



## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### 50 CFR Part 17

[Docket No. FWS–R1–ES–2020–0050; FF09E21000 FXES11110900000 212]

RIN 1018–BF01

### Endangered and Threatened Wildlife and Plants; Revised Designation of Critical Habitat for the Northern Spotted Owl

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

**ACTION:** Final rule.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), revise the designation of critical habitat for the northern spotted owl (*Strix occidentalis caurina*) under the Endangered Species Act of 1973, as amended (Act) by excluding approximately 3,472,064 acres (1,405,094 hectares) in Whatcom, Okanogan, Skagit, Chelan, Snohomish, King, Kittitas, Pierce, Yakima, Lewis, Cowlitz, Skamania, Clark, and Klickitat Counties in Washington; Tillamook, Washington, Multnomah, Hood River, Wasco, Yamhill, Clackamas, Marion, Polk, Lincoln, Linn, Jefferson, Benton, Lane, Deschutes, Douglas, Coos, Klamath, Curry, Jackson, and Josephine Counties in Oregon; and Del Norte, Siskiyou, Humboldt, Trinity, Shasta, Tehama, Mendocino, Glenn, Lake, and Colusa Counties in California, under section 4(b)(2) of the Act. These exclusions are based on a reconsideration of the relevant impacts under section 4(b)(2) of the Act as well as new information since our 2012 revised critical habitat designation for the northern spotted owl. This final rule focuses only on new exclusions under section 4(b)(2) of the Act; we are not making any other revisions to the northern spotted owl critical habitat designation.

**DATES:** This rule is effective [INSERT DATE 60 days after the date of publication in the **Federal Register**].

**ADDRESSES:** This final rule is available on the internet at <http://www.regulations.gov> under Docket No. FWS–R1–ES–2020–0050 and at <http://www.fws.gov/oregonfwo>.

Comments and materials we received, as well as some supporting documentation we used in preparing this rule, are available for public inspection at <http://www.regulations.gov> under Docket No. FWS–R1–ES–2020–0050.

The coordinates from which the Service generated the maps are included in the administrative record for this critical habitat designation and are available at <http://www.regulations.gov> at Docket No. FWS–R1–ES–2020–0050 and at <http://www.fws.gov/oregonfwo>. The GIS data reflecting the revised critical habitat units can be downloaded at <https://ecos.fws.gov/ecp0/profile/speciesProfile.action?spcode=B08B> under the heading **Critical Habitat Spatial Extents**. Any additional tools or supporting information that we developed for this critical habitat designation will also be available at the Service website and in the preamble at <http://www.regulations.gov>.

**FOR FURTHER INFORMATION CONTACT:** Gary Frazer, U.S. Fish and Wildlife Service, Department of the Interior, Washington, D.C. 20240, telephone 202/208-4646. 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.* In settlement of litigation challenging the critical habitat rule, the Service agreed to submit a proposed revised rule to the *Federal Register* that identifies proposed exclusions under section 4(b)(2) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*; hereafter, Act or ESA) by July 15, 2020,

and to submit to the *Federal Register* a final revised critical habitat rule on or before January 6, 2021, or withdraw the proposed rule by that date if we determined not to exclude any areas from the designation under ESA section 4(b)(2). We delivered a proposed rule to the *Federal Register* on July 15, 2020, which was published on August 11, 2020 (85 FR 48487).

*What this rule does.* We revise the designation of critical habitat for the northern spotted owl by excluding additional areas.

*Basis for this rule.* Under section 4(b)(2) of the Act, the Secretary may exclude an area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species. This revision to critical habitat excludes 3,472,064 acres (1,405,094 hectares) in Whatcom, Okanogan, Skagit, Chelan, Snohomish, King, Kittitas, Pierce, Yakima, Lewis, Cowlitz, Skamania, Clark, and Klickitat Counties in Washington; Tillamook, Washington, Multnomah, Hood River, Wasco, Yamhill, Clackamas, Marion, Polk, Lincoln, Linn, Jefferson, Benton, Lane, Deschutes, Douglas, Coos, Klamath, Curry, Jackson, and Josephine Counties in Oregon; and Del Norte, Siskiyou, Humboldt, Trinity, Shasta, Tehama, Mendocino, Glenn, Lake, and Colusa Counties in California, under section 4(b)(2) of the Act.

This rule revises the 2012 critical habitat designation based upon the Secretary's determination that the benefits of exclusion of particular areas of critical habitat outweigh the benefits of designation of particular areas of critical habitat based on economic, national security and other relevant impacts. Based upon the best scientific and commercial data available, the Secretary has not concluded that these exclusions will result in extinction of the species.

### **Previous Federal Actions**

On December 4, 2012, we published in the *Federal Register* (77 FR 71876) a final rule designating revised critical habitat for the northern spotted owl and announced the availability of the associated economic analysis and environmental assessment. For additional information on previous Federal actions concerning the northern spotted owl, refer to that December 4, 2012, final rule.

In 2013, the December 4, 2012, revised critical habitat designation was challenged in court in *Carpenters Industrial Council et al. v. Bernhardt et al.*, No. 13-361-RJL (D.D.C.) (now retitled *Pacific Northwest Regional Council of Carpenters et al. v. Bernhardt et al.* with the substitution of named parties). In 2015, the district court ruled that the plaintiffs lacked standing. The D.C. Circuit Court of Appeals reversed and remanded, and the case remained pending before the district court. In December of 2019, the plaintiffs filed a motion with the district court seeking permission to file a supplemental brief regarding the United States Supreme Court's decision in *Weyerhaeuser Co. v. U.S. Fish and Wildlife Service*, 139 S. Ct. 361 (2018), concerning the designation of critical habitat for the dusky gopher frog. The plaintiffs asserted that supplemental briefing on the *Weyerhaeuser* decision would benefit the district court's consideration of two of their arguments regarding the 2012 northern spotted owl critical habitat designation: that the Service unlawfully designated areas that are not northern spotted owl habitat, and that the Service failed to weigh the designation's economic impacts and consider other relevant factors when excluding lands under section 4(b)(2).

On April 13, 2020, we entered into a stipulated settlement agreement resolving the litigation. The settlement agreement was approved and ordered by the court on April 26, 2020. Under the terms of the settlement agreement, the Service agreed to submit a proposed revised critical habitat rule to the *Federal Register* that identifies proposed exclusions under section 4(b)(2) of the Act by July 15, 2020, and to submit to the *Federal Register* a final revised critical habitat rule on or before December 23, 2020,

subsequently extended by agreement to January 6, 2021, or withdraw the proposed rule by that date if we determined not to exclude any areas from the designation under ESA section 4(b)(2). We delivered a proposed rule to the *Federal Register* on July 15, 2020, which was published on August 11, 2020 (85 FR 48487), and by this final rule we exclude the particular areas described below from the designation.

### **Summary of Comments and Recommendations**

In the August 11, 2020, proposed revised critical habitat rule (85 FR 48487), we requested that all interested parties submit written comments on the proposed revision by October 13, 2020. We requested comments on the exclusions discussed in the proposed rule and invited comments on any additional proposed exclusions the public requested we consider. We also contacted appropriate Federal, State, and local agencies, scientific organizations, and other interested parties and invited them to comment on the proposed rule. A newspaper notice inviting general public comment was published in *The Oregonian* on August 16, 2020, and in the *Medford Mail Tribune* on August 17, 2020. We did not receive any requests for a public hearing.

During the comment period, we received 572 public comment letters addressing the proposed revised critical habitat designation. Many comments were non-substantive in nature, expressing either general support for or opposition to provisions of the proposed revised rule with no supporting information or analysis, or expressing opinions regarding topics not covered within the proposed revised regulation. We also received many detailed substantive comments with specific rationale for support of or opposition to specific portions of the proposed revised rule as well as specific comments requesting additional exclusions. Below, we summarize and respond to the substantive comments on the proposed revised regulation. Comments received were grouped into general categories specifically relating to the proposed revised critical habitat designation (85 FR 48487, August 11, 2020), and are addressed in the following summary.

## **Comments from Federal Agencies**

*Comment (1):* The U.S. Department of Agriculture Forest Service (USFS) Region 6 expressed neither support for nor opposition against the proposed critical habitat revision. It noted however that, as critical habitat in southern Oregon and northern California becomes more fire prone, as evidenced by the 2020 fire season, the USFS continues to be concerned for the persistence of the northern spotted owl in the Pacific Northwest. The USFS encouraged connectivity between existing critical habitat units. In particular, the USFS commented that the Service should consider the probability of wildfire events, the effect of climate change, and projected fire behavior as tools for determining where critical habitat designations should be revised throughout the range of the northern spotted owl. Additionally, we received a comment letter from the Under Secretary, Natural Resources and Environment, Department of Agriculture supporting Interior's efforts to "right size" the northern spotted owl critical habitat designation because of the difficulties encountered by the Forest Service in achieving its statutory mission for managing the National forests. The letter discussed the devastation to the spotted owl habitat and to other property caused by wildfire in general, using the 2020 wildfire season as an example. The letter requested that the Forest Service and the FWS work together in protecting the northern spotted owl and lowering the risks of catastrophic wildfire.

*Our response:* We thank the Forest Service for its response and recognize that the exclusion of particular areas from critical habitat may lessen one of the regulatory burdens for the Forest Service in carrying out its statutory mission. We also agree that good management of the Forest Service lands may provide additional environmental benefits including possibly reducing the risk of catastrophic wildfire, which may benefit for the northern spotted owl by protecting its habitat from destruction. Because ESA section 7 consultation will be completed for discretionary Federal actions and decisions

where northern spotted owls are present, the additional benefit of ESA section 7 consultation for adverse modification of critical habitat is minimal compared with the environmental benefits of additional forest management. For example, we recognize that having more lands in the potential timber harvest base may permit the Bureau of Land Management (BLM) and U.S. Forest Service (USFS) to allow longer cycles between timber harvests. Longer cycles between timber harvests can have many environmental benefits, including ensuring a mix of tree ages, which can be used by the northern spotted owl for connectivity between nesting areas, and lessening the risk of catastrophic wildfire, which harms the northern spotted owl and puts rural communities, private property and lives at risk.

### **Comments from States**

Section 4(b)(5)(A)(ii) of the Act requires the Service to give actual notice of any designation of lands that are considered to be critical habitat to the appropriate agency of each State in which the species is believed to occur, and to invite each such agency to comment on the proposed regulation. Section 4(i) of the Act states: “the Secretary shall submit to the State agency a written justification for his failure to adopt regulations consistent with the agency’s comments or petition.” We notified the States of Washington, Oregon, and California of the proposed critical habitat designation. We did not receive comments from any State or State agency.

### **Comments from Counties**

We received comments from Lewis, Klickitat, and Skamania Counties in Washington; from Douglas and Harney Counties in Oregon; and from Siskiyou County in California. All comments from counties pertained to either the economic or environmental analysis and requested additional exclusions based on economic or environmental factors; see Economic Analysis Comments and Exclusions Comments below for County comments and our responses.

## **Comments from Tribes**

We received comments from the Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians; the Cow Creek Band of Umpqua Tribe of Indians; and the Coquille Indian Tribe.

*Comment (2):* The Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians and the Cow Creek Band of Umpqua Tribe of Indians commented in support of the proposed exclusion of lands recently transferred to them in trust. The Cow Creek Band of Umpqua Tribe of Indians expressed concern, however, that the proposed rule did not consider Tribal management plans and objectives for Indian forest land as a basis for the exclusions. The Coquille Tribe similarly commented in general that the rule should include a statement that recognizes the dominant purpose of the Coquille Forest to generate sustainable revenues sufficient to support the Coquille Tribal government's ability to provide services to Coquille Tribal members, and ensure that the resulting critical habitat designation avoids burdening the Coquille Forest's dominant purpose.

*Our response:* No Indian lands were designated in the December 4, 2012, critical habitat rule (77 FR 71876). Since 2012, Federal lands managed by the BLM were transferred in trust to the Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians (CTCLUSI) and the Cow Creek Band of Umpqua Tribe of Indians (CCBUTI) pursuant to the Western Oregon Tribal Fairness Act (Pub. L. 115-103). This revised rule excludes those recently transferred lands from critical habitat designation, which were referred to as "Tribal lands" in the proposed rule but which we now refer to as "Indian lands" as defined in the 2012 critical habitat rule. We considered Tribal management plans in our analysis of these exclusions, *see* Consideration of Impacts under Section 4(b)(2) of the Act.

We have not designated critical habitat within the Coquille Forest. Should we consider revisions to the critical habitat designation in the future, the Service will

coordinate with the Coquille Tribe to address effects to the Forest and its dominant use as managed by the Tribe.

## **Public Comments**

### *Public Comments on Critical Habitat Boundaries*

*Comment (3):* Commenters expressed concern that the areas proposed for exclusion provide important connectivity between the Coast Range, Cascades, and Klamath/Siskiyou Mountains Populations and that exclusion could reduce gene flow, cause further isolation, and increase the probability of extinction of the northern spotted owl.

*Our response:* We have thoroughly examined each of the particular areas described in this final rule, weighing the benefits of exclusion with the benefits of inclusion as critical habitat. We then examined the totality of the excluded areas and, based on the best scientific and commercial data available and have not concluded that the exclusions will result in the extinction of the northern spotted owl. As noted in the preamble to this rule, the standard against which to measure exclusions under section 4(b)(2) is whether the exclusions “will” result in extinction. With regard to the connectivity concerns, all discretionary Federal actions and decisions that “may affect” the northern spotted owl where it is found will be subject to section 7 consultation to ensure that the continued existence of the northern spotted owl is not jeopardized. This includes those owls using excluded areas for connectivity between critical habitat designations. This should ensure that populations will not become isolated because owls will continue to be protected as they migrate from one range to another. Additionally, the northern spotted owl will also be protected by the prohibition against “take” of the species under ESA section 9. Thus, we have not concluded that these exclusions will result in the extinction of the northern spotted owl. Some of the areas used by the northern spotted owl for migration are secondary growth forests. The Service anticipates

that excluding such areas from critical habitat will not change their characteristics as secondary growth forests; therefore, the Service anticipates the areas will continue to function as habitat for migratory purposes.

*Comment (4):* Commenters noted that the lands proposed for exclusion met the definition of critical habitat for the northern spotted owl and were determined to be essential in our 2012 critical habitat designation (77 FR 71876, December 4, 2012), and so questioned how those lands could now be appropriate for exclusion from designation.

*Our response:* Areas that are found essential to the conservation of the species are appropriate to considered for exclusion from a critical habitat designation under section 4(b)(2) of the Act. The Secretary may exclude an area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat designation, unless he determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species. We found the areas we designated in 2012 to be essential to the conservation of the northern spotted owl. However, the Secretary has the discretion to consider these exclusions in light of either new information that has come about since the 2012 rule, as well as a consideration of relevant factors not considered in 2012. See our analysis under Consideration of Impacts under Section 4(b)(2) of the Act. Because exclusions of these particular areas will not result in the extinction of the northern spotted owl, based upon our consideration of the best scientific and commercial data available, we are making the exclusions set forth in this rule.

*Comment (5):* A commenter stated that smaller blocks of northern spotted owl critical habitat, such as those areas in the Harvest Land Base proposed for exclusion, are also important for the following reasons: they are migration/dispersal corridors linking larger habitat blocks; they link the Coast Range province with the Cascade Range

province; and they provide migration corridors that allow a species to adapt to climate (and habitat) change by relocating to more suitable habitat.

*Our response:* See our response to *Comment (3)*.

*Comment (6):* Commenters stated that we failed to explain why the Service no longer believes that Oregon and California Railroad Revested Lands (O&C lands) make a significant contribution toward meeting the conservation objectives for the northern spotted owl and that we cannot attain recovery without them.

*Our response:* The O&C lands were revested to the Federal Government under the Chamberlin-Ferris Act of 1916 (39 Stat. 218). The Oregon and California Revested Lands Sustained Yield Management Act of 1937 (O&C Act; Pub. L. 75-405) addresses the management of O&C lands. The O&C Act provides, and the courts have confirmed, that the primary use of these revested timberlands is for permanent forest production on a sustained yield basis. The Supreme Court has additionally determined that the ESA does not take precedence over an agency's mandatory (non-discretionary) statutory mission. Based on these court rulings, we have determined that exclusion of the O&C lands as critical habitat is proper in this case.

Second, all discretionary Federal actions where northern spotted owls are found will be subject to section 7 consultation to ensure that the continued existence of the northern spotted owl is not jeopardized. This should ensure that populations will not become isolated because owls will continue to be protected as they migrate from one range to another. Third, the northern spotted owl will also be protected by the prohibition against "take" of the species under ESA section 9. Finally, once the Secretary determines that the benefits of excluding a particular area outweigh the benefits of including that area, the remaining legal standard governing whether the Secretary can exclude that area from critical habitat is whether exclusion of the area will result in extinction of the species. Although there are no cases directly on point, the two cases that have discussed

“extinction” have done so with reference to the “survival” of the species rather than recovery of the species. *See Northern New Mexico Stockman’s Association v. United States Fish and Wildlife Service*, \_\_\_\_ F. Supp.3d \_\_\_\_, 2020 WL 6048149, 117 (D.N.M. 2020); *Gifford Pinchot Task Force v. USFWS*, 378 F.3d 1059, 1069-71 (9<sup>th</sup> Cir. 2004) (rejecting the previous FWS ESA section 7 regulation defining “destruction or adverse modification” because the regulation improperly conflated survival and recovery). Thus, the correct analysis for purposes of section 4(b)(2) is whether the Secretary concludes that the specific exclusion of these areas of critical habitat will result in the extinction of the species.

*Public Comments Regarding the Northwest Forest Plan (NWFP) or the BLM revised Resource Management Plans (RMPs)*

*Comment (7):* Commenters expressed concern that exclusions would allow BLM to harvest timber without project-specific consultation under Endangered Species Act section 7.

*Our response:* We completed a programmatic section 7 consultation on the BLM RMPs in 2016 under the assumption that BLM will implement its actions consistent with the RMPs over an analytical timeframe of 50 years (FWS 2016, p. 2). This approach allowed us to evaluate at a broad scale BLM’s plans to ensure that the management direction and objectives are consistent with the conservation of listed species. We found that the BLM’s plans, at the programmatic scale, were not likely to jeopardize the continued existence of the northern spotted owl, or destroy or adversely modify the owl’s designated critical habitat (FWS 2016).

Additionally, even on excluded lands, all discretionary Federal actions and decisions on areas that are occupied by the species will be required to undergo section 7 consultation if such action or decision “may affect” the northern spotted owl. Such consultation will ensure that the continued existence of the northern spotted owl is not

jeopardized. Thus, we have determined that additional consultation addressing effects to designated critical habitat provide little incremental conservation benefit and thus would not be an efficient use of limited consultation and administrative resources. Given this, in conjunction with all of the other considerations discussed in Consideration of Impacts under Section 4(b)(2) of the Act, we conclude that the benefits of including these particular areas as critical habitat are relatively minor when compared to the benefits of excluding them from critical habitat.

*Comment (8):* Commenters expressed concern that wildlife provisions in the BLM RMPs do not apply in the Harvest Land Base and that the exclusion of critical habitat would remove overlapping protections.

*Our response:* According to the 2016 BLM RMPs for western Oregon, the management objectives and management direction described for resource programs (including wildlife) apply across all land use allocations, unless otherwise noted (BLM 2016a, p. 47, BLM 2016b, p. 47). Regarding overlapping protections, see our response to *Comment (7)* for our rationale for excluding these lands from critical habitat for the northern spotted owl.

*Comment (9):* Commenters stated that we should consider the impact of recent fires that have occurred in Washington, Oregon, and California on the northern spotted owl and its habitat since the 2016 BLM RMPs were finalized, and that recent events make the modeling and analyses in the RMPs ineffective and obsolete. Commenters noted that the number of acres burned has exceeded the number of acres affected by wildfire that were modeled for the first decade in the BLM RMPs.

*Our response:* We recognize that wildfire can be detrimental to the northern spotted owl and its habitat and that the number of burned acres far exceeded modeled numbers. Commenters also noted that in September 2020, several major wildfires burned across portions of the range of the northern spotted owl in Washington, Oregon, and

California, negatively affecting habitat conditions. The fires impacted multiple ownerships, including Federal lands managed by the BLM and USFS, State lands, and private lands. As part of our balancing of the benefits of inclusion with the benefits of exclusion of critical habitat, we considered that one benefit of exclusion could be a lessening of the regulatory burdens for discretionary Federal decisions when considering management practices to protect forested lands from catastrophic wildfire. Although the commenters suggest that higher than projected wildfires necessitate designating more area as critical habitat, the Service notes that removing the obligation to consult on certain areas may facilitate wildfire management, possibly protecting these areas from wildfire destruction. Thus, we have included a consideration of wildfire management as part of the balancing for excluding particular areas from the critical habitat designation.

*Comment (10):* A commenter expressed concern that habitat for the northern spotted owl will not grow as projected in the Recovery Plan and the BLM RMPs due to climate change and the combined effects of increased fire, insects, disease, storms, and carbon enrichment. The commenter stated that mitigating the risks of climate change require greater conservation of northern spotted owl habitat and, therefore, that these additional exclusions should not be made.

*Our response:* We analyzed climate change and its potential impact on northern spotted owl recovery in the Revised Recovery Plan for the Northern Spotted Owl (FWS 2011). We noted that the combined effects of climate change and past management practices are altering forest ecosystem processes and dynamics (including patterns of wildfires, insect outbreaks, and disease) to a degree greater than anticipated in the NWFP. The Recovery Plan encourages land managers to consider this uncertainty and how best to integrate knowledge of management-induced landscape pattern and disturbance regime changes with climate change when making spotted owl management decisions. The Recovery Plan further recommended an adaptive management approach to reduce

scientific uncertainties. Recovery Action 5 in the Recovery Plan for the Northern Spotted Owl states: “Consistent with Secretarial Order 3226, as amended, the Service will consider, analyze and incorporate as appropriate potential climate change impacts in long-range planning, setting priorities for scientific research and investigations, and/or when making major decisions affecting the spotted owl” (FWS 2011, p. III-11). The Plan acknowledged the uncertainty associated with estimating rates of habitat recruitment (FWS 2011, p. B-8).

The BLM did not incorporate projections of climate change into the simulation of the growth of stands through time in its 2016 RMPs because of the uncertainty in climate change predictions and limitations in downscaling the available climate predictions for use in forest stand growth and harvesting models (BLM 2016c, p. 89). However, the BLM RMPs state that if the need for adaptive management to address changes in the climate would so alter the implementation of actions consistent with the RMPs that the environmental consequences would be substantially different than those anticipated in the Proposed RMP/Final EIS, then the BLM would engage in additional planning steps and NEPA procedures (BLM 2016a, p. 111).

The BLM may also apply adaptive management by acting on information found through the monitoring questions (Appendix B) (BLM 2016a, p. 111; BLM 2016b, p. 133).

*Comment (11):* Commenters asserted that our statement in the proposed rule that the designation of the areas proposed for exclusion provided “no incremental conservation benefit over what is already provided for in the RMPs” conflicts with the Service’s prior finding that the owl “fared very poorly” on reserves within the NWFP compared to designated critical habitat.

