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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R8–ES–2021–0060; FF09E21000 FXES1111090FEDR 223]

RIN 1018–BE49

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Southern Sierra Nevada Distinct Population Segment of Fisher

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), propose to designate critical habitat for the federally endangered Southern Sierra Nevada distinct population segment (DPS) of fisher (*Pekania pennanti*) under the Endangered Species Act of 1973, as amended (Act). In total, we propose to designate approximately 554,454 acres (ac) (224,379 hectares (ha)) in six units in California as critical habitat for the Southern Sierra Nevada DPS of fisher. We also announce the availability of a draft economic analysis of the proposed critical habitat designation.

DATES: We will accept comments received or postmarked on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Comments submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES**, below) must be received by 11:59 p.m. Eastern Time on the closing date. We must receive requests for a public hearing, in writing, at the address shown in **FOR FURTHER INFORMATION CONTACT** by [INSERT DATE 45 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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

methods:

(1) *Electronically*: Go to the Federal eRulemaking Portal: *http://www.regulations.gov*. In the Search box, enter the docket number or RIN for this rulemaking (presented above in the document headings). For best results, do not copy and paste either number; instead, type the docket number or RIN into the Search box using hyphens. Then, click on the Search button. On the resulting page, in the Search panel on the left side of the screen, under the Document Type heading, check the Proposed Rule box to locate this document. You may submit a comment by clicking on "Comment."

(2) *By hard copy*: Submit by U.S. mail to: Public Comments Processing, Attn: FWS–R8–ES–2021–0060, U.S. Fish and Wildlife Service, MS: PRB/3W, 5275 Leesburg Pike, Falls Church, VA 22041–3803.

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

Availability of supporting materials: The coordinates or plot points or both from which the critical habitat maps are generated are included in the decision file and are available at *http://www.regulations.gov* under Docket No. FWS–R8–ES–2021–0060. Any additional supporting information that we developed for this critical habitat designation will be available at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Michael Fris, Field Supervisor, U.S. Fish and Wildlife Service, Sacramento Fish and Wildlife Office, 2800 Cottage Way, Rm. W–2605, Sacramento, CA 95825; telephone 916–414–6600. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Executive Summary

Why we need to publish a rule. Under the Act, when we determine that any species is an endangered or threatened species, we are required to designate critical habitat, to the maximum extent prudent and determinable. Designations of critical habitat can be completed only by issuing a rule.

What this document does. This document proposes to designate critical habitat for the federally endangered Southern Sierra Nevada DPS of fisher in portions of six counties (Tulare, Kern, Fresno, Madera, Mariposa, and Tuolumne) in the State of California. Please note that, under the Act, the term "species" includes any subspecies of fish or wildlife or plants, and any distinct population segment (DPS) of any species of vertebrate fish or wildlife, which interbreeds when mature. Therefore, in this document, we may refer to the Southern Sierra Nevada DPS of fisher as a "DPS" or as a "species."

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

area as part of the critical habitat, unless we determine, based on the best scientific data available, that the failure to designate such area will result in the extinction of the species.

Abbreviations and Acronyms Used in This Proposed Rule

For the convenience of the reader, a list of the abbreviations and acronyms used in this proposed rule follows:

Act = Endangered Species Act (16 U.S.C. 1531 *et seq*.)

BIA = Bureau of Indian Affairs

BLM = Bureau of Land Management

Cal Fire = California Department of Forestry and Fire Protection

CBI = Conservation Biology Institute

CFR = Code of Federal Regulations

DEA = draft economic analysis

DoD = Department of Defense

DPS = distinct population segment

FR = *Federal Register*

IEc = Industrial Economics, Incorporated

IEM = incremental effects memorandum

INRMP = integrated natural resources management plan

IRMP = integrated resources management plan (Tule River Indian Tribe of the Tule River Reservation, California)

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

NPS = National Park Service

SCE = Southern California Edison

Service = U.S. Fish and Wildlife Service

SSA = species status assessment

SSN = Southern Sierra Nevada

USFS = U.S. Forest Service

WUI = wildland-urban interface

Information Requested

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

We particularly seek 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 information to inform the following factors that the regulations identify as reasons why designation of critical habitat may be not prudent:

(a) The species is threatened by taking or other human activity and identification of critical habitat can be expected to increase the degree of such threat to the species;

(b) The present or threatened destruction, modification, or curtailment of a species' habitat or range is not a threat to the species, or threats to the species' habitat stem solely from causes that cannot be addressed through management actions resulting from consultations under section 7(a)(2) of the Act;

(c) Areas within the jurisdiction of the United States provide no more than negligible conservation value, if any, for a species occurring primarily outside the jurisdiction of the United States; or

(d) No areas meet the definition of critical habitat.

(2) Specific information on:

(a) The amount and distribution of habitat for the SSN DPS of fisher;

(b) What areas, that were occupied at the time of listing (85 FR 29532; May 15, 2020) and that contain the physical and biological feature essential to the conservation of the species, should be included in the designation and why;

(c) Any additional areas occurring within the range of the species in Tulare, Kern, Fresno, Madera, Mariposa, and Tuolumne counties in California that should be included in the designation because they (1) are occupied at the time of listing and contain the physical or biological feature that is essential to the conservation of the species and that may require special management considerations, or (2) are unoccupied at the time of listing and are essential for the conservation of the species;

(d) Special management considerations or protection that may be needed in critical habitat areas we are proposing, including managing for the potential effects of climate change; and

(e) What areas not occupied at the time of listing are essential for the conservation of the species. We particularly seek comments:

(i) Regarding whether occupied areas are adequate for the conservation of the species; and

(ii) Providing specific information regarding whether or not unoccupied areas would, with reasonable certainty, contribute to the conservation of the species and contain the physical and biological feature essential to the conservation of the species; and

(iii) Explaining whether or not unoccupied areas fall within the definition of "habitat" at 50 CFR 424.02 and why.

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

(4) Information on the projected and reasonably likely impacts of climate change on the SSN DPS of fisher's proposed critical habitat.

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

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

(7) Whether any specific areas we are proposing for critical habitat designation should be considered for exclusion under section 4(b)(2) of the Act; whether the benefits of potentially excluding any specific area outweigh the benefits of including that area under section 4(b)(2) of the Act; and, in particular, whether any areas should be considered for exclusion under section 4(b)(2) of the Act based on a conservation program or plan, and why. These may include Federal, Tribal, State, county, local, or private lands with permitted conservation plans covering the species in the area such as habitat conservation plans, safe harbor agreements, or conservation easements, or non-permitted conservation agreements and partnerships that are under development. Detailed information regarding these plans, agreements, easements, and partnerships is also requested, including:

(a) The location and size of lands covered by the plan, agreement, easement, or partnership;

(b) The duration of the plan, agreement, easement, or partnership;

(c) Who holds or manages the land;

(d) What management activities are conducted;

(e) What land uses are allowable; and

(f) If management activities are beneficial to the SSN DPS of fisher and its habitat.

(8) Ongoing or proposed conservation efforts that could result in direct or indirect ecological benefits to the associated habitat for the SSN DPS of fisher. We would evaluate whether these efforts provide an ecological benefit to the DPS and contribute to the recovery of the species, and if so, these areas could be considered for exclusion from the final critical habitat designation.

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

Please include sufficient information with your submission (such as scientific journal articles or other publications) to allow us to verify any scientific or commercial information you include. If you request the exclusion of any areas from the final designation, please provide credible information regarding the existence of a meaningful economic or other relevant impact supporting the benefit of exclusion of that particular area. Also, please note that submissions merely stating support for, or opposition to, the action under consideration without providing supporting information, although noted, will not be considered in making a determination, as section 4(b)(2) of the Act directs that the Secretary shall designate critical habitat on the basis of the best scientific information available.

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

If you submit information via *http://www.regulations.gov*, your entire submission—including any personal identifying information—will be posted on the website. If your submission is made via a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this

information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on *http://www.regulations.gov*.

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

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

Public Hearing

Section 4(b)(5) of the Act provides for a public hearing on this proposal, if requested. Requests must be received by the date specified in **DATES**. Such requests must be sent to the address shown in **FOR FURTHER INFORMATION CONTACT**. We will schedule a public hearing on this proposal, if requested, and announce the date, time, and place of the hearing, as well as how to obtain reasonable accommodations, in the *Federal Register* and local newspapers at least 15 days before the hearing. For the immediate future, we will provide these public hearings using webinars that will be announced on the Service's website, in addition to the *Federal Register*. The use of these virtual public hearings is consistent with our regulations at 50 CFR 424.16(c)(3).

Previous Federal Actions

It is our intent to discuss only those topics directly relevant to the designation of critical habitat for the SSN DPS of fisher in this document. For more information on the DPS, general information about fisher habitat, and previous Federal actions associated with listing fishers that occur in the Sierra Nevada portion of the species' range, refer to

the final listing rule published in the *Federal Register* on May 15, 2020 (85 FR 29532) and associated supporting documents, available online at *http://www.regulations.gov* under Docket No. FWS–R8–ES–2018–0105.

Supporting Documents

An analysis was completed for the fisher in 2016 (Service 2016a, entire), prior to the full implementation of the current Species Status Assessment Framework, ver. 3.4 (Service 2016b, entire). At this time, the best available information regarding a full status assessment for the SSN DPS of fisher is a combination of the 2016 species report (Service 2016a, entire) and the analysis and information presented in the final listing rule (85 FR 29532; May 15, 2020). Additionally, a team of Service biologists, in consultation with other species experts, collected and analyzed the best available information (including the information presented in the 2016 species report and final listing rule and any new information available since the SSN DPS was listed as an endangered species) to support this proposed critical habitat designation. As such, the science used and presented in this proposed rule represents a compilation of the best scientific information available.

In accordance with our joint policy on peer review published in the *Federal Register* on July 1, 1994 (59 FR 34270), and our August 22, 2016, memorandum updating and clarifying the role of peer review of listing actions under the Act, we are seeking the expert opinions of at least three appropriate specialists regarding the science that informs this proposed rule. The purpose of peer review is to ensure that the science behind our critical habitat designation is based on scientifically sound data, assumptions, and analyses. We will consider any comments we receive, as appropriate, before making a final agency determination.

Background

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

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

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

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

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

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

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

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

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

Under the first prong of the Act's definition of critical habitat, areas within the geographical area occupied by the species at the time it was listed are included in a critical habitat designation if they contain physical or biological features (1) which are essential to the conservation of the species and (2) which may require special management considerations or protection. For these areas, critical habitat designations identify, to the extent known using the best scientific and commercial data available, those physical or biological features that are essential to the conservation of the species (such as space, food, cover, and protected habitat). In identifying those physical or biological features that occur in specific occupied areas, we focus on the specific features that are essential to support the life-history needs of the species, including, but not limited to, water characteristics, soil type, geological features, prey, vegetation, symbiotic species, or other features. A feature may be a single habitat characteristic or a more complex combination of habitat characteristics. Features may include habitat characteristics that support ephemeral or dynamic habitat conditions. Features may also

be expressed in terms relating to principles of conservation biology, such as patch size, distribution distances, and connectivity.

Under the second prong of the Act's definition of critical habitat, we can designate critical habitat in areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. The implementing regulations at 50 CFR 424.12(b)(2) further delineate unoccupied critical habitat by setting out three specific parameters: (1) when designating critical habitat, the Secretary will first evaluate areas occupied by the species; (2) the Secretary will only consider unoccupied areas to be essential where a critical habitat designation limited to geographical areas occupied by the species would be inadequate to ensure the conservation of the species; and (3) for an unoccupied area to be considered essential, the Secretary must determine that there is a reasonable certainty both that the area will contribute to the conservation of the species and that the area contains one or more of those physical or biological features essential to the conservation of the species.

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

When we are determining which areas should be designated as critical habitat, our primary source of information is generally the information from a species status

assessment (SSA) report and information developed during the listing process for the species; however, for this species, because the SSA framework was not yet available, we applied a slightly different framework using the 2016 species report and the analysis and information presented in the final listing rule (85 FR 29532; May 15, 2020). Additional information sources may include any generalized conservation strategy, criteria, or outline that may have been developed for the species; the recovery plan for the species; articles in peer-reviewed journals; conservation plans developed by States and counties; scientific status surveys and studies; biological assessments; other unpublished materials; or experts' opinions or personal knowledge.

As the regulatory definition of "habitat" reflects (50 CFR 424.02), habitat is dynamic, and species may move from one area to another over time. We recognize that critical habitat designated at a particular point in time may not include all of the habitat areas that we may later determine are necessary for the recovery of the species. For these reasons, a critical habitat designation does not signal that habitat outside the designated area is unimportant or may not be needed for recovery of the species. Areas that are important to the conservation of the species, both inside and outside the critical habitat designation, will continue to be subject to: (1) Conservation actions implemented under section 7(a)(1) of the Act; (2) regulatory protections afforded by the requirement in section 7(a)(2) of the Act for Federal agencies to ensure their actions are not likely to jeopardize the continued existence of any endangered or threatened species; and (3) the prohibitions found in section 9 of the Act. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. These protections and conservation tools will continue to contribute to recovery of the species. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans (HCPs), or

other species conservation planning efforts if new information available at the time of those planning efforts calls for a different outcome.

Prudency Determination

Section 4(a)(3) of the Act, as amended, and implementing regulations (50 CFR 424.12) require that, to the maximum extent prudent and determinable, the Secretary shall designate critical habitat at the time the species is determined to be an endangered or threatened species. Our regulations (50 CFR 424.12(a)(1)) state that the Secretary may, but is not required to, determine that a designation would not be prudent in the following circumstances:

(i) The species is threatened by taking or other human activity and identification of critical habitat can be expected to increase the degree of such threat to the species;

(ii) The present or threatened destruction, modification, or curtailment of a species' habitat or range is not a threat to the species, or threats to the species' habitat stem solely from causes that cannot be addressed through management actions resulting from consultations under section 7(a)(2) of the Act;

(iii) Areas within the jurisdiction of the United States provide no more than negligible conservation value, if any, for a species occurring primarily outside the jurisdiction of the United States;

(iv) No areas meet the definition of critical habitat; or

(v) The Secretary otherwise determines that designation of critical habitat would not be prudent based on the best scientific data available.

There is currently no imminent threat of overutilization for commercial, recreational, scientific, or educational purposes (see 16 U.S.C. 1533(a)(1)(B)) identified for the SSN DPS of fisher, and identification and mapping of critical habitat is not expected to initiate any such threat. Threats of taking or other human activity are not expected to increase due to the identification of critical habitat; habitat impacts are a

threat to the species, as noted in the final listing determination for the SSN DPS of fisher (85 FR 29532; May 15, 2020), and we stated that these effects are from causes that can be addressed through management actions resulting from consultations under section 7(a)(2) of the Act. The species occurs solely within the United States, and available habitat, particularly those areas that meet the definition of critical habitat, provides significant conservation value.

Overall, our analysis of the best available scientific and commercial information indicates there are areas within the range of the DPS that meet the definition of critical habitat. Therefore, because none of the circumstances enumerated in our regulations at 50 CFR 424.12(a)(1) have been met and because the Secretary has not identified other circumstances for which this designation of critical habitat would be not prudent, we have determined that the designation of critical habitat for the SSN DPS of fisher is prudent.

Critical Habitat Determinability

Having determined that designation is prudent, under section 4(a)(3) of the Act we must find whether critical habitat for the SSN DPS of fisher is determinable. Our regulations at 50 CFR 424.12(a)(2) state that critical habitat is not determinable when one or both of the following situations exist:

(i) Data sufficient to perform required analyses are lacking; or

(ii) The biological needs of the species are not sufficiently well known to identify any area that meets the definition of "critical habitat."

