rules and Regulations section of this **Federal Register**, we are approving these local rules in a direct final action without prior proposal because we believe these SIP revisions are not controversial. If we receive adverse comments, however, we will publish a timely withdrawal of the direct final rule and address the comments in subsequent action based on this proposed rule. We do not plan to open a second comment period, so anyone interested in commenting should do so at this time. If we do not receive adverse comments, no further activity is planned. For further information, please see the direct final action.

Dated: June 28, 2000.

**Nora L. McGee,**

*Acting Regional Administrator, Region IX.*  
[FR Doc. 00-18432 Filed 7-20-00; 8:45 am]

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## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### 50 CFR Part 17

**RIN 1018-AG29**

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

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

**ACTION:** Proposed rule; availability of supplementary information.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), propose the designation of critical habitat pursuant to the Endangered Species Act of 1973, as amended (Act), for the Mexican spotted owl (*Strix occidentalis lucida*) (owl). The owl inhabits canyon and montane forest habitats across a range that extends from southern Utah and Colorado, through Arizona, New Mexico, and west Texas, to the mountains of central Mexico. We propose to designate approximately 5.5 million hectares (ha) (13.5 million acres (ac)) of critical habitat in Arizona, Colorado, New Mexico, and Utah, mostly on federal lands.

If this proposed rule is finalized, section 7(a)(2) of the Act would require that Federal agencies ensure that actions they fund, authorize, or carry out are not likely to result in the "destruction or adverse modification" of critical habitat. Section 4 of the Act requires us to consider economic and other relevant impacts of specifying any particular area as critical habitat. We request data and comments from the public and all interested parties on all aspects of this proposal, including data on economic and other impacts of the designation. A draft analysis of the economic and other relevant impacts of this proposal that will be available for review and comments on during the public comment period for this proposal. We will announce the availability of this analysis in a future **Federal Register** notice and local newspapers. We also have prepared a draft environmental assessment for this proposal and are accepting public comments on the draft document.

**DATES:** We will consider all comments on the proposed rule, the draft economic analysis, and draft Environmental Assessment received from interested parties by September 19, 2000. We will hold six public hearings (see Public Hearings in the **SUPPLEMENTARY INFORMATION** section of this rule for dates).

**ADDRESSES:** 1. Send your comments on this proposed rule, draft economic analysis, and draft environmental assessment to the New Mexico Ecological Services Field Office, 2105 Osuna Road NE, Albuquerque, New Mexico 87113.

2. The complete file for this proposed rule will be available for public inspection, by appointment, during normal business hours at the New Mexico Ecological Services Field Office, 2105 Osuna Road NE, Albuquerque, New Mexico 87113. The draft environmental assessment is available by writing to the above address. We will specify the availability of the draft economic analysis in local newspapers and through a notice in the **Federal Register** once it has been completed.

3. For locations of the public hearings, see Public Hearings in the **SUPPLEMENTARY INFORMATION** section of this rule.

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

#### **SUPPLEMENTARY INFORMATION:**

##### **Background**

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

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

historical range and present distribution are thought to be similar.

According to the Recovery Plan for the Mexican Spotted Owl (USDI 1995) (Recovery Plan), 91 percent of owls known to exist in the United States between 1990 and 1993 occurred on land administered by the U.S. Forest Service (FS); therefore, the primary administrator of lands supporting owls in the United States is the FS. Most owls have been found within Region 3 of the FS, which includes 11 National Forests in New Mexico and Arizona. FS Regions 2 and 4, including two National Forests in Colorado and three in Utah, support fewer owls. The range of the owl is divided into 11 Recovery Units (RU), 5 in Mexico and 6 in the United States, as identified in the Recovery Plan. The Recovery Plan also identifies recovery criteria and provides distribution, abundance, and density estimates by RU. Of the RUs in the United States, the Upper Gila Mountain RU, located in the central portion of the species' U.S. range in central Arizona and west-central New Mexico, has the greatest known concentration of owl sites (55.9 percent of U.S. population). Owls here use a wide variety of habitat types, but are most commonly found inhabiting mature mixed-conifer and ponderosa pine-Gambel oak forests. The Basin and Range-East RU, with 16.0 percent of the U.S. population, encompassing central and southern New Mexico, and includes numerous parallel mountain ranges separated by alluvial valleys and broad, flat basins. Most breeding spotted owls occur in mature mixed-conifer forest. The Basin and Range-West RU contains mountain ranges separated by non-forested habitat. These "sky island" mountains of southern Arizona and far-western New Mexico contain mid-elevation mixed-conifer forest and lower elevation Madrean pine-oak woodlands that supports 13.6 percent of the spotted owls. Colorado Plateau RU contains 8.2 percent of the U.S. population of Mexican spotted owls. This large unit includes northern Arizona, southern Utah, southwestern Colorado, and northwestern New Mexico, with owls generally confined to deeply incised canyon systems and wooded areas of isolated mountain ranges. Southern Rocky Mountains-New Mexico RU, with 4.5 percent of the population, consists of the mountain ranges of northern New Mexico. Owls in this unit typically inhabit mature mixed-conifer forest in steep canyons. The smallest percentage of spotted owls (1.8 percent) occurs in the Southern Rocky Mountains-Colorado RU. This unit includes the southern Rocky Mountains in Colorado,

where spotted owls are largely confined to steep canyons, generally with significant rock faces and various amounts of mature coniferous forest. The critical habitat units identified in this proposal are all within these RUs.

A reliable estimate of the numbers of owls throughout its entire range is not currently available. Using information gathered by Region 3 of the FS, Fletcher (1990) calculated that 2,074 owls existed in Arizona and New Mexico in 1990. Based on more up-to-date information, we subsequently modified Fletcher's calculations and estimated a total of 2,160 owls throughout the United States (USDI 1991). However, these numbers are not considered reliable estimates of current population size for a variety of statistical reasons. While the number of owls throughout the range is currently not available, the Recovery Plan reports an estimate of owl sites based on 1990–1993 data. Surveys from 1990 through 1993 indicate one or more owls have been observed at a minimum of 758 sites in the United States and 19 sites in Mexico. In addition, these surveys indicate that the species persists in most locations reported prior to 1989, with the exception of riparian habitats in the lowlands of Arizona and New Mexico, and all previously occupied areas in the southern States of Mexico. Owl surveys since 1993 have provided new location data, increasing the knowledge of owl distribution and abundance. However, information summarized within the Recovery Plan was the last comprehensive effort to estimate the total number of owls.

Mexican spotted owls nest, roost, forage, and disperse in a diverse array of biotic communities. Nesting habitat is typically in areas with complex forest structure or rocky canyons, and contains uneven-aged, multi-storied mature or old-growth stands that have high canopy closure (Ganey and Balda 1989, USDI 1991). In the northern portion of the range (southern Utah and Colorado), most nests are in caves or on cliff ledges in steep-walled canyons. Elsewhere, the majority of nests appear to be in Douglas fir (*Pseudotsuga menziesii*) trees (Fletcher and Hollis 1994, Seamans and Gutierrez 1995). A wide variety of tree species is used for roosting; however, Douglas fir is the most commonly used species (Ganey 1988, Fletcher and Hollis 1994, Young *et al.* 1998). Owls generally use a wider variety of forest conditions for foraging than they use for nesting/roosting.

Seasonal movement patterns of Mexican spotted owls are variable. Some individuals are year-round residents within an area, some remain

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

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

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

red-tailed hawks (*Buteo jamaicensis*), and golden eagles (*Aquila chrysaetos*), as well as starvation, and collisions (e.g., with cars, powerlines), may all be contributing factors.