*Our response:* The statement concerning “reserves faring very poorly” in the 2012 critical habitat rule was in reference to a modeling scenario where we tested

population performance of a potential critical habitat designation based on only NWFP reserves. Our 2012 designation was not based on this modeling scenario.

*Comment (12):* Commenters expressed concern that the BLM RMPs that we rely on for our basis for exclusions could be vacated due to current litigation and that the protection in place under the 2016 RMPs would no longer apply.

*Our response:* In the U.S. District Court for the District of Columbia, in a consolidated set of cases, the court found that the BLM RMPs violate the O&C Act because BLM excluded portions of O&C timberland from sustained yield harvest (i.e., the BLM allocated some timberlands to reserves instead of the Harvest Land Base); *see, e.g., American Forest Resource Council et al. v. Steed* (No. 16-1599-RJL) (Memorandum Opinion, November 22, 2019). Although we will not speculate on the future resolution of this litigation, we have excluded the O&C lands because the benefits of exclusion outweigh the benefits of inclusion and, based on the best scientific and commercial data available, the Secretary has not concluded that the exclusions of these areas will result in extinction of the species. See our response to *Comment 25*.

#### *Public Comments on Competition from Barred Owls*

*Comment (13):* Commenters expressed the importance of preserving mature and old-growth forest for spotted owls in light of competition with barred owls and stated that the Service has not fully explored how much more habitat needs to be conserved to mitigate for northern spotted owl habitat occupied by barred owls.

*Our response:* The northern spotted owl faces a significant and complex threat in the form of competition from the congeneric (referring to a member of the same genus) barred owl (FWS 2011, pp. I-7 to I-8). Even despite the significant acreages of critical habitat that have been set aside for the northern spotted owl since 1990, estimated populations of northern spotted owl have declined more than 70% since the listing of the northern spotted owl. 85 FR at 81145, December 15, 2020. A recent published

demographic study for the northern spotted owl (Dugger *et al.* 2016, entire) found that the nonnative barred owl that is invading northern spotted owl habitat was currently the stressor with the largest negative impact on the northern spotted owl through competition for resources. Thus, the current best available scientific and commercial data indicate that the largest negative contributing impact on northern spotted owl population is the invasive barred owl. Mitigation for the barred owl is currently being analyzed through the barred owl removal experiment that has been underway since 2013. According to the recently completed species assessment for the northern spotted owl, the northern spotted owl is showing a positive response to the removal of the barred owl on some of the study areas. Further, the study areas occur in both areas that have previously been designated as critical habitat and areas that have not been included. This supports our understanding that exclusions of critical habitat designations in these areas will not result in the extinction of the northern spotted owl.

#### *Other Public Comments*

*Comment (14):* Commenters asked why regulatory oversight of critical habitat is no longer necessary in light of the Service's previous position that old-growth reserves of the Northwest Forest Plan "are plan-level designations with less assurance of long-term persistence than areas designated by Congress. Designation of LSRs (late-successional reserves) as critical habitat complements and supports the Northwest Forest Plan and helps to ensure persistence of this management directive over time" as well as the Service's prior statements that critical habitat has significant additional value to listed species separate from any value provided by land management plans. Commenters further stated that our previous position is in contrast to our statement in the proposed rule that these exclusions are to "clarify the primary role of these lands in relation to northern spotted owl conservation," and "eliminat[e] any unnecessary regulatory oversight."

*Our response:* Our exclusion of the areas described in this rule is based on our reevaluation of the benefits of exclusion of particular areas as critical habitat with the benefits of inclusion of particular areas as critical habitat. That reanalysis along with the consideration of the other relevant impacts of a critical habitat designation support our decision. We also note that even on excluded lands, all discretionary Federal actions and decisions on areas that are occupied by the species will be required to undergo section 7 consultation if such action or decision “may affect” the northern spotted owl. Such consultation will ensure that the continued existence of the northern spotted owl is not jeopardized. Likewise, the prohibitions of ESA section 9 continue to be applicable.

*Comment (15):* A commenter stated that when the critical habitat designation was originally established, it was understood that much of the old forest reserves would require considerable time to recover old-growth characteristics and support northern spotted owl reproduction, having been subject to logging prior to 1990. The commenter asserted that much of the occupied habitat in the Harvest Land Base would need to be left unlogged during the intervening time, to assure an ecologically sustainable continuity of old-growth forest, with no significant net loss.

*Our response:* In our 2016 Biological Opinion on the BLM RMPs, we concluded that there will be a net increase in habitat for northern spotted owls during the life of the RMPs due to forest ingrowth outpacing harvest, and the RMPs contain more reserve acres and habitat than the NWFP (FWS 2016, p. 5). During the first 5 to 8 years of the RMPs, the BLM will take measures to avoid take of northern spotted owls until implementation of a barred owl management program has begun. In addition, subsequent effects to northern spotted owls would be meted out over time. These measures in the BLM RMPs, which are unchanged by the exclusions made under section 4(b)(2) in this rule, will minimize near-term negative effects to occupied northern spotted owl habitat as

habitat continues to further develop late-successional characteristics in the reserve land use allocations.

*Comment (16):* Commenters stated that our proposal ignores the northern spotted owl Recovery Plan recommendation to protect older, complex forests on Federal lands west of the crest of the Cascades range.

*Our response:* Although the ESA requires completion of a recovery plan for species listed under the ESA, the legal standards for a recovery plan are statutorily different than those Congress developed for consideration of exclusions under section 4(b)(2). While the Recovery Plan properly focuses on recovery, the consideration of critical habitat exclusions under section 4(b)(2) focus on the prevention of extinction. The courts that have discussed “extinction” have done so with references to the “survival” of the species rather than recovery of the species. *See Northern New Mexico Stockman’s Association v. United States Fish and Wildlife Service*, \_\_\_ F. Supp.3d \_\_\_, 2020 WL 6048149, 117 (D.N.M. 2020); *Gifford Pinchot Task Force v. USFWS*, 378 F.3d 1059, 1069-71 (9<sup>th</sup> Cir. 2004) (rejecting the previous FWS ESA section 7 regulation defining “destruction or adverse modification” because the regulation improperly conflated survival and recovery). Thus, the correct analysis for purposes of section 4(b)(2) is whether the Secretary concludes that the specific exclusion of these areas of critical habitat will result in the extinction of the species.

Even with these exclusions, the total designated critical habitat includes 6,105,279 acres (2,470,719 hectares) of designated critical habitat as well as several million additionally protected acres of habitat for the northern spotted owl in designated wilderness and National Parks (see 77 FR 1876 at 71986)

*Comment (17):* Commenters expressed concern that excluding critical habitat will impede recovery of the northern spotted owl.

*Our response:* We considered the effects of exclusion of these particular areas of critical habitat on recovery of the species in our analysis of the benefits of exclusion against the benefits of inclusion but nonetheless concluded that the benefits of exclusion outweighed the benefits of inclusion as described in this rule. The correct analysis for a determination of whether to exclude particular areas from critical habitat is whether the exclusions will result in extinction of the species. As stated above, the courts that have discussed “extinction” have done so with references to the “survival” of the species rather than recovery of the species. See *Northern New Mexico Stockman’s Association v. United States Fish and Wildlife Service*, \_\_\_ F. Supp.3d \_\_\_, 2020 WL 6048149, 117 (D.N.M. 2020); *Gifford Pinchot Task Force v. USFWS*, 378 F.3d 1059, 1069-71 (9<sup>th</sup> Cir. 2004) (rejecting the previous FWS ESA section 7 regulation defining “destruction or adverse modification” because the regulation improperly conflated survival and recovery). Thus, the correct analysis for purposes of section 4(b)(2) is whether the Secretary concludes that the specific exclusion of these areas of critical habitat will result in the extinction of the species. It is against this correct legal backdrop that we have determined that the exclusion of these particular areas of critical habitat outweighs the benefits of inclusion, and that, based upon the best scientific and commercial data available, we have not concluded that exclusion of these areas will result in extinction of the species.

*Comment (18):* Commenters expressed concern that the downward trend in northern spotted owl populations has continued since the 2016 BLM RMPs were finalized, and that we should evaluate the 2020 meta-analysis (demographic analyses that are performed every five years under the NWFP) prior to making changes in the critical habitat designation.

*Our response:* The northern spotted owl continues to suffer a significant population decline across its range, due primarily in recent years to increasing

competition from the invasive and aggressive barred owl. The impact of barred owls is expected to grow unless proactively managed. To that end, our recent Species Status Report notes the preliminary positive response that northern spotted owls have in certain areas where we have implemented the experimental barred owl removal program. For example, in the most recent Species Status Report, the FWS noted:

The Barred Owl Removal Experiment has been underway since 2013. There are encouraging signs of a positive spotted owl response to the removal of barred owls on some study areas. For example, on all study areas the number of occupied sites on the treatment areas (where barred owls are removed) have been maintained while the number of occupied sites on the control area continue to decline. On the Hoopa treatment area, the apparent survival rate of spotted owls has increased by almost 10 percent compared to the period immediately before removal began. Species Status Report, at page 91. Report is published at <https://www.regulations.gov/document?D=FWS-R1-ES-2014-0061-0030>

Regarding a 2020 meta-analysis, the latest 5-year demographic analysis is still in process and not yet available for our review. The most current demographic analysis was published in 2016 and was considered in the BLM RMPs' analyses and our 2016 Biological Opinion.

*Comment (19):* Commenters stated that the BLM and Service cannot avoid their duties under the ESA simply because the area in question involves O&C lands and that section 4(b)(2) exclusions should not be used as a tool to circumvent section 7 consultation recommendations.

*Our response:* The ESA was written by members of Congress. They conveyed a powerful tool on the Secretary of the Interior by giving him the authority to exclude areas unless he determined that exclusion will result in extinction of the species. Our rationale for excluding the critical habitat exclusions is not to circumvent section 7 consultation. Rather, because there will continue to be section 7 consultations for discretionary actions in areas where the spotted owl occurs, we have concluded that the additional regulatory requirement related to review for adverse modification is outweighed by other relevant factors.

## **Economic Analysis Comments**

### *Comments from Counties*

*Comment (20):* Several counties requested that the Service undertake a new economic analysis to consider the economic impacts of the designation on local communities and natural resource-based economies.

*Our response:* We reviewed the 2012 final economic analysis (IEc 2012) conducted for the December 4, 2012, critical habitat designation (77 FR 71876) as well as additional information submitted during the public comment period. We also conferred with the consultants who prepared the final economic analysis regarding the additional information submitted (IEc 2020). See response to *Comment 21* below for further detail. In general, we found that the commenters disagree with the Service's incremental methodology used to analyze the economic effects of the critical habitat designation for northern spotted owl, although that approach was the Service's policy at the time and has since been codified in its regulations (see 50 CFR 424.19(b)). As explained in response to Comment 21, the information in the IEC 2012 report in combination with the Brattle Report continues to be the best scientific and commercial data available. Were we to be adding additional lands to this critical habitat designation, we agree that a new economic analysis would be required.

*Comment (21):* The American Forest Resource Council (AFRC 2020) provided public comments requesting that the Service exclude at least 2,506,890 additional acres in addition to the 204,653 acres proposed for exclusion. It provided a new report prepared by The Brattle Group (2020) (Brattle report) critiquing the 2012 Critical Habitat economic analysis (IEc 2012). The Brattle report included updated estimates of the economic impacts of the 2012 rule using more recent data and/or different assumptions. The Oregon Farm Bureau and Oregon Cattlemen's Association; California Farm Bureau Federation; Lewis, Skamania, and Klickitat Counties in Washington; and Douglas

County in Oregon also cited the Brattle report in their comment letters as justification for additional exclusions. We summarize AFRC and other comments pertaining to economic analysis issues in the following:

(a) A focus of the Brattle report is a review of our analysis of potential timber harvest losses attributable to northern spotted owl critical habitat designation in 2012. The Brattle report follows the same analytic approach for measuring timber harvest impacts as employed in the economic analysis for the critical habitat designation, but uses alternative assumptions or updated data. These adjustments yield the following differences when compared to the results of the 2012 economic analysis (see IEC 2020 for more details):

- The number of acres where incremental harvest impacts may occur is higher;
- The baseline annual harvest potential is higher;
- The potential reductions in harvest volumes due to the impact of critical habitat are larger;
- The estimated stumpage values are lower.

As described by IEC in their review of this information, the effect of these changes in inputs by the Brattle report results in a higher measure of the negative annualized timber harvest impacts across the affected acres. The Brattle report asserts that across 1.7 million acres, the critical habitat designation greatly diminishes harvest and causes losses to the market of between \$66.4 million and \$77.2 million on an annualized basis, and between \$753 million and \$1.18 billion over 20 years on a net present value (NPV) basis. AFRC and others suggest that the results of the Brattle report support their request for exclusion of additional acres based on economic impacts.

*Our Response:* Section 4(b)(2) of the ESA gives the Secretary discretion on how to weigh economic impacts in addressing the benefits of exclusion against the benefits of inclusion of particular areas of critical habitat. Thus, while we find several issues with

the analysis provided in the Brattle report, specifically the assumptions or data used to produce the estimate of negative annualized timber harvest impacts and their numeric conclusions due to the critical habitat designation, we agree that there is an incremental negative economic impact associated with the designation of critical habitat for the northern spotted owl.

First, the Brattle report states that the higher number of acres where incremental impacts may occur (1.7 million acres) is based upon a review of GIS files and other related information. However, the report provides no clear basis for this increase. We asked IEC to review the Brattle report and they concluded that they could not replicate the result. Additionally, the Brattle report does not evaluate the potential incremental effects as it may occur across the geographic area of the designation, by critical habitat units and subunits. In contrast, our 2012 economic analysis included an analysis of acreages by subunit where impacts may occur, scored these areas by the potential extent of impact, and then ranked each subunit according to a composite score against all other subunits (see Section 4.3 of IEC 2012). The Brattle report provides no such analysis and simply provides gross measures of potential impact across approximately 1.7 million acres.

Second, the Brattle report assumes a higher baseline annual harvest potential on USFS and BLM lands (a 9-fold increase on lands managed by USFS and a 4-fold increase on lands managed by BLM). We understand that the report relied on average yields from 2018–2020 harvest data on lands managed by BLM for moist and dry forests and then translates these harvest levels into estimates of long-term annual yields across the acres where the report assumes incremental impacts may occur. The report also assumes similar yields on BLM and USFS lands, a standard rotation age of 100 years where one percent of the land would be regeneration harvested and one percent would be thinned. The assumptions are hypothetical, however, as the BLM and USFS are unlikely to have similar yields generally for a variety of reasons; there is no standard of a 100-year

rotation age or one percent regeneration harvest used by either agency for all of their managed lands. Under the RMPs, the BLM assumed harvest of 8 percent of forested land base per decade within all land use allocations (Hooper 2020, pers. comm.). This is significantly lower than the assumptions made in the Brattle report. In contrast, we based our yield rates on actual harvest data provided by the BLM and USFS over an extended period. For lands managed by BLM, the 2012 economic analysis used data BLM provided on 30 years of planned timber harvest by land allocation type (reserve/matrix), forest conditions (nesting/roosting habitat, predominantly younger forests), and harvest type (thinning, regeneration) at the critical habitat subunit level. For lands managed by USFS, the 2012 economic analysis used projected yield rates provided by the USFS for each critical habitat unit.

Third, the Brattle report assumes an 80 percent reduction in harvest volumes due to the critical habitat designation versus the 20 percent used in the 2012 economic analysis high impact scenario. Specific information supporting the assumption of an 80 percent reduction in harvest volumes was not provided in the report; rather, the report indicates that this assumption is based on discussions with AFRC and unspecified comments provided by the USFS and BLM on the 2012 economic analysis. Additionally, the Brattle report notes that it “cannot model the timber markets that influence the demand for timber in the Pacific Northwest,” to test the reasonableness of its assumption concerning timber harvest effects (The Brattle Group 2020, p. 17).

The potential incremental effect of critical habitat on harvest levels was a point of significant debate for the 2012 critical habitat designation, see section 4.4.2 of the 2012 economic analysis. As IEc notes in its assessment of the Brattle report, “Various land managers, Service experts, and other commenters concluded that the direction and magnitude of effect due to critical habitat was uncertain, noting that harvest levels could be higher or lower depending on a variety of land management considerations and

harvest factors. In addition, the implementation of critical habitat occurs within a complex set of factors, including volatility in global demand for wood products, general timber industry transformation, and existing regulatory and statutory requirements, among other factors.” The 2012 economic analysis used three separate scenarios, along with additional sensitivity analysis to capture this uncertainty and the concerns of multiple stakeholders, including BLM and USFS. “The Brattle report does not endeavor to model markets or other factors that influence the demand for timber in the Pacific Northwest” (IEc 2020). The Brattle report did not include a sensitivity analysis to address the uncertainty of effects associated with critical habitat.

Fourth, concerning estimated stumpage values, as IEc noted in their review, our 2012 economic analysis “recognized that prices vary across forest, land manager, and year, and that future prices were uncertain. The analysis captured annual average prices from Federal timber sales on BLM and USFS managed lands between 2000 and 2011. The low-end price (\$100 per thousand board feet (mbf)) was similar to more recent prices (as of 2012) from Federal timber sales, which had been below historical averages. The higher end was selected to purposely capture the highest price received since the year 2000. This high price, therefore, served as a conservative approach, meaning it would yield the highest negative impacts from any constraints on timber harvest volumes due to critical habitat designation. Beyond this range, the 2012 economic analysis conducted a further sensitivity analysis based upon a comment received from AFRC. In this scenario, an even higher price of \$350 per mbf was analyzed for its effect and included in the economic analysis. Thus, the original range and further sensitivity analysis captured a reasonable upper and lower bound of the role of timber prices on potential impacts. In contrast, the Brattle report uses similar average stumpage prices from similar sources, but only from 2018 to 2020, a much shorter time frame. In addition, its price range of \$83 to \$191 per mbf is consistent with the price range used in the 2012 report, especially when

considering the passage of eight years and the general market volatility of lumber prices.” (IEc 2020).

In sum, the Brattle report and associated commenters concluded that the total effect of these alternative inputs is a higher measure of negative annualized timber harvest impacts across the total of potentially affected acres compared to what was estimated in the 2012 economic analysis (IEc 2012) (\$66 to \$77 million versus \$6.5 million). As noted above, the Brattle report does not distribute its overall measure of impacts across the designation’s subunits. We note that the Brattle report included additional conclusions, such as effects on Gross Domestic Product and employment. However, these conclusions are based on the assumptions we discuss above which are misapplied or cannot be confirmed with the methods provided. Therefore, for the reasons discussed above, we are unable to confirm the economic conclusions in the Brattle report.

Despite these concerns with the Brattle Report, even the economic study in 2012 by IEc notes a negative incremental impact because of the designation of critical habitat for the northern spotted owl. Our weighing of the benefits of exclusion against the benefits of inclusion considers these negative economic impacts. We have reevaluated the relative impact of even an economic loss for rural communities already faced with impacts including the initial listing of the species as well as the unquantified effects in the 2012 analysis that have taken on increasing importance due to more recent economic trends. See Consideration of Economic Impacts.

(b) The Brattle report included information on annual timber harvest levels on Federal lands in 18 counties within California, Oregon, and Washington, from 2002–2018. The report concluded that these data demonstrate that timber harvest in these counties declined as a direct consequence of the 2012 critical habitat designation.

*Our Response:* We reviewed this information and found errors and assumptions in the Brattle report. First, four of the 18 counties cited in the analysis (Calaveras, Riverside,

and Mono in California, and Morrow in Oregon) are located outside of the range of the northern spotted owl and do not contain designated northern spotted owl critical habitat, so the designation would not have impacted timber harvest in these counties. Second, of the remaining 14 counties cited in the report that contain some spotted owl critical habitat, the commenter reports timber harvest declines occurring in seven counties somewhere around (i.e., proximally before and after) the year 2012, stable or flat trends in three counties, and increased harvest levels in four counties.

Of the declines highlighted by the commenter, several began prior to the designation in December 2012, casting doubt on the potential direct impact of the 2012 designation. Almost all of these counties also show large fluctuations in the harvest levels between years going back to 2002. Third, the analysis did not include all of the counties within the critical habitat designation. A rapid assessment of the same data source cited by the commenter, but evaluating a random number of additional counties in Oregon, Washington, and California in the range of the northern spotted owl, revealed no discernible pattern in timber harvest declines that could reasonably be attributed to the 2012 critical habitat designation. Some counties experienced general increases in timber harvest after 2012, some declined, and some were relatively flat when compared to long-term trends. A similar pattern of fluctuation exists for individual counties located outside of the range of the spotted owl but within Oregon, Washington, and California, as well as in other western States.

Using the same data source cited by this commenter (with 2019 data from BLM and USFS on timber volume offered for sale), we reviewed Federal lands harvest data in Oregon counties with northern spotted owl critical habitat. The annual average harvest from 2002–2012 on BLM lands in the range of the spotted owl was approximately 159 million board feet per year prior to the 2012 critical habitat designation. The annual average harvest on BLM lands located in the range of the spotted owl from 2013–2019,

after the 2012 critical rule was published, was 235 million board feet; the total in 2019 was 272 million board feet offered for sale. Thus, annual harvest appears to have increased subsequent to the 2012 designation of critical habitat. Likewise, the annual average harvest from 2002–2012 on USFS lands located within the range of the spotted owl was approximately 196 million board feet per year prior to the 2012 critical habitat designation. The annual average harvest on USFS land from 2013–2019, after the 2012 critical rule was published, was 288 million board feet. We also reviewed Federal harvest data in Oregon counties outside the range of the spotted owl (and therefore in counties with no spotted owl critical habitat or obligation for Federal agencies to consult under ESA section 7) and saw harvest volume fluctuations similar to those in counties located within critical habitat. Based on these data it does not appear that designation of critical habitat in 2012 had a significant incremental depressive effect on subsequent Federal timber harvest. However, we also agree that the relative impact of even a “relatively small” economic loss for rural communities already faced with impacts including the initial listing of the species can economically impact that rural community. Thus, as part of our analysis of the particular areas in this case and based on the totality of the circumstances, we have determined the benefits of exclusions of these particular areas outweigh the benefits of inclusion.

*Comment (22):* Douglas County requested that the Service exclude all land within Douglas County from the critical habitat designation due to severe and disproportionate economic impacts. The County provided a 2007 report that discusses the negative economic impacts of reduced harvest on Federal lands. Additionally, Douglas County asserted that our 2012 economic analysis is flawed with respect to Douglas County and should be revised.

*Our response:* The report provided by Douglas County focuses on the impact that termination of “safety net” payments under the Secure Rural Schools and Community

Self-Determination Act would have on counties in western Oregon. The report discusses reductions in harvest on Federal lands in the O&C counties attributable to a range of factors, resulting in a loss of revenue sharing that limited county budgets and rapid contractions of the wood products sector as logging declined and mills closed or reduced shifts. The report, prepared in 2007, does not discuss impacts of the critical habitat designation (which came afterwards, in late 2012) but describes general pressures on the timber industry.