When critical habitat is not determinable, the Act allows the Service an additional year to publish a critical habitat designation (16 U.S.C. 1533(b)(6)(C)(ii)).

We reviewed the available information pertaining to the biological needs of the species and habitat characteristics where the species is located. This and other information represent the best scientific data available and led us to conclude that the designation of critical habitat is determinable for the SSN DPS of fisher.

Physical or Biological Features Essential to the Conservation of the Species

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

In considering whether features are essential to the conservation of the species, the Service may consider an appropriate quality, quantity, and spatial and temporal arrangement of habitat characteristics in the context of the life-history needs, condition,

and status of the species. These characteristics include, but are not limited to, space for individual and population growth and for normal behavior; food, water, air, light, minerals, or other nutritional or physiological requirements; cover or shelter; sites for breeding, reproduction, or rearing (or development) of offspring; and habitats that are protected from disturbance.

We derive the specific physical or biological features essential for the SSN DPS of fisher from studies of the species' habitat, ecology, and life history, which are described more fully in the final listing rule (85 FR 29532; May 15, 2020) and the species report (Service 2016a, entire) that was developed to supplement the proposed listing rule (79 FR 60419; October 7, 2014) and revised proposed listing rule (84 FR 60278; November 7, 2019).

Summary of Essential Physical or Biological Features

We have determined that there is one feature, which is considered both physical and biological, that is essential to the conservation of the SSN DPS of fisher. We derive this feature from studies of the species' habitat, ecology, and life history as described below. Additional information can be found in the final listing rule (85 FR 29532; May 15, 2020) and the species report (Service 2016a, entire) that was developed in conjunction with the proposed listing rule. These background documents are available on *http://www.regulations.gov* under Docket No. FWS–R8–ES–2021–0060.

We have determined that the following feature, which is considered both physical and biological in character, is essential to the conservation of the SSN DPS of fisher: Suitable, high-quality denning habitat that includes intermixed foraging and dispersal areas. Such habitat provides structural features for parturition, raising kits, protection from adverse weather conditions, facilitation of safe movement, sites to rest and thermoregulate, foraging opportunities, and cover to reduce predation risk for adults and young. The characteristics of this physical and biological feature include:

(a) Forest types described as Douglas fir (*Pseudotsuga menziesii*), eastside pine, Jeffrey pine (*Pinus jeffreyi*), montane hardwood-conifer, montane hardwood, montane riparian, ponderosa pine (*Pinus ponderosa*), Sierran mixed conifer, or white fir (*Abies concolor*) of California Wildlife Habitat Relationships size and density classes 4D, 5M, 5D, or 6 (Mayer and Laudenslayer 1988, entire; Thompson et al. 2020, p. 7).

(b) Forest stands in or near drainages with clusters of large, mature trees and snags, high canopy cover (generally greater than or equal to 60 percent), complex horizontal and vertical forest structure (e.g., multilayered canopy, moderate shrub cover, downed wood, vegetation of varying age classes), a moderate intermix of California black oak (*Quercus kelloggii*), and fairly steep slopes (greater than or equal to 17 percent) (Zhao et al. 2012, p. 117; Spencer et al. 2015, pp. 33–35; Green et al. 2019, entire).

(c) Multiple large diameter trees (live or dead), such as conifers greater than or equal to 35 inches (in) (89 centimeters (cm)) and hardwoods greater than or equal to 25 in (63 cm) in diameter (Spencer et al. 2015, p. 39), with cavities that provide secure natal and maternal den sites (Green et al. 2019, p. 136). Some of these large diameter trees or snags should also have branch platforms, broken top platforms, mistletoe (*Arceuthobium* spp.) infections, and other deformities or structures that provide resting sites (Green et al. 2019, p. 136).

(d) Shrub and tree clumps, large downed logs, and other structures that provide continuous dense cover or patches of dense cover that are close together to provide protection from predators (Spencer et al. 2015, p. 33; Green 2017, pp. 101–102).

(e) Intermixed foraging areas that typically include a diversity of vegetation types and seral stages to support a variety of prey species (such as western gray squirrels (*Sciurus griseus*), Douglas squirrels (*Tamiasciurus douglasii*), California ground squirrels (*Otospermophilus beecheyi*), dusky-footed woodrats (*Neotoma fuscipes*), and other small

mammals) (Spencer et al. 2015, p. 30), and structures that provide fishers resting sites and protection from predators.

(f) Intermixed dispersal areas that provide connectivity between patches of denning habitat to allow for movement of individuals within subpopulations. Dispersal areas must contain structures and habitat characteristics that facilitate resting and safe movement (Spencer et al. 2015, p. 52). These habitat characteristics and structures include some overhead cover from trees or shrubs (i.e., greater than 30 percent for male dispersal and greater than 60 percent for female dispersal (Tucker et al. 2017, pp. 14–15; Spencer et al. 2016, p. 10)), snags, downed logs, or other components to protect fishers from predation and allow for sufficient resting opportunities.

Special Management Considerations or Protection

When designating critical habitat, we assess whether the specific areas within the geographical area occupied by the species at the time of listing contain features that are essential to the conservation of the species and which may require special management considerations or protection. The features essential to the conservation of the SSN DPS of fisher may require special management considerations or protection to reduce the threats to the species; these threats are fully described in the final listing rule (85 FR 29532; May 15, 2020, pp. 85 FR 29564–29569). We determined that the ongoing threats that result in losses of individual fishers or impede population growth of the SSN DPS include: (1) Loss and fragmentation of habitat from high severity wildfire; wildfire suppression (i.e., long-term/historical absence of beneficial, low severity forest fires typically resulting in reduced fuels and healthy forest stands that subsequently have a greater likelihood of withstanding catastrophic, high severity wildfires); climate change; tree mortality from drought, disease, and insect infestation; vegetation management; and development; and (2) potential direct impacts to individuals (e.g., increased mortality, decreased reproductive rates, increased stress/hormone levels, alterations in behavioral patterns)

from wildfire, increased temperatures, increased tree mortality, disease and predation, exposure to toxicants, vehicle collisions, and potential effects associated with small population size.

Special management considerations or protection are required within critical habitat areas to address these threats. Management activities that could ameliorate these threats include, but are not limited to: (1) Implementing beneficial forest management practices, especially the use of prescribed fire that reduces fuel load and improves overall forest health, which reduces the risk of catastrophic wildfire and improves habitat resiliency; (2) minimizing habitat disturbance, fragmentation, and destruction from vegetation management and other habitat-altering activities through the use of best management at multiple scales (e,g., stand scale, home-range scale, and landscape scale); (3) maintaining and promoting dense canopy cover, large trees, and other habitat components that fishers require for reproduction or protection from predation; (4) maintaining and enhancing habitat connectivity; (5) preventing, locating, and remediating trespass marijuana grow sites and other sources of toxicants; and (6) improving the efficacy of existing road-crossing structures and installing new wildlife road crossings on major roadways. These management activities would protect the physical and biological feature for the SSN DPS of fisher by reducing the threats acting on the species and maintaining the forest structure and characteristics that are necessary for fishers to fulfill their life-history needs.

Criteria Used To Identify Critical Habitat

As required by section 4(b)(2) of the Act, we use the best scientific data available to designate critical habitat. In accordance with the Act and our implementing regulations at 50 CFR 424.12(b), we review available information pertaining to the habitat requirements of the species and identify specific areas within the geographical area occupied by the species at the time of listing and any specific areas outside the

geographical area occupied by the species to be considered for designation as critical habitat. We are not currently proposing to designate any areas outside the geographical area occupied by the species because we have not identified any unoccupied areas that meet the definition of critical habitat. We determined that occupied areas are sufficient for contributing to the conservation of the SSN DPS of fisher, following our evaluation of all suitable habitat across the DPS's range that has documented use by fishers.

For areas within the geographic area occupied by the species at the time of listing, we employed the following basic steps to delineate critical habitat (which are described in detail in the text following this list):

(1) We compiled fisher detection data and determined the geographic area that was occupied by the species at the time of listing (see *Occupancy Analysis*, below).

(2) Using the best available science, including habitat models and reasonable inferences regarding female home range size, we conducted a habitat analysis to identify essential patches of fisher habitat (see *Habitat Analysis*, below).

(3) Based on the results of these analyses, we delineated six discrete critical habitat units (including one unit—Unit 3—that is subdivided into three subunits) separated by evidence of genetic discontinuity and gaps in contiguous denning habitat associated with major river canyons (see *Mapping Critical Habitat Units*, below).

Data Sources

For our occupancy analysis, habitat analysis, and subsequent unit delineations, we used a variety of data sources that provide information regarding the occupied range of the fisher, the spatial extent of suitable fisher habitat, and habitat condition, including:

(1) Fisher observation data from the U.S. Forest Service (USFS) Natural Resource Information System, Sierra Nevada Adaptive Management Project – Sugar Pine Fisher Project, USFS Sierra Nevada Carnivore Monitoring Program, and National Park Service (NPS) databases;

(2) Models developed by the Conservation Biology Institute (CBI), including the Pre-Drought Fisher Denning Habitat Suitability Model, Post-Drought Fisher Denning Habitat Suitability Model, and Post-Drought Fisher Landscape-Scale Habitat Suitability Model;

(3) Housing density data (part of the Wildlife Urban Interface dataset) from the California Department of Forestry and Fire Protection's (Cal Fire) Fire and Resource Assessment Program; and

(4) Lake, reservoir, and pond dataset from California Department of Fish and Wildlife.

Occupancy Analysis

We used recent fisher observation data to identify the geographic area occupied by the species at the time of listing. We reviewed USFS and NPS fisher detection data including visual observations, remote camera detections, scat and hair samples, tracks, and radio telemetry locations from 1990–2020. This timeframe overlaps with the beginning of extensive surveying and monitoring efforts in the Sierra Nevada that continue today (Zielinski et al. 1995, entire) and recent northward population expansion of fishers that has occurred over the last few decades (Tucker et al. 2014, p. 131). Fisher occupancy has remained relatively stable throughout the southern Sierra Nevada from 2002 through 2019 (Zielinski et al. 2013, pp. 8–10; Tucker 2019, pers. comm.), indicating that, in general, sites that were previously occupied remain occupied today.

Based on these data, we determined that the northern extent of the geographic area occupied at the time of listing was the Tuolumne River in Yosemite National Park (Mariposa County) and the southern limit was the Greenhorn Mountains in Sequoia National Forest (Kern County). The eastern limit of the current species' range is the high-elevation, granite-dominated mountains and the western limit is the low-elevation extent of mixed-conifer forest.

We are not proposing to designate any areas outside of the geographic area occupied by the species at the time of listing because we did not find any unoccupied areas to be essential for the conservation of the species. We determined that a critical habitat designation limited to the geographic areas occupied by the species is adequate to ensure the conservation of the species. The occupied areas identified for designation are those areas that require some form of protection to achieve recovery, and they contribute to the DPS's resiliency, redundancy, and representation across its range.

Habitat Analysis

We used several habitat models developed by CBI to better understand the broad-scale spatial extent of denning habitat. Our analysis was largely focused on denning habitat because this habitat type is essential for female survival and reproduction, and denning structures are considered the most limiting habitat element for fishers (Spencer et al. 2015, p. 33). Denning habitat also supports other life-history activities necessary for female and male survival, such as foraging, resting, and dispersal. The models used for our analysis may overestimate current denning habitat quality in certain fine-scale areas, but these fine-scale areas are expected to support foraging and dispersal and would be included in established and potential fisher home ranges. Therefore, protecting and enhancing the broad-scale spatial extent of denning habitat, including the fine-scale foraging and dispersal areas, is vital to conservation and recovery of the species.

We used a combined output from CBI's Pre-Drought Fisher Denning Habitat Suitability Model (Spencer et al. 2015, pp. A-8–A-12) and the Post-Drought Fisher Denning Habitat Suitability Model (Thompson et al. 2020, p. 6) to identify the broad-scale spatial extent of denning habitat. The pre-drought denning model used den locations and an array of environmental predictors from 2013 or earlier but did not account for recent drought, tree mortality, and wildfires that have significantly altered the landscape within the DPS. Fishers' response to these landscape-scale changes is not yet fully

understood, but preliminary findings indicate that females are still denning in many areas that previously supported breeding fishers, despite the changes to the landscape (Green 2020a, pers. comm.). The availability of live forest has decreased across the landscape, but these data suggest that areas that previously supported denning fishers still support the best available habitat, even in an altered state (Green 2020b, pp. 17–18). Experts believe that this pattern may justify continued use of pre-drought data for modeling and analyses (Green 2020b, p. 18). The post-drought denning model includes more recent canopy cover data (i.e., this model may reflect current habitat conditions more accurately), but recent den location data were not available to be incorporated into the updated model. Therefore, we determined that a combined output from these two denning models captures areas that previously supported, and likely still support, denning fishers and areas that currently provide the best available habitat. In other words, the combined output represents the best prediction of suitable denning habitat currently available.

The Kern Plateau, which contains a known breeding population of fishers, has unique environmental conditions due to differences in climate, geology, and vegetation compared to the west-slope of the Sierra Nevada (Spencer et al. 2015, p. 44). These unique conditions result in true differences in denning habitat value on the Kern Plateau compared to the rest of the fisher's range (Spencer et al. 2015, p. 35). For this reason, the denning models fail to accurately predict denning habitat in this part of the range. To ensure that essential areas of suitable habitat on the Kern Plateau are considered for inclusion in critical habitat, we used CBI's Post-Drought Fisher Landscape-Scale Habitat Suitability Model, which predicts the probability of fisher occurrence (also interpreted as a measure of habitat quality) (Spencer et al. 2015, pp. A-1–A-4). Areas that are strongly selected for by fishers have a predicted probability of fisher occupancy (i.e., habitat suitability) of 0.41 and higher (Spencer et al. 2015, p. 42). For the purposes of our analysis, we consider habitat above this threshold to be "high-quality habitat." Using the

post-drought habitat suitability model, we identified all high-quality habitat on the Kern Plateau. We compared this high-quality habitat with fisher detection data and determined that this output is an appropriate surrogate for denning habitat on the Kern Plateau.

To determine if a patch of denning habitat, or high-quality habitat in the case of the Kern Plateau, is essential to the conservation of the species, we considered the size of the patch in relation to fisher ecology. We compared patch size with female territory size to determine the minimum size patch necessary to aid in the conservation of the species. Based on an analysis of female home ranges, species experts identified an average female breeding territory size of 2,471 acres as the appropriate scale to assess fisher habitat (Spencer et al. 2016, p. 27). This average territory size takes into account overlap between neighboring female home ranges and variation in habitat quality. This territory size is also similar to the average size of a female fisher's core use area, which is the portion of the home range where an animal spends a majority of its time (Spencer et al. 2015, pp. 17–18). For the purposes of our analysis, we rounded this territory size up and consider a female home range size to be 2,500 acres. We determined patches of denning habitat that are of an appropriate size to support a subpopulation (i.e., at least five female fishers based on analyses conducted by Spencer et al. (2015, pp. 41–42)) as essential to the conservation of the species. Therefore, patches of denning habitat 12,500 ac (5,059 ha) or larger are included in the proposed critical habitat designation. We also included one additional patch that plays an important role for the DPS despite being smaller than the area we determined was necessary to directly support a subpopulation. While this patch is only able to support three females, it is located within the average juvenile female dispersal distance (3.04 miles (Spencer et al. 2015, p. 20)) of two subpopulations with high occupancy rates. The location and significant amount of contiguous denning habitat provides important connectivity between the two robust subpopulations, highlighting its importance for the conservation of the DPS.