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

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

#### Previous Federal Actions

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

On December 22, 1989, we received a petition submitted by Dr. Robin D. Silver requesting the listing of the Mexican spotted owl as an endangered or threatened species. On February 27, 1990, we found that the petition presented substantial information

indicating that listing may be warranted and initiated a status review. In conducting our review, we published a notice in the **Federal Register** (55 FR 11413) on March 28, 1990, requesting public comments and biological data on the status of the Mexican spotted owl. On February 20, 1991, we made a finding, based on the contents of the status review, that listing the Mexican spotted owl under section 4(b)(3)(B)(I) of the Act was warranted. Notice of this finding was published in the **Federal Register** on April 11, 1991 (56 FR 14678). We published a proposed rule to list the Mexican spotted owl as threatened without critical habitat in the **Federal Register** on November 4, 1991 (56 FR 56344).

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

On June 23, 1993, and again on August 16, 1993, we received petitions to remove the Mexican spotted owl from the List of Endangered and Threatened Wildlife. In subsequent petition findings published in the **Federal Register** (58 FR 49467, 59 FR 15361), we addressed the issues raised in the petitions and determined that the delisting petitions did not present substantial information indicating that delisting the Mexican spotted owl was warranted. The petitioners challenged this decision in Federal District Court in New Mexico in *Coalition of Arizona/New Mexico Counties for Stable Economic Growth v. United States Fish and Wildlife Service, et al.*, CIV 94-1058-MV. The district court held that the Coalition failed to show that the Service violated any procedural rules that amounted to more than harmless error and failed to demonstrate that the Service acted arbitrarily or capriciously in listing or

refusing to delist the Mexican spotted owl. A judgment was issued by the district court denying the plaintiff's petition to delist the owl.

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

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

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

In 1996, the Tenth Circuit Court of Appeals in *Catron County Board of Commissioners v. United States Fish and Wildlife Service*, 75 F.3d 1429, 1439 (10th Cir. 1996), ruled that the Service had to comply with the National Environmental Policy Act (NEPA) before designating critical habitat for two desert fish, the spinedace and loach minnow. In addition, a federal district court in New Mexico later set aside the

final rule designating critical habitat for the owl and forbid the Service from enforcing critical habitat for the owl (*Coalition of Arizona-New Mexico Counties for Stable Economic Growth v. U.S. Fish and Wildlife Service*, No. 95–1285–M Civil). As a result of these court rulings, we removed the critical habitat designation for the owl from the Code of Federal Regulations on March 25, 1998 (63 FR 14378).

On March 13, 2000, the United States District Court for the District of New Mexico, (*Southwest Center for Biological Diversity and Silver v. Babbitt and Clark*, CIV 99–519 LFG/LCS–ACE), ordered us to propose critical habitat within 4 months of the court order, and to complete and publish a final designation of critical habitat for the Mexican spotted owl by January 15, 2001.

### Critical Habitat

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

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

Designation of critical habitat helps focus conservation activities by identifying areas that are essential to the conservation of the species, regardless of whether they are currently occupied by the listed species, thus alerting the

public and land managing agencies to the importance of an area to conservation. Critical habitat also identifies areas that may require special management or protection. Critical habitat receives protection from destruction or adverse modification through required consultation under section 7 of the Act with regard to actions carried out, funded, or authorized by a Federal agency. Aside from the added protection provided under section 7, the Act does not provide other forms of protection to lands designated as critical habitat.

Section 7(a)(2) of the Act requires Federal agencies to consult with us to ensure that any action they authorize, fund, or carry out is not likely to jeopardize the continued existence of a threatened or endangered species, or result in the destruction or adverse modification of critical habitat. In 50 CFR 402.02, “jeopardize the continued existence” (of a species) is defined as engaging in an activity likely to result in an appreciable reduction in the likelihood of survival and recovery of a listed species. “Destruction or adverse modification” (of critical habitat) is defined as a direct or indirect alteration that appreciably diminishes the value of the entire critical habitat designation for the survival and recovery of the listed species for which critical habitat was designated. Thus, the definitions of “jeopardy” to the species and “adverse modification” of critical habitat are nearly identical.

Designating critical habitat does not, in itself, lead to recovery of a listed species. Designation does not create a management plan, establish numerical population goals, prescribe specific management actions (inside or outside of critical habitat), or directly affect areas not designated as critical habitat. Specific management recommendations for areas designated as critical habitat are most appropriately addressed in recovery, conservation and management plans, and through section 7 consultations and section 10 permits.

### Primary Constituent Elements

In accordance with section 3(5)(A)(I) of the Act and regulations at 50 CFR 424.12, in determining which areas to propose as critical habitat, we are required to base critical habitat designation on the best scientific and commercial data available and to consider those physical and biological features (primary constituent elements) that are essential to conservation of the species and that may require special management considerations or protection. Such requirements include, but are not limited to—space for

individual and population growth, and for normal behavior; food, water, or other nutritional or physiological requirements; cover or shelter; sites for breeding, reproduction, or rearing of offspring; and habitats that are protected from disturbance or are representative of the historic geographical and ecological distributions of a species.

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

We determined the primary constituent elements for Mexican spotted owl from studies of their habitat requirements and the information provided in the Recovery Plan (USDI 1995 and references therein). Since owl habitat can include both canyon and forested areas, we identified primary constituent elements in both areas. The primary constituent elements that occur in mixed conifer, pine-oak, and riparian forest types, as described in the Recovery Plan, have the following attributes:

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

For canyon habitat, the primary constituent elements include the following attributes:

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

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

Canyon habitats used for nesting and roosting are typically characterized by cooler conditions found in steep, narrow canyons, often containing crevices, ledges, and/or caves. These canyons frequently contain small clumps or stringers of ponderosa pine, Douglas fir, white fir, and/or pinon-juniper. Deciduous riparian and upland tree species may also be present.

Adjacent uplands are usually vegetated by a variety of plant associations including pinon-juniper woodland, desert scrub vegetation, ponderosa pine-Gambel oak, ponderosa pine, or mixed conifer. Owl habitat may also exhibit a combination of attributes between the forested and canyon types.

#### *Criteria for Identifying Critical Habitat Units*

The primary objective in designating critical habitat is to identify existing and potential Mexican spotted owl habitat considered essential for the conservation of the subspecies, and to highlight specific areas where management considerations should be given highest priority. In proposing critical habitat for the owl, we reviewed the overall approach to the conservation of the species undertaken by local, State, tribal, and Federal agencies and private individuals and organizations since the species' listing in 1993. We also considered the features identified as necessary for recovery, as outlined in the species' Recovery Plan. We reviewed the previous proposed (59 FR 63162) and final critical habitat rules (60 FR 29914), new location data, habitat requirements and definitions

described in the Recovery Plan, and habitat information provided by FS biologists as well as utilized our own expertise.

The previous critical habitat designation included extensive use and evaluation of owl habitat and territory maps, vegetation maps, aerial photography, and field verification to identify areas for designation as critical habitat. Several qualitative criteria (currently suitable habitat, large contiguous blocks of habitat, occupied habitat, rangewide distribution, the need for special management or protection, adequacy of existing regulatory mechanisms) were considered when identifying critical habitat areas. The previous designation was done prior to the completion of the Recovery Plan for the Mexican Spotted Owl. For this proposal, we examined the previously designated critical habitat units, but relied primarily on the recovery plan to provide guidance. We expanded or combined previous units to comply with the Recovery Plan. In doing so we included wilderness areas and other areas where additional owls have been located. In addition, we included areas where owls could occur based on the presence of the appropriate topography, elevation, and habitat types (protected and restricted habitat areas as defined in the Recovery Plan).

