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## **DEPARTMENT OF THE INTERIOR**

### **Fish and Wildlife Service**

#### **50 CFR Part 17**

**[Docket No. FWS–R1–ES–2013–0088; 4500030114]**

**RIN 1018–AZ56**

### **Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Oregon Spotted Frog**

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

**ACTION:** Proposed rule; reopening of comment period.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), announce the reopening of the public comment period on the August 29, 2013, proposed designation of critical habitat for the Oregon spotted frog (*Rana pretiosa*) under the Endangered Species Act of

1973, as amended (Act). We are proposing changes to four of the proposed critical habitat units based on new information we have received. We also announce the availability of a draft economic analysis (DEA) of the proposed designation of critical habitat for the Oregon spotted frog and an amended required determinations section of the proposal. We are reopening the comment period to allow all interested parties an opportunity to comment simultaneously on the proposed designation of critical habitat, the associated DEA, the amended required determinations section, and the proposed changes to the critical habitat units described in this document. Comments previously submitted need not be resubmitted, as they will be fully considered in preparation of the final rule.

**DATES:** The comment period for the proposed rule published August 29, 2013 (at 78 FR 53538), is reopened. We will consider comments on that proposed rule or the changes to it proposed in this document that we receive or that are postmarked on or before **[INSERT DATE 30 DAYS AFTER DATE OF FEDERAL REGISTER PUBLICATION]**. Comments submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES** section, below) must be received by 11:59 p.m. Eastern Time on the closing date.

**ADDRESSES:** *Document availability:* You may obtain copies of the proposed rule and the associated draft economic analysis on the Internet at <http://www.regulations.gov> at Docket No. FWS-R1-ES-2013-0088 or by mail from the Washington Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

*Written comments:* You may submit written comments by one of the following methods:

(1) *Electronically:* Go to the Federal eRulemaking Portal:

<http://www.regulations.gov>. Submit comments on the critical habitat proposal and associated draft economic analysis by searching for Docket No. FWS–R1–ES–2013–0088, which is the docket number for this rulemaking.

(2) *By hard copy:* Submit comments on the critical habitat proposal and associated draft economic analysis U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS–R1–ES–2013–0088; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, MS 2042–PDM; Arlington, VA 22203.

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

**FOR FURTHER INFORMATION CONTACT:** Ken S. Berg, Manager, U.S. Fish and Wildlife Service, Washington Fish and Wildlife Office, 510 Desmond Drive SE., Suite 102, Lacey, WA 98503; telephone 360-753-9440; or facsimile 360-753-9445. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800-877-8339.

**SUPPLEMENTARY INFORMATION:**

## Public Comments

We will accept written comments and information during this reopened comment period on our proposed designation of critical habitat for the Oregon spotted frog that was published in the **Federal Register** on August 29, 2013 (78 FR 53538), our revisions to the proposed designation of critical habitat described in this document, our DEA of the proposed designation, and the amended required determinations provided in this document. We will consider information and recommendations from all interested parties. We are particularly interested in comments concerning:

(1) The reasons why we should or should not designate habitat as “critical habitat” under section 4 of the Act (16 U.S.C. 1531 et seq.), including whether there are threats to the species from human activity, the degree of which can be expected to increase due to the designation, and whether that increase in threats outweighs the benefit of designation such that the designation of critical habitat is not prudent.

(2) Specific information on:

(a) The amount and distribution of Oregon spotted frog habitat;

(b) What may constitute “physical or biological features essential to the conservation of the species,” within the geographical range currently occupied by the Oregon spotted frog;

(c) Where these features are currently found;

(d) Whether any of these features may require special management considerations or protection;

(e) What areas, that were occupied at the time of listing (or are currently occupied) and that contain features essential to the conservation of the species, should be included in the designation and why;

(f) What areas not occupied at the time of listing are essential for the conservation of the species and why;

(g) Whether there are any specific areas where the proposed critical habitat boundaries should be expanded to include adjacent riparian areas, what factors or features should be considered in determining an appropriate boundary revision, and why this would be biologically necessary or unnecessary; and

(h) Additional research studies or information regarding the movement distances or patterns of Oregon spotted frogs.

(3) Land use designations and current or planned activities in the areas proposed to be designated as critical habitat, and possible impacts of these activities on the proposed critical habitat.

(4) Information on the projected and reasonably likely impacts of climate change on the Oregon spotted frog within the proposed critical habitat areas.

(5) Any probable economic, national security, or other relevant impacts of designating any area that may be included in the final designation; in particular, we seek information on any impacts on small entities or families, and the benefits of including or excluding areas from the proposed designation that exhibit these impacts.

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

(7) Information on the extent to which the description of economic impacts in the draft economic analysis is a reasonable estimate of the likely economic impacts.

(8) The likelihood of adverse social reactions to the designation of critical habitat, as discussed in the associated documents of the draft economic analysis, and how the consequences of such reactions, if likely to occur, would relate to the conservation and regulatory benefits of the proposed critical habitat designation.