The models used for our analysis resulted in outputs with several "holes" where modeled denning habitat quality dropped below a threshold set by the modelers based on their understanding of denning habitat selection by fishers. Based on our review of aerial imagery, canopy cover, and other data, the habitat within these holes is still expected to support fisher foraging or dispersal. Due to their proximity to denning habitat and their utility to support other fisher life-history needs, we determined that the habitat within these holes can play an essential role in an established home range or for a dispersing female or male fisher. Therefore, we determined that these areas contain the physical and biological feature essential to the conservation of the SSN DPS of fisher and are included in the proposed critical habitat designation.

Within the areas modeled as denning habitat, and the additional areas that support foraging and dispersal, we identified and removed certain areas that do not contain the physical and biological feature or are not essential to the conservation of the species. First, we removed all lakes, reservoirs, and ponds from the proposed designation because these features do not contain fisher habitat. Next, we identified areas with high human activity (i.e., areas with houses and buildings) that, although they may support fishers and their habitat, are not essential to the conservation of the species. Fishers are less likely to den in areas with high levels of human activity, such as immediately adjacent to human structures (Spencer et al. 2017, p. 4). Furthermore, areas surrounding homes and buildings generally have been and will be treated heavily to reduce the risk of fire to lives and property. These intense fuels treatments (such as removing all ground vegetation within the defensible space surrounding a building) typically result in reduced habitat quality for fishers. We used housing density data from Cal Fire to identify areas with greater than zero housing units per acre and removed these areas of low quality habitat from the proposed designation.

Mapping Critical Habitat Units

Consistent with previous analyses conducted for the Southern Sierra Nevada Fisher Conservation Assessment (Spencer et al. 2015, pp. 41–52, A-4–A-5), six discrete units (including one unit—Unit 3—that is subdivided into three subunits) were delineated based on evidence of genetic discontinuity and gaps between patches of modeled denning habitat, typically associated with major river canyons. Unit 1 (Kern Plateau) and Unit 2 (South Sequoia) were separated based on a break in modeled habitat continuity along the Kern River Canyon. Unit 2 abuts Unit 3 (North Sequoia), but the units were delineated based on evidence of genetic discontinuity (Tucker et al. 2014, pp. 129–132; Spencer et al. 2015, pp. 10, 46). Consistent with Spencer et al. (2015, pp. 41, 46), we used Bear Creek in Mountain Home Demonstration State Forest to separate Units 2 and 3 (Subunit 3A). Breaks in contiguous patches of denning habitat separated Subunit 3A (Dillonwood Grove) from Subunit 3B (Homes Nose–Paradise Peak), and Subunit 3B from Subunit 3C (Muir Grove). Unit 3 (Subunit 3C) and Unit 4 (South Sierra) are separated by a gap in suitable habitat and evidence of genetic subdivision associated with the Kings River Canyon (Tucker et al. 2014, pp. 129–132). Unit 4 and Unit 5 (North Sierra) are separated by the San Joaquin River and the associated discontinuity of suitable fisher habitat. Tucker et al. (2014, pp. 131–132) found slight genetic separation between the areas mapped as Unit 4 and Unit 5. Finally, Unit 5 and Unit 6 (Stanislaus) are separated by the break in modeled habitat along the Merced River.

Finally, we used a geoprocessing tool to smooth the boundaries of the units to improve implementation of the proposed designation. This will simplify analyses to determine if a particular location or project area falls within the designation. This exercise had a negligible impact on the area proposed as critical habitat.

When determining proposed critical habitat boundaries, we made every effort to avoid including developed areas such as lands covered by buildings (including 100 feet (30.5 meters) of defensible space surrounding buildings), pavement, and other structures

because such lands lack the physical and biological feature necessary for the SSN DPS of fisher. The scale of the maps we prepared under the parameters for publication within the Code of Federal Regulations may not reflect the exclusion of such developed lands. Additionally, the dataset we relied on to remove human structures from the proposed designation may have inadvertently omitted some houses and communities. Any such lands inadvertently left inside critical habitat boundaries shown on the maps of this proposed rule have been excluded by text in the proposed rule and are not proposed for designation as critical habitat. Therefore, if the critical habitat is finalized as proposed, a Federal action involving these lands would not trigger section 7 consultation with respect to critical habitat and the requirement of no adverse modification unless the specific action would affect the physical and biological feature in the adjacent critical habitat.

We propose to designate as critical habitat lands that we have determined were occupied at the time of listing and that contain the physical and biological feature that is essential to support life-history processes of the species.

Six units (including one unit—Unit 3—that is subdivided into three subunits) are proposed for designation based on the physical and biological feature being present to support the fisher's life-history processes. All of the units contain the identified physical and biological feature (and all characteristics of the physical and biological feature) and support multiple life-history processes.

The proposed critical habitat designation is defined by the maps, as modified by any accompanying regulatory text, presented at the end of this document under **Proposed Regulation Promulgation**. We include more detailed information on the boundaries of the critical habitat designation in the preamble of this document. We will make the coordinates or plot points or both on which each map is based available to the public on *http://www.regulations.gov* at Docket No. FWS–R8–ES–2021–0060.

Proposed Critical Habitat Designation

We are proposing six units as critical habitat for the SSN DPS of fisher. All units are considered occupied at the time of listing. The critical habitat areas we describe below constitute our current best assessment of areas that meet the definition of critical habitat for the SSN DPS of fisher. The six areas we propose as critical habitat (from south to north) are: (1) Kern Plateau; (2) South Sequoia; (3) North Sequoia, including three subunits; (4) South Sierra; (5) North Sierra; and (6) Stanislaus. Table 1 shows the proposed critical habitat units and the approximate area of each unit. Units 4 and 5 overlap with portions of designated critical habitat for the federally threatened Yosemite toad (*Anaxyrus canorus*) (see 50 CFR 17.95(d) and 81 FR 59046, August 26, 2016).

TABLE 1. Proposed critical habitat units for the SSN DPS of fisher (south to north).
[Area estimates reflect all land within critical habitat unit boundaries.]

Critical Habitat Unit	Land Ownership by Type	Size of Unit in Acres (Hectares)	Occupied?
Unit 1—Kern Plateau	Federal	64,131 (25,953)	Yes
	State	0	
	Tribal	0	
	Unclassified/Private	654 (265)	
	TOTAL	64,785 (26,218)	
Unit 2—South Sequoia	Federal	93,106 (37,679)	Yes
	State	2,147 (869)	
	Tribal*	16,246 (6,574)	
	Unclassified/Private	4,138 (1,674)	
	TOTAL	115,637 (46,797)	
Unit 3—North Sequoia Subunit 3A: Dillonwood Grove	Federal	12,943 (5,238)	Yes
	State	1,315 (532)	
	Tribal	0	
	Unclassified/Private	967 (391)	
	TOTAL	15,225 (6,161)	
Unit 3—North Sequoia Subunit 3B: Homes Nose-Paradise Peak	Federal	9,369 (3,791)	Yes
	State	0	
	Tribal	0	
	Unclassified/Private	0	
	TOTAL	9,369 (3,791)	
Unit 3—North Sequoia Subunit 3C: Muir Grove	Federal	85,526 (34,611)	Yes
	State	386 (156)	
	Tribal	0	

	Unclassified/Private	2,170 (878)	
	TOTAL	88,082 (35,645)	
Unit 4—South Sierra	Federal	46,123 (18,665)	Yes
	State	0	
	Tribal	0	
	Unclassified/Private	14,900 (6,030)	
	TOTAL	61,023 (24,695)	
Unit 5—North Sierra	Federal	137,430 (55,616)	Yes
	State	0	
	Tribal	0	
	Unclassified/Private	9,800 (3,966)	
	TOTAL	147,230 (59,582)	
Unit 6—Stanislaus	Federal	52,304 (21,167)	Yes
	State	0	
	Tribal	0	
	Unclassified/Private	798 (323)	
	TOTAL	53,102 (21,490)	
Total	**Federal**	**500,933 (202,721)**	
	State	**3,848 (1,557)**	
	Tribal	**16,246 (6,574)**	
	Unclassified/Private	**33,426 (13,527)**	
	TOTAL	**554,454 (224,379)**	

Note: Area sizes may not sum due to rounding.
*These lands are held in Federal trust status by the Bureau of Indian Affairs (BIA) for the Tule River Indian Tribe of the Tule River Reservation, California.

We present brief descriptions of all units and subunits, and reasons why they meet the definition of critical habitat for the SSN DPS of fisher, below.

Unit 1: Kern Plateau

Unit 1 consists of 64,785 ac (26,218 ha) of lands in the Sierra Nevada mountains in Tulare County, California. Unit 1 is situated on the Kern Plateau, east of the Kern River, west of South Fork Kern River and Kennedy Meadows, north of Sirretta Peak, and south of Templeton Mountain. Lands within this unit include approximately 64,131 ac (25,953 ha; 99 percent) in Federal ownership (Inyo National Forest and Sequoia National Forest, USFS) and 654 ac (265 ha; 1 percent) in private ownership. General land use within this unit includes forest management (e.g., timber harvest, fuels reduction, hazard tree management, forest restoration, prescribed fire), grazing, and recreation.

Unit 1 is occupied by the fisher and contains the physical and biological feature essential to the conservation of the species. This unit is the only unit not on the west slope of the Sierra Nevada; is located on the Kern Plateau, which supports unique environmental conditions compared to the rest of the fisher's range due to differences in climate, geology, and vegetation; and has a complex mosaic of mixed-age forest stands intermixed with open areas and shrublands (Spencer et al. 2015, p. 44). Additionally, fishers in this unit occupy higher elevations than in other units, likely due to the lesser accumulation of snow on the Kern Plateau (Spencer et al. 2015, p. 44). The unique environmental conditions of this unit provide important redundancy and representation for the DPS.

Threats identified within this unit include wildfire and wildfire suppression; climate change; tree mortality from drought, disease, and insect infestation; vegetation management; exposure to toxicants; and potential for effects associated with small population size. Special management considerations or protection measures to reduce or alleviate the threats may include: (1) Implementing forest management practices, especially the use of prescribed fire, that reduce the risk of catastrophic wildfire and improve habitat resiliency in and adjacent to fisher habitat; (2) minimizing habitat disturbance, fragmentation, and destruction (at the stand scale, home-range scale, and landscape scale) from vegetation management activities through the use of conservation measures; and (3) preventing, locating, and remediating trespass marijuana grow sites and other sources of toxicants. Federal lands in this unit are managed under the Land Management Plan for the Inyo National Forest (USFS 2019, entire) and the Sierra Nevada Forest Plan Amendment (USFS 2004, entire).

Unit 2: South Sequoia

Unit 2 consists of 115,637 ac (46,797 ha) of lands in the Sierra Nevada mountains in Kern and Tulare Counties, California. This unit extends northward from the

southwestern tip of the Sierra Nevada and Greenhorn Mountains until it abuts Subunit 3A to the north, where there is evidence of genetic discontinuity between the two subpopulations in the area of Mountain Home Demonstration State Forest (Mountain Home) (Tucker et al. 2014, pp. 129–131). Bear Creek in the Tule River Watershed serves as the northern boundary of Unit 2 from the western edge of the unit to a wildland-urban interface (WUI) associated with Mountain Home. The boundary follows the northern border of this WUI and then continues to the northeast until the eastern edge of the unit. The unit lies north and west of the Kern River and east of Springville and California Hot Springs. Lands within this unit include approximately 92,924 ac (37,605 ha; 80 percent) managed by USFS (Sequoia National Forest, Giant Sequoia National Monument) and 182 ac (74 ha; less than 1 percent) managed by the Bureau of Land Management (BLM). Also, there are 2,147 ac (869 ha; 2 percent) in State ownership (Cal Fire and State Lands Commission), 16,246 ac (6,574 ha; 14 percent) that are Tribal lands (i.e., the Tule River Indian Tribe of the Tule River Reservation, California), and 4,138 ac (1,674 ha; 4 percent) in private ownership. We are considering excluding the 16,246 ac (6,575 ha) of the Tule River Reservation based on the Tribe's long history of managing natural resources on the Reservation. General land use within this unit includes forest management (e.g., timber harvest, fuels reduction, hazard tree management, forest restoration, prescribed fire), grazing, recreation, residential development, and management for protection of natural resources.

Unit 2 is occupied by the fisher and contains the physical and biological feature essential to the conservation of the species. This unit is important for the resiliency, redundancy, and representation of the DPS because it supports the highest recorded fisher occupancy rates (Tucker 2020, pers. comm.), the highest predicted average habitat quality (Spencer et al. 2015, p. 46), and the highest genetic diversity (Tucker et al. 2014, entire) in the DPS. This unit supports habitat features and conditions that are

optimal for successful denning, such as scattered giant sequoia groves and relatively abundant old-growth mixed-conifer forest with large sugar pines, high basal areas, high diversity of tree diameter classes, and dense canopy cover (greater than 70 percent) (Spencer et al. 2015, p. 46).

Threats identified within this unit include wildfire and wildfire suppression; climate change; tree mortality from drought, disease, and insect infestation; vegetation management; exposure to toxicants; potential for effects associated with small population size; disease and predation; and vehicle collisions. Special management considerations or protection measures to reduce or alleviate the threats may include: (1) Implementing forest management practices, especially the use of prescribed fire, that reduce the risk of catastrophic wildfire and improve habitat resiliency in and adjacent to fisher habitat; (2) minimizing habitat disturbance, fragmentation, and destruction (at the stand scale, home-range scale, and landscape scale) from vegetation management activities through the use of conservation measures; (3) preventing, locating, and remediating trespass marijuana grow sites and other sources of toxicants; and (4) improving the efficacy of existing road-crossing structures and installing new wildlife road crossings on major roadways. Federal lands in this unit are managed under the Sierra Nevada Forest Plan Amendment (USFS 2004, entire), the Giant Sequoia National Monument Management Plan (USFS 2012, entire), and the Approved Resource Management Plan for the Bakersfield Field Office (BLM 2014, entire).

Unit 3: North Sequoia

Unit 3 consists of 112,676 ac (45,597 ha) of lands in the Sierra Nevada mountains in Tulare and Fresno Counties, California. Unit 3 is composed of three subunits.

Subunit 3A: Dillonwood Grove

Subunit 3A consists of 15,225 ac (6,161 ha) of lands in the Sierra Nevada mountains in Tulare County, California. This subunit is located west of Moses Mountain, east of Battle Mountain, and south of Homes Nose, and it abuts Unit 2 to the south (see the boundary description for Unit 2, above). Lands within this subunit include approximately 7,337 ac (2,969 ha; 48 percent) managed by USFS (Giant Sequoia National Monument and Sequoia National Forest) and 5,606 ac (2,269 ha; 37 percent) managed by NPS (Sequoia and Kings Canyon National Parks). Also, there are 1,315 ac (532 ha; 9 percent) in State ownership (Cal Fire) and 967 ac (391 ha; 6 percent) in private ownership. General land use within this subunit includes forest management (e.g., timber harvest, fuels reduction, hazard tree management, forest restoration, prescribed fire), grazing, recreation, and management for protection of natural resources.

Subunit 3A is occupied by the fisher and contains the physical and biological feature essential to the conservation of the species. This subunit supports high fisher occupancy rates (Tucker 2020, pers. comm.), suggesting it supports relatively high population densities (Spencer et al. 2015, p. 46) compared to other areas within its range, which provides resiliency for the DPS. This subunit has high predicted habitat value due to mature forest conditions and numerous giant sequoia groves and other mixed-coniferous forests with high basal area, dense canopies, and abundant black oaks which support denning features (Spencer et al. 2015, p. 46).