#### *Proposed Critical Habitat Designation*

The proposed critical habitat constitutes our best assessment of areas needed for the conservation of the owl and is based on the best scientific and commercial information available. The proposed areas are essential to the conservation of the species because they either currently support populations of the owl, or because they currently support the necessary habitat requirements for nesting, roosting, and foraging (see description of primary constituent elements). Thus, the proposed critical habitat is limited to areas within the identified RUs that meet the definition of protected and restricted habitat, as described in the Recovery Plan. Although a recovery plan is not a regulatory document, its management recommendations were considered in developing this proposed critical habitat rule. Excluded from the designation are those areas in restricted habitat that do not contain the primary constituent elements.

The Mexican Spotted Owl Recovery Plan provides for three levels of habitat management: Protected areas, restricted areas, and other forest and woodland types. Protected habitat includes all known owl sites, all areas within mixed conifer or pine-oak types with slopes

greater than 40 percent where timber harvest has not occurred in the past 20 years, and all reserved (designated Wilderness areas) lands. The Recovery Plan recommends that protected areas, or Protected Activity Centers (PACs), be designated around known owl sites. A PAC would include an area of at least 243 ha (600 ac) that includes the best nesting and roosting habitat in the area. Based on available data, the recommended size for a PAC includes, on average, 75 percent of the foraging area of an owl.

Restricted habitat includes mixed conifer forest, pine-oak forest, and riparian areas outside of protected areas described above (*i.e.*, areas that do not currently contain owls). These areas are essential to the conservation of the species because the Recovery Plan identifies these areas as providing additional owl habitat for future occupancy. In restricted habitat, only areas that contain the primary constituent elements are designated as critical habitat. These areas, however, are important to owl conservation and should continue to be managed to attain the primary constituent elements.

Other forest and woodland types (ponderosa pine, spruce-fir, pinon-juniper, and aspen) are not expected to provide nesting or roosting habitat for the Mexican spotted owl (except when associated with rock canyons). Thus, these other forest and woodland types are not considered to be critical habitat unless specifically delineated within PACs. Although the Recovery Plan does not provide owl-specific guidelines to managing these areas, these and other habitat types may provide important foraging and dispersal habitat for the owl, particularly if adjacent to protected or restricted areas. Therefore, these areas should be managed for landscape diversity, mimicking natural disturbance patterns, incorporating natural variation in stands, and retaining special features such as snags and large trees (USDI 1995). We anticipate that species concerns in these areas can be adequately addressed under the Act through section 7 consultation, the section 9 prohibition against taking listed species, the section 10 habitat conservation planning process, and through other appropriate State and Federal statutes and regulations.

Critical habitat units are being proposed in portions of Bernalillo, Catron, Cibola, Colfax, Grant, Hidalgo, Lincoln, Los Alamos, McKinley, Mora, Otero, Rio Arriba, San Juan, San Miguel, Sandoval, Santa Fe, Sierra, Socorro, Taos, Torrance, Valencia Counties in

New Mexico; Apache, Cochise, Coconino, Gila, Graham, Greenlee, Maricopa, Mohave, Navajo, Pima, Pinal, Santa Cruz, Yavapai Counties in Arizona; Carbon, Emery, Garfield, Grand, Iron, Kane, San Juan, Washington, Wayne Counties in Utah; and Custer, Douglas, El Paso, Fremont, Huerfano, Jefferson, Pueblo, and Teller Counties in Colorado, on the maps. Precise legal descriptions of each critical habitat unit are on file at the New Mexico Ecological Services Field Office.

With the exception of some tribal lands (See discussion under American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act, below) and low-density areas, this proposed designation includes all habitat on Federal and tribal lands used by currently known populations of Mexican spotted owls. The inclusion of both occupied and currently unoccupied areas in this critical habitat proposal is in accordance with section 3(5)(A)(I) of the Act, which provides that areas outside the geographical area currently occupied by the species may meet the definition of critical habitat upon a determination that they are essential for the conservation of the species. We find that the inclusion of currently unoccupied areas identified in this rule as having one or more

constituent elements is essential for conservation of the owl.

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

State and private lands are not included in this proposed designation. The overwhelming majority of Mexican spotted owl records are from Federal and Tribal lands, indicating that those lands are essential to the species' recovery. Some of the State (79,030 ha (195,288 ac)) and private (257,872 ha (637,216 ac)) parcels within the critical habitat boundaries likely support mid- and higher-elevation forests that are capable of providing nesting and roosting habitat. However, given that the majority of the owl's range occurs on Federal and tribal lands, we do not feel

that State and private lands are essential to the recovery of the subspecies and should not be designated as critical habitat.

Given the above, we believe that Mexican spotted owl conservation can best be achieved by management of Federal and Tribal lands, and that State and private lands are not essential to the species' recovery. Where feasible, proposed critical habitat boundaries were drawn so as to exclude State and private lands. However, the short amount of time allowed by the court to complete this proposed designation did not allow us to conduct the fine-scale mapping necessary to physically exclude the smaller and widely scattered State and private parcels that remain within the proposed boundaries. Those areas under State or private ownership are therefore excluded from the proposed designation by definition.

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

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

|                                    | Arizona               | New Mexico            | Colorado          | Utah                  | Total                  |
|------------------------------------|-----------------------|-----------------------|-------------------|-----------------------|------------------------|
| Forest Service .....               | 1,330,339 (3,287,339) | 1,688,295 (4,171,869) | 152,096 (375,837) | 111,133 (274,616)     | 3,281,863 (8,109,661)  |
| Bureau of Land Management .....    | 4,903 (12,115)        | 5,879 (14,528)        | 60,255 (148,894)  | 666,270 (1,646,388)   | 737,307 (1,821,925)    |
| National Park Service .....        | 322,069 (795,850)     | 12,618 (31,179)       | 0                 | 260,346 (643,328)     | 595,033 (1,470,357)    |
| Department of Defense .....        | 9,728 (24,038)        | 1,682 (4,157)         | 17,966 (44,394)   | 0                     | 29,376 (72,589)        |
| Bureau of Reclamation .....        | 0                     | 0                     | 0                 | 109,610 (270,853)     | 109,610 (270,853)      |
| Unknown Federal <sup>a</sup> ..... | 0                     | 0                     | 0                 | 156,207 (385,995)     | 156,207 (385,995)      |
| Tribal .....                       | 342,503 (846,344)     | 165,333 (408,548)     | 0                 | 40,983 (101,272)      | 548,819 (1,356,164)    |
| Total .....                        | 2,009,542 (4,630,281) | 1,873,807 (4,630,281) | 230,317 (569,125) | 1,344,549 (3,322,452) | 5,458,215 (13,487,544) |
| Total critical habitat units ..... | 37 <sup>b</sup>       | 31 <sup>b</sup>       | 2                 | 5                     | 72                     |

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

<sup>b</sup> Counts three critical habitat units that overlap two states.

## Effect of Critical Habitat Designation

### Section 7 Consultation

Section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that actions they fund, authorize, or carry out do not destroy or adversely modify critical habitat to the extent that the action appreciably diminishes the value of the critical habitat for the survival and recovery of the species. Individuals, organizations, States, local governments, and other non-Federal entities are affected by the designation of critical habitat only if their actions occur on Federal lands, require a Federal permit, license, or other authorization, or involve Federal funding.