Our 2012 economic analysis (IEc 2012) addressed the incremental effects of critical habitat within the area proposed for designation for the northern spotted owl. Consistent with our practice at the time (now codified in regulations) the economic analysis quantifies the economic impacts that may be directly attributable to the designation of critical habitat, comparing scenarios both “with critical habitat” and “without critical habitat.” Our incremental analysis did not consider the economic impact of changes other than from the proposed critical habitat designation, and did not evaluate the economic condition or status of the timber industry at large. Rather, it addressed the effects related to the impacts to Federal agencies and their activities, because Federal agencies are the only entities directly subject to the requirement to evaluate and consider effects of their actions on designated critical habitat.

Nonetheless, we acknowledged that, “[m]ultiple forces have contributed to the recent changes in the Pacific Northwest timber industry. In general, the timber industry is characterized as being highly competitive; there is a relatively low degree of concentration of production among the largest producers and there is essentially a single national price for commodity grades of lumber. In recent decades, competition has intensified with increased harvesting in the U.S. South and interior Canadian Provinces. New technologies and increased mechanization have led to mill closures; generally, less efficient mills located near Federal forests have been closed in favor of larger more

advanced facilities closer to major transportation corridors or private timberlands. In addition, other forces such as endangered species protections, fluctuations in domestic consumption, shifts in international trade, and changes in timberland ownership, have all contributed to changes in the Pacific Northwest timber industry” (IEc 2012, p. 3-17).

*Comment (23):* One commenter noted that a 2012 economic analysis from the Sierra Institute, “Response to the Economic Analysis of Critical Habitat Designation for the Northern Spotted Owl by Industrial Economics” (Kusel and Saah 2012), was not fully considered in the 2012 designation and that a new economic analysis should be conducted.

*Our Response:* The Service fully considered the content of the Kusel and Saah report and found a great deal of overlap between that economic analysis and the economic analysis contracted by the Service and written by Industrial Economics (IEc 2012), even incorporating a summary of the Kusel and Saah report (see our response to *Comment (201)* in the December 4, 2012, critical habitat rule (77 FR 71876, p. 72040)). The Service believes the 2012 economic analysis (IEc 2012) is a reasonable assessment of the quantified costs related to timber harvest. We have reviewed other aspects of the 2012 final economic analysis (IEc 2012) and determined the unquantified effects, including the effects associated with “linear projects” have become more significant due to recent economic trends that were not foreseen in 2012. In 2012, we acknowledged that “considerable uncertainty surrounds the future level of construction of natural gas pipelines and electric transmission lines as significant uncertainty exists related to the level of demand for natural gas and electricity from hydropower sources. Due to this uncertainty, this analysis does not attempt to forecast activity associated with the construction of new natural gas pipelines and storage facilities or transmission lines related to hydro-power generation based on historical activity levels within the proposed critical habitat area in the foreseeable future.” (IEc 2012) The uncertainty continues to

persist but the recent trends in the electricity power sector makes these unquantified effects more important and significant. However, the persisting uncertainty makes new analysis difficult.

### **Environmental Analysis Comments**

*Comment (24):* Commenters expressed that the Service must conduct a NEPA analysis and evaluate the exclusions in a biological opinion before finalizing exclusions.

*Our response:* It is our position that, outside the jurisdiction of the U.S. Court of Appeals for the Tenth Circuit (see *Catron County Board of Commissioners, New Mexico v. U.S. Fish and Wildlife Service*, 75 F.3d 1429 (10th Cir. 1996), we do not need to prepare environmental analyses pursuant to NEPA (42 U.S.C. 4321 *et seq.*) in connection with designating critical habitat under the Act. We published a notice outlining our reasons for this determination in the *Federal Register* on October 25, 1983 (48 FR 49244). This position was upheld by the U.S. Court of Appeals for the Ninth Circuit in *Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. 1995). All of the States impacted by the critical habitat designation for the northern spotted owl are located within the jurisdiction of the Ninth Circuit Court. Therefore, consistent with the ruling in *Douglas County*, conducting a NEPA analysis and completion of a biological opinion on the proposed exclusions would be redundant, and an inefficient use of limited government resources.

### **Section 4(b)(2) Exclusions Comments**

*Comment (25):* Commenters variously requested that we exclude all O&C lands, all USFS matrix lands, all USFS lands, BLM lands outside the Harvest Land Base, and all Douglas County lands. We respond separately to each reason provided for these suggested exclusion requests first (except for assertions of economic impacts, which are addressed above in response to *Comments 20–23*), and then provide a collective summary:

(a) Commenters asserted that critical habitat conflicts with BLM and USFS management direction and constrains timber harvest on O&C lands and matrix lands.

*Our Response:* We have analyzed the statutory basis for the O&C lands and the USFS matrix lands in the section entitled *Exclusion of Additional Federal Lands*. Please see that section for a response.

(b) There are conflicting principles between the O&C Act and the Endangered Species Act, and the Service should consider the pending court remedy on O&C lands.

*Our Response:* We note that there is ongoing litigation challenging BLM's management of O&C lands under the 2016 RMPs (BLM 2016a, 2016b). As we described in the proposed rule, one district court has concluded the 2016 RMPs (including their consideration of the Endangered Species Act) does not conflict with the O&C Act, a conclusion affirmed by an appellate court (see *Pacific Rivers v. BLM* (No. 19-35384) (Memorandum, May 15, 2020)). In a separate proceeding, the U.S. District Court for the District of Columbia, in a consolidated set of cases, found that the BLM RMPs violate the O&C Act because BLM excluded portions of O&C timberland from sustained yield harvest (*i.e.*, the BLM allocated some timberlands to reserves instead of the Harvest Land Base); *see, e.g., American Forest Resource Council et al. v. Steed* (No. 16-1599-RJL) (Memorandum Opinion, November 22, 2019). The parties briefed the court on the appropriate remedy, but the court has not yet issued an order. We considered this information in developing the proposed rule, and sought comment specifically on how we should address this information in the final rule. One commenter suggested that we wait for the outcome of that proceeding before revising critical habitat; another commenter indicated that the court ruling, even without the remedy order, supported the exclusion of all O&C lands from designated critical habitat.

As stated in the section entitled *Consideration of Impacts under Section 4(b)(2) of the Act*, we have considered the statutory mandates for the lands mandated by the BLM

and USFS as part of our exclusion analysis. The Secretary's decision in this case was not based on speculation about the outcome of a particular case but upon a weighing of the benefits of inclusion against the benefits of exclusion of particular areas of critical habitat. Because, based on the best scientific and commercial data available, the Secretary has not concluded that the exclusions will result in extinction of the species, we are granting the request to exclude the O&C lands and NWFP matrix lands from this critical habitat designation.

(c) A commenter asserted that O&C lands managed by the BLM and land managed by the USFS should be excluded because the NWFP and RMPs should guide management on Federal lands since they are consistent with the Recovery Plan for the Northern Spotted Owl (FWS 2011).

*Our Response:* The Service agrees that the NWFP and RMPs guide management on Federal lands, as informed by other plans, laws, designations, and input. Federal land managers are skilled at incorporating a wide variety of required inputs and feedback when planning and carrying out land management actions, including public comment under the National Environmental Policy Act, recommendations from listed species' recovery plans, input from the Service and National Marine Fisheries Service through the section 7 consultation process, growth and yield models, and critical habitat designations, to name just a few. The BLM RMPs have undergone section 7 consultation recently, in 2016, with the 2012 spotted owl critical habitat rule in place and were found to be consistent with the Endangered Species Act, including our determination that the management direction of the plans is consistent with the critical habitat designation. All USFS actions carried out under the NWFP since the 2012 designation of critical habitat that have undergone section 7 consultation have also resulted in our determination that there was no destruction or adverse modification of critical habitat, affirming that the management of these lands is consistent with the critical habitat designation.

Additionally, all discretionary USFS and BLM actions carried out under the NWFP since the 2012 designation of critical habitat have undergone section 7 consultation on a project-by-project basis and have been found to be consistent with the Endangered Species Act. The determination of whether to exclude particular areas from a critical habitat designation is whether the benefits of exclusion outweigh the benefit of inclusion, so long as, based on the best scientific and commercial data available, unless the Secretary concludes that the extinction of the species will result from the exclusions. Our considered analysis of the statutory requirements for a critical habitat designation has been fully documented and discussed in this rule.

*(d)* Non-O&C BLM lands should be excluded for ease of administration.

*Our Response:* We are excluding all BLM Harvest Land Base lands addressed in the 2016 RMPs (referred to as “matrix lands” prior to the 2016 RMPs) that are not managed under the O&C Act (approximately 12,000 acres) from critical habitat for the northern spotted owl. See Consideration of Impacts under Section 4(b)(2) of the Act.

*(e):* Commenters stated that our reliance on the management under the BLM RMPs (BLM 2016a, 2016b), as a rationale for excluding the Harvest Land Base in those plans, should also be applied to considering all O&C lands addressed in those plans and that we should also rely on a similar rationale for excluding O&C lands and matrix lands managed by the USFS under the protections of the NWFP for exclusions.

*Our response:* See our response to *Comment 25(b), (c) and (e)* above.

*Comment (26):* Commenters requested that we exclude: all unoccupied areas; areas of younger forests; all critical habitat subunits that have 50 percent or more younger forests; areas described as dispersal habitat; “habitat capable” lands; stands under 80 years old; and low-quality habitat.

*Our Response:* We decline to revisit whether younger forests, including stands under 80 years old, habitat capable lands, stands under 80 years old and low-quality

habitat fit within the definitions of habitat or critical habitat for the northern spotted owl. As stated in our proposed rule, the purpose of this rule was to consider exclusion of particular areas based on section 4(b)(2) of the ESA. The determination of whether younger forests, including stands under 80 years old, areas for dispersal habitat, habitat capable lands and low-quality habitat falls outside the definitions of habitat and critical habitat is not contemplated by this rulemaking.

*Comment (27):* Commenters requested that we exclude all California lands, areas of high or moderately high fire hazard risk or fire-prone forests, dry forest in California, dry forest in the Eastern Washington Cascades, and previously burned Late Successional Reserves, citing the following rationale:

(a) Commenters stated that a conflict exists between critical habitat and management objectives for fuels reduction and active management, and that wildfire suppression costs are immense. They asserted that exclusion of certain lands would facilitate density management, dry forest restoration, and fuels reduction on the most vulnerable acres and prevent loss of northern spotted owl habitat.

*Our Response:* Both the Forest Service and the BLM are required to manage the lands under their jurisdictions in compliance with the statutory mandates of their organic statutes. Since the 2012 rule, the courts have provided additional guidance on those mandates. This final rule recognizes the courts' guidance as discussed in the *Consideration of Impacts under Section 4(b)(2) of the Act*. In the 2012 critical habitat rule, the Service accounted for the drier provinces and parts of the range and recognized that forest management needs to be tailored to the forest type and climatic conditions, including the dry forests in California and the Eastern Washington Cascades. As part of the critical habitat rule, the Service expressly encourages land managers to consider implementation of active forest management, utilizing "ecological forestry" practices, to restore natural ecological processes where they have been disrupted or suppressed (e.g.,

natural fire regimes). In this rule we continue to encourage these practices as well as recognizing the statutory requirements for providing sustained yield timber harvest on O&C lands and multiple use management on Forest Service matrix lands.

On page 71908 of the December 4, 2012, critical habitat rule (77 FR 71876) we stated that, in drier, more fire-prone regions of the owl's range, habitat conditions will likely be more dynamic, and more active management may be required to reduce the risk to the essential physical or biological features from fire, insects, disease, and climate change, as well as to promote regeneration following disturbance.

The Service recognizes that land managers have a variety of forest management goals, including maintaining or improving ecological conditions where the intent is to provide long-term benefits to forest resiliency and restore natural forest dynamic processes (USDI FWS 2011, III-45).

The Service has consulted under section 7 with Federal agencies on their fuels reduction, stand resiliency, and pine restoration projects in dry forest systems within the range of the northern spotted owl. For example, we have consulted with the BLM and the USFS on such actions in the Klamath Province of southern Oregon. The proposed actions may include treatment areas that reduce forest canopy to obtain desired silvicultural outcomes and meet the purpose and need of the project, including timber production. They can also promote ecological restoration and are expected to reduce future losses of spotted owl habitat and improve overall forest ecosystem resilience to climate change.

In the 2012 critical habitat rule, we repeatedly reference the need and appropriateness for conducting forest health treatments in spotted owl habitat, including designated critical habitat. Likewise, the Revised Recovery Plan for the Northern Spotted Owl (FWS 2011) encourages application of active forest management within spotted owl habitat to address forest health, wildfire risk, and impacts of climate change. Lastly, the 2016 Biological Opinion on the BLM's 2016 RMPs generally supports this need as well.

(b) Commenters requested the exclusion of burned areas to allow reforestation and fuels treatments to occur.

*Our Response:* To the extent the commenters are suggesting that burned areas do not fit within the definition of critical habitat, those determinations are not contemplated by this rulemaking.

(c) Commenters asserted that “habitat capable” lands do not meet the definition of critical habitat.

*Our Response:* To the extent the commenters are suggesting that habitat capable lands do not fit within the definition of critical habitat, those determinations are not contemplated by this rulemaking.

*Comment (28):* Commenters requested that we exclude areas of less than 3,000 contiguous acres because areas this small cannot support northern spotted owls.

*Our Response:* To the extent the commenters are suggesting that areas of less than 3,000 contiguous areas do not fit within the definition of critical habitat, we decline to address those comments as outside the scope of this rulemaking.

*Comment (29):* Commenters requested that we exclude the White Pass Ski Area in Washington to avoid any ambiguity because this acreage does not function as northern spotted owl habitat.

*Our Response:* We have excluded the critical habitat within the White Pass ski area as part of this critical habitat determination. See [Exclusion of the White Pass Ski Area](#).

*Comment (30):* Certain Tribes requested that Federal lands within 5 miles of Indian land be excluded from critical habitat due to economic impacts, the need to maintain road infrastructure to access Indian land in checkerboard ownership, and to provide greater management flexibility to maintain forest health and prevent wildfires.

*Our Response:* The Service recognizes in the critical habitat rule the need to actively manage forests, particularly in the drier provinces, to increase their resiliency to wildfires, including reducing ladder fuels, uneven age management, and prescribed burning. This recognition includes the forests that are within 5 miles of Indian lands. Roads are not considered critical habitat, and thus the designation should not hinder road maintenance anywhere, including access across Federal lands. Because the critical habitat designation does not preclude active management or road maintenance of the lands adjacent to Indian lands, we do not find a basis for exclusion of additional Federal lands adjacent to Indian land.

*Comment (31):* Commenters requested we exclude Adaptive Management Areas and Experimental Forests because placing additional constraints on actions in these areas will limit the ability to conduct scientifically credible work.

*Our Response:* To the extent that Adaptive Management Areas and Experimental Forests are included within the exclusions discussed on BLM and Forest Service lands as part of this rule, they are excluded from the critical habitat designation. To the extent they are not within the excluded portion of critical habitat discussed in this rule, the opportunities for scientific research and management experimentation associated with experimental forests and Adaptive Management Areas lend themselves to putting into practice the types of timber management that the critical habitat rule recommends, thereby serving as a type of field laboratory to try new and alternative approaches that could prove useful in applying those approaches across a greater landscape. Additionally, there is enough flexibility built into the recommendations in the critical habitat rule that Experimental Forests and Adaptive Management Areas can continue to conduct their valuable work on their landscapes.

*Comment (32):* Commenters asserted that because the barred owl is now widespread and competes with the northern spotted owl, the designated critical habitat

lacks the biological features necessary to restore northern spotted owl breeding populations and recover the species.

*Our Response:* The barred owl poses a tremendous challenge to the future of the northern spotted owl. The barred owl impact on spotted owls is extremely significant. Although the northern spotted owl Recovery Plan identified two primary threats to spotted owls—habitat loss and competition from barred owls—and did not recognize either as preeminent, we now have further research and analysis to determine that the aggressive and invasive barred owl is the primary threat to the northern spotted owl. In fact, the recent 12-Month Finding for the northern spotted owl (85 FR 81144; December 15, 2020) determined that an uplisting from threatened to endangered was warranted but precluded by higher priorities. *Id.* A recent published demographic study for the northern spotted owl (Dugger *et al.* 2016, entire) found that the nonnative barred owl has the largest negative impact on the northern spotted owl through competition for resources. Based on this recognition, the Service is currently developing a barred owl management strategy to help reduce the effect of barred owls on northern spotted owls.

## **CRITICAL HABITAT**

### **Background**

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

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

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

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

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

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

Conservation, as defined under section 3 of the Act, means to use and the use of all methods and procedures 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 translocation, 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. Designation also does not allow the government or public to access private lands, nor does designation 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 and 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. When designating critical habitat, the Secretary will first evaluate areas occupied by the species. The Secretary will consider unoccupied areas to be essential only where a critical habitat designation limited to geographical areas occupied by the species would be inadequate to ensure the conservation of the species. In addition, 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.

In our December 4, 2012, final rule (77 FR 71876), we determined that all units and subunits met the Act's definition of being within the geographical area occupied by the species at the time of listing. This rule does not revisit that determination, and the comments raised as to whether certain habitats did or did not fit the definition of critical habitat are outside the scope of this rulemaking. Rather, the purpose of this rulemaking is to apply the requirements of section 4(b)(2) to the determinations discussed in the 2012 rule to determine if the benefits of exclusions of particular areas outweigh the benefits of inclusion of those particular areas. Because we have not concluded, based on the best scientific and commercial data available, that these exclusions will result in extinction of the species, we are finalizing the exclusions in this rule.

## **FINAL REVISED CRITICAL HABITAT DESIGNATION**

### ***Changes from the Proposed Rule***

In our proposed rule, we proposed excluding those acres managed by the BLM under the O&C Act as Harvest Land Base pursuant to BLM's 2016 RMPs, or approximately 204,797 acres (82,809 hectares) in Benton, Clackamas, Coos, Curry, Douglas, Jackson, Josephine, Klamath, Lane, Lincoln, Multnomah, Polk, Tillamook, Washington, and Yamhill Counties, Oregon, under section 4(b)(2) of the Act. With this final rule, we are excluding (1) all O&C lands, whether managed by the BLM or USFS (approximately 1,391,714 acres); (2) Forest Service "matrix lands" addressed in the NWFP and not already managed under the O&C Act (approximately 2,047,929 acres);

(3) lands managed under the 2016 RMPs as Harvest Land Base, though not under the O&C Act (referred to as “matrix” prior to the 2016 RMPs) (approximately 12,046 acres); (4) northern spotted owl critical habitat lands within the Forest Service Special Use Permit for the White Pass Ski Area (approximately 211 acres); and (5) additional Tribal lands (approximately 20,177 acres).

Consistent with the 2012 rule, 6,105,279 ac (2,470,719 ha) are now identified as critical habitat in 11 units and 60 subunits as meeting the definition of critical habitat for the northern spotted owl. The 11 units we have identified as critical habitat are: (1) North Coast Olympics, (2) Oregon Coast Ranges, (3) Redwood Coast, (4) West Cascades North, (5) West Cascades Central, (6) West Cascades South, (7) East Cascades North, (8) East Cascades South, (9) Klamath West, (10) Klamath East, and (11) Interior California Coast Ranges. All of the critical habitat units and subunits identified were occupied at the time of listing; however, some units may include some smaller areas that were not known to be occupied at the time of listing but have been determined to be essential to the conservation of the species. Land ownership of the designated critical habitat includes Federal and State lands. No Indian lands or private lands are included in the critical habitat designation. The approximate area of each excluded area within critical habitat subunits is shown in Table 1. Only the units and subunits that we have revised in this rule are described below; see the 2012 critical habitat rule for descriptions of the units and subunits that remain unchanged.