Threats identified within this subunit include wildfire and wildfire suppression; climate change; tree mortality from drought, disease, and insect infestation; vegetation management; exposure to toxicants; potential for effects associated with small population size; disease and predation; and vehicle collisions. Special management considerations or protection measures to reduce or alleviate the threats may include: (1) Implementing forest management practices, especially the use of prescribed fire, that reduce the risk of catastrophic wildfire and improve habitat resiliency in and adjacent to fisher habitat; (2)

minimizing habitat disturbance, fragmentation, and destruction (at the stand scale, home-range scale, and landscape scale) from vegetation management activities through the use of conservation measures; (3) preventing, locating, and remediating trespass marijuana grow sites and other sources of toxicants; and (4) improving the efficacy of existing road-crossing structures and installing new wildlife road crossings on major roadways. Federal lands in this subunit are managed under the Sierra Nevada Forest Plan Amendment (USFS 2004, entire), the Giant Sequoia National Monument Management Plan (USFS 2012, entire), and the Sequoia and Kings Canyon National Parks General Management Plan (NPS 2012, entire).

Subunit 3B: Homes Nose-Paradise Peak

Subunit 3B consists of 9,369 ac (3,791 ha) of lands in the Sierra Nevada mountains in Tulare County, California. This subunit is located north and west of Homes Nose, east of Case Mountain, and south of Paradise Peak, and it crosses the East Fork Kaweah River. Lands within this subunit include approximately 9,283 ac (3,757 ha; 99 percent) managed by NPS (Sequoia and Kings Canyon National Parks) and 86 ac (35 ha; 1 percent) managed by BLM. General land use within this subunit includes forest management (e.g., timber harvest, fuels reduction, hazard tree management, forest restoration, prescribed fire), grazing, recreation, and management for protection of natural resources.

Subunit 3B is occupied by the fisher and contains the physical and biological feature essential to the conservation of the species. This subunit has high predicted habitat value due to mature forest conditions and numerous giant sequoia groves and other mixed-coniferous forests with high basal area, dense canopies, and abundant black oaks which support denning features (Spencer et al. 2015, p. 46).

Threats identified within this subunit include wildfire and wildfire suppression; climate change; tree mortality from drought, disease, and insect infestation; vegetation

management; exposure to toxicants; potential for effects associated with small population size; disease and predation; and vehicle collisions. Special management considerations or protection measures to reduce or alleviate the threats may include: (1) Implementing forest management practices, especially the use of prescribed fire, that reduce the risk of catastrophic wildfire and improve habitat resiliency in and adjacent to fisher habitat; (2) minimizing habitat disturbance, fragmentation, and destruction (at the stand scale, home-range scale, and landscape scale) from vegetation management activities through the use of conservation measures; (3) preventing, locating, and remediating trespass marijuana grow sites and other sources of toxicants; and (4) improving the efficacy of existing road-crossing structures and installing new wildlife road crossings on major roadways. Federal lands in this subunit are managed under the Sequoia and Kings Canyon National Parks General Management Plan (NPS 2012, entire) and the Approved Resource Management Plan for the Bakersfield Field Office (BLM 2014, entire).

Subunit 3C: Muir Grove

Subunit 3C consists of 88,082 ac (35,645 ha) of lands in the Sierra Nevada mountains in Tulare and Fresno Counties, California. This subunit lies north of Paradise Peak, extending northwest across the North Fork Kaweah River to the Kings River Canyon. A sinuous arm of the unit extends east along the southern edge of the Kings River Canyon to approximately Cedar Grove. Lands within this subunit include approximately 44,793 ac (18,127 ha; 51 percent) managed by USFS (Giant Sequoia National Monument, Sequoia National Forest, and Sierra National Forest) and 40,733 ac (16,484 ha; 46 percent) managed by NPS (Sequoia and Kings Canyon National Parks). Also, there are 386 ac (156 ha; less than 1 percent) in State ownership (State Lands Commission) and 2,170 ac (878 ha; 2 percent) in private ownership. General land use within this subunit includes forest management (e.g., timber harvest, fuels reduction,

hazard tree management, forest restoration, prescribed fire), grazing, recreation, and management for protection of natural resources.

Subunit 3C is occupied by the fisher and contains the physical and biological feature essential to the conservation of the species. This subunit supports high fisher occupancy rates (Tucker 2020, pers. comm.), suggesting it supports relatively high population densities (Spencer et al. 2015, p. 46) compared to other areas within its range, which provides resiliency for the DPS. This subunit has high predicted habitat value due to mature forest conditions and numerous giant sequoia groves and other mixed-coniferous forests with high basal area, dense canopies, and abundant black oaks which support denning features (Spencer et al. 2015, p. 46).

Threats identified within this subunit include wildfire and wildfire suppression; climate change; tree mortality from drought, disease, and insect infestation; vegetation management; exposure to toxicants; potential for effects associated with small population size; disease and predation; and vehicle collisions. Special management considerations or protection measures to reduce or alleviate the threats may include: (1) Implementing forest management practices, especially the use of prescribed fire, that reduce the risk of catastrophic wildfire and improve habitat resiliency in and adjacent to fisher habitat; (2) minimizing habitat disturbance, fragmentation, and destruction (at the stand scale, home-range scale, and landscape scale) from vegetation management activities through the use of conservation measures; (3) preventing, locating, and remediating trespass marijuana grow sites and other sources of toxicants; and (4) improving the efficacy of existing road-crossing structures and installing new wildlife road crossings on major roadways. Federal lands in this subunit are managed under the Sierra Nevada Forest Plan Amendment (USFS 2004, entire), the Giant Sequoia National Monument Management Plan (USFS 2012, entire), and the Sequoia and Kings Canyon National Parks General Management Plan (NPS 2012, entire).

Unit 4: South Sierra

Unit 4 consists of 61,023 ac (24,695 ha) of lands in the Sierra Nevada mountains in Fresno County, California. Patterson Mountain marks the approximate southern tip of Unit 4, which then continues to the northwest approximately to Pine Ridge. From there, the unit forms a nearly complete ring around Shaver Lake. The San Joaquin River and Big Creek are immediately north of the unit. Lands within this unit include approximately 46,123 ac (18,665 ha; 76 percent) in Federal ownership (Sierra National Forest, USFS) and 14,900 ac (6,030 ha; 24 percent) in private ownership. Of the private lands in this unit, we are considering excluding 10,254 ac (4,150 ha) owned by Southern California Edison Company based on their forest management practices that are compatible with fisher conservation by providing suitable fisher habitat and reducing threats to the DPS. General land use within this unit includes forest management (e.g., timber harvest, fuels reduction, hazard tree management, forest restoration, prescribed fire), grazing, recreation, and residential development.

Unit 4 is occupied by the fisher and contains the physical and biological feature essential to the conservation of the species. This unit is located between the areas with high occupancy rates to the south and the recently re-colonized areas to the north, indicating the habitat in this unit is essential for continued population and range expansion. Approximately 3,089 ac (1,250 ha) of the unit overlap with designated critical habitat for the federally threatened Yosemite toad (see 50 CFR 17.95(d) and 81 FR 59046, August 26, 2016).

Threats identified within this unit include wildfire and wildfire suppression; climate change; tree mortality from drought, disease, and insect infestation; vegetation management; exposure to toxicants; potential for effects associated with small population size; disease and predation; and vehicle collisions. Special management considerations or protection measures to reduce or alleviate the threats may include: (1) Implementing

forest management practices, especially the use of prescribed fire, that reduce the risk of catastrophic wildfire and improve habitat resiliency in and adjacent to fisher habitat; (2) minimizing habitat disturbance, fragmentation, and destruction (at the stand scale, home-range scale, and landscape scale) from vegetation management activities through the use of conservation measures; (3) preventing, locating, and remediating trespass marijuana grow sites and other sources of toxicants; and (4) improving the efficacy of existing road-crossing structures and installing new wildlife road crossings on major roadways. Federal lands in this unit are managed under the Sierra Nevada Forest Plan Amendment (USFS 2004, entire).

Unit 5: North Sierra

Unit 5 consists of 147,230 ac (59,582 ha) of lands in the Sierra Nevada mountains in Madera and Mariposa Counties, California. Unit 5 lies north and west of the San Joaquin River, east of Bass Lake and California State Route 49, and south of the Merced River and the unincorporated community of El Portal. Lands within this unit include approximately 106,240 ac (42,994 ha; 72 percent) managed by USFS (Sierra National Forest), 31,008 ac (12,548 ha; 21 percent) managed by NPS (Yosemite National Park), 157 ac (64 ha; less than 1 percent) managed by BIA (a public domain allotment held in trust status; not affiliated with a recognized Tribe), and 25 ac (10 ha; less than 1 percent) managed by BLM. Also, there are 9,800 ac (3,966 ha; 7 percent) in private ownership. General land use within this unit includes forest management (e.g., timber harvest, fuels reduction, hazard tree management, forest restoration, prescribed fire), grazing, recreation, and residential development.

Unit 5 is occupied by the fisher and contains the physical and biological feature essential to the conservation of the species. This unit supports relatively high predicted habitat quality with a high proportion of shade-tolerant incense cedar and white fir that fishers use for denning and resting (Spencer et al. 2015, p. 49). This unit was recently re-

colonized in the 1990s (Tucker et al. 2014, p. 131), and its habitat is essential to support the species' continued northern expansion. Approximately 129 ac (52 ha) of the unit overlap with designated critical habitat for the federally threatened Yosemite toad (see 50 CFR 17.95(d) and 81 FR 59046, August 26, 2016).

Threats identified within this unit include wildfire and wildfire suppression; climate change; tree mortality from drought, disease, and insect infestation; vegetation management; exposure to toxicants; potential for effects associated with small population size; disease and predation; and vehicle collisions. Special management considerations or protection measures to reduce or alleviate the threats may include: (1) Implementing forest management practices, especially the use of prescribed fire, that reduce the risk of catastrophic wildfire and improve habitat resiliency in and adjacent to fisher habitat; (2) minimizing habitat disturbance, fragmentation, and destruction (at the stand scale, home-range scale, and landscape scale) from vegetation management activities through the use of conservation measures; (3) preventing, locating, and remediating trespass marijuana grow sites and other sources of toxicants; and (4) improving the efficacy of existing road-crossing structures and installing new wildlife road crossings on major roadways. Federal lands in this unit are managed under the Sierra Nevada Forest Plan Amendment (USFS 2004, entire), Yosemite National Park General Management Plan (NPS 1980, entire), and Approved Resource Management Plan for the Bakersfield Field Office (BLM 2014, entire).

Unit 6: Stanislaus

Unit 6 consists of 53,102 ac (21,490 ha) of lands in the Sierra Nevada mountains in Mariposa and Tuolumne Counties, California. Unit 6 is situated between the Merced River to the south and the Tuolumne River to the north, with Buck Meadows to the west and Tamarack Flat and Aspen Valley to the east. Lands within this unit include approximately 30,209 ac (12,225 ha; 57 percent) managed by USFS (Stanislaus National

Forest) and 22,096 ac (8,942 ha; 42 percent) managed by NPS (Yosemite National Park). Also, there are 798 ac (323 ha; 2 percent) in private ownership. General land use within this unit includes forest management (e.g., timber harvest, fuels reduction, hazard tree management, forest restoration, prescribed fire), grazing, recreation, and residential development.

Unit 6 is occupied by the fisher and contains the physical and biological feature essential to the conservation of the species. This unit represents the northernmost extent of the species' current range and was recently re-colonized over the previous decade, with possible evidence of reproduction documented for the first time in 2020 (Stock 2021, pers. comm.). This northward expansion and establishment of a subpopulation north of the Merced River improves the redundancy of the DPS.

Threats identified within this unit include wildfire and wildfire suppression; climate change; tree mortality from drought, disease, and insect infestation; vegetation management; exposure to toxicants; potential for effects associated with small population size; disease and predation; and vehicle collisions. Special management considerations or protection measures to reduce or alleviate the threats may include: (1) Implementing forest management practices, especially the use of prescribed fire, that reduce the risk of catastrophic wildfire and improve habitat resiliency in and adjacent to fisher habitat; (2) minimizing habitat disturbance, fragmentation, and destruction (at the stand scale, home-range scale, and landscape scale) from vegetation management activities through the use of conservation measures; (3) preventing, locating, and remediating trespass marijuana grow sites and other sources of toxicants; and (4) improving the efficacy of existing road-crossing structures and installing new wildlife road crossings on major roadways. Federal lands in this unit are managed under the Sierra Nevada Forest Plan Amendment (USFS 2004, entire) and the Yosemite National Park General Management Plan (NPS 1980,

entire).

Effects of Critical Habitat Designation

Section 7 Consultation

Section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that any action they fund, authorize, or carry out is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of designated critical habitat of such species. In addition, section 7(a)(4) of the Act requires Federal agencies to confer with the Service on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under the Act or result in the destruction or adverse modification of proposed critical habitat.

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

If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. Examples of actions that are subject to the section 7 consultation process are actions on State, Tribal, local, or private lands that require a Federal permit (such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq*.) or a permit from the Service under section 10 of the Act) or that involve some other Federal action (such as funding from the Federal Highway Administration, Federal Aviation Administration, or Federal Emergency Management Agency). Federal actions not affecting listed species or critical habitat—and actions on State, Tribal, local, or private lands that are not federally funded, authorized, or carried out by a Federal agency—do not require section 7 consultation.

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

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

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

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

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

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

(3) Are economically and technologically feasible, and

(4) Would, in the Service Director's opinion, avoid the likelihood of jeopardizing the continued existence of the listed species and/or avoid the likelihood of destroying or adversely modifying critical habitat.

Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 set forth requirements for Federal agencies to reinitiate formal consultation on previously reviewed actions. These requirements apply when the Federal agency has retained discretionary involvement or control over the

action (or the agency's discretionary involvement or control is authorized by law) and, subsequent to the previous consultation: (1) if the amount or extent of taking specified in the incidental take statement is exceeded; (2) if new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered; (3) if the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion; or (4) if a new species is listed or critical habitat designated that may be affected by the identified action.

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

Application of the "Destruction or Adverse Modification" Standard

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

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

Activities that the Service may, during a consultation under section 7(a)(2) of the Act, consider likely to destroy or adversely modify the critical habitat of the SSN DPS of fisher include, but are not limited to:

(1) Actions that would significantly alter the configuration, quality, or availability of denning habitats. Such activities are large-scale activities (as opposed to small, individual projects) that appreciably diminish the conservation value of the entire critical habitat designation. Actions could include, but are not limited to, vegetation management activities (such as fuels reduction and timber harvest operations) and residential and commercial development. These activities could reduce the amount and quality of habitat necessary for the survival and reproduction of fishers.

(2) Actions that would significantly diminish foraging opportunities. Such activities include, but are not limited to, the same types of large-scale activities listed in (1), above. These activities would eliminate or reduce the habitat necessary for fishers to safely forage or reduce the availability of prey species, reducing the fisher's survival and successful reproduction.

(3) Actions that would reduce connectivity between patches of denning habitat. Such activities include, but are not limited to, the same types of large-scale activities listed in (1), above. These activities would prevent safe movement of adult fishers, dispersing subadults, and kits.

Exemptions

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

Section 4(a)(3)(B)(i) of the Act (16 U.S.C. 1533(a)(3)(B)(i)) provides that the Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense (DoD), or designated for its use, that are subject to an integrated natural resources management plan (INRMP) prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary determines in writing that

such plan provides a benefit to the species for which critical habitat is proposed for designation. No DoD lands with a completed INRMP are within the proposed critical habitat designation.

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

Section 4(b)(2) of the Act states that the Secretary shall designate and make revisions to critical habitat on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude an area from designated critical habitat based on economic impacts, impacts on national security, or any other relevant impacts. In considering whether to exclude a particular area from the designation, we identify the benefits of including the area in the designation, identify the benefits of excluding the area from the designation, and evaluate whether the benefits of exclusion outweigh the benefits of inclusion. If the analysis indicates that the benefits of exclusion outweigh the benefits of inclusion, the Secretary may exercise discretion to exclude the area only if such exclusion would not result in the extinction of the species. In making the determination to exclude a particular area, the statute on its face, as well as the legislative history, are clear that the Secretary has broad discretion regarding which factor(s) to use and how much weight to give to any factor. We describe below the process that we undertook for taking into consideration each category of impacts and our analyses of the relevant impacts.