If you submitted comments or information on the proposed rule (78 FR 53538) during the initial comment period from August 29, 2013, to November 12, 2013, please do not resubmit them. We will incorporate them into the public record as part of this comment period, and we will fully consider them in the preparation of our final determination. Our final determination concerning critical habitat will take into consideration all written comments and any additional information we receive during both comment periods. On the basis of public comments, we may, during the development of our final determination, find that areas proposed are not essential, are appropriate for exclusion under section 4(b)(2) of the Act, or are not appropriate for exclusion.

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

If you submit a comment via <http://www.regulations.gov>, your entire comment—including any personal identifying information—will be posted on the website. We will post all hardcopy comments on <http://www.regulations.gov> as well. If you submit a hardcopy comment 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.

Comments and materials we receive, as well as supporting documentation we used in preparing the proposed rule and DEA, will be available for public inspection on <http://www.regulations.gov> at Docket No. FWS–R1–ES–2013–0088, or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Washington Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**). You may obtain copies of the proposed rule and the DEA on the Internet at <http://www.regulations.gov> at Docket Number FWS–R1–ES–2013–0088, or by mail from the Washington Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

## **Background**

It is our intent to discuss only those topics directly relevant to the designation of critical habitat for Oregon spotted frog in this document. For more information on previous Federal actions concerning the Oregon spotted frog, refer to the proposed designation of critical habitat published in the **Federal Register** on August 29, 2013 (78 FR 53538). For more information on the Oregon spotted frog or its habitat, refer to the proposed listing rule published in the **Federal Register** on August 29, 2013 (78 FR 53582), which is available online at <http://www.regulations.gov> (at Docket Number FWS–R1–ES–2013–0013) or from the Washington Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

On August 29, 2013, we published a proposed rule to list the Oregon spotted frog as a threatened species (78 FR 53582) and a proposed rule to designate critical habitat for the Oregon spotted frog (78 FR 53538). We proposed to designate approximately 68,192 acres (27,597 hectares (ha)) and approximately 24 river miles (mi) (38 river kilometers (km)) in 14 units located in Washington and Oregon as critical habitat. That proposal had a 60-day comment period, to end October 28, 2013. On September 26, 2013, we extended the public comment period an additional 15 days, until November 12, 2013, to allow all interested parties additional time to comment on the proposed rules, and we announced that we would hold a public hearing (78 FR 59334). The public hearing was held on October 21, 2013, in Lacey, Washington. We will submit for publication in the **Federal Register** a final critical habitat designation for the Oregon spotted frog after we receive public comment on the changes to the proposed critical habitat described in this document, the DEA, and the amended required determinations provided in this document.

### *Critical Habitat*

Section 3 of the Act defines critical habitat as the specific areas within the geographical 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 essential to the conservation of the species and that may require special management considerations or protection, and specific areas outside the geographical 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. If the proposed rule is made final, section 7 of the Act will prohibit destruction or adverse

modification of critical habitat by any activity funded, authorized, or carried out by any Federal agency. Federal agencies proposing actions affecting critical habitat must consult with us on the effects of their proposed actions under section 7(a)(2) of the Act.

### **Changes from Previously Proposed Critical Habitat**

The Service received new information from Federal partners and the public that led to our refinement of four of the proposed critical habitat units in Oregon. We are proposing to expand the four units to include a total of 309 additional acres (125 additional ha). All of the additional areas are known to be occupied by Oregon spotted frogs and are subject to the same suite of activities described in our August 29, 2013, proposed designation (78 FR 53538). The approximate acreages to be added to the four units, as well as the landownership, are shown below in Table 1. There are no changes being proposed in the other 10 proposed critical habitat units.

TABLE 1—Approximate area and landownership of changes to proposed critical habitat units for the Oregon spotted frog. All units in table are located in Oregon.

Critical Habitat Unit	Additional Federal Ac (Ha)	Additional State Ac (Ha)	Additional County Ac (Ha)	Additional Private/Local Municipalities Ac (Ha)	Total Additional Proposed Ac (Ha)	Total Proposed Ac (Ha)
7. Lower Deschutes River	27 (11)	0	0	0	27 (11)	96 (39)
12. Williamson River	82 (33)	0	0	98 (40)	180 (73)	15,332 (6,205)
13. Upper Klamath Lake	7 (3)	3 (1)	0	75 (30)	85 (34)	2,336 (946)
14. Upper Klamath	15 (6)	0	0	2 (1)	17 (7)	262 (106)
Total	131 (53)	3 (1)	0	175 (71)	309 (125)	

**Note:** Area sizes may not sum due to rounding. Area estimates reflect all land and river miles within proposed critical habitat unit boundaries.

## *Changes to Proposed Critical Habitat Units*

### Critical Habitat Unit 7: Lower Deschutes River

A comment we received from a peer reviewer indicated that the proposed critical habitat unit did not include overwintering habitat currently used by Oregon spotted frogs at Camas Prairie (Corkran 2013). Upon consideration of the information we received, we propose to include an additional 27 acres (11 ha) of the meadow and springs that provide overwintering habitat for the Oregon spotted frog. The additional acreage is occupied by the Oregon spotted frog, contains the physical or biological features essential to the conservation of the species, and occurs entirely on the Mt. Hood National Forest. The essential features within the additional acres may require special management considerations or protection to ensure maintenance or improvement of existing overwintering habitat, aquatic movement corridors, or refugia habitat, and to address any changes that could affect these features. The total acreage of proposed critical habitat in Unit 7, after this refinement, is 96 acres (39 ha) in Wasco County, Oregon.