Section 7(a) of the Act requires Federal agencies to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened and with respect to its critical habitat, if any is designated or proposed. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Section 7(a)(4) of the Act require Federal agencies to confer with us on any action that is likely to jeopardize the continued existence of a proposed species or to result in destruction or adverse modification of proposed critical habitat. Conference reports provide conservation recommendations to assist the agency in eliminating conflicts that may be caused by the proposed action. The conservation recommendations in a conference report are advisory.

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

If a species is subsequently listed or critical habitat is designated, then section 7(a)(2) requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of such a species or destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency must enter into consultation with us. Regulations at 50 CFR 402.16 also require Federal agencies to reinstitute consultation in instances where we have already reviewed an

action for its effects on a listed species if critical habitat is subsequently designated. Consequently, some Federal agencies may request reinitiation of consultation or conferencing with us on actions for which formal consultation has been completed, if those actions may affect designated critical habitat or adversely modify or destroy proposed critical habitat.

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

Section 4(b)(8) of the Act requires us to describe in any proposed or final regulation that designates critical habitat a description and evaluation of those activities involving a Federal action that may adversely modify such habitat or that may be affected by such designation. When determining whether any of these activities may adversely modify critical habitat, we base our analysis on the effects of the action on the entire critical habitat area and not just on the portion where the activity will occur. Adverse effects on constituent elements or segments of critical habitat generally do not result in an adverse modification determination unless that loss, when added to the environmental baseline, is likely to appreciably diminish the capability of the critical habitat to satisfy essential requirements of the species. In other words, activities that may destroy or adversely modify critical habitat include those that alter the primary constituent elements (defined above) to an extent that the value of critical habitat for both the survival and recovery of the Mexican spotted owl is appreciably reduced.

To properly portray the effects of critical habitat designation, we must

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

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

A number of Federal agencies or departments fund, authorize, or carry out actions that may affect the Mexican spotted owl and proposed critical habitat. Among these agencies are the Forest Service, Bureau of Indian Affairs, Bureau of Land Management, Department of Defense, Department of Energy, National Park Service, and Federal Highway Administration. We have reviewed and continue to review numerous activities proposed within the range of the Mexican spotted owl that are currently the subject of formal or informal section 7 consultations. Actions on Federal lands that we reviewed in past consultations on effects to the owl include land management plans; land acquisition and

disposal; road construction, maintenance, and repair; timber harvest; livestock grazing and management; fire/ecosystem management projects (including prescribed natural and management ignited fire); powerline construction and repair; campground and other recreational developments; and access easements. We expect that the same types of activities will be reviewed in section 7 consultation if critical habitat is designated.

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

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

If you have questions regarding whether specific activities will likely

constitute destruction or adverse modification of critical habitat, contact the Field Supervisor, New Mexico Ecological Services Field Office (see **ADDRESSES** section). If you would like copies of the regulations on listed wildlife or have questions about prohibitions and permits, contact the U.S. Fish and Wildlife Service, Division of Endangered Species, P.O. Box 1306, Albuquerque, New Mexico 87103 (telephone 505-248-6920; facsimile 505-248-6788).

#### **Economic Analysis**

Section 4(b)(2) of the Act requires that we designate critical habitat on the basis of the best scientific and commercial information available and consider the economic and other relevant impacts of designating a particular area as critical habitat. We based this proposal on the best available scientific information, including the recommendations in the species' recovery plan. We will utilize the economic analysis and our analysis of other relevant impacts, and take into consideration all comments and information submitted during the public hearing and comment period, to make a final critical habitat designation. We may exclude areas from critical habitat upon a determination that the benefits of such exclusions outweigh the benefits of specifying such areas as critical habitat. However, we cannot exclude these areas from critical habitat when their exclusion will result in the extinction of the species. We are preparing a draft economic analysis that will be completed and available for public review and comment during the comment period for this proposal. Send your requests for copies of the economic analysis to the New Mexico Ecological Services Field Office (see **ADDRESSES** section).

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

In accordance with the Presidential Memorandum of April 29, 1994, we believe that, to the maximum extent possible, tribes should be the governmental entities to manage their lands and tribal trust resources. To this end, we support tribal measures that preclude the need for Federal conservation regulations. We provide technical assistance to Indian tribes who wish assistance in developing and expanding tribal programs for the management of healthy ecosystems so that Federal conservation regulations, such as designation of critical habitat, on tribal lands are unnecessary.

The Presidential Memorandum of April 29, 1994, also requires us to

consult with the tribes on matters that affect them, and section 4(b)(2) of the Act requires us to gather information regarding the designation of critical habitat and the effects thereof from all relevant sources, including the tribes. Recognizing a government-to-government relationship with tribes and our Federal trust responsibility, we will consult with the Indian tribes that might be affected by the designation of critical habitat. We have already held two meetings with the Mescalero Apache Tribe.

Due to the time constraints imposed by the court order, we will make every effort to consult with the tribes during the comment period for this proposal to gain information on—(1) possible effects if critical habitat were designated on Indian reservation lands; and (2) possible effects on tribal resources resulting from designation of critical habitat on non-tribal lands. We will meet with each potentially affected tribe to ensure that consultation on critical habitat issues occurs in a timely manner.

#### ***Designation of Critical Habitat on Tribal Lands***

Section 3(5) of the Act defines critical habitat, in part, as areas within the geographical area occupied by the species "on which are found those physical and biological features (I) essential to the conservation of the species and (II) which may require special management considerations and protection." In our previous critical habitat proposal for the owl, we identified lands of the White Mountain Apache, Jicarilla Apache, Mescalero Apache, San Carlos Apache, Southern Ute, Ute Mountain Ute, and Navajo Nation Tribes as containing habitat that may be appropriate for designation of critical habitat. However, after reevaluating the available data, we no longer feel that designating all of these areas is appropriate.

Lands of the Mescalero Apache, San Carlos Apache, and Navajo Nation have areas that meet the definition of critical habitat with respect to the Mexican spotted owl, and portions of those lands are proposed as critical habitat. As provided under section 4(b)(2) of the Act, we are soliciting information on the possible economic and other impacts of critical habitat designation, and we will continue to work with the tribes in developing voluntary measures adequate to conserve Mexican spotted owls on tribal lands. We understand the Navajo Nation is nearing completion of a Forest Management Plan and the Mescalero Apache Tribes are working on Mexican Spotted Owl Habitat

Management Plans. Critical habitat proposed on the San Carlos Apache Reservation does not include areas covered by the Tribe's Malay Gap Management Plan. We reviewed this plan in 1996 and determined it to be adequate for the management of the owl. The San Carlos Apache Tribe is developing similar management plans for other management units on their lands. If any of these tribes submit management plans, we will consider whether these plans provide adequate special management or protection for the species, or we will weigh the benefits of including versus the benefits of excluding these areas under section 4(b)(2). We will use this information in determining which, if any, tribal land should be included in the final designation as critical habitat for the owl.

Since our previous critical habitat designation, we learned that the Southern Ute Reservation has not supported spotted owls historically, and our assessment revealed that the Reservation does not support habitat essential to the species' conservation. Thus, lands of the Southern Ute Reservation do not meet part (I) of the definition of critical habitat stated above; we are, therefore, not proposing to designate those lands as critical habitat.

Lands of the Ute Mountain Ute Tribe are not being proposed either. Due to the low population density and isolation from other occupied areas in Colorado, New Mexico, and Utah, the owls in southwestern Colorado are not believed to be essential for the survival or recovery of the species. Thus, these lands do not meet part (I) of the definition of critical habitat stated above; we are, therefore, not proposing to designate those lands as critical habitat.