Consideration of Economic Impacts

Section 4(b)(2) of the Act and its implementing regulations require that we consider the economic impact that may result from a designation of critical habitat. To assess the probable economic impacts of a designation, we must first evaluate specific land uses or activities and projects that may occur in the area of the critical habitat. We then must evaluate the impacts that a specific critical habitat designation may have on

restricting or modifying specific land uses or activities for the benefit of the species and its habitat within the areas proposed. We then identify which conservation efforts may be the result of the species being listed under the Act versus those attributed solely to the designation of critical habitat for this particular species. The probable economic impact of a proposed critical habitat designation is analyzed by comparing scenarios both "with critical habitat" and "without critical habitat."

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

For this particular designation, we developed an incremental effects memorandum (IEM; Service 2021, entire) 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 SSN DPS of fisher (IEc 2021, entire). We began by

conducting a screening analysis of the proposed designation of critical habitat in order to focus our analysis on the key factors that are likely to result in incremental economic impacts. The purpose of the screening analysis is to filter out particular geographic areas of critical habitat that are already subject to such protections and are, therefore, unlikely to incur incremental economic impacts. In particular, the screening analysis considers baseline costs (i.e., absent critical habitat designation) and includes any probable incremental economic impacts where land and water use may already be subject to conservation plans, land management plans, best management practices, or regulations that protect the habitat area as a result of the Federal listing status of the species. Ultimately, the screening analysis allows us to focus our analysis on evaluating the specific areas or sectors that may incur probable incremental economic impacts as a result of the designation. If the proposed critical habitat designation contains any unoccupied units, the screening analysis assesses whether those units require additional management or conservation efforts that may incur incremental economic impacts. This screening analysis combined with the information contained in our IEM constitute what we consider to be our draft economic analysis (DEA) of the proposed critical habitat designation for the SSN DPS of fisher; our DEA is summarized in the narrative below.

Executive Orders 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 Executive Orders' regulatory analysis requirements, our effects analysis under the Act may take into consideration impacts to both directly and indirectly affected entities, where practicable and reasonable. If sufficient data are available, we assess to the extent practicable the probable impacts to both directly and indirectly affected entities. 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 SSN DPS of fisher, first we identified, in the IEM dated April 29, 2021 (Service 2021, entire), probable incremental economic impacts associated with the following categories of activities: development, fire management, forestry, hydropower, recreation, tourism, transportation, and conservation/restoration. We considered each industry or category individually. Additionally, we considered whether their activities have any Federal involvement. Critical habitat designation generally will not affect activities that do not have any Federal involvement; under the Act, designation of critical habitat only affects activities conducted, funded, permitted, or authorized by Federal agencies. Because the species is already listed, in areas where the SSN DPS of fisher is present, Federal agencies are required to consult with the Service under section 7 of the Act on activities they fund, permit, or implement that may affect the species. When we finalize this proposed critical habitat designation, our consultations would also include an evaluation of measures to avoid the destruction or adverse modification of critical habitat.

In our IEM, we attempted to clarify the distinction between the effects that would result from the species being listed and those attributable to the critical habitat designation (i.e., difference between the jeopardy and adverse modification standards) for the SSN DPS of fisher's critical habitat. The following specific circumstances help to inform our evaluation: (1) The essential physical and biological feature identified for critical habitat (i.e., denning habitat with intermixed dispersal and foraging areas) is the most important feature essential for the life requisites of the species, and (2) any actions that would result in sufficient adverse effect to the essential physical and biological feature of critical habitat would also constitute jeopardy to fishers. The IEM outlines our rationale concerning this limited distinction between baseline conservation efforts and incremental impacts of the designation of critical habitat for the SSN DPS of fisher. This evaluation of the incremental effects has been used as the basis to evaluate the probable

incremental economic impacts of this proposed designation of critical habitat.

The proposed critical habitat designation for the SSN DPS of fisher includes six critical habitat units (including Unit 3, which is subdivided into three subunits) totaling 554,454 ac (224,379 ha), all of which were occupied by fishers at the time of listing, and are currently occupied. Any actions that may affect the species or its habitat would also affect 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 SSN DPS of fisher. Therefore, the proposed critical habitat designation is expected to result in only administrative costs. While 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 additional administrative effort (i.e., consideration of adverse modification during the consultation process) includes an annual estimate of 8 formal consultations, 52 informal consultations, 2 programmatic consultations, and 4 requests for technical assistance. Our analysis forecasts no incremental costs associated with project modifications that would involve additional conservation efforts for the species. The incremental costs for each programmatic, formal, informal, and technical assistance effort are estimated to be $5,300 (formal consultation), $2,600 (informal consultation), $9,800 (programmatic consultation), and $420 (technical assistance). Considering adverse modification of fisher critical habitat during section 7 consultation will result in a total annual incremental cost of less than approximately $179,300 (2021 dollars) per year for the fisher (IEc 2021, Exhibit 5); therefore, the annual administrative burden is unlikely to generate costs exceeding $100 million in a single year (i.e., the threshold for an economically significant rule under Executive Order 12866).

We are soliciting data and comments from the public on the DEA discussed

above, as well as on all aspects of this proposed rule and our required determinations. During the development of a final designation, we will consider the information presented in the DEA and any additional information on economic impacts we receive during the public comment period to determine whether any specific areas should be excluded from the final critical habitat designation under authority of section 4(b)(2) and our implementing regulations at 50 CFR 17.90. If we receive credible information regarding the existence of a meaningful economic or other relevant impact supporting a benefit of exclusion, we will conduct an exclusion analysis for the relevant area or areas. We may also exercise the discretion to evaluate any other particular areas for possible exclusion. Furthermore, when we conduct an exclusion analysis based on impacts identified by experts in, or sources with firsthand knowledge about, impacts that are outside the scope of the Service's expertise, we will give weight to those impacts consistent with the expert or firsthand information unless we have rebutting information. We may exclude an area from critical habitat if we determine that the benefits of excluding the area outweigh the benefits of including the area, provided the exclusion will not result in the extinction of this species.

Consideration of National Security Impacts

Section 4(a)(3)(B)(i) of the Act may not cover all DoD lands or areas that pose potential national-security concerns (e.g., a DoD installation that is in the process of revising its INRMP for a newly listed species or a species previously not covered). If a particular area is not covered under section 4(a)(3)(B)(i), then national-security or homeland-security concerns are not a factor in the process of determining what areas meet the definition of "critical habitat." However, the Service must still consider impacts on national security, including homeland security, on those lands or areas not covered by section 4(a)(3)(B)(i), because section 4(b)(2) requires the Service to consider those impacts whenever it designates critical habitat. Accordingly, if DoD, Department of

Homeland Security (DHS), or another Federal agency has requested exclusion based on an assertion of national-security or homeland-security concerns, or we have otherwise identified national-security or homeland-security impacts from designating particular areas as critical habitat, we generally have reason to consider excluding those areas.

However, we cannot automatically exclude requested areas. When DoD, DHS, or another Federal agency requests exclusion from critical habitat on the basis of national-security or homeland-security impacts, we must conduct an exclusion analysis if the Federal requester provides credible information, including a reasonably specific justification of an incremental impact on national security that would result from the designation of that specific area as critical habitat. That justification could include demonstration of probable impacts, such as impacts to ongoing border-security patrols and surveillance activities, or a delay in training or facility construction, as a result of compliance with section 7(a)(2) of the Act. If the agency requesting the exclusion does not provide us with a reasonably specific justification, we will contact the agency to recommend that it provide a specific justification or clarification of its concerns relative to the probable incremental impact that could result from the designation. If we conduct an exclusion analysis because the agency provides a reasonably specific justification or because we decide to exercise the discretion to conduct an exclusion analysis, we will defer to the expert judgment of DoD, DHS, or another Federal agency as to: (1) Whether activities on its lands or waters, or its activities on other lands or waters, have national-security or homeland-security implications; (2) the importance of those implications; and (3) the degree to which the cited implications would be adversely affected in the absence of an exclusion. In that circumstance, in conducting a discretionary section 4(b)(2) exclusion analysis, we will give great weight to national-security and homeland-security concerns in analyzing the benefits of exclusion.

Under section 4(b)(2) of the Act, we also consider whether a national-security or

homeland-security impact might exist on lands not owned or managed by DoD or DHS. In preparing this proposal, we have determined that the lands within the proposed designation of critical habitat for the SSN DPS of fisher are not owned or managed by DoD or DHS. Therefore, we anticipate no impact on national security or homeland security. However, if through the public comment period we receive credible information regarding impacts on national security or homeland security from designating particular areas as critical habitat, then as part of developing the final designation of critical habitat, we will conduct a discretionary exclusion analysis to determine whether to exclude those areas under authority of section 4(b)(2) and our implementing regulations at 50 CFR 17.90.

Consideration of Other Relevant Impacts

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

When analyzing other relevant impacts of including a particular area in a designation of critical habitat, we weigh those impacts relative to the conservation value of the particular area. To determine the conservation value of designating a particular area, we consider a number of factors, including, but not limited to, the additional regulatory benefits that the area would receive due to the protection from destruction or adverse modification as a result of actions with a Federal nexus, the educational benefits of mapping essential habitat for recovery of the listed species, and any benefits that may result from a designation due to State or Federal laws that may apply to critical habitat.

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

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

After identifying the benefits of inclusion and the benefits of exclusion, we carefully weigh the two sides to evaluate whether the benefits of exclusion outweigh

those of inclusion. If our analysis indicates that the benefits of exclusion outweigh the benefits of inclusion, we then determine whether exclusion would result in extinction of the species. If exclusion of an area from critical habitat will result in extinction, we will not exclude it from the designation.

We are considering whether to exclude the following areas under section 4(b)(2) of the Act from the final critical habitat designation for the SSN DPS of fisher:

(1) Unit 4: Southern California Edison; 10,254 ac (4,150 ha).

(2) Unit 2: Tule River Indian Tribe of the Tule River Reservation, California; 16,246 ac (6,574 ha).

However, we specifically solicit comments on the inclusion or exclusion of such areas. In the paragraphs below, we provide a detailed analysis of our consideration of these lands for exclusion under section 4(b)(2) of the Act.

Private or Other Non-Federal Conservation Plans or Agreements and Partnerships

We sometimes exclude specific areas from critical habitat designations based in part on the existence of private or other non-Federal conservation plans or agreements and their attendant partnerships. A conservation plan or agreement describes actions that are designed to provide for the conservation needs of a species and its habitat, and may include actions to reduce or mitigate negative effects on the species caused by activities on or adjacent to the area covered by the plan. Conservation plans or agreements can be developed by private entities with no Service involvement, or in partnership with the Service, sometimes through the permitting process under Section 10 of the Act.

When we undertake a discretionary section 4(b)(2) analysis, we evaluate a variety of factors to determine how the benefits of any exclusion and the benefits of inclusion are affected by the existence of private or other non-Federal conservation plans or agreements and their attendant partnerships. The factors we consider may differ, depending on whether we are evaluating a conservation plan that involves permits under

Section 10 or a non-permitted plan. See 50 CFR 17.90(d)(3)-(4).

Southern California Edison Company

Southern California Edison Company (SCE), a private electric utility company and landowner, owns and manages approximately 10,254 ac (4,150 ha) of lands within Unit 4 of the proposed critical habitat designation for the SSN DPS of fisher. SCE currently manages these lands to maintain a natural vegetation structure while enhancing wildlife habitat, forest and watershed health, as well as providing recreation opportunities and timber revenue (SCE 2021, p. 1). SCE uses an uneven-aged timber management system, which replicates and re-establishes natural ecosystem process resulting in an increase in the diversity of vegetation, providing a broader range of habitat characteristics for wildlife to utilize (SCE 2021, p. 4). These forest management practices have maintained and enhanced vital habitat for fishers and have reduced threats facing the DPS, including improving resiliency against severe fire and tree mortality (SCE 2021, pp. 4–5). Additionally, SCE implements a number of avoidance and protection measures to safeguard biological resources during the implementation of timber management activities, including fisher-specific measures such as avoiding the denning period and retaining specific habitat features that are important to the fisher (e.g., hardwoods, live trees with cavities or other similar features, snags, platforms and other resting structures, existing logs and slash) (SCE 2021, pp. 10–12). SCE has developed a draft plan to guide their management of fisher and fisher habitat on their forested lands located in the Shaver Lake and Dinkey Creek areas that describes their current management techniques and fisher-specific avoidance and protection measures (SCE 2021, entire). A final plan is expected to be completed before the final designation.

Tribal Lands

Several Executive Orders, Secretarial Orders, and policies concern working with Tribes. These guidance documents generally confirm our trust responsibilities to Tribes,

recognize that Tribes have sovereign authority to control Tribal lands, emphasize the importance of developing partnerships with Tribal governments, and direct the Service to consult with Tribes on a government-to-government basis.

A joint Secretarial Order that applies to both the Service and the National Marine Fisheries Service—Secretarial Order 3206, *American Indian Tribal Rights, Federal–Tribal Trust Responsibilities, and the Endangered Species Act* (June 5, 1997) (S.O. 3206)—is the most comprehensive of the various guidance documents related to Tribal relationships and Act implementation, and it provides the most detail directly relevant to the designation of critical habitat.

In addition to the general direction discussed above, the Appendix to S.O. 3206 explicitly recognizes the right of Tribes to participate fully in any listing process that may affect Tribal rights or Tribal trust resources; this includes the designation of critical habitat. Section 3(b)(4) of the Appendix requires the Service to consult with affected Tribes "when considering the designation of critical habitat in an area that may impact Tribal trust resources, Tribally-owned fee lands, or the exercise of Tribal rights." That provision also instructs the Service to avoid including Tribal lands within a critical habitat designation unless the area is essential to conserve a listed species, and it requires the Service to "evaluate and document the extent to which the conservation needs of the listed species can be achieved by limiting the designation to other lands."

Our implementing regulations at 50 CFR 17.90(d)(1)(i) are consistent with S.O. 3206. When we undertake a discretionary exclusion analysis, in accordance with S.O. 3206, we consult with any Tribe whose Tribal trust resources, Tribally-owned fee lands, or Tribal rights may be affected by including any particular areas in the designation, and we evaluate the extent to which the conservation needs of the species can be achieved by limiting the designation to other areas. We then weight nonbiological impacts to Tribal lands and resources consistent with the information provided by the Tribes.

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

There are Tribal lands included in the proposed designation of critical habitat for the SSN DPS of fisher. Using the criteria described under **Criteria Used To Identify Critical Habitat**, we have determined that Tribal lands that are occupied by the SSN DPS of the fisher contain the feature essential to the conservation of the species. We have begun government-to-government consultation with the Tribe, and will continue to do so throughout the public comment period and during development of the final designation of critical habitat for the SSN DPS of fisher. We will consider these areas for exclusion from the final critical habitat designation to the extent consistent with the requirements of section 4(b)(2) of the Act.

The Tule River Indian Tribe of the Tule River Reservation, California

Lands that are held in trust by BIA for the Tule River Indian Tribe of the Tule River Reservation overlap with 16,246 ac (6,574 ha) of Unit 2 of the proposed critical habitat for the SSN DPS of fisher. We sent a notification letter in September 2019 to the Tribe describing our efforts to evaluate the species' status and to develop critical habitat and soliciting information to aid in our development of a proposed critical habitat designation. Since then, we have engaged in conversations with BIA and the Tribe about the proposal. BIA, in coordination with the Tribe, also reviewed and provided comments

on the draft IEM, in which they expressed support for the exclusion of the Tribal reservation lands from critical habitat designation. We will continue to coordinate with the Tribe on this proposal.