### Critical Habitat Unit 12: Williamson River

New information we received from the U.S. Geological Survey indicated that the proposed critical habitat unit did not include the full extent of occupancy by Oregon spotted frogs along Jack Creek (C. Pearl, USGS, pers. comm. 2014). Therefore, we

propose to include an additional 180 acres (73 ha) in this unit. Upon consideration of the information we received, this refinement includes approximately 3.1 miles (5 km) of Jack Creek and its adjacent seasonally wetted areas south of U.S. Forest Service Road 88 through 1.32 mi (2.12 km) of O'Connor Meadow. The additional acreage is occupied by the Oregon spotted frog and contains the physical or biological features essential to the conservation of the species. Eighty-two acres (33 ha) are managed by the Fremont-Winema National Forest, and 98 acres (40 ha) are privately owned. The essential features within the additional acres may require special management considerations or protection to ensure maintenance or improvement of the existing nonbreeding, breeding, rearing, and overwintering habitat; aquatic movement corridors; or refugia habitat, and to address any changes that could affect these features. The total acreage of proposed critical habitat in Unit 12, after this refinement, is 15,332 acres (6,205 ha) in Klamath County, Oregon.

#### Critical Habitat Unit 13: Upper Klamath Lake

New information we received from the U.S. Geological Survey and National Park Service indicated that the proposed critical habitat unit did not include the full extent of occupancy by Oregon spotted frogs (D. Hering, NPS, pers. comm. 2014; C. Pearl, pers. comm. 2013). Upon consideration of the information we received, we propose to include an additional 85 acres (34 ha) in this unit. This refinement includes approximately 0.75 mi (1.2 km) of Annie Creek and the associated, adjacent, seasonally wetted areas from the Annie Creek Sno-Park downstream to its junction with the Wood River;

approximately 1.19 mi (1.92 km) of Sun Creek and the associated, adjacent, seasonally wetted areas from the boundary of State and private property to the junction with Annie Creek; and approximately 1.10 mi (1.77 km) of Blue Spring and the associated, adjacent, seasonally wetted areas from the spring origin to the junction of Short Creek. The additional acreage is occupied by the Oregon spotted frog and contains the physical or biological features essential to the conservation of the species. Seven acres (3 ha) are managed by the Bureau of Land Management and Fremont-Winema National Forest, 3 acres (1 ha) are managed by Oregon State Parks, and 75 acres (30 ha) are privately owned. The essential features within the additional acres may require special management considerations or protection to ensure maintenance or improvement of the existing nonbreeding, breeding, rearing, and overwintering habitat; aquatic movement corridors; or refugia habitat, and to address any changes that could affect these features. The total acreage of proposed critical habitat in Unit 13, after this refinement, is 2,336 acres (946 ha) in Klamath County, Oregon.

#### Critical Habitat Unit 14: Upper Klamath

New information we received from the U.S. Forest Service indicated the proposed critical habitat unit did not include the full extent of occupancy by Oregon spotted frogs (T. Smith, USFS, pers. comm. 2014). Therefore, we propose to include an additional 17 acres (7 ha) in this unit. Upon consideration of the information we received, this refinement includes an additional portion of the Buck Lake drainage system of canals, as well as Spencer Creek from Buck Lake downstream approximately 1.6 miles (2.6 km),

ending at the intersection of U.S. Forest Service Road 46 and Clover Creek Road. The additional acreage is occupied by the Oregon spotted frog and contains the essential physical or biological features. Fifteen acres (6 ha) are managed by the Bureau of Land Management and Fremont-Winema National Forest, and 2 acres (1 ha) are privately owned. The essential features within the additional acres may require special management considerations or protection to ensure maintenance or improvement of the existing nonbreeding, breeding, rearing, and overwintering habitat; aquatic movement corridors; or refugia habitat, and to address any changes that could affect these features. The total acreage of proposed critical habitat in Unit 14, after this refinement, is 262 acres (106 ha) in Klamath and Jackson Counties, Oregon.

### **Consideration of Impacts under Section 4(b)(2) of the Act**

Section 4(b)(2) of the Act requires that we designate or revise critical habitat based upon the best scientific data available, after taking into consideration the economic impact, impact on national security, or any other relevant impact of specifying any particular area as critical habitat. 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 as critical habitat, provided such exclusion will not result in the extinction of the species.

When considering the benefits of inclusion for an area, we consider among other factors, the additional regulatory benefits that an area would receive through the analysis under section 7 of the Act addressing the destruction or adverse modification of critical

habitat as a result of actions with a Federal nexus (activities conducted, funded, permitted, or authorized by Federal agencies), the educational benefits of identifying areas containing essential features that aid in the recovery of the listed species, and any ancillary benefits triggered by existing local, State or Federal laws as a result of the critical habitat designation.