The White Mountain Apache and Jicarilla Apache Tribes completed Mexican Spotted Owl Habitat Management Plans prior to the previous critical habitat designation. Since those plans are still valid and in use, we believe that the lands of the White Mountain Apache and Jicarilla Apache Tribes are not in need of special management considerations and protection, and therefore do not meet part (II) of the definition of critical habitat. Thus, we are not proposing critical habitat in those areas.

In addition, other tribal lands including the Picuris, Taos, and Santa Clara Pueblos in New Mexico and the Havasupai Reservation in Arizona are adjacent to critical habitat units proposed in this rule and may have potential owl habitat. However, the

available information, although limited, on the habitat quality and current or past owl occupancy in these areas does not indicate that these areas meet the definition of critical habitat. Therefore, we are not proposing to designate these lands as critical habitat.

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

We do not anticipate that proposal of critical habitat on non-tribal lands will result in any impact on tribal trust resources or the exercise of tribal rights. However, in complying with our tribal trust responsibilities, we must communicate with all tribes potentially affected by the designation. Therefore, we are soliciting information from the tribes and will arrange meetings with the tribes during the comment period on potential effects to them or their resources that may result from critical habitat designation.

#### **Public Comments Solicited and Public Hearings**

We intend to make any final action resulting from this proposal to be as accurate and as effective as possible. Therefore, we are soliciting comments or suggestions from the public, other concerned governmental agencies, the scientific community, industry, or any other interested party concerning this proposed rule. We particularly seek comments concerning:

(1) The reasons why any habitat should or should not be determined to be critical habitat as provided by section 4 of the Act, including whether the benefits of excluding areas will outweigh the benefits of including areas as critical habitat. Specifically we ask if there is adequate special management and protection in place on any lands to allow us not to designate these lands as critical habitat. Further, we ask whether all areas identified in the Recovery Plan should be designated as critical habitat;

(2) Specific information on the amount and distribution of Mexican spotted owl habitat, and what habitat is essential to the conservation of the species and why;

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

(4) Any foreseeable economic or other impacts resulting from the proposed designation of critical habitat, in particular, any impacts on small entities or families; and

(5) Economic and other values associated with designating critical habitat for the Mexican spotted owl, such as those derived from

nonconsumptive uses (e.g., hiking, camping, birding, enhanced watershed protection, increased soil retention, "existence values," and reductions in administrative costs).

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

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

#### **Peer Review**

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

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

### Public Hearings

The Act provides for one or more public hearings on this proposal, if requested. Given the large geographic extent covered by this proposal, the high likelihood of multiple requests, and the need to publish a final determination by December 15, 2000, we have scheduled six public hearings. We will hold the hearings in Santa Fe, New Mexico, on August 14; Las Cruces, New Mexico, on August 15; Tucson, Arizona, on August 16; Flagstaff, Arizona, on August 17; Colorado Springs, Colorado, on August 21, 2000; and Cedar City, Utah, on August 23. We will hold the hearings at the following locations:

- Santa Fe, New Mexico: Morgan Hall, New Mexico State Land Office, 310 Old Santa Fe Trail, 6:30 to 9:30 p.m.
- Las Cruces, New Mexico: Dona Ana Room, Corbett Center Student Union, New Mexico State University, 6:30 to 9:30 p.m.
- Tucson, Arizona: Louis Rich Theater, Tucson Convention Center, 260 South Church Street, 6:30 to 9:30 p.m.
- Flagstaff, Arizona: Flagstaff High School, Main Auditorium, 400 West Elm Street, 6:30 to 9:30 p.m.
- Colorado Springs, Colorado: Pikes Peak Community College, Cafeteria,

5675 South Academy Boulevard, 6:30 to 9:30 p.m.

- Cedar City, Utah: Southern Utah University, Hunter Conference Center, The Great Hall, 351 West Center Street, 6:30 to 9:30 p.m.

Announcements for the public hearings will be made in local newspapers.

Written comments submitted during the comment period receive equal consideration with those comments presented at a public hearing.

### Required Determinations

#### Regulatory Planning and Review

In accordance with the criteria in Executive Order 12866, this rule is a significant regulatory action and has been reviewed by the Office of Management and Budget. We are preparing a draft analysis of this proposed action, which will be available during the comment period for this proposed rule, to determine the economic consequences of designating the specific areas as critical habitat. The availability of the draft economic analysis will be announced in the **Federal Register** and in local newspapers so that it is available for public review and comments during the 60-day comment period for this proposed rule.

(a) This rule will not have an annual economic effect of \$100 million or adversely affect an economic sector, productivity, jobs, the environment, or other units of government. A cost-benefit analysis is not required for purposes of Executive Order 12866. The Mexican spotted owl was listed as a

threatened species in 1993. Since that time, we have conducted, and will continue to conduct, formal and informal section 7 consultations with other Federal agencies to ensure that their actions would not jeopardize the continued existence of the Mexican spotted owl.

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

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

| Categories of activities                                                    | Activities potentially affected by the designation of critical habitat in areas occupied by the species (in addition to those activities affected from listing the species) | Activities potentially affected by the designation of critical habitat in unoccupied areas                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
|-----------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Federal Activities Potentially Affected <sup>1</sup> .                      | None .....                                                                                                                                                                  | Activities such as those affecting protected, restricted, and canyon habitats by the Forest Service, Bureau of Indian Affairs, Bureau of Land Management, Department of Defense, Department of Energy, National Park Service, and Federal Highway Administration; vegetative management projects (including timber harvest, timber salvage, and tree density control activities such as thinning, insect and disease suppression activities, snag removal, and certain fire/ecosystem projects such as prescribed natural and management ignited fire); livestock grazing in riparian habitat; land acquisition and disposal; oil and gas development; mining and mineral exploration; military maneuvers; road development, maintenance, and repair; utility construction and repair; construction of campgrounds and other recreational developments; and access easements. |
| Private or other non-Federal Activities Potentially Affected <sup>2</sup> . | None .....                                                                                                                                                                  | Activities that require a Federal action (permit, authorization, or funding) and that involve such activities as removing or destroying Mexican spotted owl habitat (as defined in the primary constituent elements discussion), whether by mechanical or other means (e.g., timber harvest, right-of-way access, road construction, development, etc.), including indirect effects and that appreciably decrease habitat value or quality.                                                                                                                                                                                                                                                                                                                                                                                                                                   |

<sup>1</sup> Activities initiated by a Federal agency.

<sup>2</sup> Activities initiated by a private or other non-Federal entity that may need Federal authorization or funding.

Designation of unoccupied areas as critical habitat may have impacts on what actions may or may not be conducted by Federal agencies or non-Federal persons that receive Federal authorization or funding. In the case of the owl, however, we are already consulting with Federal agencies on activities that may affect the owl within the Recovery Units. Since the proposed critical habitat units all occur within the Recovery Units, we do not anticipate any additional impact due to designating unoccupied habitat within the Recovery Units. However, we will evaluate any potential impact through our economic analysis ( see Economic Analysis section of this rule).

(b) This rule will not create inconsistencies with other agencies' actions. Federal agencies have been required to ensure that their actions do not jeopardize the continued existence of the Mexican spotted owl since its listing in 1993. The prohibition against adverse modification of critical habitat is not expected to impose any additional restrictions to those that currently exist in areas of proposed critical habitat. Because of the potential for impacts on other Federal agency's activities, we will continue to review this proposed action for any inconsistencies with other Federal agency's actions.