The Tribe has a long history of managing and protecting forest resources on the Reservation. A forest management program that emphasizes forest health and protection has been in place for over 70 years (Garfield 2021, p. 2). The Tribe's integrated resources management plan (IRMP) (Lwenya 2013, entire) guides the activities that occur on the Reservation, including, but not limited to, forest management (e.g., forest health projects, sustainable timber harvest, thinning, planting), range management, fire management (e.g., suppression, fuels reduction, post-fire rehabilitation, prescribed burning), and water quality management (e.g., remediation of marijuana grow sites). Fishers have long been known to occur in the higher-elevation forests of the Reservation, and both radio telemetry monitoring and camera surveys have documented fisher presence since these efforts began in the early 2010s (Jensen and Pearson 2021, p. 23). While the IRMP does not offer fisher-specific management considerations, the Tribe's management practices are considered generally compatible with fisher conservation by reducing threats facing the DPS, such as high-severity wildfire (Jensen and Pearson 2021, p. 38).

We have also recently coordinated with the Tribe and BIA to develop fisher-specific conservation measures that the Tribe will implement when conducting resource management activities under the IRMP. These measures will further ensure that the Tribe's management activities will minimize adverse effects to the DPS and its habitat and maximize beneficial effects of forest management to the greatest extent possible. BIA will enter into section 7 programmatic consultation on BIA-funded and -permitted activities of the Tribe to ensure that future actions implemented under the IRMP will not jeopardize the continued existence of the SSN DPS of fisher.

A final determination on whether the Secretary will exercise her discretion to

exclude this area from critical habitat for the SSN DPS of fisher will be made at the time of our final determination regarding critical habitat. We will take into account the Tribe's comments and carefully weigh the benefits of exclusion versus inclusion of the Tribe's reservation lands.

We may also consider areas not identified above for exclusion from the final critical habitat designation based on information we may receive during the public comment period. As noted above, we have requested that the entities seeking exclusion of areas provide credible information regarding the existence of a meaningful economic or other relevant impact supporting a benefit of exclusion for that particular area (see 50 CFR 17.90).

Required Determinations

Clarity of the Rule

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

(1) Be logically organized;

(2) Use the active voice to address readers directly;

(3) Use clear language rather than jargon;

(4) Be divided into short sections and sentences; and

(5) Use lists and tables wherever possible.

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

Regulatory Planning and Review (Executive Orders 12866 and 13563)

Executive Order 12866 provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget will review all significant rules. OIRA has determined that this rule is not significant.

Executive Order 13563 reaffirms the principles of Executive Order 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. Executive Order 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this proposed rule in a manner consistent with these requirements.

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

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

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

Under the RFA, as amended, and as understood in light of recent court decisions, Federal agencies are required to evaluate the potential incremental impacts of rulemaking on those entities directly regulated by the rulemaking itself; in other words, the RFA does not require agencies to evaluate the potential impacts to indirectly regulated entities. The regulatory mechanism through which critical habitat protections are realized is section 7 of the Act, which requires Federal agencies, in consultation with the Service, to ensure that any action authorized, funded, or carried out by the agency is not likely to destroy or adversely modify critical habitat. Therefore, under section 7, only Federal action agencies are directly subject to the specific regulatory requirement (avoiding destruction and adverse modification) imposed by critical habitat designation. Consequently, it is our position that only Federal action agencies would be directly regulated if we adopt this proposed critical habitat designation. The RFA does not require evaluation of the

potential impacts to entities not directly regulated. Moreover, Federal agencies are not small entities. Therefore, because no small entities would be directly regulated by this rulemaking, the Service certifies that, if made final as proposed, the critical habitat designation for the SSN DPS of fisher will not have a significant economic impact on a substantial number of small entities.

In summary, we have considered whether the proposed designation would result in a significant economic impact on a substantial number of small entities. For the above reasons and based on currently available information, we certify that, if made final as proposed, the critical habitat designation for the SSN DPS of fisher will not have a significant economic impact on a substantial number of small business entities. Therefore, an initial regulatory flexibility analysis is not required.

Energy Supply, Distribution, or Use—Executive Order 13211

Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) requires agencies to prepare Statements of Energy Effects when undertaking certain actions. Operation, management, and maintenance activities of utility facilities (e.g., hydropower facilities, powerlines, and pipelines) have been known to occur within the range of the SSN DPS of fisher and its proposed critical habitat units/subunits (Service 2021, Table 3); hydropower activities have primarily occurred in Units 2, 3, 4, and 5, and powerline and pipeline utilities activities have occurred in all units. These are activities that the Service consults on with Federal agencies (and their respective permittees, including utility companies) under section 7 of the Act. As discussed in the DEA, the costs associated with consultations related to occupied critical habitat would be largely administrative in nature and are not anticipated to reach $100 million in any given year based on the anticipated annual number of consultations and associated consultation costs, which are not expected to exceed $179,300 per year (2021 dollars) (Industrial Economics Inc. 2021, pp. 2, 17–18).

In our economic analysis, we did not find that this proposed critical habitat designation would significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

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

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

(1) This proposed rule would not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or Tribal governments, or the private sector, and includes both "Federal intergovernmental mandates" and "Federal private sector mandates." These terms are defined in 2 U.S.C. 658(5)–(7). "Federal intergovernmental mandate" includes a regulation that "would impose an enforceable duty upon State, local, or Tribal governments" with two exceptions. It excludes "a condition of Federal assistance." It also excludes "a duty arising from participation in a voluntary Federal program," unless the regulation "relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and Tribal governments under entitlement authority," if the provision would "increase the stringency of conditions of assistance" or "place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding," and the State, local, or Tribal governments "lack authority" to adjust accordingly. At the time of enactment, these entitlement programs were: Medicaid; Aid to Families with Dependent Children work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement. "Federal private sector mandate" includes a regulation that "would impose an enforceable duty upon the private sector,

except (i) a condition of Federal assistance or (ii) a duty arising from participation in a voluntary Federal program."

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

(2) We do not believe that this rule would significantly or uniquely affect small governments because it is not anticipated to reach a Federal mandate of $100 million in any given year; that is, it is not a "significant regulatory action" under the Unfunded Mandates Reform Act. The designation of critical habitat imposes no obligations on State or local governments. Small governments could be affected only to the extent that any programs having Federal funds, permits, or other authorized activities must ensure that their actions will not adversely affect the critical habitat. By definition, Federal agencies are not considered small entities, although the activities they fund or permit may be proposed or carried out by small entities. Consequently, we do not believe that the proposed critical habitat designation would significantly or uniquely affect small government entities. Therefore, a Small Government Agency Plan is not required.

Takings—Executive Order 12630

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

Federalism—Executive Order 13132

In accordance with Executive Order 13132 (Federalism), this proposed rule does not have significant Federalism effects. A federalism summary impact statement is not required. In keeping with Department of the Interior and Department of Commerce policy, we requested information from, and coordinated development of this proposed critical habitat designation with, appropriate State resource agencies. From a federalism perspective, the designation of critical habitat directly affects only the responsibilities of Federal agencies. The Act imposes no other duties with respect to critical habitat, either for States and local governments, or for anyone else. As a result, the proposed rule does not have substantial direct effects either on the States, or on the relationship between the

national government and the States, or on the distribution of powers and responsibilities among the various levels of government. The proposed designation may have some benefit to these governments because the areas that contain the features essential to the conservation of the species are more clearly defined, and the physical or biological feature(s) of the habitat necessary for the conservation of the species are specifically identified. This information does not alter where and what federally sponsored activities may occur. However, it may assist State and local governments in long-range planning because they no longer have to wait for case-by-case section 7 consultations to occur.

Where State and local governments require approval or authorization from a Federal agency for actions that may affect critical habitat, consultation under section 7(a)(2) of the Act would be required. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency.

Civil Justice Reform—Executive Order 12988

In accordance with Executive Order 12988 (Civil Justice Reform), the Office of the Solicitor has determined that the rule would not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the Order. We have proposed designating critical habitat in accordance with the provisions of the Act. To assist the public in understanding the habitat needs of the species, this proposed rule identifies the physical or biological features essential to the conservation of the species. The proposed areas of critical habitat are presented on maps, and the proposed rule provides several options for the interested public to obtain more detailed location information, if desired.

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

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

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

It is our position that, outside the jurisdiction of the U.S. Court of Appeals for the Tenth Circuit, we do not need to prepare environmental analyses pursuant to the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*) in connection with regulations adopted pursuant to section 4(a) of the Act. We published a notice outlining our reasons for this determination in the *Federal Register* on October 25, 1983 (48 FR 49244). This position was upheld by the U.S. Court of Appeals for the Ninth Circuit (*Douglas County* v. *Babbitt*, 48 F.3d 1495 (9th Cir. 1995), cert. denied 516 U.S. 1042 (1996)).

Government-to-Government Relationship with Tribes

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

Indian Tribe of the Tule River Reservation. We used the criteria described above under **Criteria Used To Identify Critical Habitat** to identify Tribal lands that are occupied by the SSN DPS of fisher that contain the feature essential to the conservation of the species. We will consider this area for exclusion from the final critical habitat designation to the extent consistent with the requirements of section 4(b)(2) of the Act. We began government-to-government consultation with the Tule River Indian Tribe of the Tule River Reservation on September 13, 2019, in a prenotification letter informing the Tribe that we had begun an analysis of the species' status and an evaluation of potential critical habitat areas for the fisher. We solicited information on the Tribe's activities and any section 7 consultation history in coordination with BIA, and invited them to discuss the critical habitat process. We have since had informal government-to-government discussions with the Tribe to explain the proposal to designate critical habitat for the SSN DPS of fisher, and to describe the exclusion process under section 4(b)(2) of the Act. Beginning in September 2020, we have been coordinating with the Tribe and BIA to develop fisher-specific conservation measures that the Tribe can implement to aid in fisher conservation, and to ensure compliance of the Tribe's and BIA's activities through section 7 of the Act. Finally, the Tribe, in coordination with BIA, had an opportunity to review the draft IEM, and their comments were incorporated into the final IEM. We will continue to work with the Tribe during the development of a final rule for the designation of critical habitat for the SSN DPS of fisher.

References Cited

A complete list of references cited in this rulemaking is available on the Internet at *http://www.regulations.gov* and upon request from the Sacramento Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

Authors

The primary authors of this proposed rule are the staff members of the Fish and Wildlife Service's Species Assessment Team and the Sacramento 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 amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

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

AUTHORITY: 16 U.S.C. 1361–1407; 1531–1544; and 4201–4245, unless otherwise noted.

2. Amend § 17.11(h) by revising the entry for "Fisher (Southern Sierra Nevada DPS)" in the List of Endangered and Threatened Wildlife under MAMMALS to read as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Common name	Scientific name	Where listed	Status	Listing citations and applicable rules
* * * * * * *				
MAMMALS				
* * * * * * *				
Fisher [Southern Sierra Nevada DPS]	*Pekania pennanti*	U.S.A. (Southern Sierra Nevada, CA)	E	85 FR 29532, 5/15/2020; 50 CFR 17.95(a).CH
* * * * * * *				

3. Amend § 17.95(a) by adding an entry for "Fisher (*Pekania pennanti*), Southern Sierra Nevada Distinct Population Segment (DPS)" immediately following the entry for "Woodland Caribou (*Rangifer tarandus caribou*), Southern Mountain Distinct Population Segment (DPS)", to read as follows:

§ 17.95 Critical habitat—fish and wildlife.

(a) *Mammals*.

* * * * *

Fisher (*Pekania pennanti*), Southern Sierra Nevada Distinct Population Segment (DPS)

(1) Critical habitat units are depicted for Fresno, Kern, Madera, Mariposa, Tulare, and Tuolumne Counties, California, on the maps in this entry.

(2) Within these areas, the physical and biological feature essential to the conservation of the Southern Sierra Nevada DPS of fisher is suitable, high-quality denning habitat that includes intermixed foraging and dispersal areas. Such habitat provides structural features for parturition, raising kits, protection from adverse weather conditions, facilitation of safe movement, sites to rest and thermoregulate, foraging opportunities, and cover to reduce predation risk for adults and young. The characteristics of this physical and biological feature include:

(i) Forest types described as Douglas fir (*Pseudotsuga menziesii*), eastside pine, Jeffrey pine (*Pinus jeffreyi*), montane hardwood-conifer, montane hardwood, montane riparian, ponderosa pine (*Pinus ponderosa*), Sierran mixed conifer, or white fir (*Abies concolor*) of California Wildlife Habitat Relationships size and density classes 4D, 5M, 5D, or 6.

(ii) Forest stands in or near drainages with clusters of large, mature trees and snags, high canopy cover (generally greater than or equal to 60 percent), complex horizontal and vertical forest structure (e.g., multilayered canopy, moderate shrub cover, downed wood, vegetation of varying age classes), a moderate intermix of California

black oak (*Quercus kelloggii*), and fairly steep slopes (greater than or equal to 17 percent).

(iii) Multiple large diameter trees (live or dead), such as conifers greater than or equal to 35 inches (in) (89 centimeters (cm)) and hardwoods greater than or equal to 25 in (63 cm) in diameter, with cavities that provide secure natal and maternal den sites. Some of these large diameter trees or snags should also have branch platforms, broken top platforms, mistletoe (*Arceuthobium* spp.) infections, and other deformities or structures that provide resting sites.

(iv) Shrub and tree clumps, large downed logs, and other structures that provide continuous dense cover or patches of dense cover that are close together to provide protection from predators.

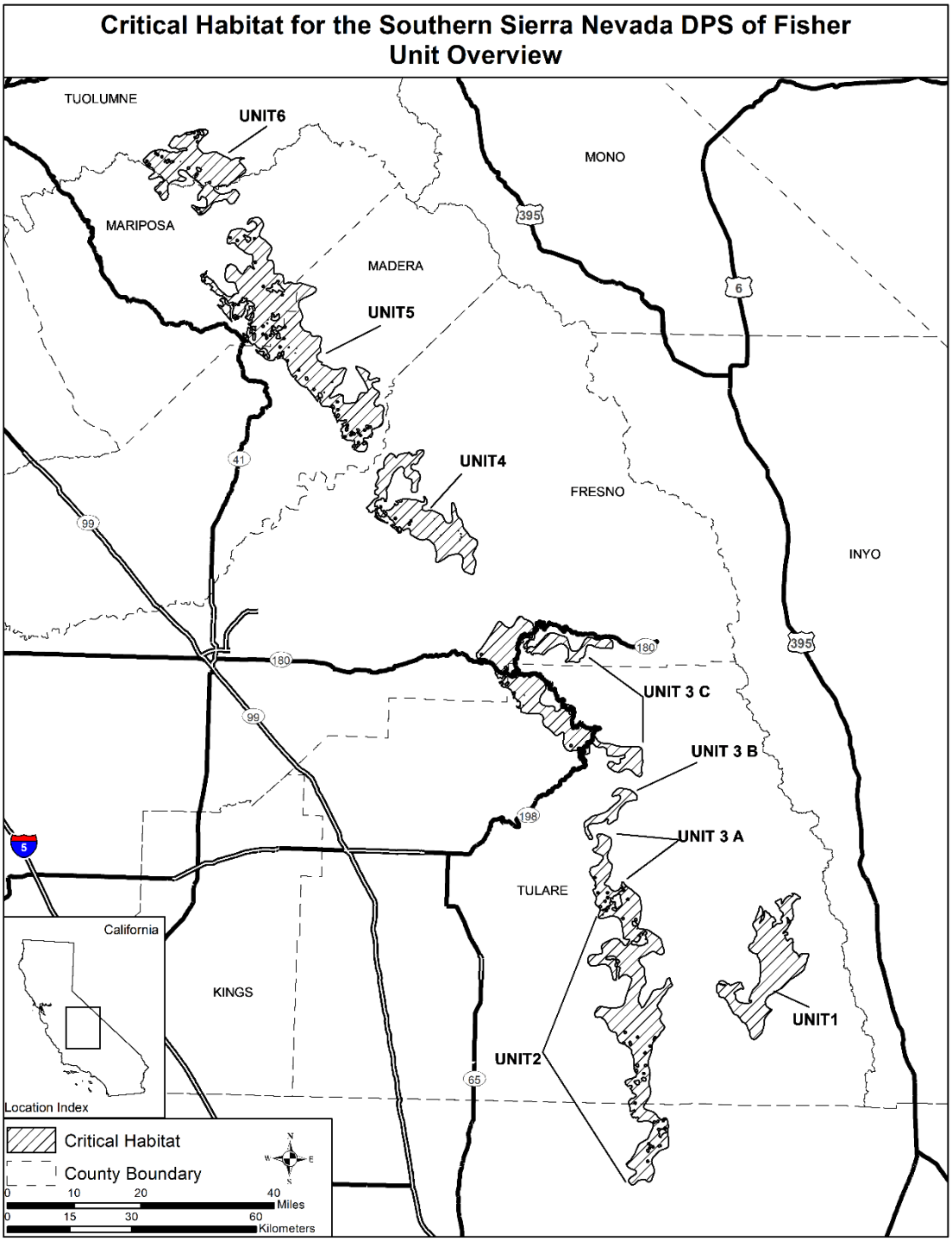
(v) Intermixed foraging areas that typically include a diversity of vegetation types and seral stages to support a variety of prey species (such as western gray squirrels (*Sciurus griseus*), Douglas squirrels (*Tamiasciurus douglasii*), California ground squirrels (*Otospermophilus beecheyi*), dusky-footed woodrats (*Neotoma fuscipes*), and other small mammals), and structures that provide fishers resting sites and protection from predators.