When considering the benefits of exclusion, we consider, among other things, whether exclusion of a specific area is likely to incentivize or result in conservation; the continuation, strengthening, or encouragement of partnerships; or implementation of a management plan. In the case of the Oregon spotted frog, the benefits of critical habitat include public awareness of the presence of the Oregon spotted frog and the importance of habitat protection, and, where a Federal nexus exists, increased habitat protection for the Oregon spotted frog due to protection from adverse modification or destruction of critical habitat. In practice, situations with a Federal nexus exist primarily on Federal lands or for projects undertaken by Federal agencies.

The final decision on whether to exclude any areas will be based on the best scientific data available at the time of the final designation, including information obtained during the comment period and information about the economic impact of designation. Accordingly, we have prepared a draft economic analysis concerning the proposed critical habitat designation (DEA), which is available for review and comment (see **ADDRESSES**).

### **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 “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). The baseline, therefore, 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 an optional section 4(b)(2) exclusion analysis.

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 Oregon spotted frog (IEc, April 30, 2014). 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 the geographic areas in which the critical habitat designation is unlikely to result in probable incremental economic impacts. In particular, the screening analysis considers baseline costs (i.e., absent critical habitat designation) and includes probable economic impacts where land and water use may 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. The screening analysis filters out particular areas of critical habitat that are already subject to such protections and are, therefore, unlikely to incur incremental economic impacts. The screening analysis also assesses whether units are unoccupied by the species and may require additional management or conservation efforts as a result of the critical habitat designation and may incur incremental economic impacts. This screening analysis, combined with the information contained in our IEM, is what we consider our draft economic analysis of the proposed critical habitat designation for the Oregon spotted frog and is summarized in the narrative below.

Executive Orders (E.O.) 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 impacted entities, where practicable and reasonable. We assess, to the extent practicable, the probable impacts, if sufficient data are available, to both directly and indirectly impacted entities. 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 Oregon spotted frog, first we identified, in the IEM dated January 14, 2014, and the IEM addendum dated February 13, 2014, probable incremental economic impacts associated with the following categories of activities: (1) Grazing, (2) water management, (3) land restoration and conservation, (4) agriculture, (5) recreation, and (6) transportation activities. We considered each industry or category individually. Additionally, we considered whether their activities have any Federal involvement. Critical habitat designation will not affect activities that do not have any Federal involvement; designation of critical habitat only affects activities conducted, funded, permitted, or authorized by Federal agencies. If the listing proposal is made final, in areas where the Oregon spotted frog is present, Federal agencies would be 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 also finalize the proposed critical habitat designation, consultations to avoid the destruction or adverse modification of critical habitat would be

incorporated into the existing consultation process. Therefore, disproportionate impacts to any geographic area or sector are not likely as a result of this critical habitat designation.

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 Oregon spotted frog's critical habitat. Because the designation of critical habitat for Oregon spotted frog was proposed concurrently with the listing, it has been our experience that it is more difficult to discern which conservation efforts are attributable to the species being listed and those which will result solely from the designation of critical habitat. However, the following specific circumstances in this case help to inform our evaluation: (1) The essential physical or biological features identified for critical habitat are the same features essential for the life history requisites of the species, and (2) any actions that would result in sufficient harm or harassment to constitute jeopardy to the Oregon spotted frog would also likely adversely affect the essential physical and biological features of 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 the proposed designation of critical habitat.

The proposed critical habitat designation for the Oregon spotted frog totals approximately 68,500 acres (27,721 ha) and 24 river mi (38 river km). The majority of these areas are occupied by the Oregon spotted frog, although approximately 365 acres

(148 ha) and less than 1 river mile are not known to be occupied by the species. In occupied areas, any actions that may affect the species or its habitat would also affect designated critical habitat, and it is unlikely that any additional conservation efforts would be recommended to address the adverse modification standard over and above those recommended as necessary to avoid jeopardizing the continued existence of the Oregon spotted frog. Additionally, in areas proposed as critical habitat that are not known to be occupied by the Oregon spotted frog, Federal action agencies are likely to treat these areas as potentially occupied due to their proximity to occupied areas, and any project modifications requested to avoid adverse modification are likely to be the same as those needed to avoid jeopardy. Therefore, only administrative costs are expected due to the proposed critical habitat designation. While this additional analysis will require time and resources by both the Federal action agency and the Service, it is believed that, in most circumstances, these costs would predominantly be administrative in nature and would not be significant. The unit likely to incur the largest incremental administrative costs is Unit 9 (Little Deschutes River) due to a relatively high number of anticipated consultations to consider grazing allotments intersecting the unit. The total incremental administrative costs associated with all known future actions are estimated to be \$190,000. Thus, future probable incremental economic impacts are not likely to exceed \$100 million in any single year and disproportionate impacts to any geographic area or sector are not likely as a result of this critical habitat designation.