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

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

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

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

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

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

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

In accordance with the Unfunded Mandates Reform Act:

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

b. This rule will not produce a Federal mandate on State, local, or tribal governments or the private sector of more than \$100 million or greater in any year, *i.e.*, it is not a "significant regulatory action" under the Unfunded Mandates Reform Act. The designation of critical habitat imposes no obligations on State or local governments.

#### *Takings*

In accordance with Executive Order 12630, this rule does not have significant takings implications, and a takings implication assessment is not required. This proposed rule, if made final, will not "take" private property. However, we will evaluate whether the value of private property is altered by it being designated as critical habitat on a case-by-case basis. Critical habitat designation is applicable to Federal lands and to private lands only if a Federal nexus, through funding, permitting or licensing of activities, exists. We do not designate private lands as critical habitat unless the areas are essential to the conservation of a species.

#### *Federalism*

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

In keeping with Department of the Interior and Department of Commerce policy, we requested information from and coordinated development of this critical habitat proposal with appropriate State resource agencies in Arizona, New Mexico, Colorado, and Utah. In addition, Arizona and Utah have representatives on the recovery team for this species. We will continue to coordinate any future designation of critical habitat for Mexican spotted owl with the appropriate State agencies.

#### *Civil Justice Reform*

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

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

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

#### *National Environmental Policy Act (NEPA)*

Our position is that, outside the Tenth Circuit, we do not need to prepare environmental analyses as defined by the NEPA in connection with designating critical habitat under the Endangered Species Act of 1973, as amended. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This assertion was upheld in the courts of the Ninth Circuit (*Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. Ore. 1995), *cert. denied* 116 S. Ct. 698 (1996)). However, when the range of the species includes States within the Tenth Circuit, such as that of the Mexican spotted owl, pursuant to the Tenth

Circuit ruling in *Catron County Board of Commissioners v. U.S. Fish and Wildlife Service*, 75 F.3d 1429 (10th Cir. 1996), we undertake a NEPA analysis for critical habitat designation. Send your requests for copies of the draft environmental assessment for this proposal to the New Mexico Ecological Services Field Office (see **ADDRESSES** section).

#### References Cited

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

#### Authors

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

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

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

#### Proposed Regulation Promulgation

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

#### PART 17—[AMENDED]

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

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

2. Amend § 17.11(h), by revising the entry for “Owl, Mexican spotted” under “BIRDS” to read as follows:

#### § 17.11 Endangered and threatened wildlife.

\* \* \* \* \*

(h) \* \* \*

| Species               |                                    | Historic range                       | Vertebrate population where endangered or threatened | Status | When listed | Critical habitat | Special rules |
|-----------------------|------------------------------------|--------------------------------------|------------------------------------------------------|--------|-------------|------------------|---------------|
| Common name           | Scientific name                    |                                      |                                                      |        |             |                  |               |
| * * *                 | * * *                              | * * *                                | * * *                                                | * * *  | * * *       | * * *            | * * *         |
| BIRDS                 |                                    |                                      |                                                      |        |             |                  |               |
| * * *                 | * * *                              | * * *                                | * * *                                                | * * *  | * * *       | * * *            | * * *         |
| Owl, Mexican spotted. | <i>Strix occidentalis lucida</i> . | U.S.A. (AZ, CO, NM, TX, UT), Mexico. | Entire .....                                         | T      | 494         | § 17.95(b)       | NA            |
| * * *                 | * * *                              | * * *                                | * * *                                                | * * *  | * * *       | * * *            | * * *         |

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

#### § 17.95 Critical habitat—fish and wildlife.

\* \* \* \* \*

(b) Birds.

\* \* \* \* \*

#### Mexican Spotted Owl (*Strix Occidentalis Lucida*)

Critical habitat is limited to areas within the proposed boundaries that meet the definition of protected (600 acres around known owl sites, mixed conifer or pine-oak forests with slopes greater than 40 percent where timber harvest has not occurred in the past 20 years, and all reserved (designated wilderness areas) lands) and restricted (mixed conifer forest, pine-oak forest, and riparian areas outside of protected areas) habitat as described in the Recovery Plan. Restricted habitat is designated only where primary constituent elements can be found. Private and state lands within mapped boundaries are not designated as critical habitat. Critical habitat proposed on the San Carlos Apache Reservation does not include areas covered by the Tribe's Malay Gap Management Plan. The lands of the White Mountain Apache, Jicarilla Apache, Ute Mountain Ute and Southern Ute Tribe are not being designated. Critical habitat units for the States of Arizona, Colorado, New Mexico,

and Utah are depicted on the maps below. Larger maps for all four States and maps of critical habitat units in the State of New Mexico are available at the New Mexico Ecological Services Field Office, 2105 Osuna N.E., Albuquerque, New Mexico 87113, telephone (505) 346–2525. For the States of Arizona, Colorado, and Utah, maps of the critical habitat units specific to each State are available at the following U.S. Fish and Wildlife Service offices—Arizona Ecological Services Field Office, 2321 West Royal Palm Road, Suite 103, Phoenix, Arizona 85021, telephone (602) 640–2720; Colorado State Sub-Office, 764 Horizon Drive South, Annex A, Grand Junction, Colorado 81506, telephone (970) 243–2778; and Utah Ecological Services Field Office, Lincoln Plaza, 145 East 1300 South, Suite 404, Salt Lake City, Utah 84115, telephone (801) 524–5001.