(vi) Intermixed dispersal areas that provide connectivity between patches of denning habitat to allow for movement of individuals within subpopulations. Dispersal areas must contain structures and habitat characteristics that facilitate resting and safe movement. These habitat characteristics and structures include some overhead cover from trees or shrubs (i.e., greater than 30 percent for male dispersal and greater than 60 percent for female dispersal), snags, downed logs, or other components to protect fishers from predation and allow for sufficient resting opportunities.

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

(4) Data layers defining map units were created using fisher habitat suitability models developed by the Conservation Biology Institute, and critical habitat units were then mapped using Universal Transverse Mercator Zone 11N coordinates. The maps in this entry, as modified by any accompanying regulatory text, establish the boundaries of the critical habitat designation. The coordinates or plot points or both on which each map is based are available to the public at *http://www.regulations.gov* at Docket No. FWS–R8–ES–2021–0060 and at the field office responsible for this designation. You may obtain field office location information by contacting one of the Service regional offices, the addresses of which are listed at 50 CFR 2.2.

(5) Note: Index map follows:

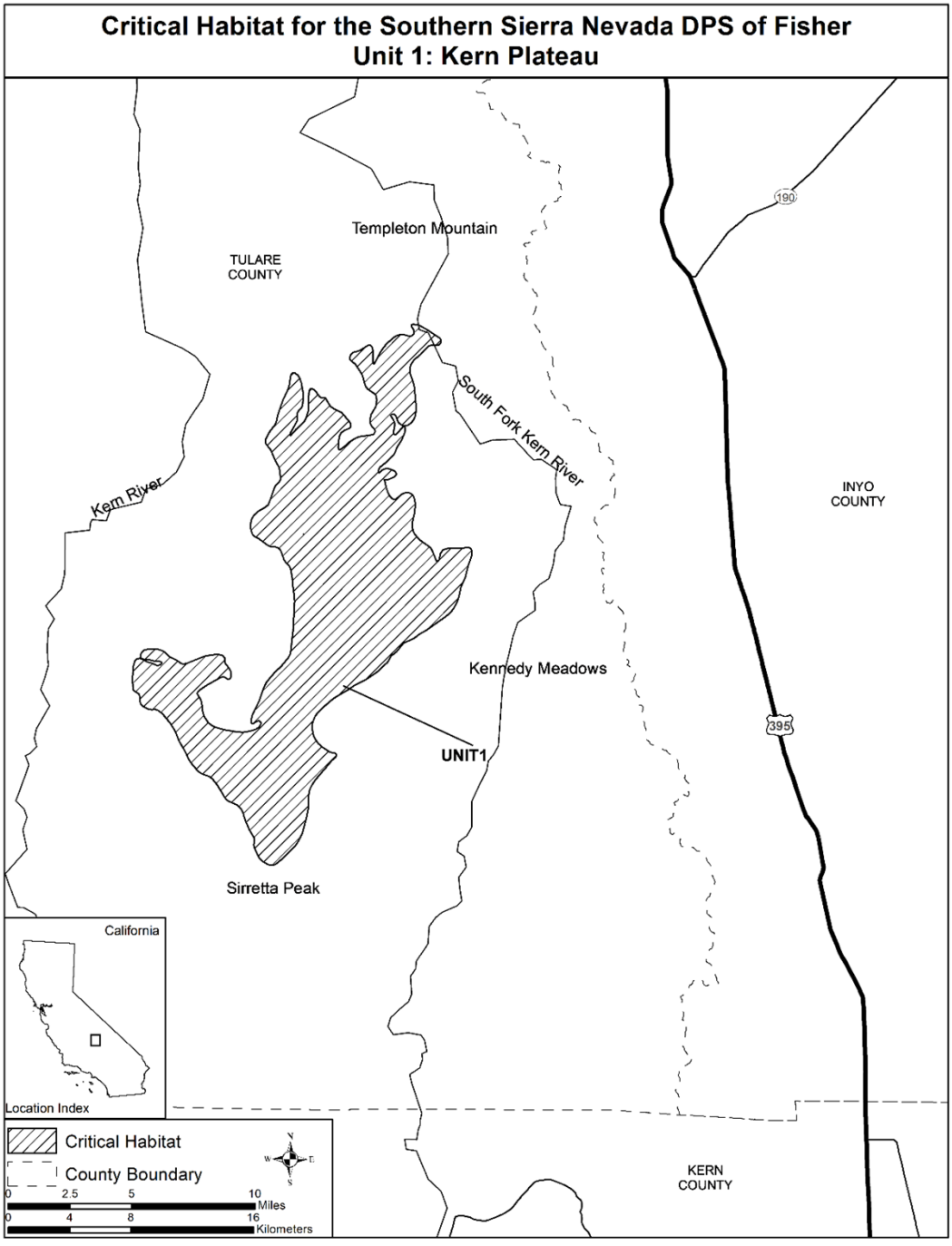


(6) Unit 1: Kern Plateau, Tulare County, California.

(i) Unit 1 consists of 64,785 acres (ac) (26,218 hectares (ha)) of occupied habitat on the Kern Plateau, east of the Kern River, west of South Fork Kern River and Kennedy Meadows, north of Sirretta Peak, and south of Templeton Mountain. Lands within this

unit include 64,131 ac (25,953) ac in Federal ownership (Inyo National Forest and Sequoia National Forest) and approximately 654 ac (265 ha) in private ownership.

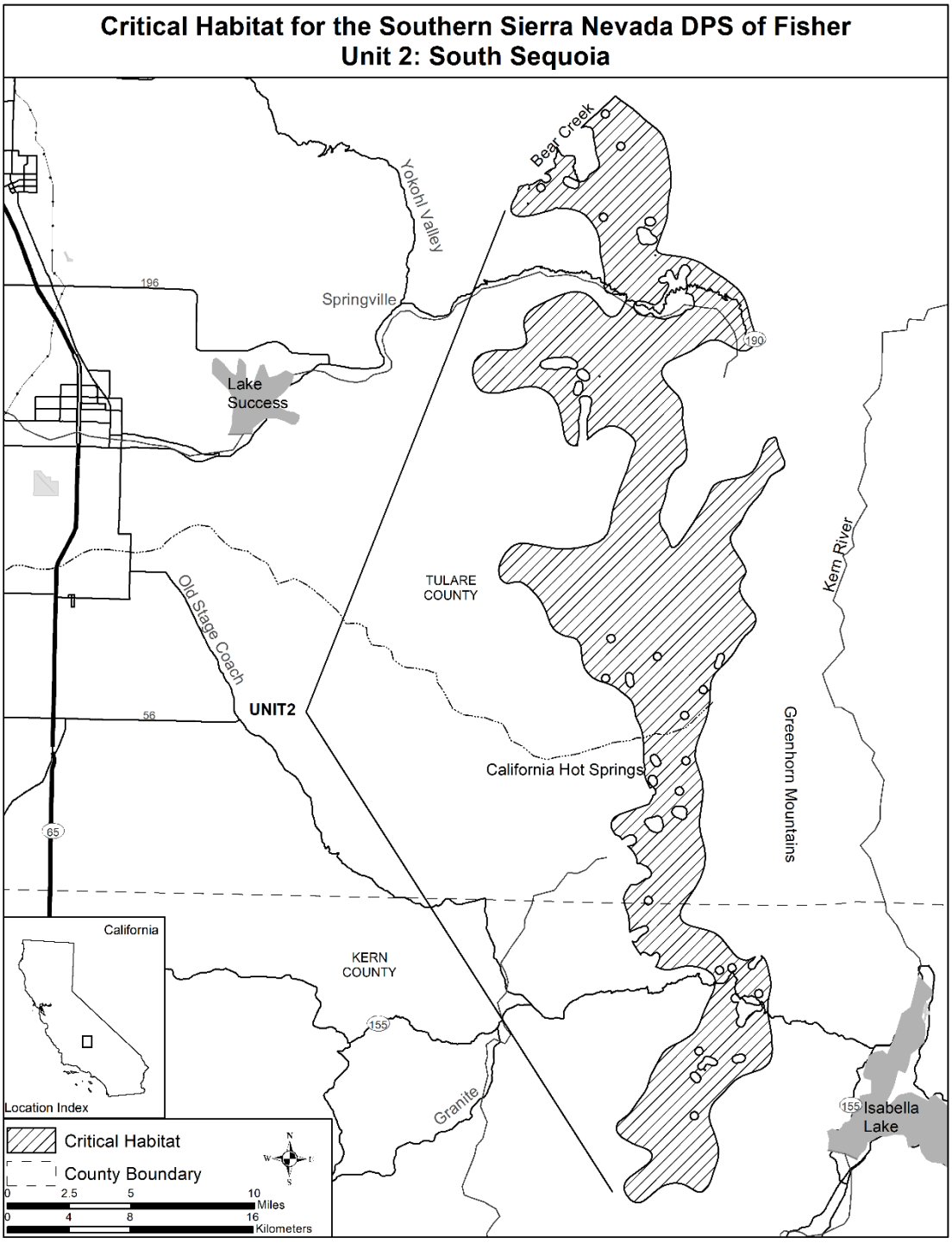
(ii) Map of Unit 1 follows:



(7) Unit 2: South Sequoia, Kern and Tulare Counties, California.

(i) Unit 2 consists of 115,637 ac (46,797 ha) of occupied habitat in the Sierra Nevada mountains, extending northward from the southwestern tip of the Sierra Nevada and Greenhorn Mountains until it abuts Subunit 3A in the area of Mountain Home Demonstration State Forest (Mountain Home). Bear Creek in the Tule River Watershed serves as the northern boundary of Unit 2 from the western edge of the unit to a wildland-urban interface (WUI) associated with Mountain Home. The boundary follows the northern border of this WUI and then continues to the northeast until the eastern edge of the unit. The unit lies north and west of the Kern River and east of Springville and California Hot Springs. Lands within this unit include 93,106 ac (37,679 ha) in Federal ownership (Sequoia National Forest, Giant Sequoia National Monument, and BLM), 2,147 ac (869 ha) in State ownership (Cal Fire and State Lands Commission), 16,246 ac (6,574 ha) of lands that are held in trust by the Bureau of Indian Affairs for the Tule River Indian Tribe of the Tule River Reservation, and 4,138 ac (1,674 ha) in private ownership.

(ii) Map of Unit 2 follows:


Critical Habitat for the Southern Sierra Nevada DPS of Fisher
Unit 2: South Sequoia
Bear Creek
Yokohl Valley
196
Springville
190
Lake
Success
TULARE
COUNTY
Kern River
Old Stage Coach
UNIT2
56
California Hot Springs
Greenhorn Mountains
65
California
KERN
COUNTY
155
Granite
155
Isabella
Lake
Location Index
Critical Habitat
County Boundary
0 2.5 5 10 Miles
0 4 8 16 Kilometers

(8) Unit 3: North Sequoia, Fresno and Tulare Counties, California.

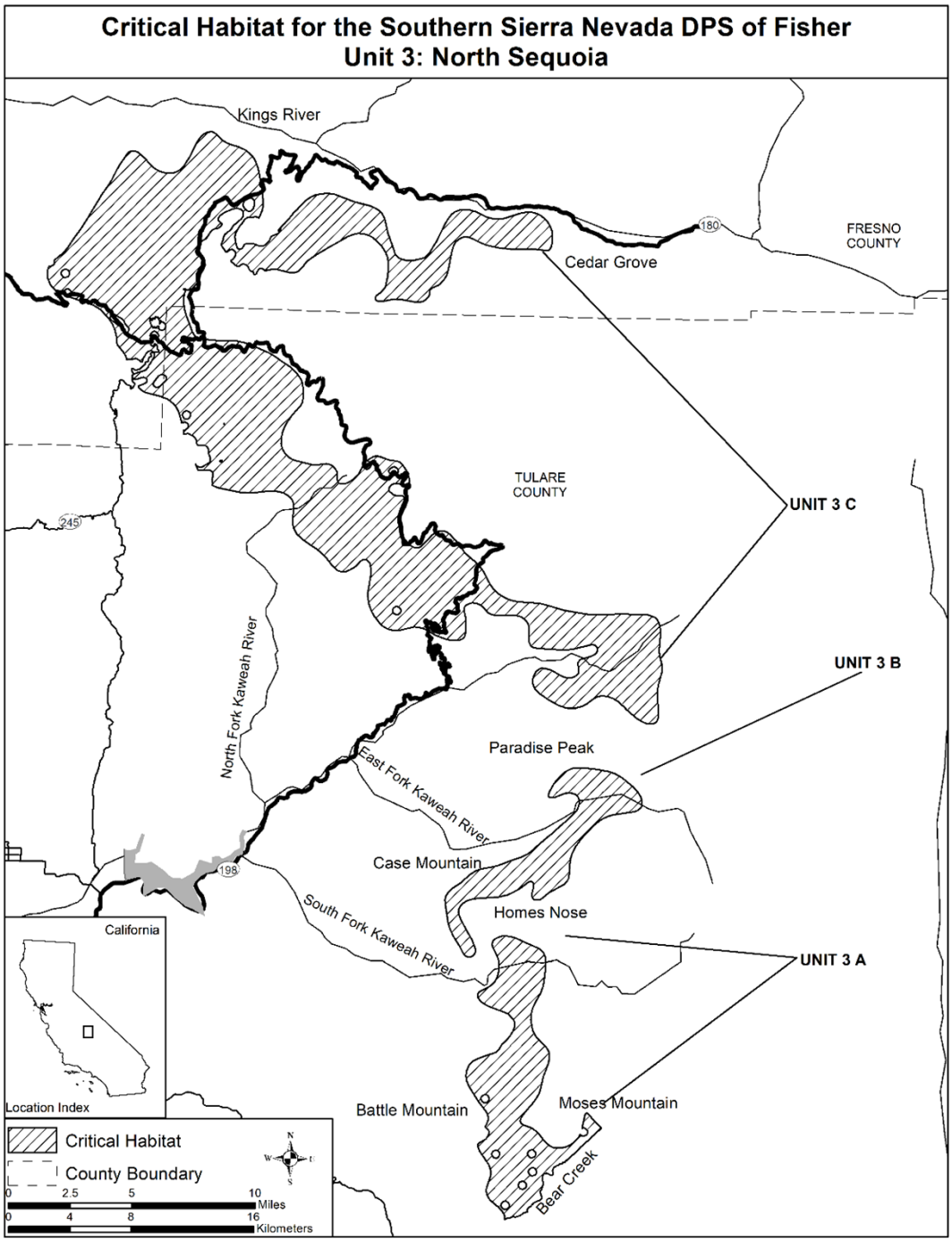
(i) Unit 3 consists of three subunits comprising 112,676 ac (45,597 ha) of occupied habitat in the vicinities of Dillonwood Grove and Homes Nose–Paradise Peak in Tulare County, and Muir Grove in both Fresno and Tulare Counties.