**Table 1. Areas Excluded by Critical Habitat Subunit by this Rule.**

<b>Subunit</b>	<b>2012 Critical Habitat in Acres (Hectares)</b>	<b>Areas Excluded in Acres (Hectares)</b>	<b>Final Critical Habitat in Acres (Hectares)</b>	<b>Excluded Lands</b>
ECN 1	101,656 (41,139)	22,643 (9,163)	79,013 (31976)	USFS Matrix
ECN 2	60,087 (24,316)	17,475 (7,072)	42,612 (17244)	USFS Matrix
ECN 3	301,220 (121,899)	108,367 (43,855)	192,853 (78045)	USFS Matrix
ECN 4	223,282 (90,359)	8,031 (3,250)	215,251 (87109)	USFS Matrix
ECN 5	201,140 (81,398)	83,107 (33,632)	118,033 (47766)	USFS Matrix
ECN 6	81,842 (33,120)	47,896 (19,383)	33,946 (13738)	USFS Matrix
ECN 7	139,979 (56,647)	96,433 (39,025)	43,546 (17623)	USFS Matrix
ECN 8	94,622 (38,292)	33,590 (13,593)	61,033 (24699)	USFS Matrix
ECN 9	155,434 (62,902)	59,264 (23,983)	96,170 (38919)	USFS Matrix
ECS 1	125,560 (50,812)	68,723 (27,811)	56,837 (23001)	BLM Harvest Land Base, BLM O&C, USFS Matrix
ECS 2	66,086 (26,744)	18,209 (7,369)	47,877 (19375)	BLM Harvest Land Base, USFS O&C, BLM O&C, USFS Matrix
ECS 3	112,179 (45,397)	33,533 (13,571)	78,646 (31827)	USFS Matrix
ICC 1	332,061 (134,380)	51,308 (20,764)	280,753 (113617)	USFS Matrix
ICC 2	204,461 (82,742)	107,558 (43,527)	96,903 (39215)	USFS Matrix
ICC 3	104,813 (42,416)	39,600 (16,025)	65,214 (26391)	USFS Matrix
ICC 4	119,957 (48,545)	47,256 (19,124)	72,701 (29421)	USFS Matrix
ICC 5	34,955 (14,146)	6,358 (2,573)	28,597 (11573)	USFS Matrix
ICC 7	119,729 (48,453)	20,019 (8,101)	99,710 (40351)	USFS Matrix
ICC 8	83,376 (33,741)	7,100 (2,873)	76,276 (30868)	USFS Matrix
KLE 1	242,905 (98,300)	130,233 (52,703)	112,672 (45597)	BLM Harvest Land Base, Indian, USFS O&C, BLM O&C, USFS Matrix
KLE 2	100,454 (40,652)	96,490 (39,048)	3,964 (1,604)	BLM Harvest Land Base, Indian, USFS O&C, BLM O&C, USFS Matrix
KLE 3	112,799 (45,648)	105,262 (42,598)	7,537 (3,050)	BLM Harvest Land Base, USFS O&C, BLM O&C, USFS Matrix
KLE 4	256,079 (103,631)	103,077 (41,714)	153,002 (61,918)	BLM Harvest Land Base, USFS O&C, BLM O&C, USFS Matrix
KLE 5	38,252 (15,480)	36,567 (14,798)	1,684 (682)	BLM Harvest Land Base, BLM O&C, USFS Matrix
KLE 6	167,849 (67,926)	56,161 (22,728)	111,688 (45,198)	BLM Harvest Land Base, BLM O&C, USFS Matrix
KLE 7	66,478 (26,903)	22,797 (9,226)	43,681 (17,677)	USFS Matrix

KLW 1	147,263 (59,595)	130,290 (52,726)	16,973 (6,869)	BLM Harvest Land Base, Indian, BLM O&C, USFS Matrix
KLW 2	149,965 (60,689)	105,256 (42,596)	44,709 (18,093)	BLM Harvest Land Base, BLM O&C, USFS Matrix
KLW 3	146,092 (59,121)	37,595 (15,214)	108,498 (43,907)	BLM Harvest Land Base, BLM O&C, USFS Matrix
KLW 4	158,835 (64,278)	94,360 (38,186)	64,475 (26,092)	BLM Harvest Land Base, BLM O&C, USFS Matrix
KLW 5	31,084 (12,579)	5,475 (2,216)	25,610 (10,364)	BLM Harvest Land Base, USFS Matrix
KLW 6	117,541 (47,567)	10,289 (4,164)	107,252 (43,404)	USFS Matrix
KLW 7	254,465 (102,978)	168,854 (68,333)	85,610 (34,645)	USFS Matrix
KLW 8	114,676 (46,408)	39,225 (15,874)	75,452 (30,534)	USFS Matrix
KLW 9	149,641 (60,558)	735 (297)	148,906 (60,260)	USFS Matrix
NCO 4	124,219 (50,270)	2,244 (908)	121,975 (49,362)	BLM Harvest Land Base, BLM O&C
NCO 5	198,463 (80,315)	57,326 (23,199)	141,137 (57,116)	BLM Harvest Land Base, USFS O&C, BLM O&C
ORC 1	110,658 (44,782)	23,538 (9,526)	87,120 (35,256)	BLM Harvest Land Base, USFS O&C, BLM O&C, USFS Matrix
ORC 2	261,403 (105,786)	83,330 (33,723)	178,073 (72,064)	BLM Harvest Land Base, Indian, USFS O&C, BLM O&C, USFS Matrix
ORC 3	204,185 (82,631)	130,177 (52,681)	74,008 (29,950)	BLM Harvest Land Base, Indian, USFS O&C, BLM O&C, USFS Matrix
ORC 4	8,263 (3,344)	8,202 (3,319)	61 (25)	BLM O&C
ORC 5	176,402 (71,387)	111,009 (44,924)	65,392 (26,463)	BLM Harvest Land Base, USFS O&C, BLM O&C, USFS Matrix
ORC 6	81,912 (33,149)	78,257 (31,669)	3,655 (1,479)	BLM Harvest Land Base, Indian, BLM O&C
RDC 1	60,766 (24,591)	1,459 (590)	59,307 (24,001)	USFS Matrix
WCC 1	225,272 (91,164)	12,704 (5,141)	212,568 (86,023)	USFS Matrix
WCC 2	279,420 (113,077)	88,765 (35,922)	190,655 (77,156)	USFS Matrix, White Pass Ski Area
WCC 3	394,462 (159,633)	122,196 (49,451)	272,266 (110,182)	USFS Matrix
WCN 1	438,247 (177,352)	4,816 (1,949)	433,431 (175,403)	USFS Matrix
WCN 2	103,899 (42,046)	318 (129)	103,581 (41,918)	USFS Matrix
WCS 1	92,586 (37,468)	48,904 (19,791)	43,682 (17,677)	BLM Harvest Land Base, USFS O&C, BLM O&C, USFS Matrix
WCS 2	151,418 (61,277)	115,898 (46,902)	35,520 (14,374)	BLM Harvest Land Base, USFS O&C, BLM O&C, USFS Matrix
WCS 3	318,382 (128,845)	99,805 (40,390)	218,577 (88,455)	BLM Harvest Land Base, BLM O&C, USFS Matrix
WCS 4	379,023 (153,385)	172,930 (69,982)	206,093 (83,403)	BLM Harvest Land Base, USFS O&C, BLM O&C, USFS Matrix
WCS 5	356,718 (144,359)	194,057 (78,532)	162,661 (65,827)	BLM Harvest Land Base, USFS O&C, BLM O&C, USFS Matrix

WCS 6	99,516 (40,273)	96,994 (39,252)	2,522 (1,021)	BLM Harvest Land Base, USFS O&C, BLM O&C, USFS Matrix
-------	-----------------	-----------------	---------------	---

## **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 designation. The Secretary may exclude an area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat designation, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species. In making the determination to exclude a particular area, the statute on its face, as well as the legislative history, are clear that the Secretary has broad discretion regarding which factor(s) to use and how much weight to give to any factor.

The first sentence in section 4(b)(2) of the Act requires that we take into consideration the economic, national security, or other relevant impacts of designating any particular area as critical habitat. We took into consideration the economic and national security impacts in the 2012 critical habitat designation (77 FR 71876, December 4, 2012; pp. 71944–71947). We are revising the 2012 critical habitat designation here based on a reconsideration of those economic impacts combined with a consideration of other relevant factors that were not discussed in the 2012 rule as well as those raised in the public comment period.

### *Process for Consideration of Impacts*

When identifying the benefits of inclusion of an area as designated critical habitat, we primarily consider the additional regulatory benefits that a species would receive due to the protection of that area from potential destruction or adverse modification as a result of actions with a Federal nexus (that is, a discretionary activity or program authorized, funded, or carried out in whole or in part by a Federal agency), the educational benefits of mapping the critical habitat 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 northern spotted owl, the benefits of including an area as designated critical habitat include public awareness of the presence of northern spotted owls and the importance of habitat protection. Another benefit, where a Federal nexus exists, is increased habitat protection for northern spotted owls through the Act's section 7(a)(2) mandate that Federal agencies ensure that any discretionary action they authorize, fund, or carry out is not likely to result in the destruction or adverse modification of critical habitat. Although regardless of a critical habitat determination, Federal agencies will still be required to complete section 7 consultation for the northern spotted owl where the species is present, we acknowledge that there could be adverse impacts to the habitat if the species is not present at the time of the consultation. Because the FWS determined that all 2012 designated critical habitat was "occupied," surveys will occur prior to authorizing any project on Federal lands to determine if the species is present. Thus, while we recognize that additional section 7 consultation based on the destruction or adverse modification standard is a benefit, completion of section 7 consultation based on the jeopardy standard only will not result in the extinction of the species. Finally, there may be a benefit from a critical habitat designation for certain sources of third-party funding for habitat conservation projects.

When considering the benefits of exclusion, we considered whether the proposed critical habitat designation conflicts with any statutory requirements or nondiscretionary mandates for managing any Federal lands within the critical habitat designation. Second, we considered whether lessening any of the regulatory burdens that may occur due to section 7 consultation for habitat modification may provide other environmental benefits such as lessening the risk of catastrophic wildfire. Third, we place great value on our relationships with Tribal, State, and local governments, so we affirmatively consider their expertise in protecting their local tax base, and the customs and cultures of those within their jurisdiction. Recognizing the expertise and comments from our governmental partners is critical in gaining support for the protection of the northern spotted owl and other listed species.

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. The Secretary may assign the weight given to any of the benefits of inclusion as critical habitat as well as the benefits of exclusion from a critical habitat designation. 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 designation will result in extinction of the species, we will not exclude it from the critical habitat designation under section 4(b)(2) of the Act. The final decision on whether to exclude any areas under section 4(b)(2) will be based on the best scientific and commercial data available at the time of the final designation.

### **Exclusions**

Based on a reanalysis of the 2012 designation, as well as additional public comments we received, we evaluated whether the areas proposed for exclusion or additional areas suggested for exclusion were appropriate to exclude from the final designation under section 4(b)(2) of the Act. Our analysis indicated that the benefits of excluding certain lands from the final designation outweigh the benefits of including those lands as critical habitat; therefore, the Secretary exercises his discretion to exclude these lands from the final designation. Accordingly, we exclude the areas identified below in Table 8 Addendum under section 4(b)(2) of the Act from the critical habitat designation for the northern spotted owl. (Note that the Table 8 Addendum is an addendum to Table 8 in the 2012 final critical habitat rule and displays the areas we are further excluding from the December 4, 2012, final critical habitat designation (77 FR 71876, pp. 71948–71949).) The Table 8 Addendum identifies the specific critical habitat units from the December 4, 2012, final rule (77 FR 71876), which is codified in title 50 of the Code of Federal Regulations (CFR) at § 17.95(b), that we are excluding, at least in part; the approximate areas (ac, ha) of lands involved; and the ownership of the excluded areas.

### **Table 8 Addendum—Additional Lands Excluded from the Designation of Critical Habitat under Section 4(b)(2) of the Act**

Type of Agreement	Critical habitat unit	State	Land owner/agency	<i>Acres</i>	<i>Hectares</i>
O&C Lands, NWFP Matrix	ECN	OR	USFS	476,806	192,957
	ECS	OR	BLM, USFS	120,465	48,751
	ICC	OR	USFS	279,198	112,987
	KLE	OR	BLM, USFS	539,803	218,450
	KLW	OR	BLM, USFS	588,258	238,059
	NCO	OR	BLM, USFS	59,570	24,107
	ORC		BLM, USFS	428,939	173,585
	RDC		USFS	1,459	590
	WCC		USFS	223,454	90,428
	WCN		USFS	5,134	2,078
	WCS		BLM, USFS	728,588	294,849
	Indian lands	ORC	OR	CTCLUSI <sup>1</sup>	5,575
KLE		OR	CCBUTI <sup>2</sup>	10,783	4,364
KLW		OR	CCBUTI	3,821	1,546
White Pass Ski Area	WCC	WA	USFS	211	85
Total additional lands excluded under section 4(b)(2) of the Act				3,472,064	1,405,094

<sup>1</sup> CTCLUSI is the Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians.

<sup>2</sup> CCBUTI is the Cow Creek Band of Umpqua Tribe of Indians.

These exclusions are based in part on new information that has become available since the December 4, 2012, critical habitat designation for the northern spotted owl (77 FR 71876), including the Western Oregon Tribal Fairness Act (Pub. L. 115-103), court decisions regarding the future management of O&C lands, and public comments. The exclusions also reflect the new conclusions by the Secretary as to the weight to be accorded to various benefits. In the paragraphs below, we provide a detailed analysis of our consideration of the lands excluded under section 4(b)(2) of the Act.

### **Consideration of Economic Impacts**

Although the economic impacts analysis showed economic impacts in 2012, we did not exclude areas from our December 4, 2012, final critical habitat designation (77 FR 71876) based on those economic impacts. Refer to the December 4, 2012, rule (77 FR 71876) for a description of the purpose and process of evaluating the economic impacts that may result from a

designation of critical habitat. However, we have reconsidered those incremental economic impacts in light of our commitment to our Tribal, State, and local government partners and give weight to the needs of the local tax and economic base as well as the custom and culture of the citizens most impacted by a critical habitat designation in addition to updated information that suggests that economic benefits could accrue. We have reevaluated the relative impact of even a “relatively small” economic loss for rural communities already faced with impacts including the initial listing of the species. As noted in our 2012 analysis, the direct incremental effects from the critical habitat designation included: (1) An increased workload for action agencies, the Service, and third-party applicants to conduct reinitiated consultations for ongoing actions in newly designated critical habitat (areas proposed for designation that were not already included within the then-extant designation); (2) the cost to action agencies of completing an analysis of the effects to critical habitat for discretionary new projects occurring in occupied areas of designated critical habitat; and (3) potential project alterations in critical habitat areas that are currently unoccupied by spotted owls, since the critical habitat designation would create a potential section 7 obligation based on the adverse modification standard that might not otherwise exist.

In response to the proposed rule, we received submissions of additional economic information from several commenters, including Counties, as well as from the American Forest Resource Council. We reviewed this information carefully, and we also conferred with IEc, which conducted the economic analysis in the 2012 designation (IEc 2012), regarding critiques in the additional materials submitted regarding the 2012 economic analysis. We incorporated our review and consideration of this information in our response to comments above (See *Comments 20–23*).

Based on this review, we have concluded that completing a new economic analysis for these additional critical habitat exclusions is unnecessary. For further information regarding the 2012 analysis, see the December 4, 2012, final rule for a summary of the final economic analysis

and our consideration of economic impacts (77 FR 71876, pp. 71878, 71945–71947, 72046–72048). Both the 2012 economic analysis as well as the additional information we received showed that there is an incremental economic impact to the critical habitat designation. There is no minimum statutory economic impact included in the section 4(b)(2) regulation or the legislative history against which the Secretary is directed to consider in his exclusion analysis. Thus, the Secretary is using the wide discretion under the ESA to weigh these economic costs in favor of exclusion. We reviewed the 2012 final economic analysis (IEc 2012) as well as comments and additional information received on the proposed rule. Both the original 2012 economic analysis and the additional information presented show that there is some monetized economic cost savings based upon the exclusions undertaken in this final rule. However, the original 2012 economic analysis did not provide quantified cost estimates related to consultation and potential project modifications of “linear projects,” including power lines and natural gas pipe lines. The 2012 economic analysis could not have foreseen the recent changes in the electricity generating industry that moved the industry from retiring coal powered plants to natural gas plants. Because of such changes, the unquantified effects of the 2012 economic analysis takes on more importance in this action, albeit still unquantified. We have weighed those economic costs, in combination with the other relevant factors discussed below to determine that the balance weighs in favor of excluding additional habitat.

### **Consideration of Impacts on National Security**

We did not exclude areas from our December 4, 2012, revised critical habitat designation based on impacts on national security, but we did exempt Joint Base Lewis-McChord lands based on the integrated natural resources management plan under section 4(a)(3) of the Act (77 FR 71876, pp. 71944–71945). We did not receive any comments or additional information on the impacts of the proposed revised designation on national security or homeland security. We have determined not to exclude any additional areas on the basis of impacts on national security.

### **Consideration of Other Relevant Impacts**

Under section 4(b)(2) of the Act, we consider any other relevant impacts, in addition to economic impacts and impacts on national security. We consider a number of factors including whether there are permitted conservation plans such as habitat conservation plans (HCPs), safe harbor agreements (SHAs), or candidate conservation agreements with assurances (CCAAs) covering species in the area, or whether designation of, or exclusion from, critical habitat would encourage any non-permitted conservation agreements and partnerships. In addition, we consider any Tribal forest management plans (FMPs) and partnerships and consider the government-to-government relationship of the United States with Tribes. We also considered the requests from the local governments directly impacted by the northern spotted owl critical habitat designation based upon our recognition that County Commissions are elected representatives of their constituents and have knowledge and expertise in the areas related to the economic well-being, employment, tax base, and custom and cultures of the citizens within their jurisdictions. Because we recognize their duty as locally elected officials to represent the best interests of their citizens and we take their concerns seriously, we acknowledge the impacts that the northern spotted owl listing and critical habitat designation has had on their jurisdictions as part of our balancing of other relevant impacts.

#### Exclusion of Indian Lands

Several Executive Orders, Secretarial Orders, and policies are relevant when working with Tribes. These guidance documents generally confirm our trust responsibilities to Tribes, recognize that Tribes have sovereign authority to control Indian 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;, it provides the most detail directly relevant to the designation of critical habitat. In addition to the general direction discussed above, S.O. 3206 explicitly recognizes the right of Tribes to participate fully in the listing process, including designation of critical habitat. The Order also states: “Critical habitat shall not be designated in such areas unless it is determined essential to conserve a listed species. In designating critical habitat, the Services shall evaluate and document the extent to which the conservation needs of the listed species can be achieved by limiting the designation to other lands.” In light of this instruction, when we undertake a discretionary section 4(b)(2) exclusion analysis, we always consider exclusions of Indian lands under section 4(b)(2) of the Act prior to finalizing a designation of critical habitat, and give great weight to Tribal concerns in analyzing the benefits of exclusion.

In this final designation, the Secretary has exercised his discretion under section 4(b)(2) of the Act to exclude from this critical habitat designation 14,605 acres (5,910 hectares) of Indian lands (in this case, lands held in trust) for Cow Creek Band of Umpqua Tribe of Indians (CCBUTI) and 5,575 acres (2,256 hectares) of land for Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians (CTCLUSI). See Table 1 for the Unit and Subunit location of these Indian lands.

In our December 4, 2012, final rule (77 FR 71876), we prioritized areas for critical habitat designation by looking first to Federal lands, followed by State, private, and Indian lands. No Indian lands were designated in our final rule because we found that we could achieve the conservation of the northern spotted owl with limiting the designation to other lands. However, in 2018, Congress passed and the President signed the Western Oregon Tribal Fairness Act (Pub. L. 115-103). This act mandated that certain lands managed by BLM be taken into trust by the United States for the benefit of the CCBUTI and the CTCLUSI. In January 2020, BLM released its decision record (BLM 2020) transferring management authority of approximately 17,800 acres (7,203 hectares) to CCBUTI and 14,700 acres (5,949 hectares) to CTCLUSI. Of the transferred lands, 20,179 acres (8,166 hectares) are located within designated critical habitat for

the northern spotted owl. We considered this new information, as well as comments received on this proposed exclusion of these lands, and we are now excluding these Indian lands under section 4(b)(2) of the Act, as explained below.

*Benefits of Inclusion—Indian Lands*

The CCBUTI and CTCLUSI Indian lands includes areas occupied by the northern spotted owl. Therefore, even without designating these lands, Federal agencies would need to consult for jeopardy if they are considering actions that may affect the species. This would limit the extent to which designating these areas will incrementally benefit the species through consultation under section 7. Nevertheless, designating these areas will have other benefits.

One of the benefits of the designation of critical habitat on Tribal land is that it may affect the implementation of Federal laws, such as the Clean Water Act. These laws require analysis of the potential environmental effects of proposed projects via ESA section 7 consultation, and completion of that consultation on critical habitat may signal the presence of sensitive habitat that could otherwise be missed in the review process for these other environmental laws.

Additionally, there is an educational benefit to the inclusion of land as critical habitat. A critical habitat designation can inform Tribal members and others about the potential conservation value of the area for the species.

Another possible benefit is that additional funding could be generated for habitat improvement by an area being designated as critical habitat. Some funding sources may rank a project higher if the area is designated as critical habitat. Tribes often seek additional sources of funding in order to conduct wildlife-related conservation activities. Therefore, having an area designated as critical habitat could improve the chances of receiving funding for northern spotted owl habitat-related projects.

A final possible benefit is these lands may contribute to the recovery of the species by providing additional areas of habitat for breeding, feeding, or connectivity between active home territories.

*Benefits of Exclusion—Indian Lands*

The benefits of excluding Indian lands from designated critical habitat are significant. We have determined that the significant benefits that would be realized by forgoing the designation of critical habitat on these areas include: (1) our deference to the Tribes to develop and implement conservation and natural resource management plans for their lands and resources, which includes benefits to the northern spotted owl and its habitat that might not otherwise occur; and (2) the continuance and strengthening of our effective working relationships with the Tribes to promote the conservation of the northern spotted owl and its habitat.

We have determined that the CCBUTI and CTCLUSI should be the governmental entities to manage and promote the conservation of the northern spotted owl on their trust land as indicated in Secretarial Order 3206; Executive Order 13175; and the relevant provision of the Departmental Manual of the Department of the Interior (512 DM 2).

We find that other conservation benefits are provided to the affected critical habitat subunits and the northern spotted owl and its habitat by excluding these lands from the designation. For example, the Continuous Forestry Management Approach adopted by the CCBUTI in their forest management plan takes proactive prevention, control, and recovery actions to mitigate damages and loss of forest values from wildfire, insects, and disease and other damaging events. Additionally, the CTCLUSI has committed to coordination with the Service in developing its approach to conservation of listed species for these newly acquired lands.

Finally, both Tribes specifically requested these exclusions in their comment letters on the proposed rule and we evaluated these exclusions in light of their requests. We place a high value on our relationship with the Tribes and recognize their expertise in areas related to the representation of their Tribal members. Because we recognize our government-to-government

relationship, we seriously consider their requests as part of our balancing of other relevant impacts as required under ESA section 4(b)(2). For these reasons, we have determined that excluding these recently transferred lands from the designation of critical habitat for the northern spotted owl is of substantial benefit in aid of the unique relationship between the Federal Government and Tribes and in support of Tribal self-governance.

*Benefits of Exclusion Outweigh the Benefits of Inclusion—Indian Lands*

The benefits of including Indian lands in the critical habitat designation are educational awareness, the potential additional grant funding, and the completion of section 7 based upon the implementation of other laws and regulations. While there remain some benefits to these regulatory intersections, the Tribes' commitment to continue to coordinate with us in conserving habitat for the northern spotted owl in these newly acquired areas as they manage the landscape is also significant. Consistent with principles of self-determination and the unique Federal-Tribal relationship, we conclude that requests from Tribal governments are important to consider and weigh. We view this as a substantial benefit since we have developed a cooperative working relationship for the mutual benefit of endangered and threatened species, including the northern spotted owl. Because the Tribes will implement habitat conservation efforts on these newly acquired lands, and are aware of the value of their lands for northern spotted owl conservation, the educational benefits of a northern spotted owl critical habitat designation are also minimized. For these reasons, we have determined that designation of critical habitat would have few, if any, additional benefits beyond those that will result from the presence of the species.

In summary, the benefits of these Indian lands as critical habitat are low, and are limited to additional regulatory processes and educational benefits that are insignificant—particularly since the northern spotted owl listing and past critical habitat needs have been so well publicized and are known. Additionally, the Tribes have committed to managing these lands to benefit (which include the potential recovery of) the northern spotted owl making the additional benefit of designating these lands as critical habitat for recovery purposes also

minimal. The benefits of excluding these areas from designation as critical habitat for the northern spotted owl are significant, and include encouraging the continued development and implementation of special management measures that the Tribes plan for the future or are currently implementing. These activities and projects will allow the Tribes to manage their natural resources to benefit the northern spotted owl. This approach is consistent with the government-to-government nature of our working relationship with the Tribes, and also consistent with our published policies on Native American natural resource management. The exclusion of these areas will likely also provide additional benefits to the species that would not otherwise be available to encourage and maintain cooperative working relationships. We find that the benefits of excluding these areas from critical habitat designation outweigh the benefits of including these areas as critical habitat.

#### *Exclusion Will Not Result in Extinction of the Species—Indian Lands*

We do not conclude that the exclusion of these Indian lands will result in extinction of the species. First, as discussed under Effects of Critical Habitat Designation Section 7 Consultation in the 2012 critical habitat rule (77 FR 71876, December 4, 2012, p. 71937), if a Federal action or permitting occurs, the known presence of northern spotted owls would require evaluation under the jeopardy standard of section 7 of the Act, even absent the designation of critical habitat, and thus will provide the information and means to protect the species against extinction. Second, the Tribes are committed to protecting and managing these lands and species found on these lands, according to their Tribal and cultural management plans and natural resource management objectives, which provide conservation benefits for the northern spotted owl and its habitat. Accordingly, we are excluding the 20,179 acres (8,166 hectares) of Indian lands under section 4(b)(2) of the Act because the benefits of exclusion outweigh the benefits of inclusion and exclusion will not cause the extinction of the species.