Therefore, the probable incremental economic impacts of the Oregon spotted frog critical habitat designation are expected to be limited to additional administrative effort in conducting future section 7 consultations. This is due to three factors: (1) In occupied

areas, activities with a Federal nexus would be subject to section 7 consultation requirements regardless of critical habitat designation, due to the presence of the listed species; (2) In areas not known to be occupied, agencies would in most cases be likely to treat areas as potentially occupied due to their proximity to occupied areas; and (3) project modifications requested to avoid adverse modification would be likely to be the same as those needed to avoid jeopardy.

As we stated earlier, we are soliciting data and comments from the public on the DEA, as well as all aspects of the proposed rule and our amended required determinations. We may revise the proposed rule or supporting documents to incorporate or address information we receive during the public comment period. In particular, 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.

### **Required Determinations—Amended**

In our August 29, 2013, proposed rule (78 FR 53538), we determined our compliance with several statutes and executive orders. Following our evaluation of the probable incremental economic impacts resulting from the designation of critical habitat for the Oregon spotted frog, we have amended or affirmed our determinations below. Specifically, we affirm the information in our proposed rule concerning Executive Orders (E.O.s) 12866 and 13563 (Regulatory Planning and Review), E.O. 13132 (Federalism), E.O. 12988 (Civil Justice Reform), E.O. 13211 (Energy, Supply, Distribution, or Use),

the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*), and the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951).

However, based on our evaluation of the probable incremental economic impacts of the proposed designation of critical habitat for the Oregon spotted frog, we are amending our required determinations concerning the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) and E.O. 12630 (Takings).

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

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA; 5 U.S.C. 801 *et seq.*), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the RFA to require Federal agencies to provide a certification statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities.

According to the Small Business Administration, small entities include small

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

The Service’s current understanding of the requirements under the RFA, as amended, and following recent court decisions, is that Federal agencies are only required to evaluate the potential incremental impacts of rulemaking on those entities directly regulated by the rulemaking itself, and therefore, not required 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 adversely modify critical habitat. Therefore, under these circumstances only Federal action agencies are directly subject to the specific regulatory requirement (avoiding destruction and adverse modification) imposed by critical habitat

designation. Under these circumstances, it is our position that only Federal action agencies will be directly regulated by this designation. Federal agencies are not small entities and to this end, there is no requirement under RFA to evaluate the potential impacts to entities not directly regulated. Therefore, because no small entities are directly regulated by this rulemaking, the Service certifies that, if promulgated, 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 promulgated, the proposed critical habitat designation would not have a significant economic impact on a substantial number of small business entities. Therefore, an initial regulatory flexibility analysis is not required.

*E.O. 12630 (Takings)*

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 Oregon spotted frog in a takings implications assessment. As discussed above, the designation of critical habitat affects only Federal actions. Although private parties that receive Federal funding, assistance, or 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. The economic analysis found that no significant economic impacts are likely to result from the designation of critical habitat for the Oregon spotted frog. Because the Act's critical habitat protection requirements apply only to Federal agency actions, few conflicts between critical habitat and private property rights should result from this designation. Based on information contained in the economic analysis assessment and described within this document, it is not likely that economic impacts to a property owner would be of a sufficient magnitude to support a takings action. Therefore, the takings implications assessment concludes that this designation of critical habitat for Oregon spotted frog does not pose significant takings implications for lands within or affected by the designation.

### **Authors**

The primary authors of this notice are the staff members of the Washington Fish and Wildlife Office, Oregon Fish and Wildlife Office-Bend Field Office, and Klamath Falls Fish and Wildlife Office.

### **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 further amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as proposed to be amended on August 29, 2013, at 78 FR 53538, 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; 1531–1544; 4201–4245, unless otherwise noted.

2. Amend § 17.95(d) by revising paragraphs (12), (18), (19), and (20) in the entry proposed for “Oregon Spotted Frog (*Rana pretiosa*)” at 78 FR 53538 to read as follows:

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

\* \* \* \* \*

(d) *Amphibians.*

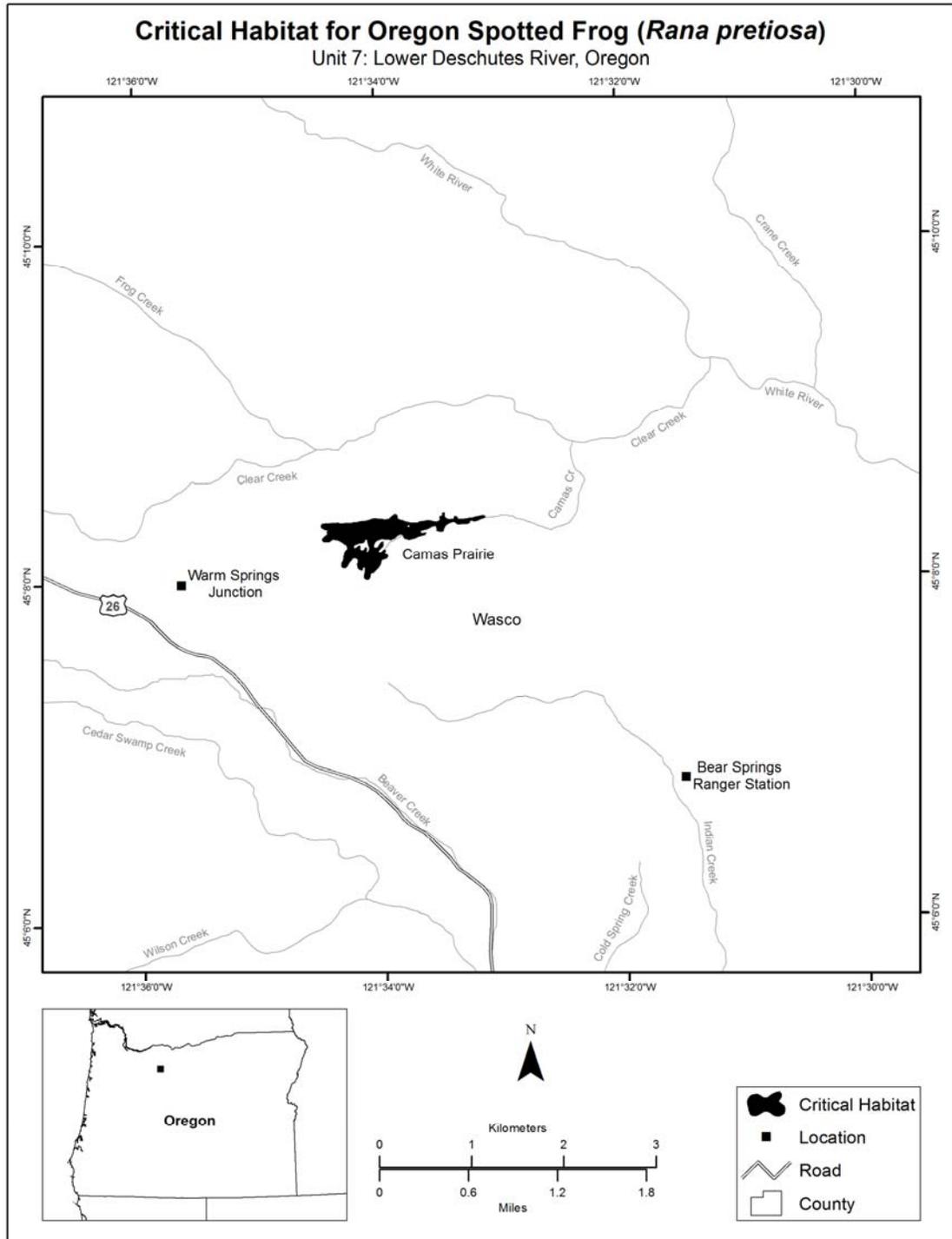
\* \* \* \* \*

Oregon Spotted Frog (*Rana pretiosa*)

\* \* \* \* \*

(12) Unit 7: Lower Deschutes River, Wasco County, Oregon. Map of Unit 7

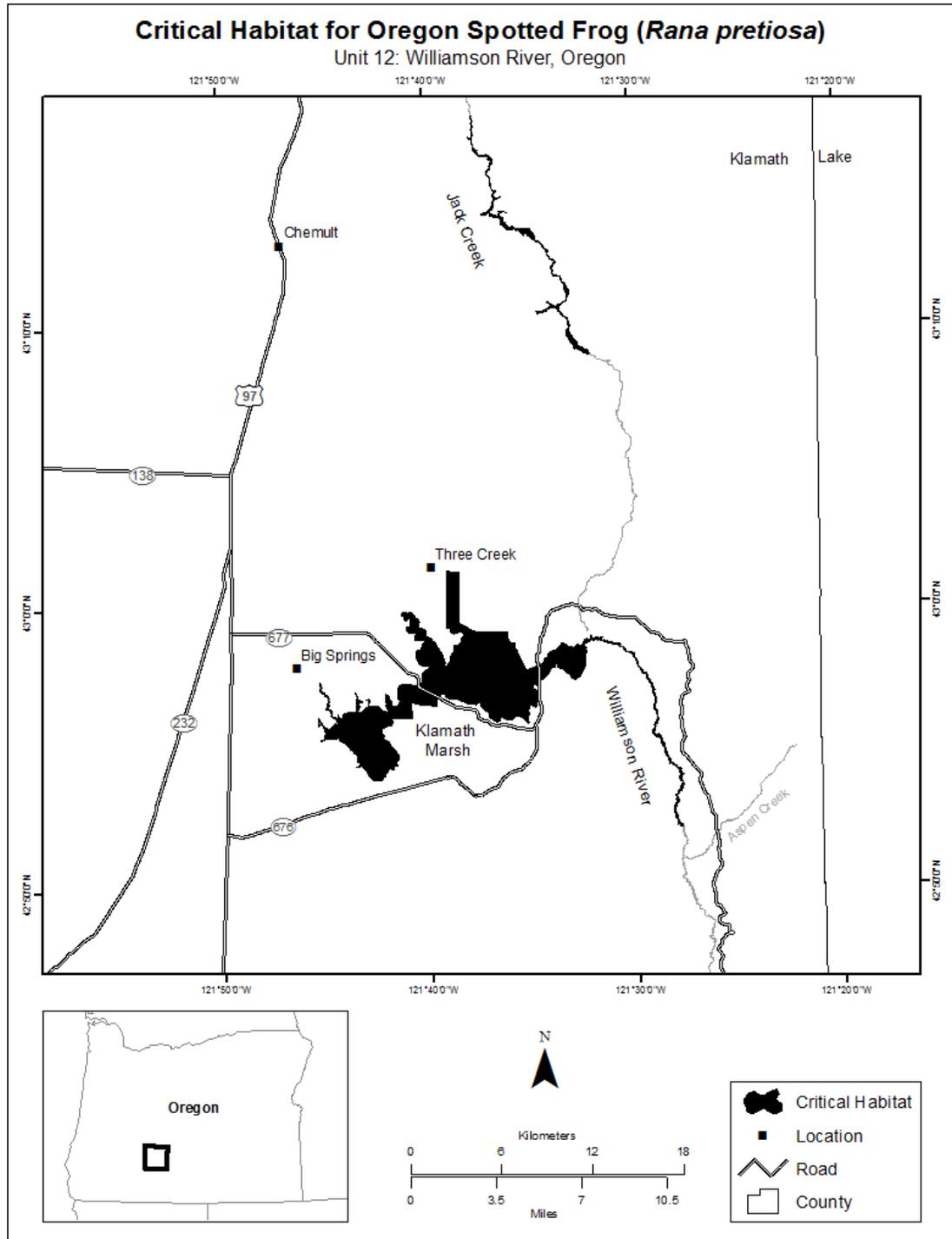
follows:



\* \* \* \* \*

(18) Unit 12: Williamson River, Klamath County, Oregon. Map of Unit 12

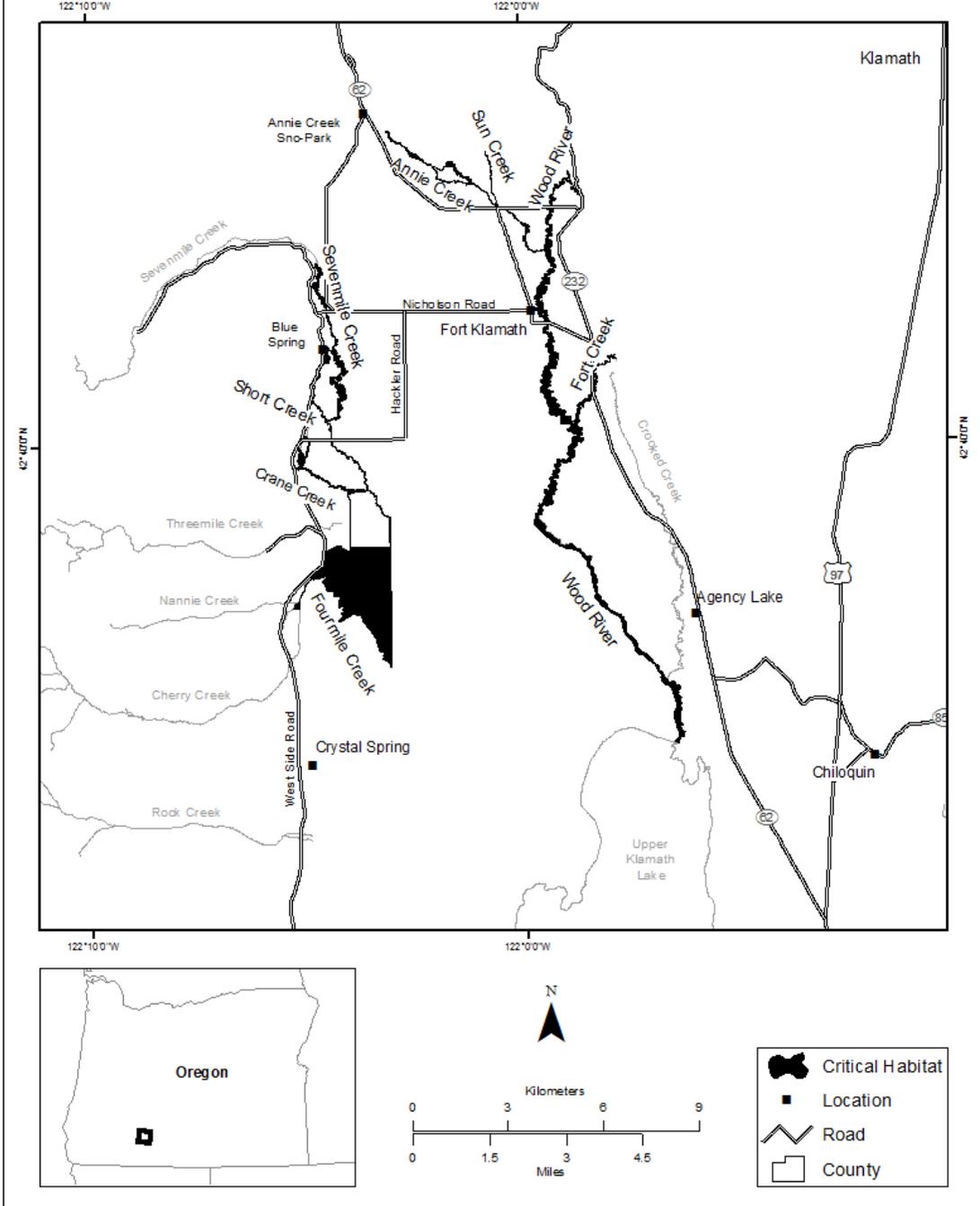
follows:



(19) Unit 13: Upper Klamath Lake, Klamath County, Oregon. Map of Unit 13

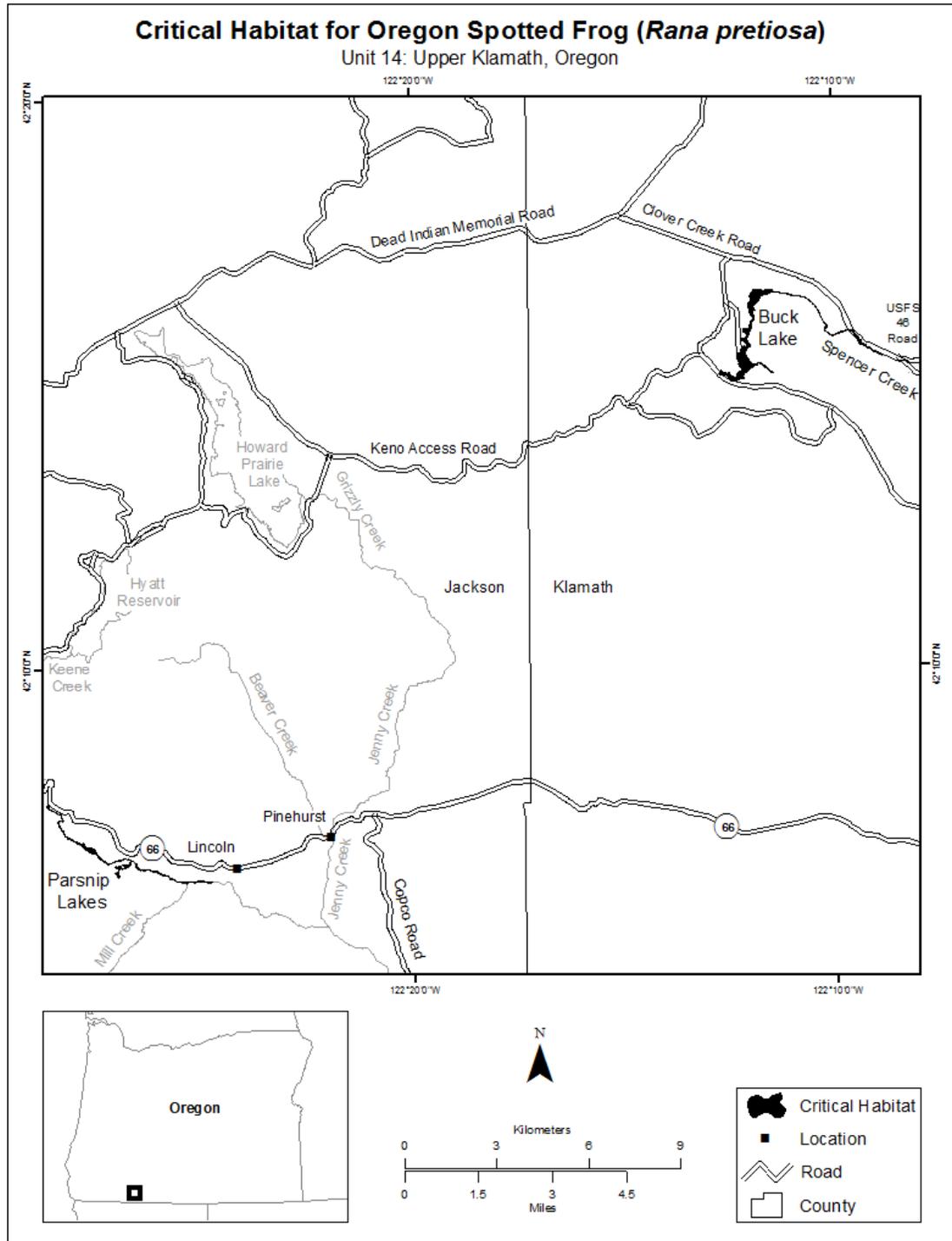
follows:

### Critical Habitat for Oregon Spotted Frog (*Rana pretiosa*) Unit 13: Upper Klamath Lake, Oregon



(20) Unit 14: Upper Klamath, Jackson and Klamath Counties, Oregon. Map of

Unit 14 follows:



\* \* \* \* \*

Date: June 10, 2014.

Rachel Jacobson,

Principal Deputy Assistant Secretary for Fish and Wildlife and Parks.

~~[Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat  
for the Oregon Spotted Frog]~~

Billing Code 4310-55-P

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