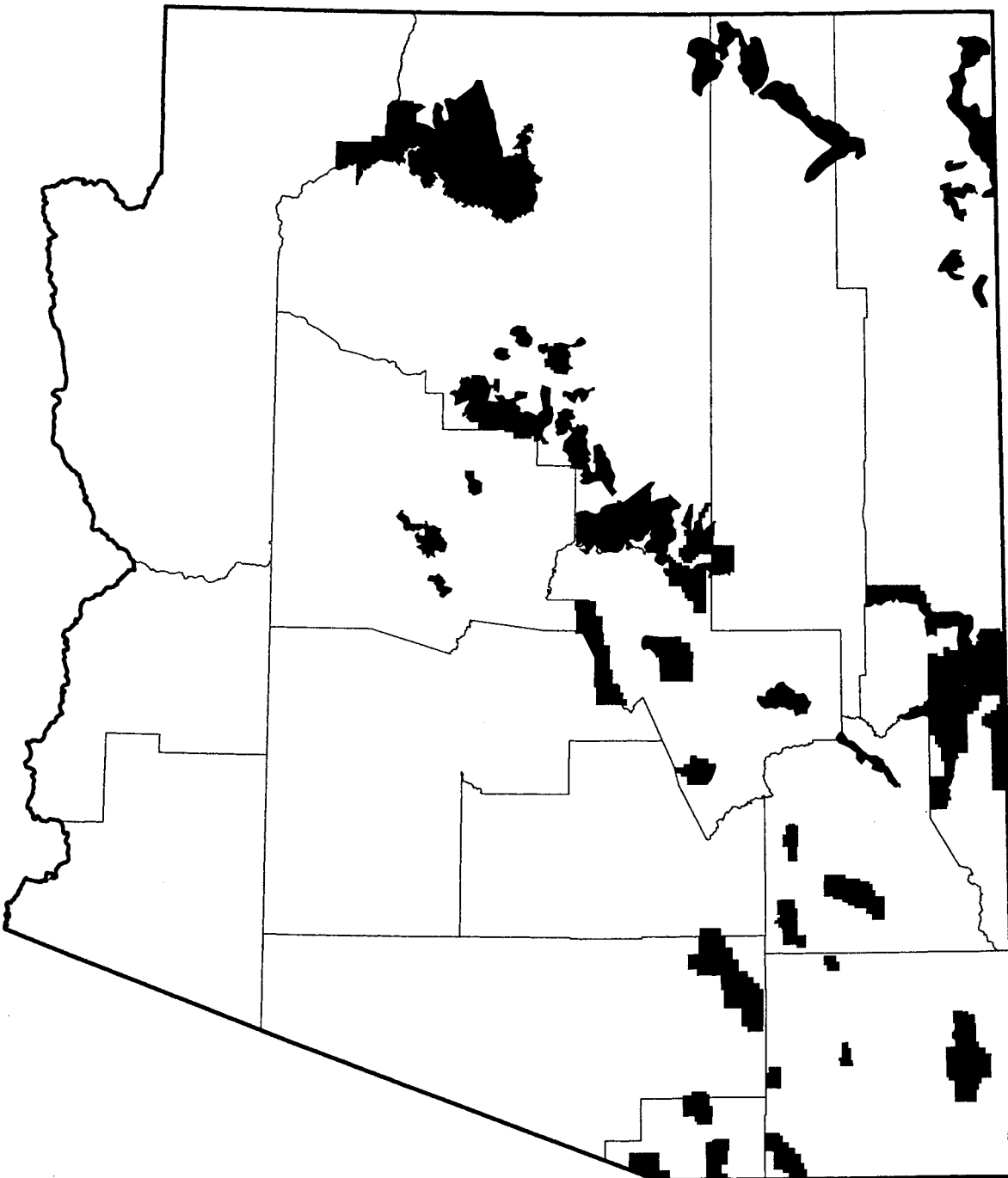
1. Critical habitat units are depicted for portions of Bernalillo, Catron, Cibola, Colfax, Grant, Hidalgo, Lincoln, Los Alamos, McKinley, Mora, Otero, Rio Arriba, San Juan, San Miguel, Sandoval, Santa Fe, Sierra, Socorro, Taos, Torrance, and Valencia Counties in New Mexico; Apache, Cochise, Coconino, Gila, Graham, Greenlee, Maricopa, Mohave, Navajo, Pima, Pinal, Santa Cruz, and Yavapai Counties in Arizona; Carbon, Emery, Garfield, Grand, Iron, Kane, San Juan, Washington, and Wayne Counties in Utah; and Custer, Douglas, El Paso, Fremont, Huerfano, Jefferson, Pueblo, and Teller Counties in Colorado, on the maps. Precise legal descriptions of each critical habitat unit

are on file at the New Mexico Ecological Services Field Office.

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

BILLING CODE 4310–55–P

# **MEXICAN SPOTTED OWL CRITICAL HABITAT UNITS IN ARIZONA**

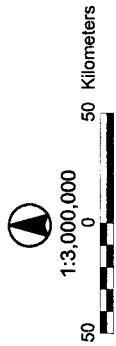
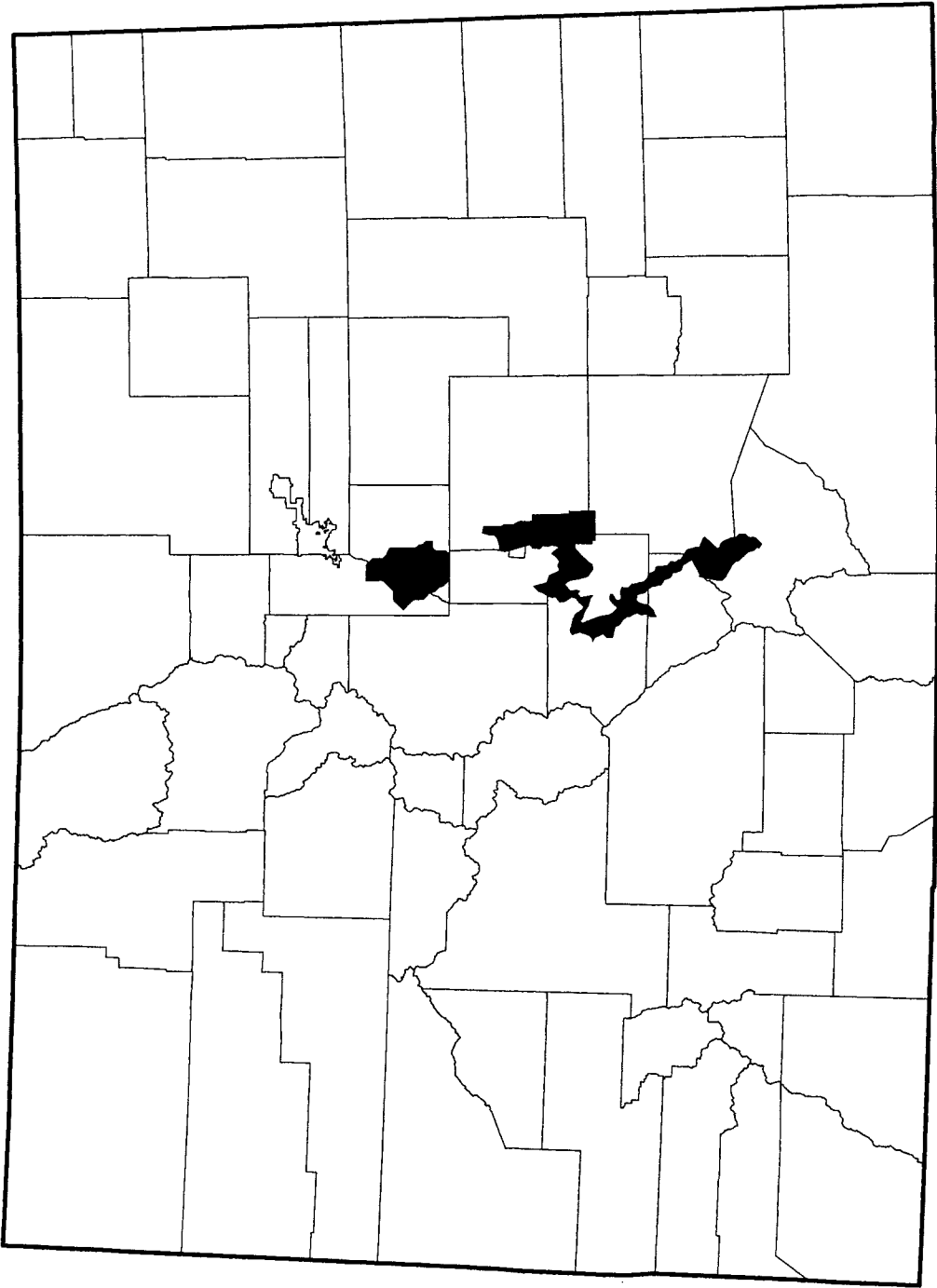