#### Exclusion of the White Pass Ski Area

The White Pass Ski Area occupies approximately 1,200 acres of Forest Service lands (211 acres of which are within the 2012 northern spotted owl critical habitat designation) in the Okanogan/Wenatchee and Gifford Pinchot National Forests. The Ski Area contains ski lifts and runs and provides recreational opportunities for approximately 130,076 visitors each year benefitting a county with a population of just over 75,000. Although the 2012 critical habitat rule states that “meadows and grasslands . . . and manmade structures and the land on which they are located” are not critical habitat, because the part of the area encompassed by the Ski Area’s special use permit with the Forest Service is within the critical habitat boundaries, the Ski Area owners and Lewis County have raised concerns as to the Ski Area’s future vis-a-vis the northern spotted owl critical habitat designation. Lewis County, Washington, is particularly concerned given the Ski Area’s large and positive economic impact for the County.

*Benefits of Inclusion—White Pass Ski Area*

As noted above, one benefit of inclusion of Federal lands in a critical habitat designation is that Federal agencies are required to consult on whether their activity would destroy or adversely modify critical habitat. In this case, we believe that benefit based both on the current habitat needs and recovery needs is small considering the amount of acreage concerned (211 acres) and the remaining requirement for section 7 consultation should owls be located within the area impacted by future Forest Service actions regarding the Ski Area. An additional benefit is public education and awareness of the presence of northern spotted owls and their habitat and range.

*Benefits of Exclusion—White Pass Ski Area*

Lewis County, Washington, noted that the ski area provides significant economic benefit to the County. Although quantification of these economic impacts may be difficult, minimum estimations based on the number of annual visitors to the Ski Area; the cost of lift tickets, equipment rentals, and group and private lessons at the Ski Area; and related economic benefits from this influx of visitors to the County are likely in the magnitude of tens of millions of dollars

annually. The Secretary exercises his discretion to give weight to the economic importance of this continued use of the National Forest lands. This weight is based on our recognition that County Commissioners are elected representatives of their constituents and have knowledge and expertise in the areas related to the economic well-being, employment, tax base, and custom and cultures of the citizens within their jurisdictions. Because we recognize their duty as locally elected officials to represent the best interests of their citizens and we take their concerns seriously, we acknowledge the impacts that the northern spotted owl listing and critical habitat designation has had on their communities as part of our balancing of other relevant impacts. Thus, we conclude that the benefits of excluding the White Pass Ski Area from designated critical habitat are significant.

*Benefits of Exclusion Outweigh the Benefits of Inclusion—White Pass Ski Area*

Because we conclude that the benefits of exclusion are significant, and the benefits of inclusion are small, we conclude that the benefits of exclusion outweigh the benefits of inclusion of 211 acres of critical habitat in the Ski Areas Special Use Permit. With regard to the educational benefits of inclusion as critical habitat, because the spotted owl has been listed as a threatened species since 1990 and the significant amount of local and national discussion and debate that has occurred since that time, the public is very aware of the species' range and habitat needs; thus, any additional educational benefits of designated critical habitat are limited. With regard to recovery, the benefits of inclusion are also small because of the small size of the acreage and because section 7 consultation will still be required for all discretionary activities if the owl is present.

Additionally, as discussed under **Effects of Critical Habitat Designation**, *Section 7 Consultation*, in the 2012 critical habitat rule (77 FR 71876, December 4, 2012, p. 71937), if a discretionary Federal action or permitting occurs, the known presence of northern spotted owls would require evaluation under the jeopardy standard of section 7 of the Act, even absent the designation of critical habitat. Because the separate requirement of an evaluation under the

jeopardy standard limits the benefits of including the area in the designation of critical habitat, the benefits of exclusion outweigh the benefits of inclusion.

#### *Exclusion of the Ski Area will Not Result in Extinction of the Species*

We do not conclude that the exclusion of 211 acres within the White Pass Ski Area will result in extinction of the species because exclusion of this area is so small that exclusion will have minimal impacts on the conservation of the owl. First, because of the significant development of ski lifts (manmade structures) and the removal of trees for ski runs, the conservation benefit of this land is very low. Second, the Forest Service will still be required to consult on whether renewal of the special use permit or changes to the permit will jeopardize the continued existence of the species if northern spotted owls are found to be present in the Ski Area Special Use Permit boundaries. Ensuring that the proposed action or permitting does not jeopardize the existence of the species will further ensure that exclusion will not cause extinction of the species. Therefore, we are excluding this area from the designation of critical habitat.

#### Exclusion of Additional Federal Lands

We recognize that, under our 2016 policy regarding implementation of section 4(b)(2) (81 FR 7226, February 11, 2016), we generally focus our exclusions on non-Federal lands, as the 2016 policy opined that the benefits of designating Federal lands as critical habitat are typically greater than the benefits of excluding Federal lands. This policy was based on Congress's declaration that "all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act." (Section 2(c)(1)). Additionally, Congress requires that all Federal agencies have responsibilities under section 7 of the Act to carry out programs for the conservation of listed species and to ensure their actions are not likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat. However, for the reasons set forth below, we can comply with these mandates while still determining that the

benefits of exclusion of critical habitat outweigh the benefit of including these areas as critical habitat.

As stated above, the Secretary has very broad discretion under the second sentence of section 4(b)(2) on how to weigh the impacts of a critical habitat designation. In particular, “[t]he consideration and weight given to any particular impact is completely within the Secretary’s discretion.” (H.R. Rep. No. 95–1625, at 17 (1978)). In weighing the benefits of inclusion against the benefits of exclusion, we considered the following general principles. First, we gave considerable weight to the statute’s governing the use and management of the O&C lands, which specifies that the primary purpose of those lands is to produce timber on a sustained yield basis.

Second, even if the exclusion of certain Federal lands occurs, under section 7 of the Act, Federal agencies cannot fund, authorize, or carry out any discretionary activities that result in jeopardy to a listed species. This requirement applies regardless of the existence of designated critical habitat. Additionally, the northern spotted owl will be protected from “take” under section 9 of the ESA. Thus, the species will be protected regardless of the critical habitat exclusions discussed in the rule, and the benefits of inclusion are therefore small. The only direct consequence of critical habitat designation is to require Federal agencies to ensure that any action they fund, authorize, or carry out does not destroy or adversely modify designated critical habitat. The costs that this requirement may impose on Federal agencies can be divided into two types: (1) the additional administrative or transactional costs associated with the consultation process with a Federal agency, and (2) the costs to Federal agencies and other affected parties, including applicants for Federal authorizations (*e.g.*, permits, licenses, leases), of any project modifications necessary to avoid destruction or adverse modification of critical habitat. These costs may be minimal, however, if the species occupies the area so that section 7 consultation would occur regardless of whether the habitat is designated as critical habitat. Nevertheless, although our original 2012 economic analysis found that the actual administrative cost with a critical habitat designation is small, avoidance of that specific cost is not the only measure of

benefits of excluding an area from a critical habitat designation. More recent information about the transition of the electricity power sector and well as the potential administrative costs consultation including the underlying analytic requirements lends more compelling weight to the previously unquantified effects noted in the 2012 analysis. We have also considered the great benefits of excluding certain federally owned areas from critical habitat, and we find that these significant benefits greatly tip the balance in favor of exclusion.

For example, the additional requirement for completing section 7 consultation and the underlying analytic requirements constitutes a regulatory hurdle for Federal agencies in completing their duties under their organic statutes. These costs do not account for the economic costs associated with potential delay or modification of projects. Lessening one of the regulatory hurdles could lead to increased timber production and thereby benefit local counties and communities by supplying jobs and county revenues for schools and roads, protecting the local tax base, and protecting the social fabric and customs and culture of the citizens of the county. These benefits outweigh the benefits of including the areas in the critical habitat designation because section 7 consultation will still be completed under the jeopardy standard even if the areas are excluded from designation. Moreover, such section 7 consultations based on the jeopardy standard will ensure that excluding the areas from the designation will not result in extinction of the species.

#### Oregon and California Lands (O&C Lands)

In this final designation, the Secretary has exercised his discretion under section 4(b)(2) of the Act to exclude from this critical habitat designation 1,373,693 acres (555,913 ha) of lands that were reserved to the Federal Government under the Chamberlin-Ferris Act of 1916 (39 Stat. 218) (O&C lands). See Table 1 for the Unit and Subunit locations of these exclusions.

The O&C lands were revested to the Federal Government under the Chamberlin-Ferris Act of 1916 (39 Stat. 218). The Oregon and California Revested Lands Sustained Yield Management Act of 1937 (O&C Act; Pub. L. 75-405) addresses the management of O&C lands.

The O&C Act identifies the primary use of revested timberlands for permanent forest production. These lands occur in western Oregon in a checkerboard pattern intermingled with private land across 18 counties. Most of these lands (82 percent) are administered by BLM (FWS 2019, p. 1). The remaining lands are administered by the U.S. Forest Service. The opening statement of the O&C Act provides that these lands are to be managed “for permanent forest production, and the timber thereon shall be sold, cut, and removed in conformity with the principle of sustained yield for the purpose of providing a permanent source of timber supply, protecting watersheds, regulating stream flow, and contributing to the economic stability of local communities and industries, and providing recreational facilities.” 43 U.S.C. 2601.

The counties where the O&C lands are located participate in a revenue-sharing program with the Federal Government wherein the counties receive 50% of the revenues based on commercial receipts (*e.g.*, income from commercial timber harvest) generated on these Federal lands. 43 U.S.C. 2605(a). When timber production on these lands was severely curtailed by listing of the northern spotted owl among other things, Congress in 1993 attempted to establish certain safety-net payments to the affected counties, and in 2000 passed the Secure Rural Schools and Community Self Determination Act, Public Law 106-393, 16 U.S.C. 500 (SRS) to, among other things, extend the previously established safety-net payments to try to make up for the economic devastation of the loss of timber receipts to the impacted counties. However, because none of the safety-net provisions, including the SRS, authorizes a permanent fund, the local governments that commented on this rulemaking do not view it as an equal replacement to the loss their schools and roads suffered from the loss in their timber receipts from the O&C lands.

Since the mid-1970s, scientists and land managers have recognized the importance of forests located on O&C lands to the conservation of the northern spotted owl and have attempted to reconcile this conservation need with other land uses (Thomas *et al.* 1990, entire). Starting in 1977, BLM worked closely with scientists and other State and Federal agencies to implement

northern spotted owl conservation measures on O&C lands. Over the ensuing decades, the northern spotted owl was listed as a threatened species under the Act, and critical habitat was designated (57 FR 1796, January 15, 1992) and revised two times (73 FR 47326, August 13, 2008; 77 FR 71876, December 4, 2012) on portions of the O&C lands.

An initial Recovery Plan for the owl was completed in 2008 (73 FR 29471, May 21, 2008). In 2011, the Service revised the northern spotted owl Recovery Plan (see 76 FR 38575, July 1, 2011), and the revised plan recommended “continued application of the reserve network of the [Northwest Forest Plan] NWFP until the 2008 designated spotted owl critical habitat is revised and/or the land management agencies amend their land management plans taking into account the guidance in this Revised Recovery Plan” (FWS 2011, p. II-3). On December 4, 2012, the Service published in the *Federal Register* (77 FR 71876) a final rule revising the northern spotted owl critical habitat designation, and in 2016, BLM revised its RMPs for western Oregon, resulting in two separate plans (BLM 2016a, 2016b). These two BLM plans, the Northwestern Oregon and Coastal Oregon Record of Decision and Resource Management Plan (BLM 2016a) and the Southwestern Oregon Record of Decision and Resource Management Plan (BLM 2016b), address all or part of six BLM districts across western Oregon.

The land and use allocations in the BLM RMPs were challenged in the Federal District Court for the District of Columbia. The Court determined that the O&C Act “plainly requires that timber grown on O&C land be ‘sold, cut, and removed in conformity with the princip[le] of sustained yield.’” *American Forest Resource Council v. Hammond*, 422 F. Supp. 3d 184, 189 (D.D.C. 2019) (quoting 43 U.S.C. 2610). The ruling also calls into question aspects of the legal analysis in the 2012 critical habitat designation that it failed to recognize the statutory requirement for the management of the O&C lands.

Finally, while the proposed rule only included the Harvest Land Base portion of the O&C lands for exclusion, we conclude that all O&C lands should be excluded. First, commenters had requested exclusion of all O&C lands as part of the public comments on the proposed rule,

illustrating that the public was on fair notice that the exclusions in the final rule could be expanded. Second, the O&C Act and its mandate for sustained yield timber harvest applies to all O&C lands, not just those identified for harvest in the 2016 BLM RMPs. Third, section 4(b)(2) gives the Secretary very broad discretion in weighing the benefits of inclusion with the benefits of exclusion, so long as he concludes that the exclusion will not result in extinction of the species. The Secretary has exercised that extremely broad discretion in this case as explained below. Thus, the exclusion of the O&C lands in this case is procedurally and legally supported.

#### NWFP Matrix Lands

This rule also excludes approximately 2,077,697 acres (840,814 ha) of Forest Service and BLM matrix lands described in the NWFP. On April 2, 1993, President Clinton convened a Forest Conference in Portland, Oregon, to discuss the management on over 24 million acres of Federal lands, in light of the listing of the northern spotted owl in 1990. Out of that conference and based on an interdisciplinary team effort came the Northwest Forest Plan. The plan proceeded from the Forest Service's and BLM's statutory authorities as set forth in the Forest Service Organic Act, the Multiple-Use Sustained-Yield Act, the Endangered Species Act, and the Federal Land Policy and Management Act. These statutes grant the Departments of Agriculture and the Interior broad discretion to rely upon their expertise to manage the lands under their authorities in a manner deemed to best meet the purposes Congress has delineated. The purpose of the O&C lands has been discussed in the preceding paragraphs. With regard to the Forest Service lands, one of the purposes of the National Forest organic statutes is to provide for the long-term sustainability of the forests' many natural resources, including the species that inhabit them. Another purpose of the Forest Service Organic Act was to "to improve and protect the forest within the reservation, ... securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States." 16 U.S.C. 473.

Through its utilization of ecosystem management principles, the NWFP was designed to balance these mandates more effectively and efficiently than previous planning efforts associated with management of Federal old-growth forests. Statutes such as the Forest and Rangeland Renewable Resources Planning Act, the National Forest Management Act, and the Federal Land Policy and Management Act, which outline various procedures to follow in Federal public land planning, also authorize the employment of principles intrinsic to ecosystem management. ESA section 7 consultation was completed on the NWFP and we found that implementation of that plan would not result in jeopardy to the Northern Spotted Owl. Based on these principles, the Record of Decision (ROD) for the NWFP was signed on April 13, 1994. The ROD designated seven land allocations, including:

Congressionally Reserved Areas – 7,320,600 acres

Late Successional Reserves – 7,430,800 acres

Adaptive Management Areas – 1,521,800 acres

Managed Late Successional Areas – 102,200 acres

Administratively Withdrawn Areas – 1,477,100 acres

Riparian Reserves – 2,627,500 acres

Matrix lands – 3,975,300 acres

Matrix lands represent just 16% of the Federal land within the range of the northern spotted owl. According to the Record of Decision, it was to be in the matrix lands where the most timber harvest and other silvicultural activities would be conducted.

Finally, while the proposed rule only included the Harvest Land Base portion of the O&C lands for exclusion, we conclude that the NWFP matrix lands should also be excluded. First, commenters had requested exclusion of all NWFP matrix lands as part of the public comments on the proposed rule, illustrating that the public was on fair notice that the exclusions in the final rule could be expanded. Second, the NWFP matrix lands have previously been designated as multiple use lands, including timber harvest thus, including them here does not change the

character of the prior decisions. Third, makeup and management of these lands is similar to the O&C lands. Fourth, section 4(b)(2) gives the Secretary very broad discretion in weighing the benefits of inclusion with the benefits of exclusion, so long as he does not conclude that the exclusion will result in extinction of the species. The Secretary has exercised that extremely broad discretion in this case as explained below. Thus, the exclusion of the NWFP matrix lands in this case is procedurally and legally supported.

#### *Benefits of Inclusion—O&C and NWFP Matrix Lands*

As discussed above under *Consideration of Impacts under Section 4(b)(2) of the Act*, the primary effect of designating any particular area as critical habitat is the requirement for Federal agencies to consult with the FWS under section 7 of the Act to ensure discretionary actions that they carry out, authorize, or fund do not destroy or adversely modify designated critical habitat. Thus, a benefit of a critical habitat designation on these lands would be any additional measures or alternatives required by the FWS as a result of the section 7 consultation if the proposed activity would otherwise destroy or adversely modify critical habitat.

An additional benefit of including an area as designated critical habitat includes public awareness of the presence of northern spotted owls and the importance of habitat protection.

A third benefit of including these lands is the role that they play in the recovery of the northern spotted owl. According to the guidance in the 2011 Revised Recovery Plan, the inclusion of these lands is important for connectivity between the Eastern and Western northern spotted owl ranges. Additionally, there is benefit of including low-suitability or marginal lands as critical habitat as these habitats may be able to grow into “old growth forests” at some point in the future. We also considered whether inclusion of these lands supports recovery of the northern spotted owl.

#### *Benefits of Excluding—O&C Lands and NWFP Matrix Lands*

There are appreciable benefits that will be realized by excluding O&C and the NWFP matrix lands (including those “matrix” lands now managed by BLM as Harvest Land Base lands

under the 2016 RMPs outside of the O&C lands) from critical habitat. Executive Order 12866 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. Thus, one benefit of excluding these lands from critical habitat is to remove one of the regulatory burdens in managing these lands for their original purposes, including sustained yield timber production. As stated above, O&C lands are to be managed for providing timber on a sustained-yield basis. NWFP matrix lands are to be managed for multiple use and sustained yield. Lessening one of the regulatory hurdles towards that management could lead to increased timber production that would benefit local counties and communities by supplying jobs and county revenues for schools and roads, protecting the local tax base, and protecting the social fabric and customs and culture of the citizens of the county.

An additional benefit of excluding these lands is that making more lands available for timber harvest gives land managers a greater opportunity to allow longer cycles between timber harvests or to design timber harvests to benefit the northern spotted owl. The northern spotted owl can use second-growth timber that leaves a few snags or old trees on the harvested land. The more land that is in the potential harvest base, the more flexibility the BLM and Forest Service have to manage for longer cycles between timber harvests, providing environmental benefits from the resulting mix of tree ages. Authorizing and conducting more timber sales may also lessen the risk of catastrophic wildfire that can destroy or degrade northern spotted owl habitat and puts rural communities, private property, and lives at great risk.

Another important and relevant factor in considering the benefits of exclusion is the recognition of the expertise of locally elected governments in areas relating to the stability of the local economy and protection of the local custom and culture of the county. While the FWS has expertise in biological matters, our expertise does not extend to consideration of the local tax base, areas of potential employment, and the social fabric of communities and counties. We also recognize that the Federal Government should strongly consider and give weight to the input of

its State and local government partners, and we do so here. The County Commissions commenting on this rule are also elected representatives of their constituents and should have a considered voice in the decisions directly affecting their constituents.

*Benefits of Exclusion Outweigh the Benefits of Inclusion—O&C Lands and NWFP Matrix Lands*

The Secretary has determined that the benefits of excluding the O&C and the NWFP matrix lands from the designation of critical habitat for the northern spotted owl outweigh the benefits of including these areas as critical habitat. Even after excluding these lands, there remain approximately 6,105,279 acres of designated critical habitat as well as several million additional acres of protected habitat for the northern spotted owl in designated wilderness and National Parks, throughout the owl's range. Although the excluded areas provide some conservation value, the Secretary has determined that the benefits of excluding the O&C lands, given their mandated primary use for timber harvest, and the NWFP matrix lands, given their multiple-use values, outweigh the value of their inclusion as critical habitat. This conclusion is supported by the northern spotted owl's use of timbered private lands where some older trees and snags have been retained but timber harvest is allowed.

This also supports our determination that these areas can still be used for recovery of the northern spotted owl. First, as stated in our analysis, currently the biggest threat to the recovery of the northern spotted owl is the invasive barred owl. We are considering the next steps to implement an aggressive barred owl treatment/management program with the completion of our experimental study. Additionally, northern spotted owl can use a variety of timber age classes for recovery. Simply excluding these lands from critical habitat does not mean that the owls will abandon these areas or that they will not contribute, in some manner, to the recovery of the species, assuming an aggressive barred owl removal program is implemented.

Additionally, where northern spotted owls are present and may be affected by discretionary Federal actions, any resulting section 7 consultations will determine if the actions

jeopardize the continued existence of the owl; if so, we can work with the Federal agencies and applicants to develop reasonable and prudent measures or alternatives that allow the action to go forward without jeopardizing the species. In other words, for discretionary actions, Federal agencies remain obligated under section 7 of the Act to consult with us on actions that may affect a federally listed species where it is present to ensure such actions do not jeopardize the species' continued existence, even in the absence of designated critical habitat. On both O&C and matrix lands to be excluded in this rule, surveys for northern spotted owls will be completed to determine the presence or absence of owls before any activity can occur. If the northern spotted owl is present, the proposed activity cannot jeopardize the continued existence of the species. Additionally, any programmatic land use plans or amendments proposed by the BLM and Forest Service will have to be analyzed through section 7 consultation, further ensuring that the management actions therein do not jeopardize the species. Thus, the added requirement to consult on effects to designated critical habitat in the O&C and matrix lands is not an efficient use of limited consultation and administrative resources.

Finally, the informational benefits of including the O&C lands and matrix lands as critical habitat are minimal given the well-known history of the northern spotted owl. Because the spotted owl has been listed since 1990, the public is very aware of its status and any additional educational benefits are limited.

In sum, the benefits derived from excluding the O&C and the NWFP matrix lands outweigh the benefit of including these lands in the designation. Excluding the O&C and the NWFP matrix lands reduces the unnecessary regulatory burden of additional section 7 consultations on discretionary activities about adverse modification of designated critical habitat. Additionally, exclusion of these lands to ease the process for authorizing Federal timber harvesting reflects our consideration of the input of the local governments.

*Exclusion Will Not Result in Extinction—O&C Lands and NWFP Matrix Lands*

We do not find that excluding the O&C and the NWFP matrix acres, in addition to the other exclusions discussed above, from the critical habitat designation will result in extinction of the northern spotted owl. Our findings are summarized below, and are further described in a memorandum from the Director to the Secretary (FWS 2021).

The legal standard under which exclusions are evaluated is whether, based on the best scientific and commercial data available, the Secretary concludes that the exclusions “will result in extinction of the species.” Although there are no cases directly on point, the two cases that have discussed “extinction” have done so with references to the “survival” of the species rather than recovery of the species. *See Northern New Mexico Stockman’s Association v. United States Fish and Wildlife Service*, \_\_\_ F. Supp.3d \_\_\_, 2020 WL 6048149, 117 (D.N.M. 2020); *Gifford Pinchot Task Force v. USFWS*, 378 F.3d 1059 (9<sup>th</sup> Cir. 2004) (rejecting the FWS ESA section 7 regulation defining “destruction or adverse modification” for conflating survival and recovery). Thus, the correct analysis for purposes of section 4(b)(2) is whether the Secretary concludes that the specific exclusion of these areas of critical habitat will result in the extinction of the species—that is whether the species can survive without these particular areas. For the following reasons, based on the best scientific and commercial data available, the Secretary has not concluded that excluding these particular areas will result in extinction of the northern spotted owl.