(A) Subunit 3A consists of 15,225 ac (6,161 ha) of occupied habitat in Tulare County west of Moses Mountain, east of Battle Mountain, and south of Homes Nose. Subunit 3A abuts Unit 2 to the south. Lands within this subunit include approximately 12,943 ac (5,238 ha) in Federal ownership (Giant Sequoia National Monument, Sequoia National Forest, and Sequoia and Kings Canyon National Parks), 1,315 ac (532 ha) in State ownership (Cal Fire), and 967 ac (391 ha) in private ownership.

(B) Subunit 3B consists of 9,369 ac (3,791 ha) of occupied habitat in Tulare County north and west of Homes Nose, east of Case Mountain, and south of Paradise Peak. Subunit 3B crosses the East Fork Kaweah River. Lands within this subunit are all in Federal ownership (Sequoia and Kings Canyon National Parks, and BLM).

(C) Subunit 3C consists of 88,082 ac (35,645 ha) of occupied habitat in Fresno and Tulare Counties north of Paradise Peak extending northwest across the North Fork Kaweah River to the Kings River Canyon. A sinuous arm of the unit extends east along the southern edge of the Kings River Canyon to approximately Cedar Grove. Lands within this subunit include 85,526 ac (34,611 ha) in Federal ownership (Giant Sequoia National Monument, Sequoia National Forest, Sierra National Forest, and Sequoia and Kings Canyon National Parks), 386 ac (156 ha) in State ownership (State Lands Commission), and 2,170 ac (878 ha) in private ownership.

(ii) Map of Unit 3 follows:

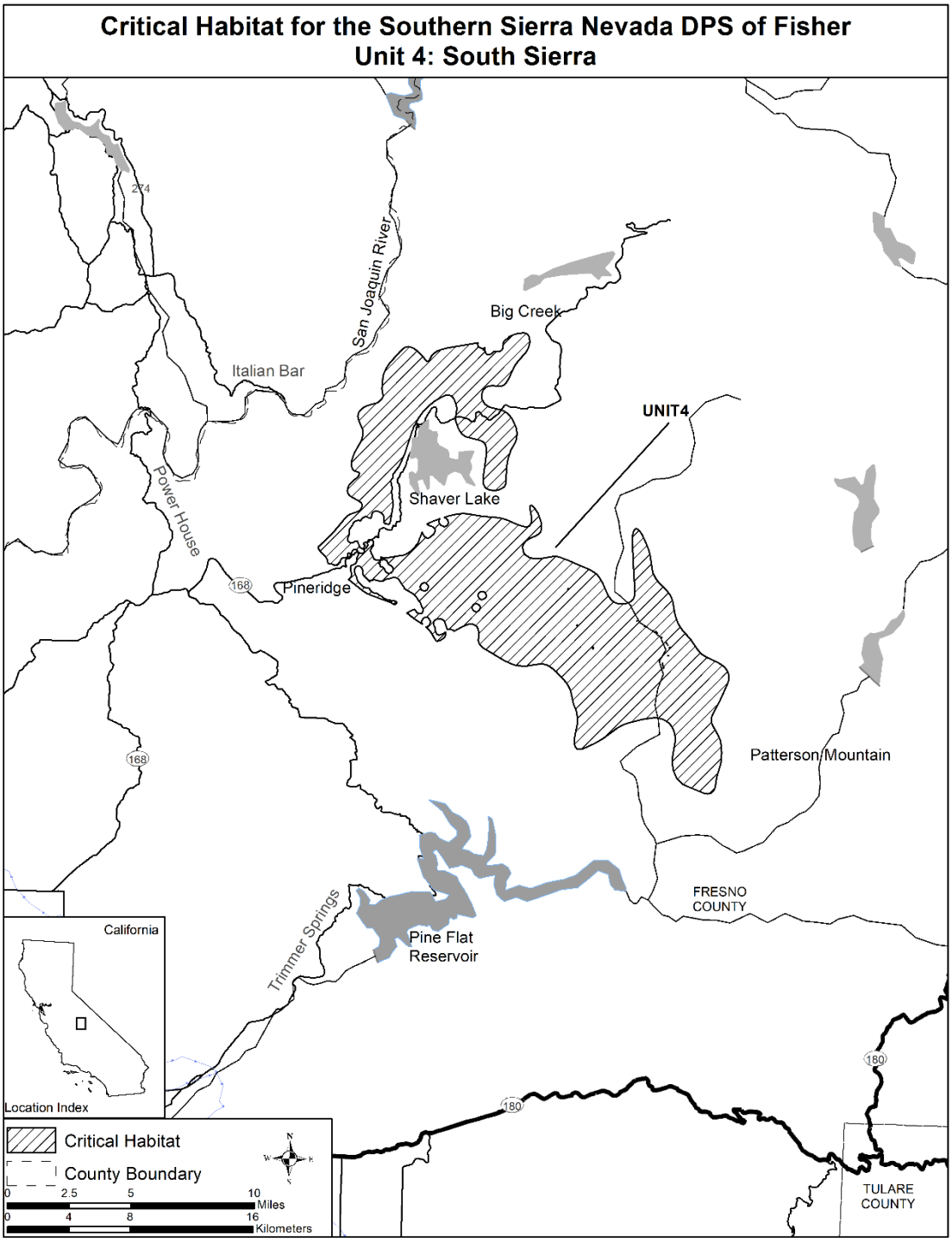


(9) Unit 4: South Sierra, Fresno County, California.

(i) Unit 4 consists of 61,023 ac (24,695 ha) of occupied habitat in the Sierra Nevada mountains. Patterson Mountain marks the approximate southern tip of this unit, which then continues to the northwest approximately to the unincorporated community of Pineridge. From there, the unit forms a nearly complete ring around Shaver Lake. The

San Joaquin River and the town of Big Creek are immediately north of the unit. Lands within this unit include 46,123 ac (18,665 ha) in Federal ownership (Sierra National Forest) and 14,900 ac (6,030 ha) in private ownership.

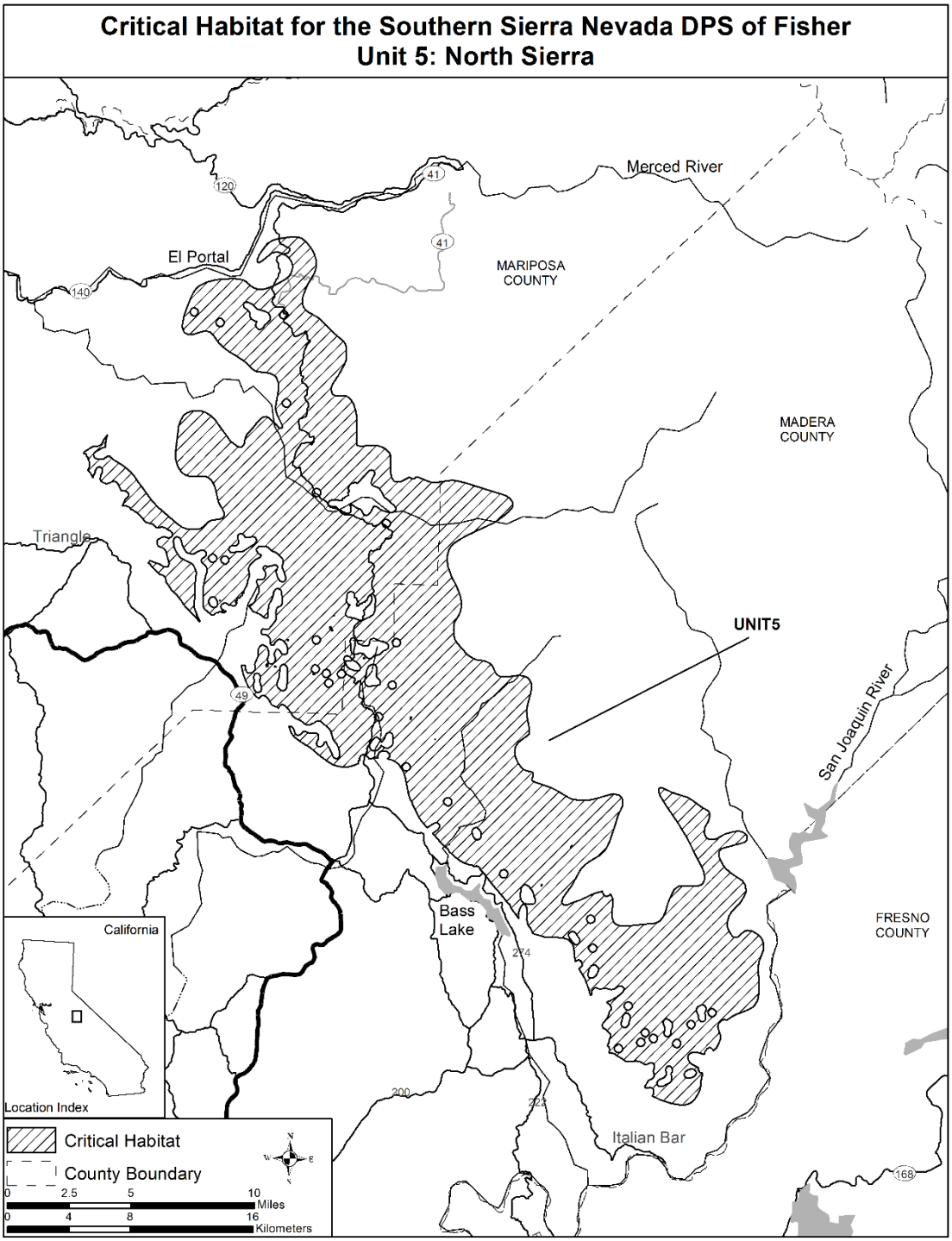
(ii) Map of Unit 4 follows:



(10) Unit 5: North Sierra, Madera and Mariposa Counties, California.

(i) Unit 5 consists of 147,230 ac (59,582 ha) of occupied habitat in the Sierra Nevada mountains north and west of the San Joaquin River, east of Bass Lake and California State Route 49, and south of the Merced River and the unincorporated community of El Portal. Lands within this unit include 137,430 ac (55,616 ha) in Federal ownership (Sierra National Forest, Yosemite National Park, Bureau of Indian Affairs, and Bureau of Land Management) and 9,800 ac (3,966 ha) in private ownership.

(ii) Map of Unit 5 follows:

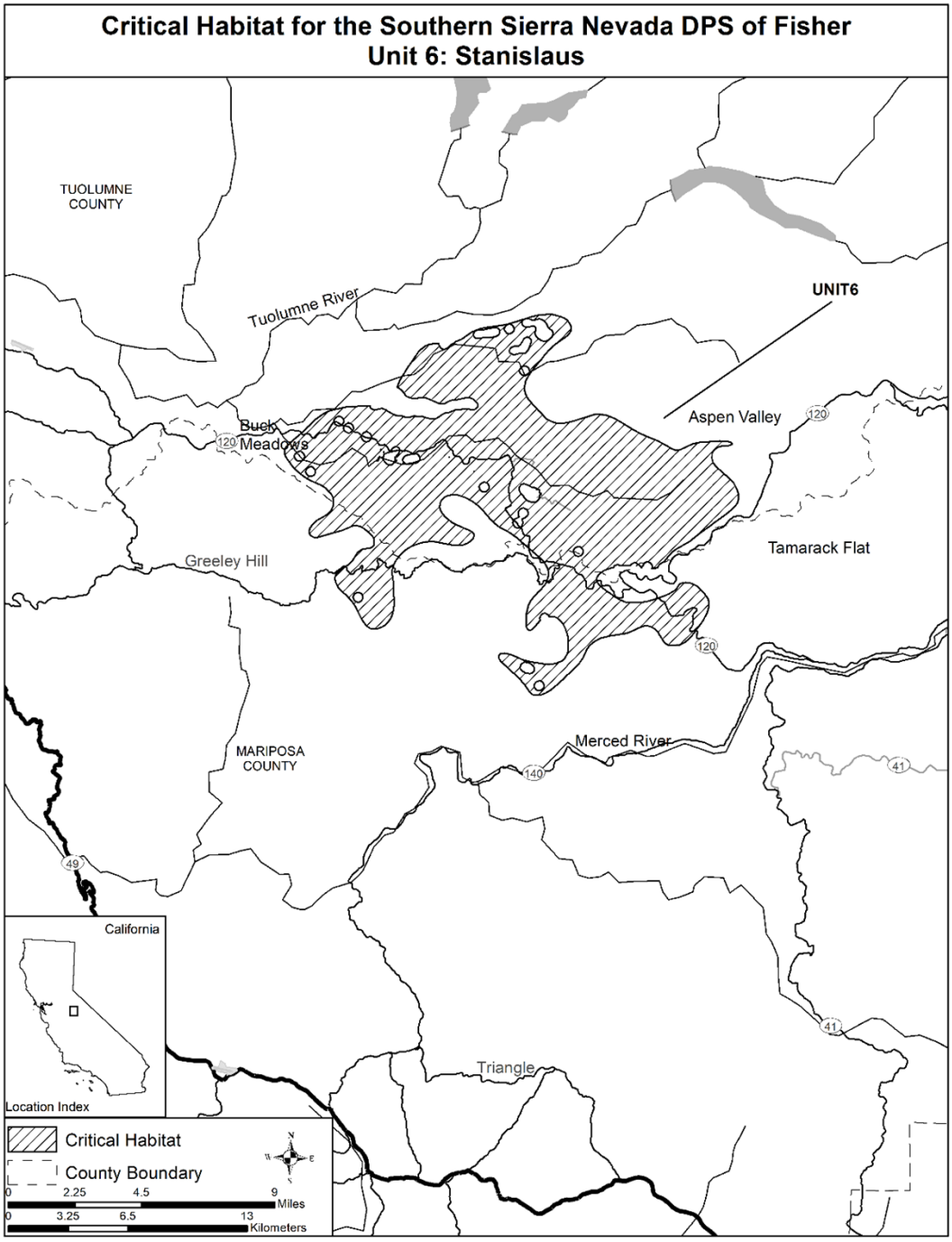


(11) Unit 6: Stanislaus, Mariposa and Tuolumne Counties, California.

(i) Unit 6 consists of 53,102 ac (21,490 ha) of occupied habitat situated between the Merced River to the south and the Tuolumne River to the north, with Buck Meadows to the west and Tamarack Flat and Aspen Valley to the east. Lands within this unit

include 52,304 ac (21,167 ha) in Federal ownership (Stanislaus National Forest and Yosemite National Park) and 798 ac (323 ha) in private ownership.

(ii) Map of Unit 6 follows:



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Martha Williams
Principal Deputy Director,
Exercising the Delegated Authority of the Director,
U.S. Fish and Wildlife Service.

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