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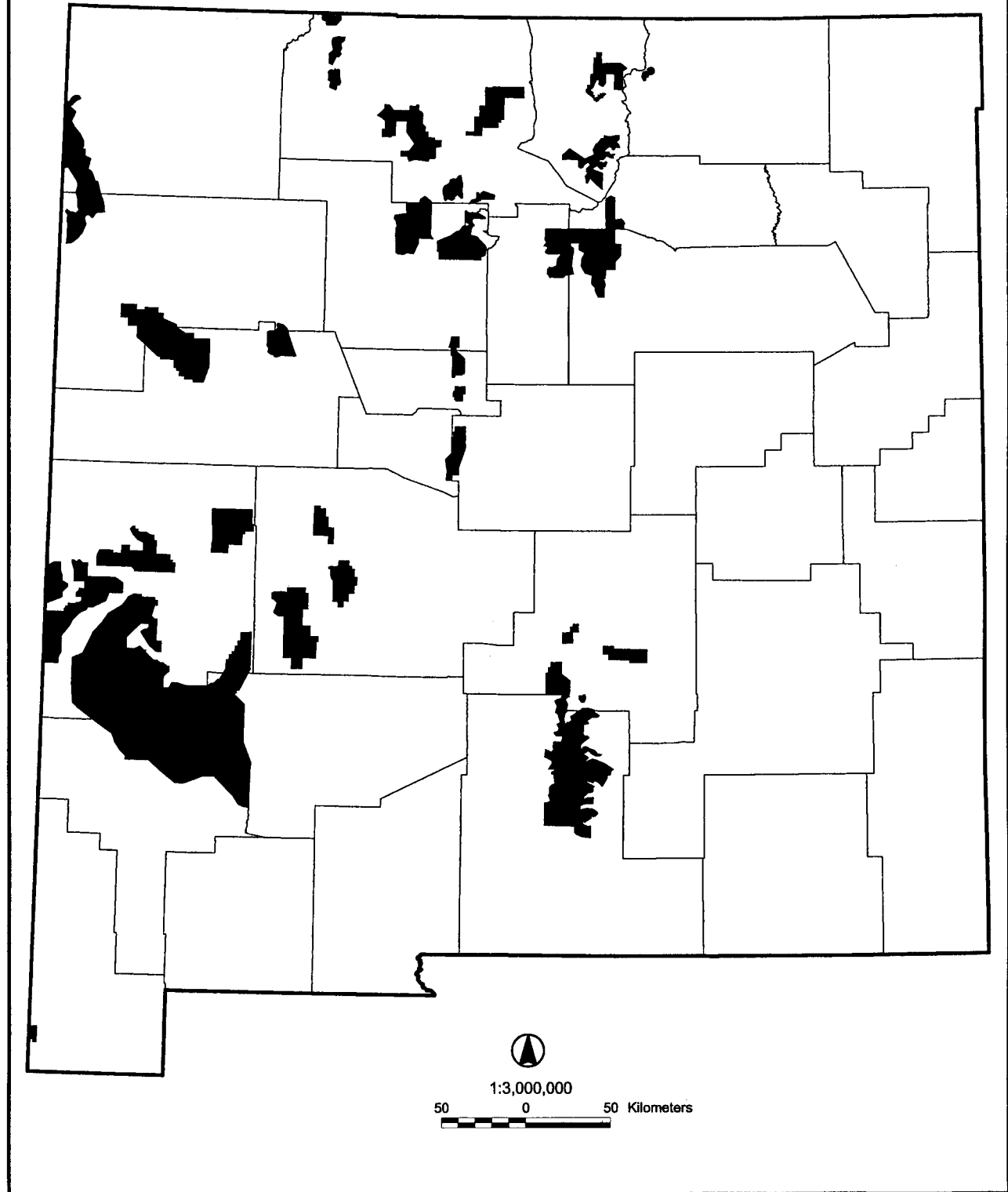
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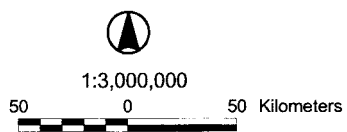
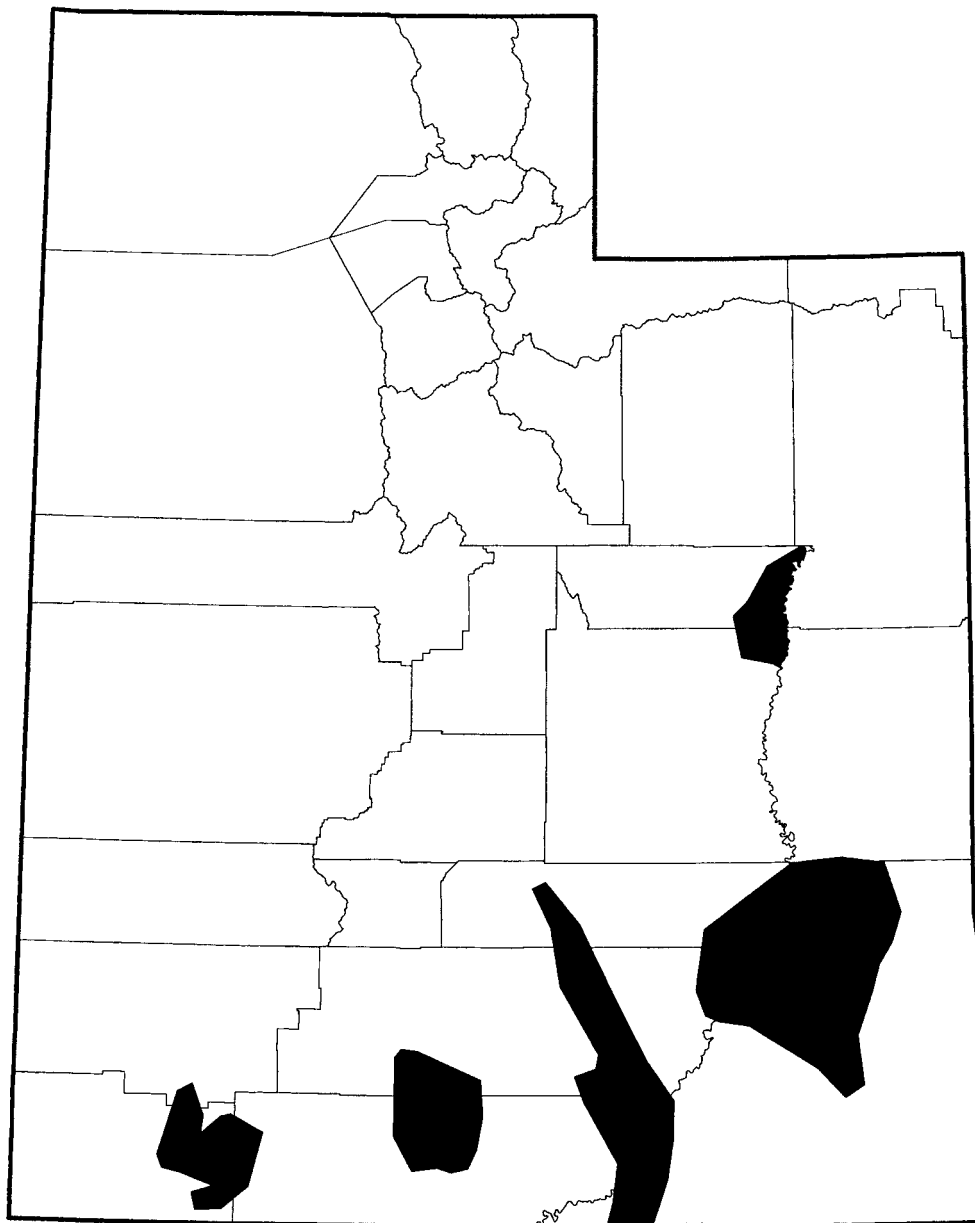
**MEXICAN SPOTTED OWL  
CRITICAL HABITAT UNITS IN COLORADO**



# **MEXICAN SPOTTED OWL CRITICAL HABITAT UNITS IN NEW MEXICO**



**MEXICAN SPOTTED OWL  
CRITICAL HABITAT UNITS IN UTAH**



Dated: July 14, 2000.

**Donald J. Barry,**

*Assistant Secretary for Fish and Wildlife and  
Parks.*

[FR Doc. 00-18407 Filed 7-20-00; 8:45 am]

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