First, as stated above, the determination to exclude an area from critical habitat designation does not affect the requirement that Federal agencies comply with the section 7 obligation to avoid discretionary actions that may jeopardize the continued existence of a listed species. Similarly, the decision to exclude an area from critical habitat does not eliminate the need to comply with the section 9 prohibitions of the Endangered Species Act. Because there is no section 4(d) rule accompanying the northern spotted owl threatened listing, the species is treated as if it were endangered and take is prohibited. Therefore, any assumptions regarding the

future activities that take place on Federal or private lands must recognize the compliance with those section 7 and section 9 of the ESA, where applicable.

Second, despite the significant acreages of critical habitat that have been set aside for the northern spotted owl since 1990, estimated populations of northern spotted owl have declined more than 70% since the listing of the species. (85 FR 81145, December 15, 2020.) The recent 12-Month Finding for the northern spotted owl (85 FR 81144, December 15, 2020) determined that an uplisting from threatened to endangered was warranted but precluded by higher priorities. *Id.* A recent published demographic study for the northern spotted owl (Dugger *et al.* 2016, entire) found that the nonnative barred owl that is invading northern spotted owl habitat was currently the stressor with the largest negative impact on the northern spotted owl through competition for resources. Current best available scientific and commercial data indicate that the largest negative contributing factor on the northern spotted owl population is the invasive barred owl. Thus, in order to protect the northern spotted owl from extinction, management of the barred owl must occur.

Third, in addition to the critical habitat exclusions finalized here, there remain several million acres in National Parks, designated wilderness, and wilderness study areas that contain northern spotted owl habitat. These areas are not officially designated as critical habitat because no additional management is needed in these areas to protect the habitat. Absent invasions by the barred owl or wildfire, this habitat and the owls living therein will be maintained in their current state regardless of any critical habitat exclusions. Because the habitat and owls living in National Parks and wilderness will continue to be maintained absent barred owl invasions, the proposed exclusions will not cause the extinction of the northern spotted owl under the section 4(b)(2) standard.

#### State Lands

We also evaluated whether additional exclusions from the critical habitat designation under section 4(b)(2) of the Act should be considered on State lands. In our December 4, 2012,

critical habitat designation (77 FR 71876), we excluded State lands in Washington and California that were covered by HCPs and other conservation plans. In Oregon, State agencies are currently working on HCPs that will address State forest lands in western Oregon, including the Elliott State Forest (managed by the Oregon Department of State Lands) and other State forest lands in western Oregon (managed by the Oregon Department of Forestry).

HCPs necessary in support of incidental take permits under section 10(a)(1)(B) of the Act provide for partnerships with non-Federal entities to minimize and mitigate impacts to listed species and their habitat. In some cases, as a result of their commitments in the HCPs, incidental take permittees agree to provide more conservation of the species and their habitats on private lands than designation of critical habitat would provide alone. We place great value on the partnerships that are developed during the preparation and implementation of HCPs.

When we undertake a discretionary section 4(b)(2) exclusion analysis, we consider areas covered by an approved HCP, and generally exclude such areas from a designation of critical habitat if three conditions are met:

(1) The permittee is properly implementing the HCP and is expected to continue to do so for the term of the agreement. An HCP is properly implemented if the permittee is, and has been, fully implementing the commitments and provisions in the HCP, implementing agreement, and permit.

(2) The species for which critical habitat is designated is a covered species in the HCP, or very similar in its habitat requirements to a covered species. The recognition that the Service extends to such an agreement depends on the degree to which the conservation measures undertaken in the HCP would also protect the habitat features of the similar species.

(3) The HCP specifically addresses the habitat of the species for which critical habitat is being designated and meets the conservation needs of the species in the planning area.

The proposed State forest HCPs will not be completed prior to the publication of this document; thus, they do not yet fulfill the above criteria. As a result, we are not including

additional State lands for exclusion from the critical habitat designation for the northern spotted owl.

## **Required Determinations**

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

Executive Order 12866 provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget will review all significant rules. OIRA has identified this rulemaking action as economically significant.

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

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

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

a certification statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities.

According to the Small Business Administration, small entities include small organizations such as independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; and small businesses (13 CFR 121.201). Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than \$5 million in annual sales, general and heavy construction businesses with less than \$27.5 million in annual business, special trade contractors doing less than \$11.5 million in annual business, and agricultural businesses with annual sales less than \$750,000. To determine 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 the 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. . Although the Service acknowledges that there may be significant economic impacts to small entities, largely deregulatory, as a result of the Service’s decision to exclude

additional area in this rule, there is no requirement under the RFA to evaluate the potential impacts to entities that are not directly regulated. The Service has discussed economic impacts to small entities elsewhere as part of its reasoning with respect to exclusions considered under section 4(b)2 and the requirements of E.O. 12866.

Moreover, Federal agencies are not small entities. Therefore, because no small entities would be directly regulated by this rulemaking, the Service certifies that the revised critical habitat designation will not have a significant economic impact on a substantial number of small entities.

In summary, we have considered whether the revised 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 the revised critical habitat designation will not have a significant adverse economic impact on a substantial number of small business entities. Therefore, a regulatory flexibility analysis is not required.

*Executive Order 13771*

This rule is an E.O. 13771 (“Reducing Regulation and Controlling Regulatory Costs”) (82 FR 9339, February 3, 2017) deregulatory action.

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

Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) requires agencies to prepare Statements of Energy Effects when undertaking certain actions. In our economic analysis for the December 4, 2012, revised critical habitat designation for the northern spotted owl (77 FR 71876), we did not find that the critical habitat designation would significantly affect energy supplies, distribution, or use. Any administrative costs due to the designation of critical habitat would be reduced because we are excluding additional lands from the designation in this final rule. The OIRA Administrator has not otherwise designated this action as an energy action. Accordingly, no Statement of Energy Effects is required.

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

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

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

The revised 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 we are only excluding areas from the northern spotted owl's critical habitat designation; we are not designating additional lands as critical habitat for the species. Therefore, a Small Government Agency Plan is not required.

*Takings—Executive Order 12630*

In accordance with E.O. 12630 (Government Actions and Interference with Constitutionally Protected Private Property Rights), we have analyzed the potential takings implications of designating critical habitat for northern spotted owl 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 revised designation of critical habitat for northern spotted owl, and it concludes that, if adopted, this

designation of critical habitat does not pose significant takings implications for lands within or affected by the designation.

*Federalism—Executive Order 13132*

In accordance with E.O. 13132 (Federalism), this final rule does not have significant federalism effects that warrant preparation of a federalism summary impact statement. In keeping with Department of the Interior and Department of Commerce policy, we requested information from, and coordinated development of this revised 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, this final rule does not have substantial direct effects 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. As noted above, the decision set forth in this document removes areas from the designation.

Where State and local governments require approval or authorization from a Federal agency for actions that may affect critical habitat, consultation with the Federal agency 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. Further, in this document, we are excluding areas from the northern spotted owl's critical habitat designation; we are not designating additional lands as critical habitat for the species.

*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 are revising critical habitat in accordance with the provisions of the Act. To assist the public in understanding the habitat needs of the northern spotted owl, the December 4, 2012, final rule (77 FR 71876) identifies the elements of physical or biological features essential to the conservation of the species, and we are not making any changes to those elements in this document. The areas that we are excluding from the designated critical habitat are described in this rule and the maps and coordinates or plot points or both of the subject areas are included in the administrative record and are available at <http://www.fws.gov/oregonfwo> and at <http://www.regulations.gov> under Docket No.

FWS–R1–ES–2020–0050.

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

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

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

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

*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 Indian lands are not subject to the same controls as Federal public lands, to remain sensitive to Tribal culture, and to make information available to Tribes. We have also evaluated this rule under the criteria in Executive Order 13175 and under the Department's Tribal consultation policy and have determined that this rule may have a substantial direct effect on federally recognized Indian Tribes. To fulfill our responsibility under Secretarial Order 3206, we have consulted with the Cow Creek Band of Umpqua Tribe of Indians and the Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians, which both manage Indian land within the areas designated as critical habitat for the northern spotted owl.

### **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 U.S. Fish and Wildlife Service and the Department of the Interior.

### **Author**

The primary author of this final rule was Karen Budd-Falen, Deputy Solicitor, Parks and Wildlife, Immediate Office of the Solicitor, Department of the Interior, 1849 C Street N.W., Washington D.C. 20240.

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

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

**Regulation Promulgation**

Accordingly, for the reasons discussed above in the preamble, we hereby amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

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

1. The authority citations for part 17 are revised to read as follows:

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

2. Amend § 17.95(b), the entry for “Northern Spotted Owl (*Strix occidentalis caurina*),” by revising paragraphs (6) through (8), introductory text and second map of (9), and (10) through (19) to read as follows:

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

\* \* \* \* \*

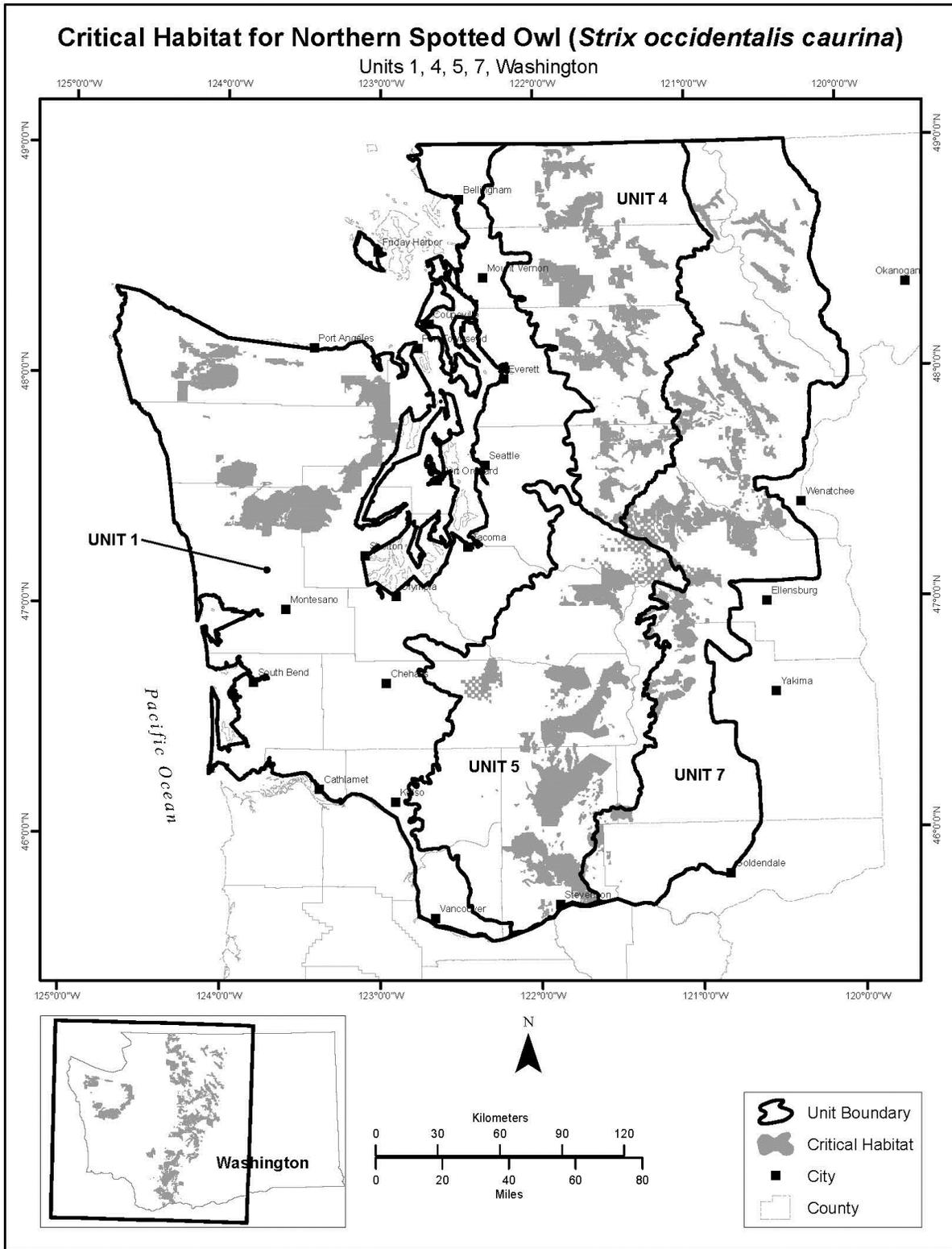
(b) *Birds.*

\* \* \* \* \*

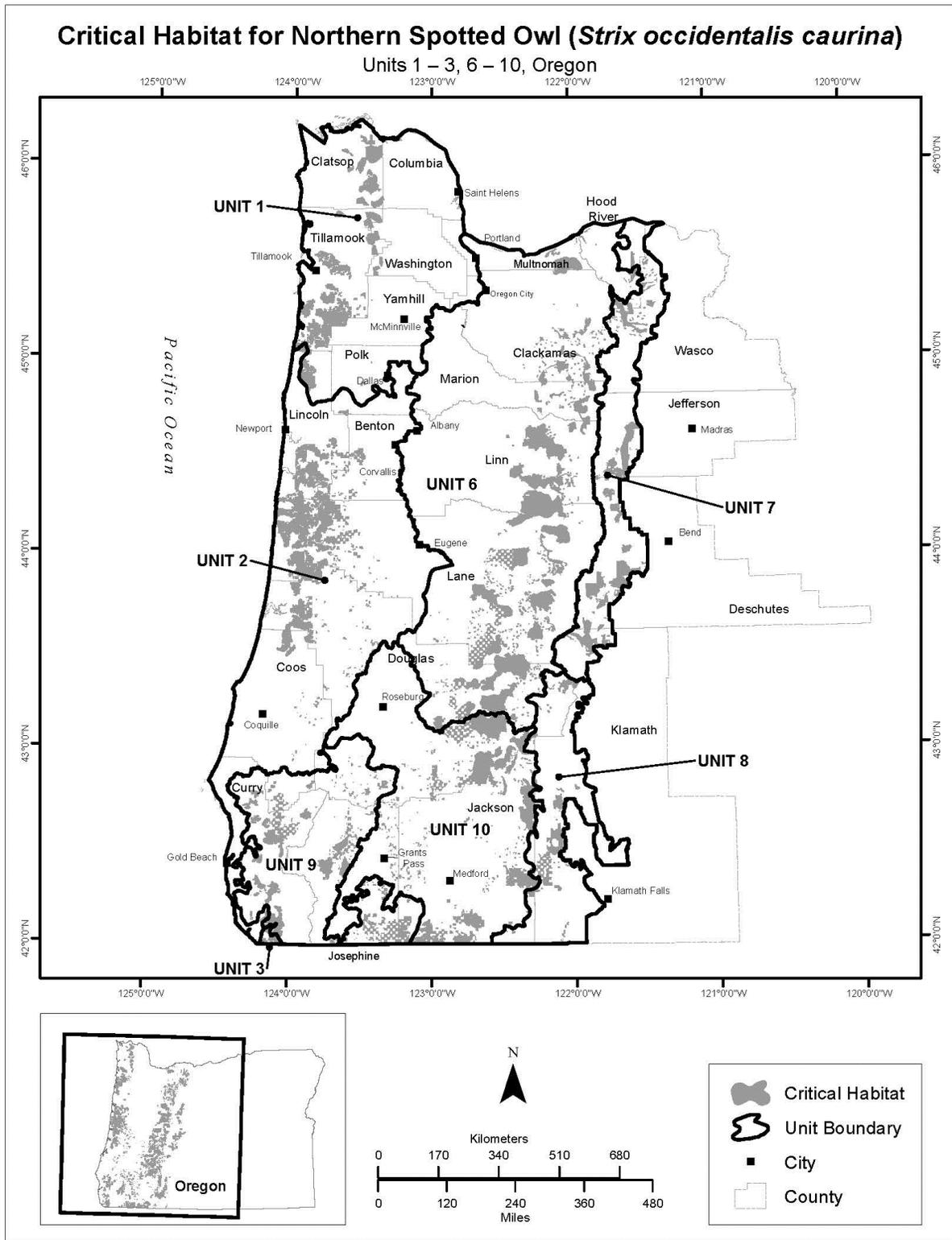
Northern Spotted Owl (*Strix occidentalis caurina*)

\* \* \* \* \*

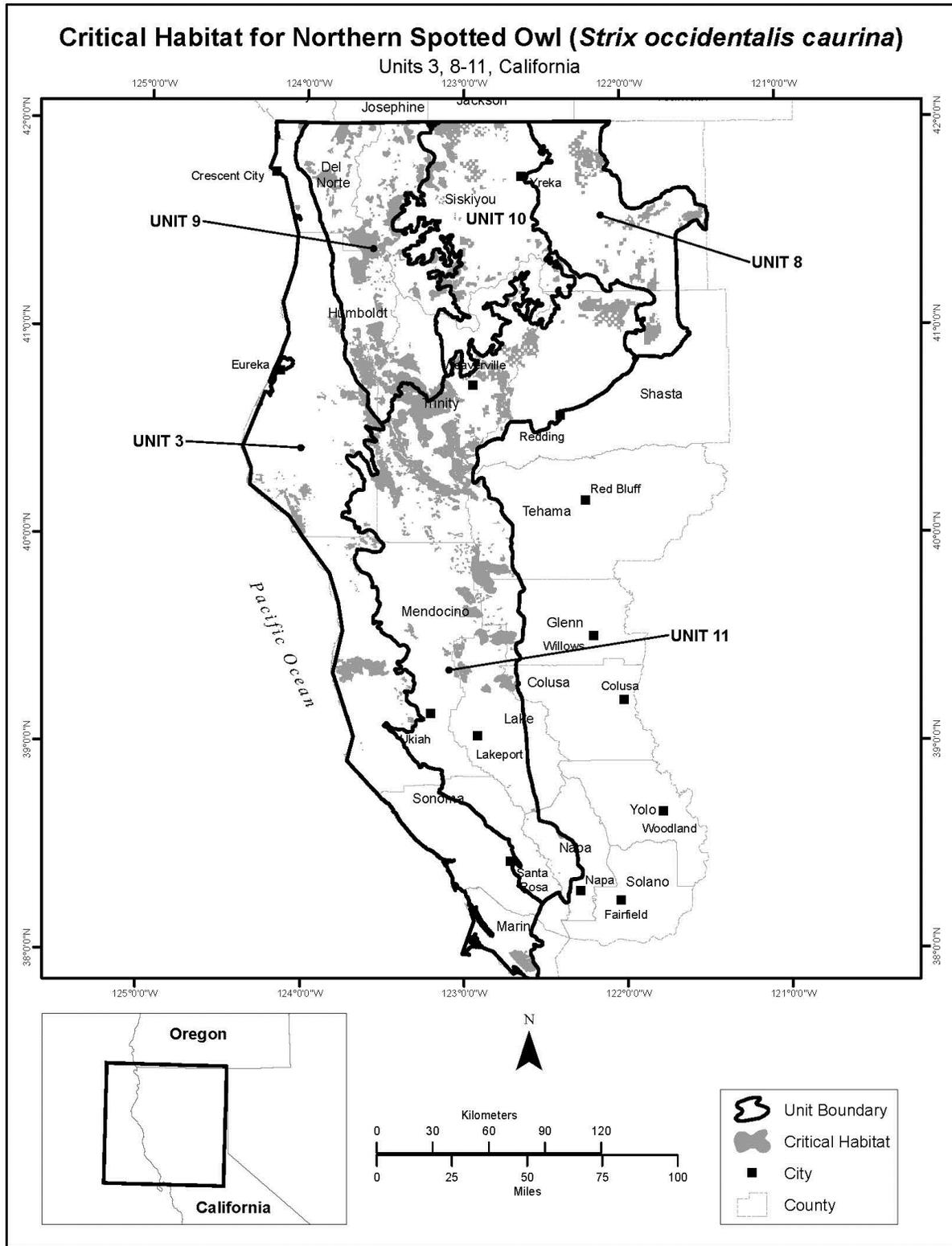
(6) *Note:* Index map of critical habitat units for the northern spotted owl in the State of Washington follows:



(7) Note: Index map of critical habitat units for the northern spotted owl in the State of Oregon follows:

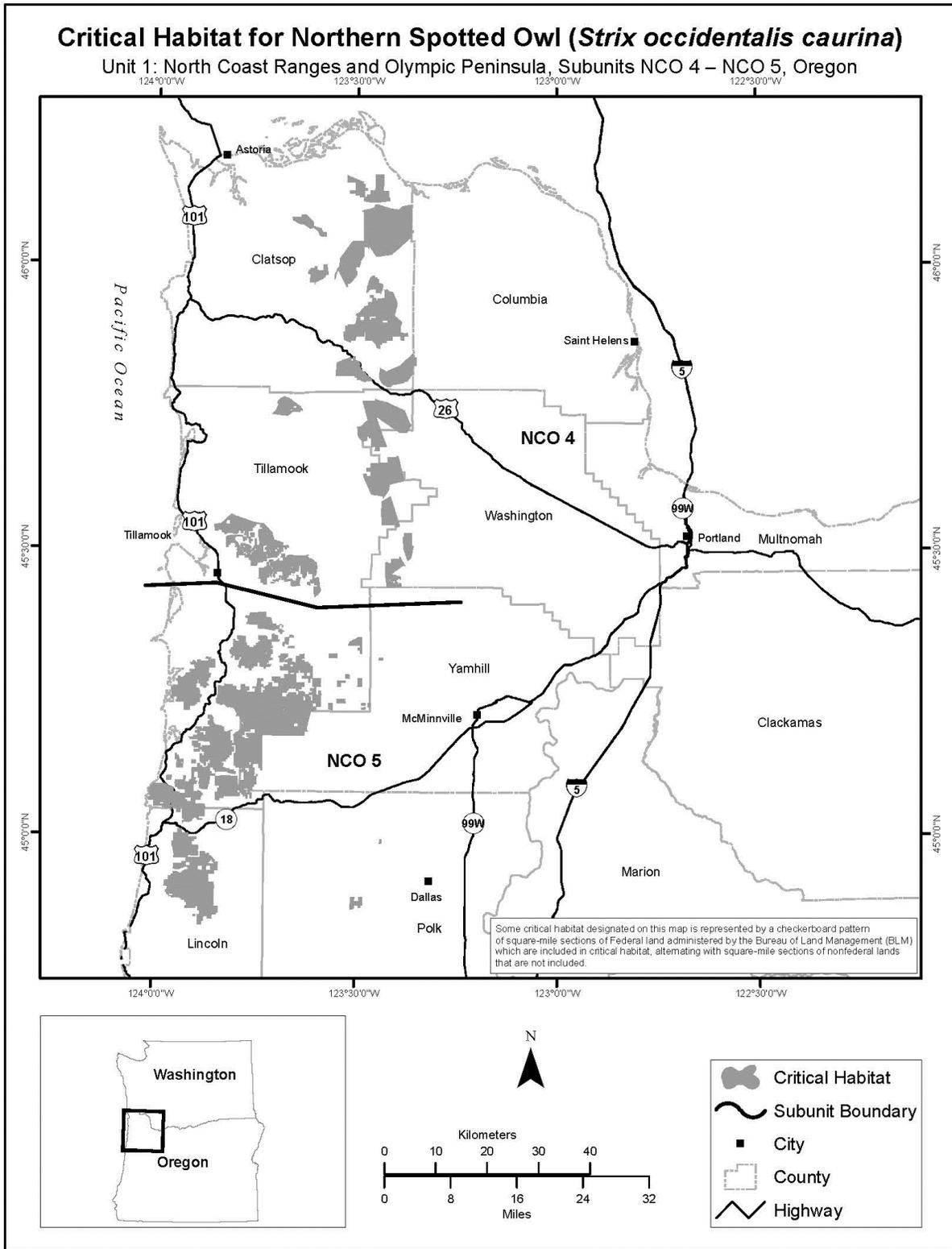


(8) *Note:* Index map of critical habitat units for the northern spotted owl in the State of California follows:



(9) Unit 1: North Coast Ranges and Olympic Peninsula, Oregon and Washington. Maps of Unit 1: North Coast Ranges and Olympic Peninsula, Oregon and Washington, follow:

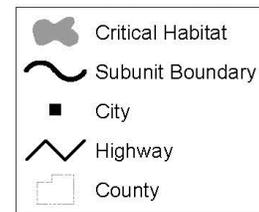
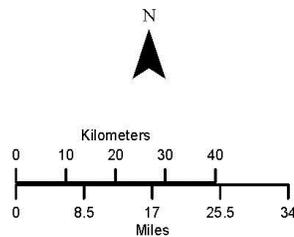
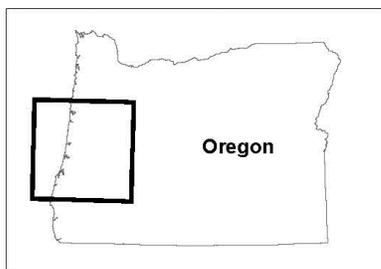
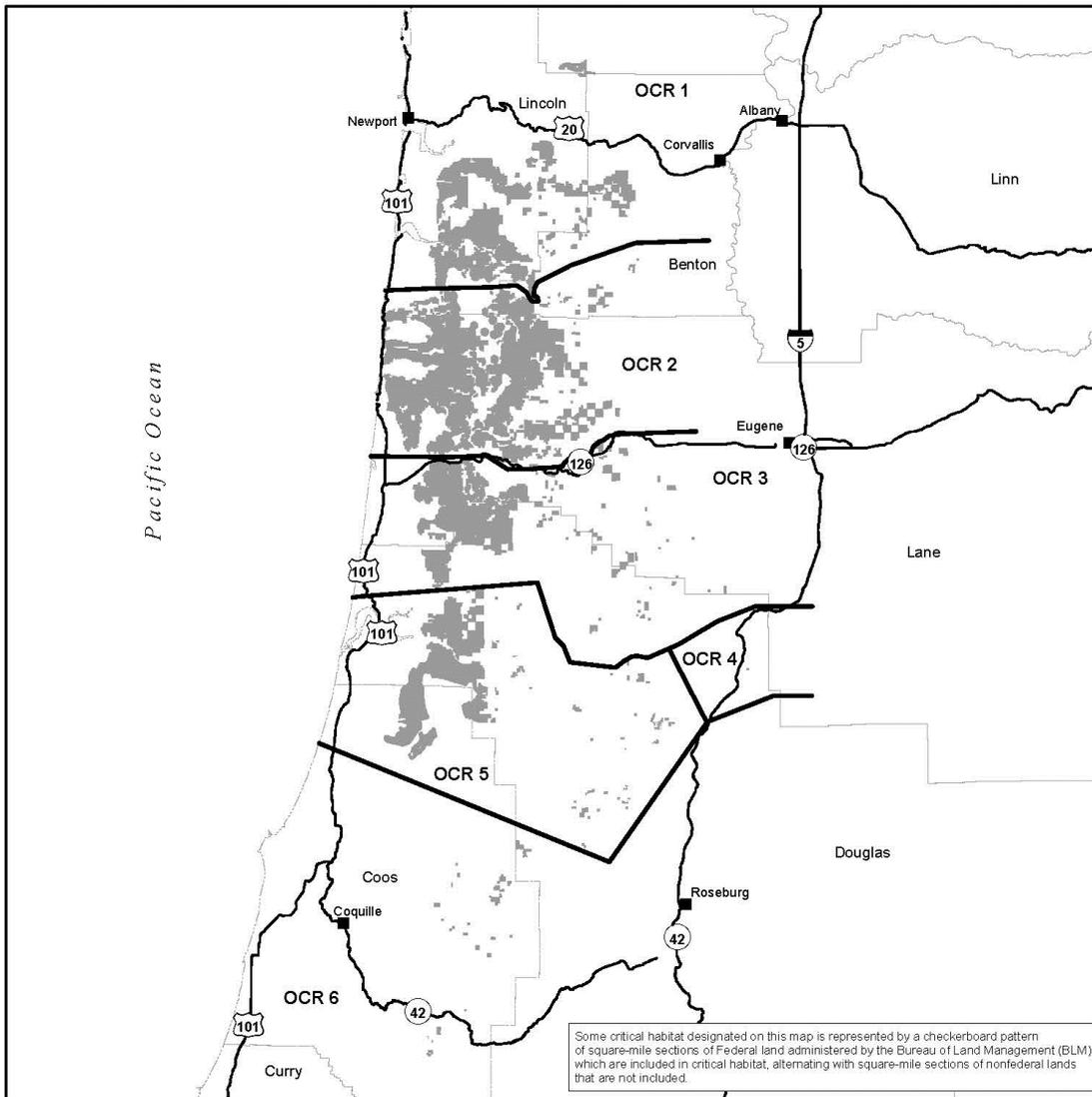
\* \* \* \* \*



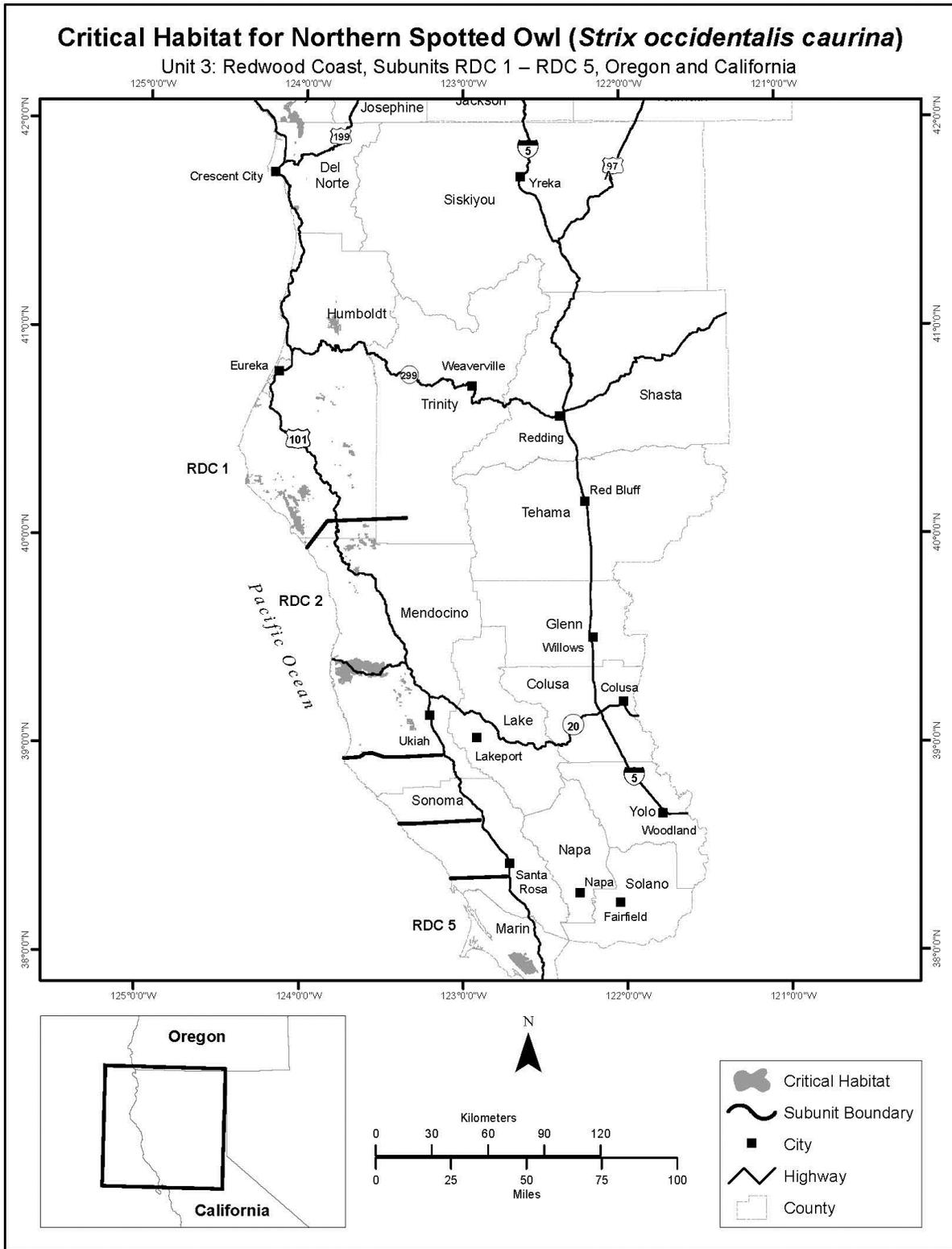
(10) Unit 2: Oregon Coast Ranges, Oregon. Map of Unit 2, Oregon Coast Ranges, Oregon, follows:

# Critical Habitat for Northern Spotted Owl (*Strix occidentalis caurina*)

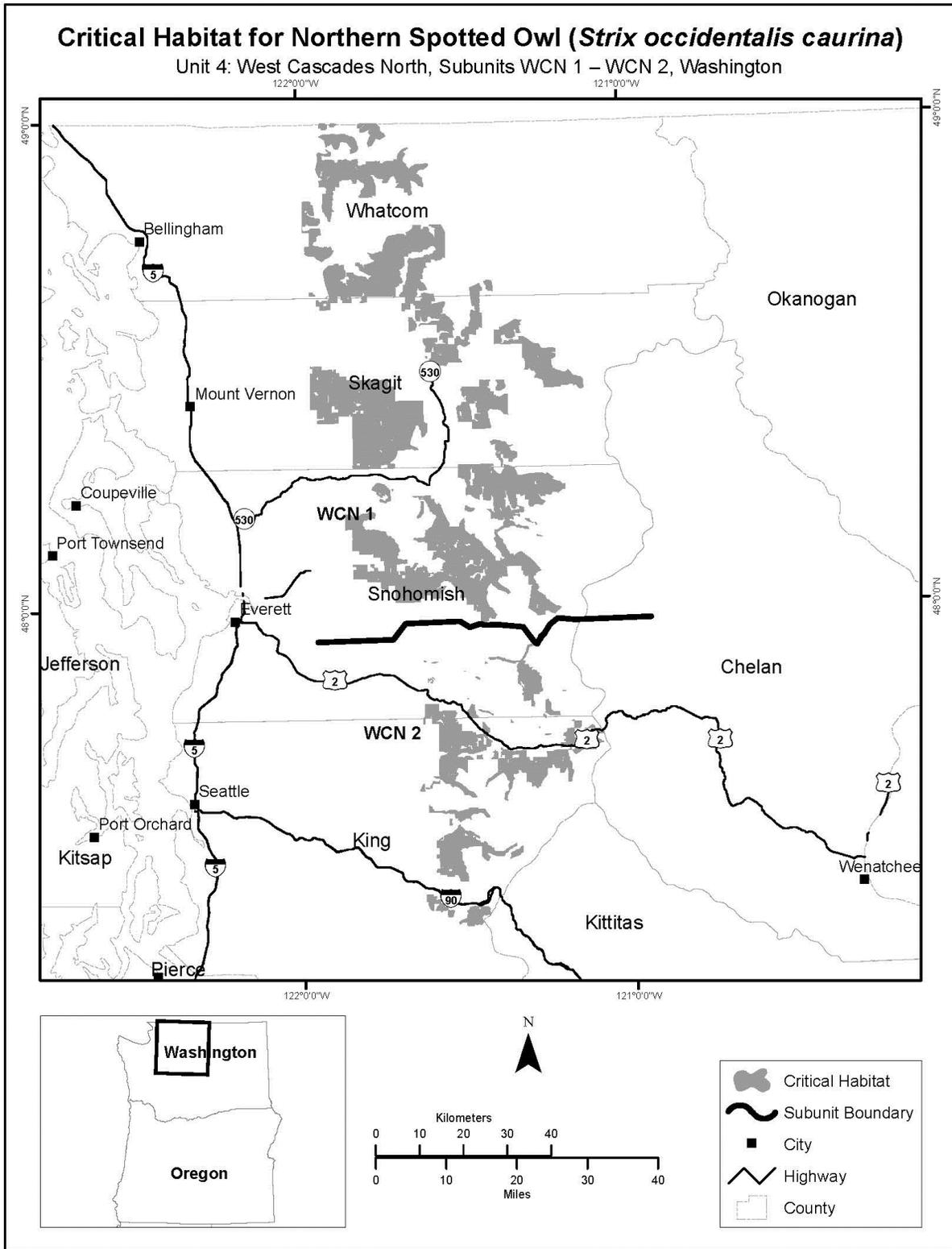
Unit 2: Oregon Coast Ranges, Subunits OCR 1 – OCR 6, Oregon



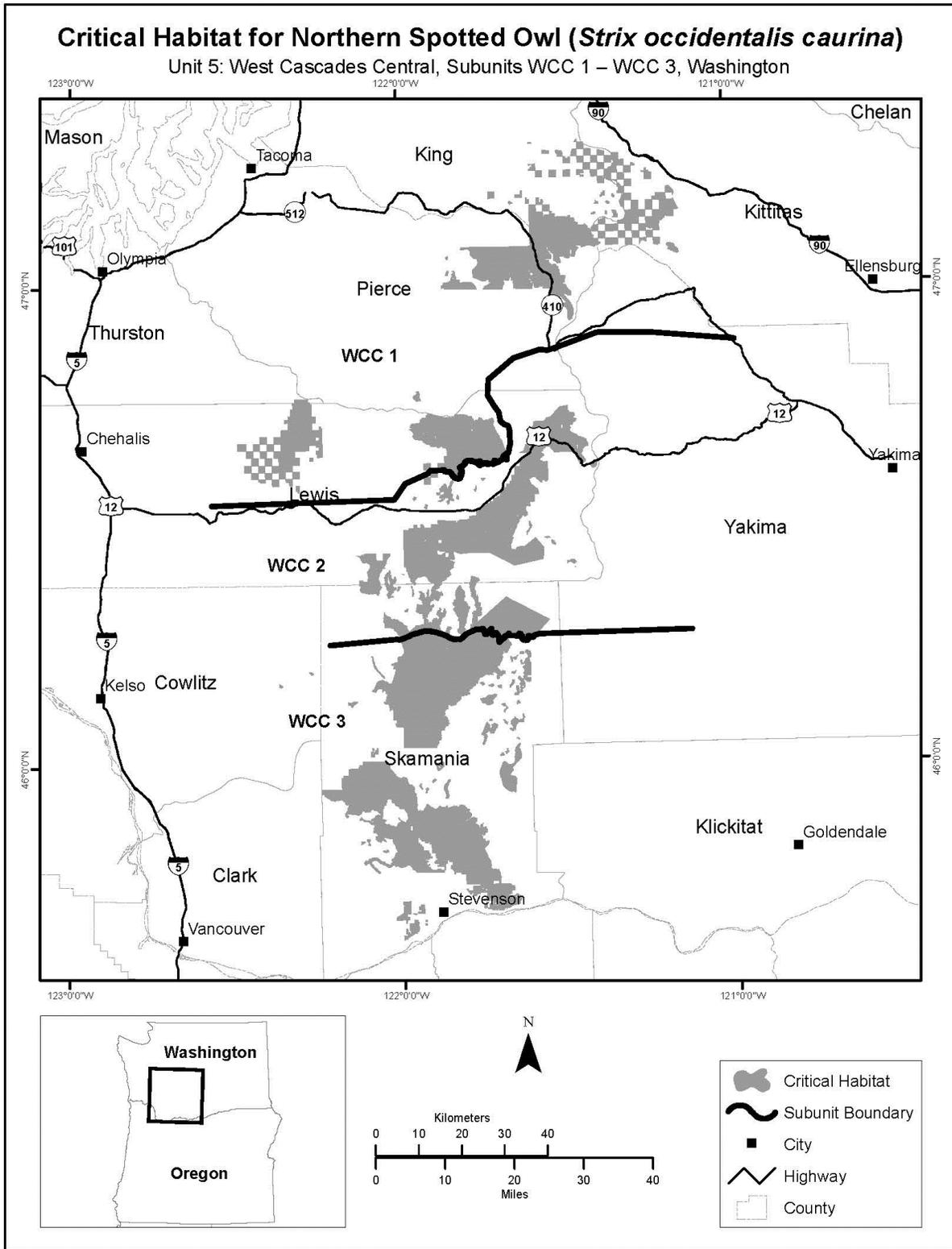
(11) Unit 3: Redwood Coast, Oregon and California. Map of Unit 3, Redwood Coast, Oregon and California, follows:



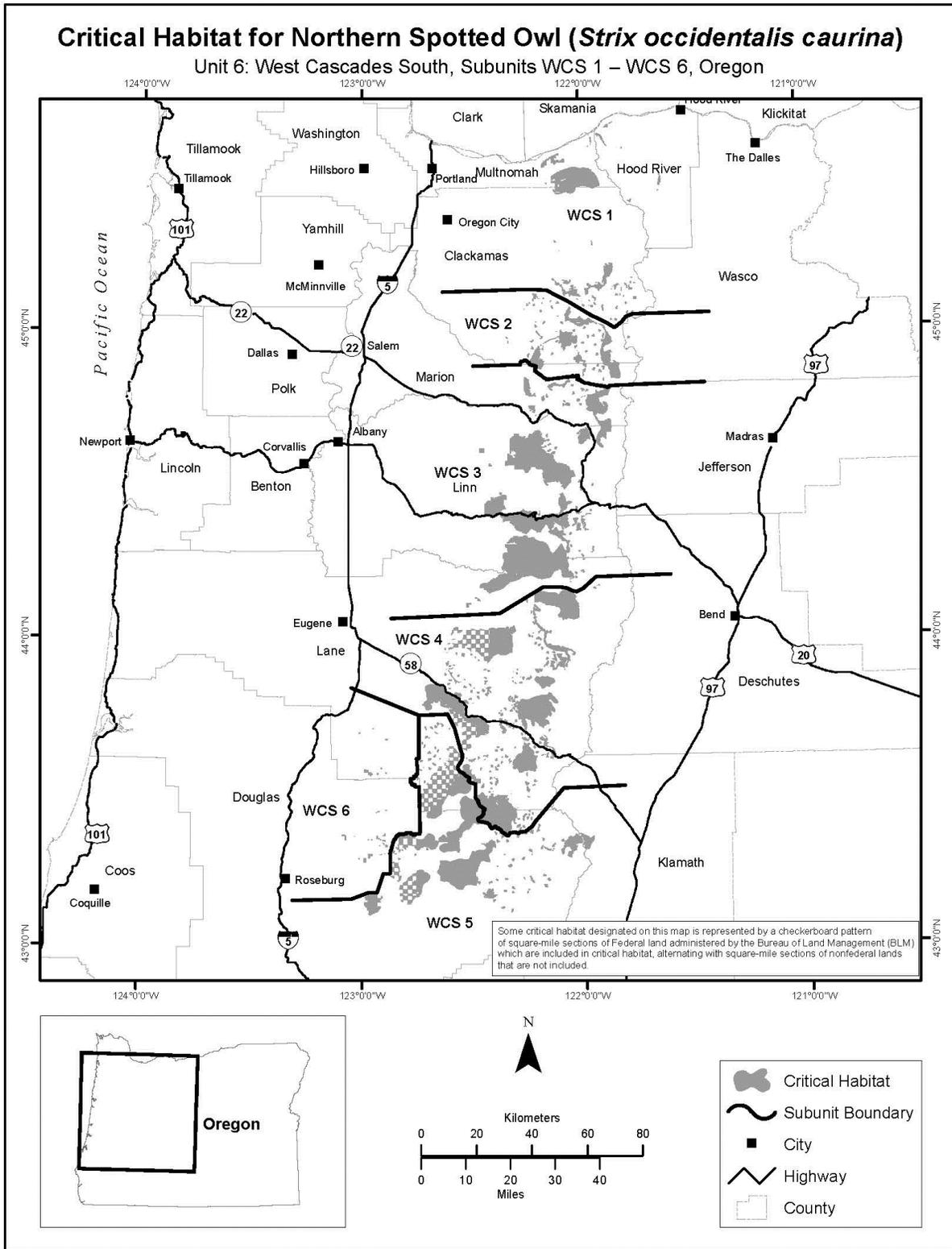
(12) Unit 4: West Cascades North, Washington. Map of Unit 4, West Cascades North, Washington, follows:



(13) Unit 5: West Cascades Central, Washington. Map of Unit 5, West Cascades Central, Washington, follows:



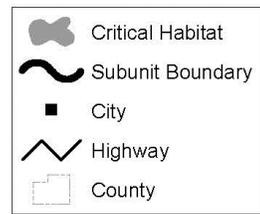
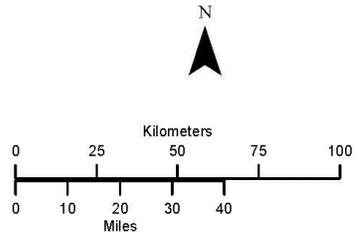
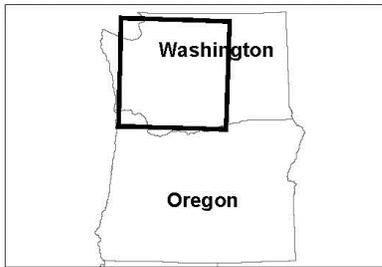
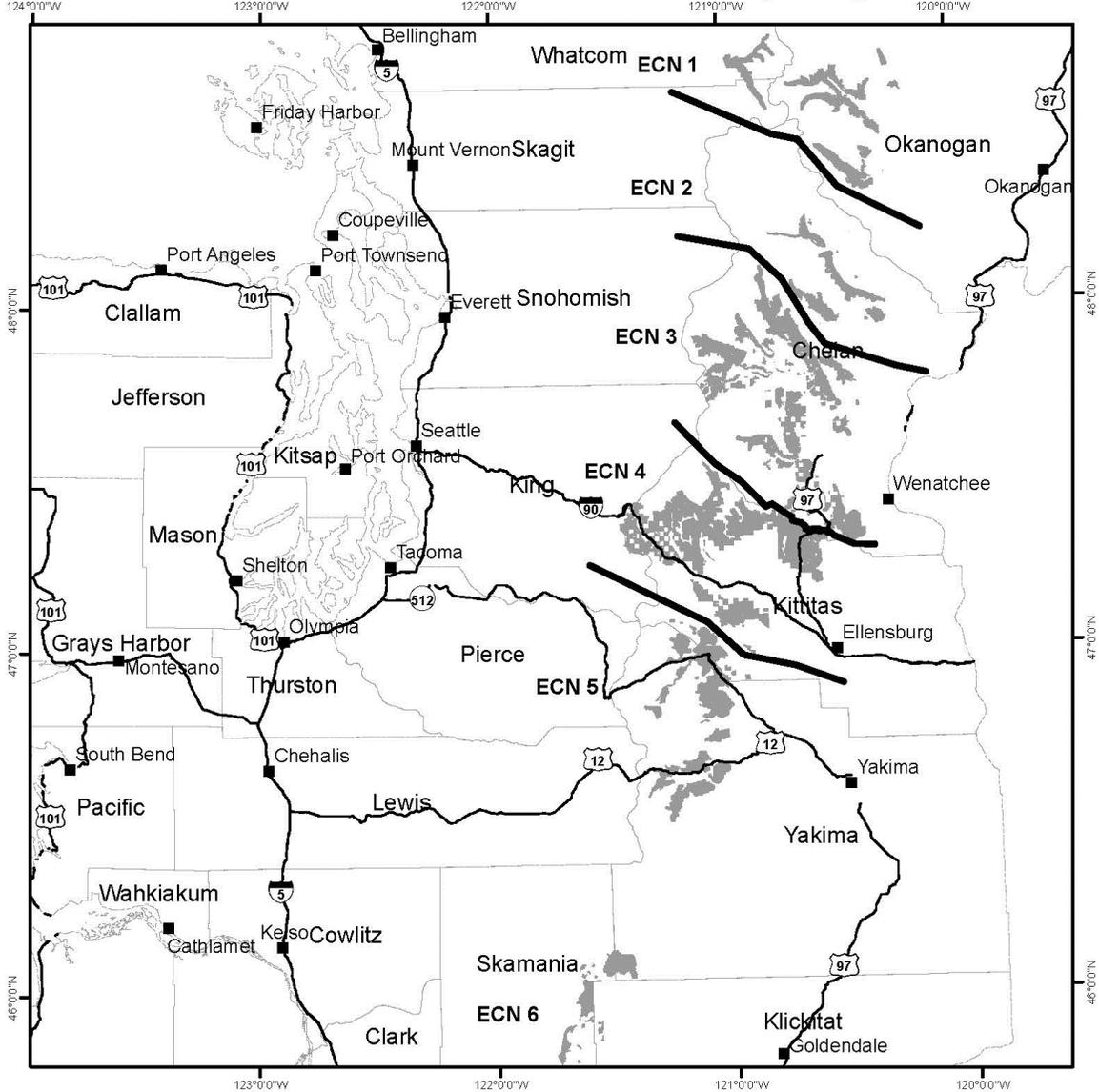
(14) Unit 6: West Cascades South, Oregon. Map of Unit 6, West Cascades South, Oregon, follows:

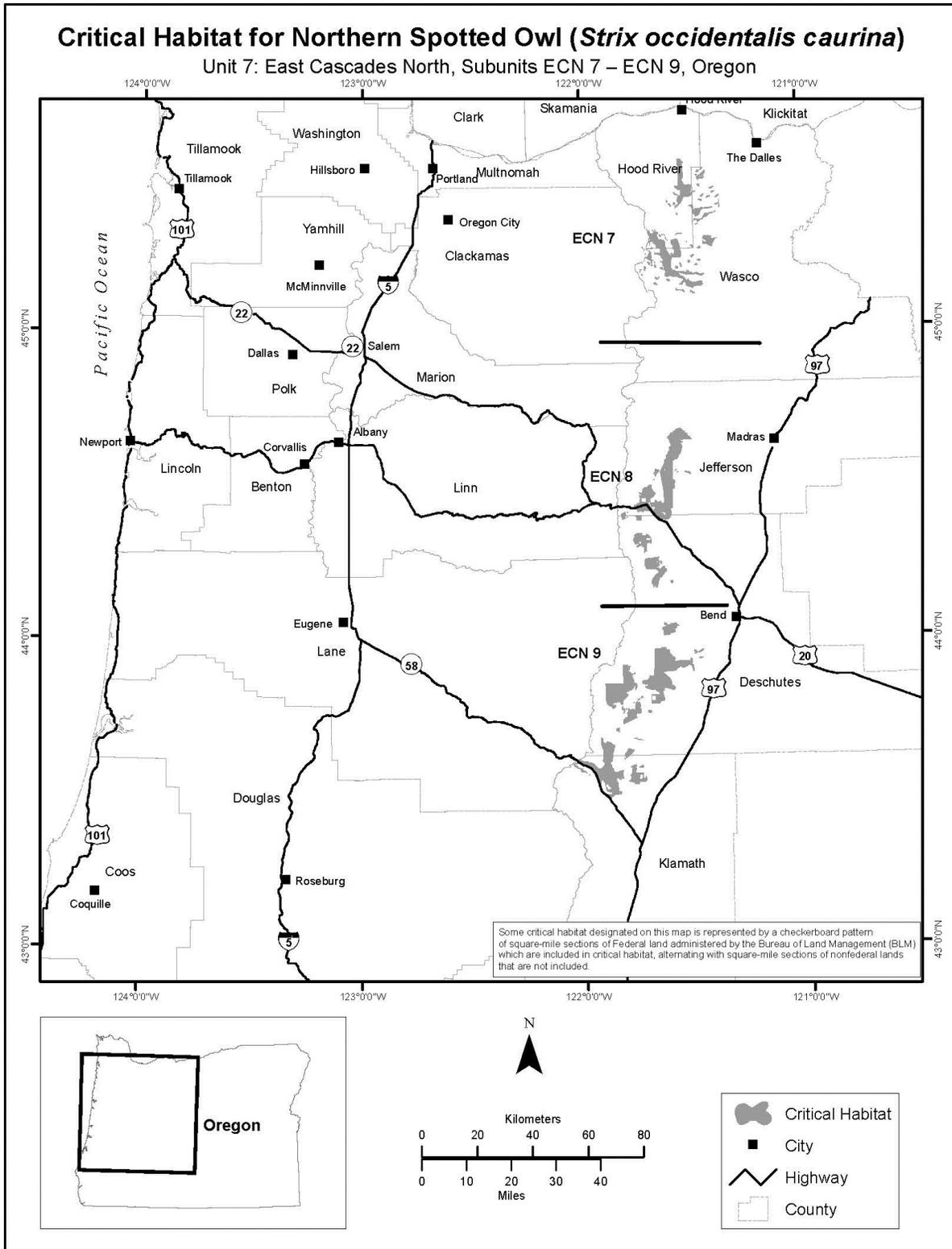


(15) Unit 7: East Cascades North, Washington and Oregon. Maps of Unit 7, East Cascades North, Washington and Oregon, follow:

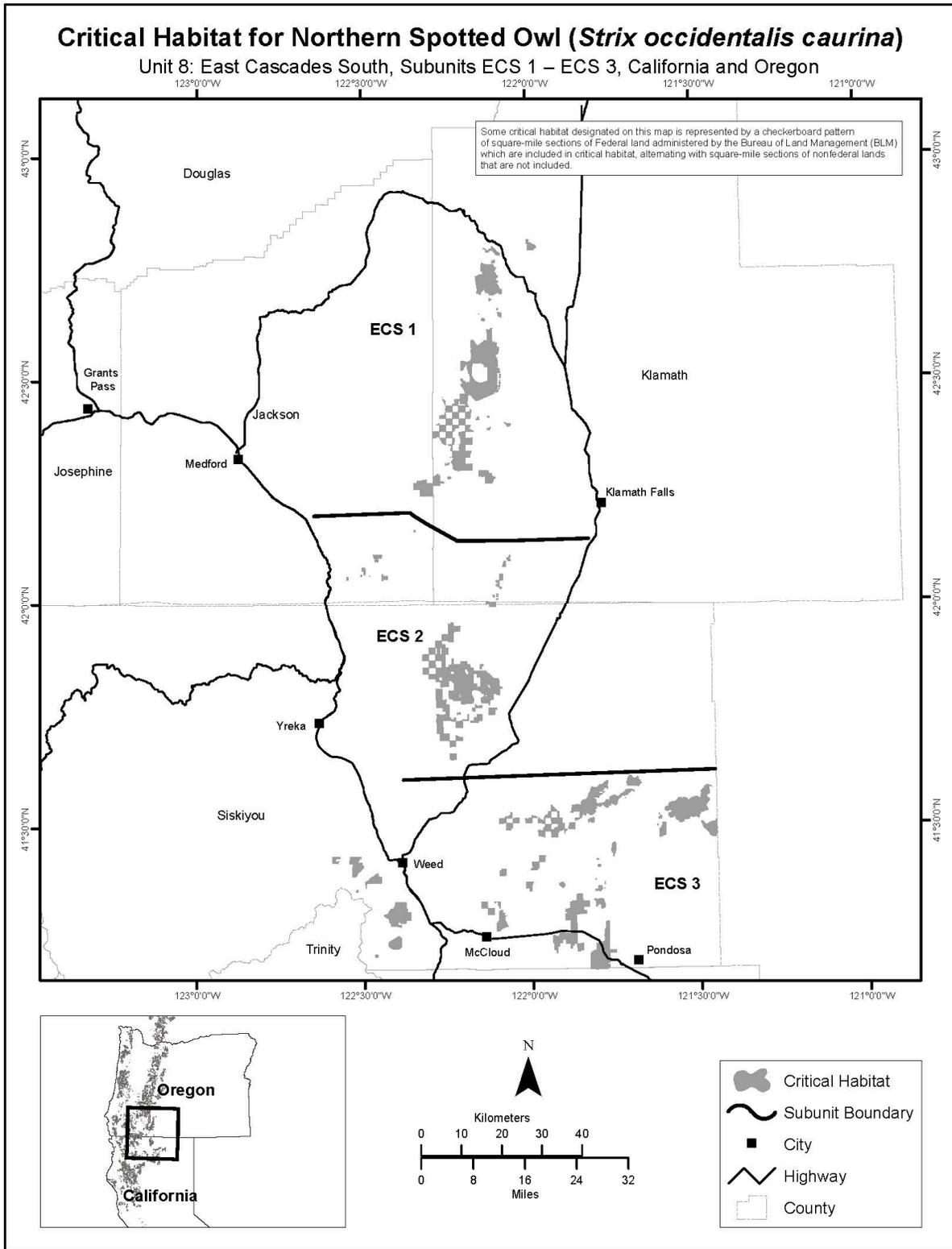
# Critical Habitat for Northern Spotted Owl (*Strix occidentalis caurina*)

Unit 7: East Cascades North, Subunits ECN 1 – ECN 6, Washington

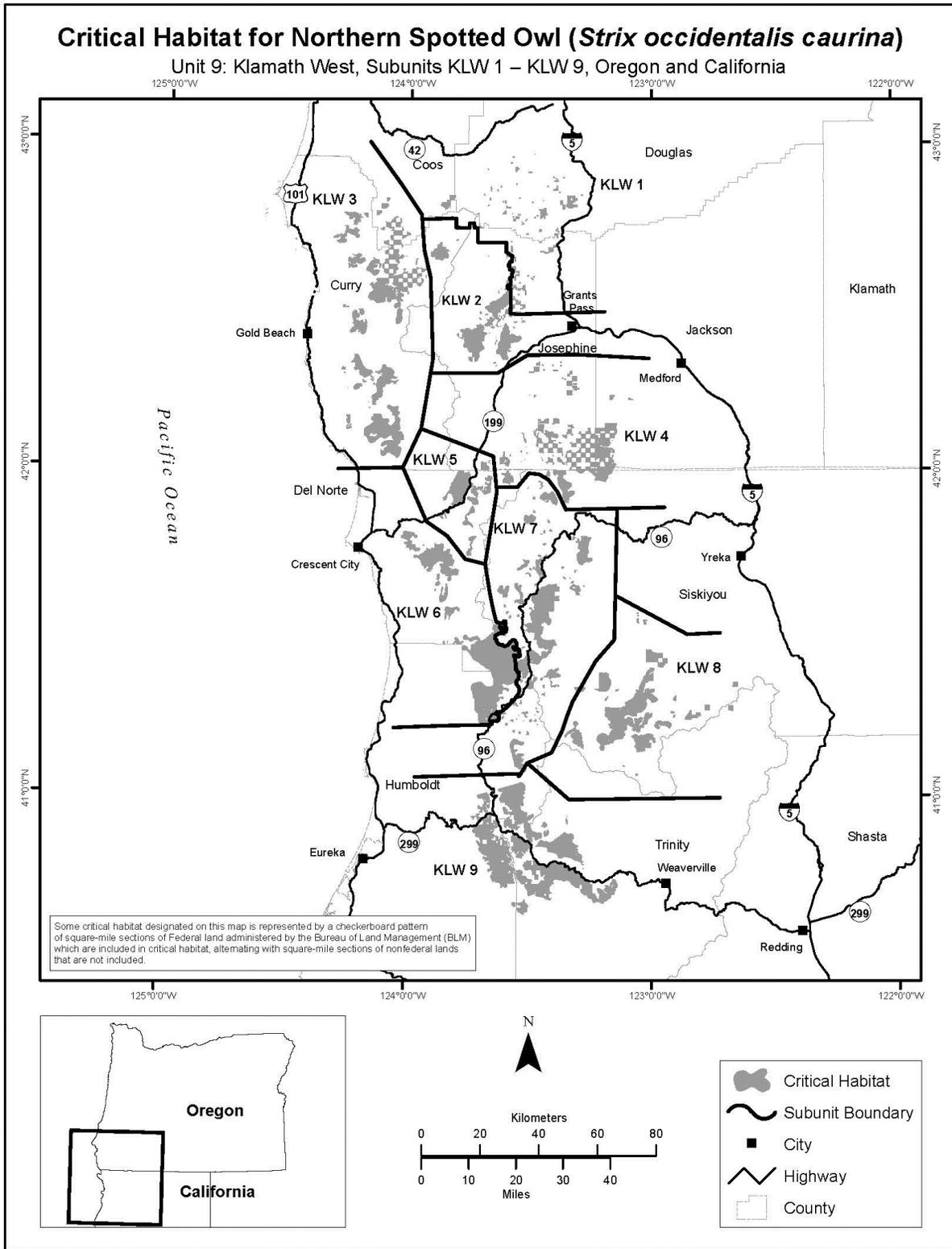




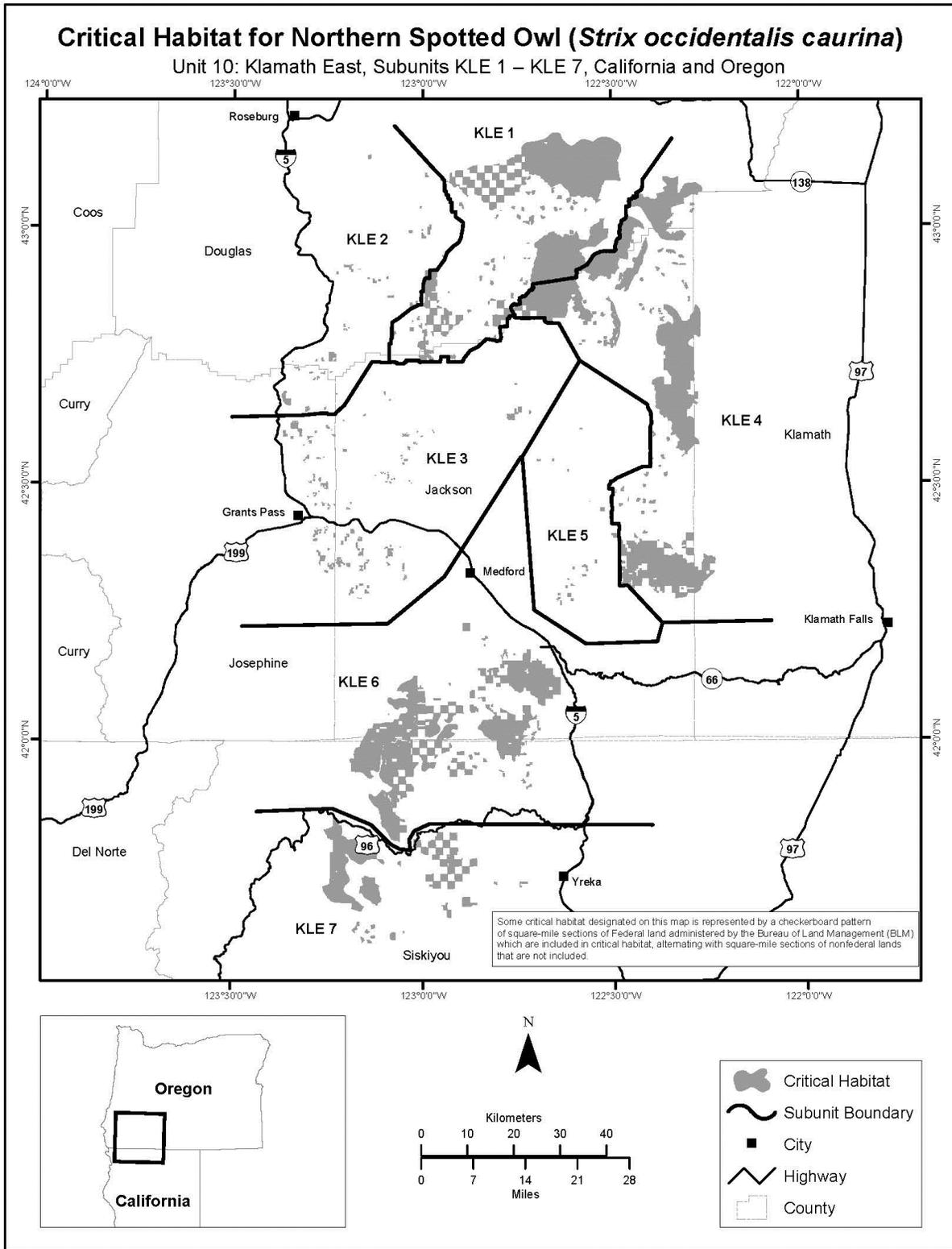
(16) Unit 8: East Cascades South, California and Oregon. Map of Unit 8, East Cascades South, California and Oregon, follows:



(17) Unit 9: Klamath West, Oregon and California. Map of Unit 9: Klamath West, Oregon and California, follows:



(18) Unit 10: Klamath East, California and Oregon. Map of Unit 10: Klamath East, California and Oregon, follows:

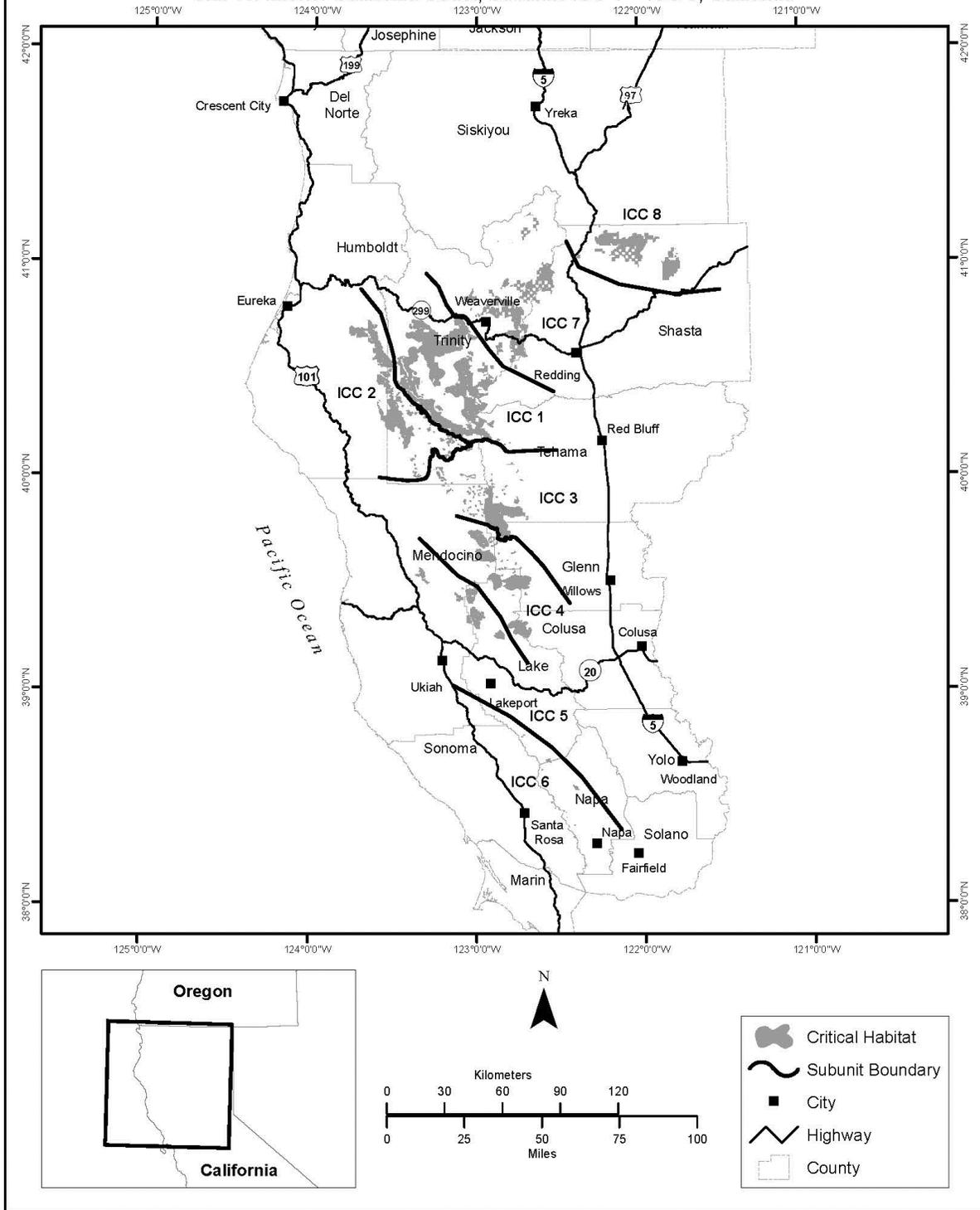


(19) Unit 11: Interior California Coast, California. Map of Unit 11: Interior California

Coast, California, follows:

# Critical Habitat for Northern Spotted Owl (*Strix occidentalis caurina*)

Unit 11: Interior California Coast, Subunits ICC 1 – ICC 8, California



\* \* \* \* \*

---

**Aurelia Skipwith,**  
*Director,*  
*U.S. Fish and Wildlife Service.*

[FR Doc. 2021-00484 Filed: 1/13/2021 11:15 am; Publication Date: 1/15/2021]