We are to base this finding on information provided in the petition, supporting information submitted with the petition, and information available in our files. To the maximum extent practicable, we are to make this finding within 90 days of our receipt of the petition and publish our notice of the finding promptly in the **Federal Register**.

Our process for making this 90–day finding under section 4(b)(3)(A) of the Act is limited to a determination of whether the information in the petition presents "substantial scientific and commercial information," which is interpreted in our regulations as "that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted" (50 CFR 424.14(b)). We reviewed the petition, supporting information provided by the petitioner, and information in our files, and we evaluated that information to determine whether the sources cited support the claims made in the petition.

The petition and supporting information identified factors affecting the Honduran emerald hummingbird including land clearing for cattle grazing and agriculture, road construction and expansion, residential development (Factor A) and loss of genetic variability due to a small and declining population (Factor E). On the basis of information provided in the petition and other information in our files, we have determined that the petition presents substantial scientific or commercial information that listing the Honduran emerald hummingbird under the Act may be warranted. Therefore, we are initiating a status review to determine if listing the species is warranted. During the status review, we will consider threats to the hummingbird under all of the listing factors above. To ensure that the status review is comprehensive, we are soliciting scientific and commercial data and other information regarding this species.

The "substantial information" standard for a 90–day finding differs from the Act's "best scientific and commercial data" standard that applies to a status review to determine whether a petitioned action is warranted. A 90–day finding does not constitute a status review under the Act. In a 12–month finding, we will determine whether a petitioned action is warranted after we have completed a thorough status review of the species, which we would conduct following a substantial 90–day finding. Because the Act's standards for 90–day and 12–month findings are different, as described above, a substantial 90–day finding does not mean that the 12–month finding will result in a warranted finding.

References Cited

A complete list of all references cited in this finding is available on the Internet at *http://www.regulations.gov* or upon request from the Endangered Species Program, Branch of Listing, U.S. Fish and Wildlife Service (see **FOR FURTHER INFORMATION CONTACT**).

Author

The primary authors of this notice are staff members of the Endangered Species Program, U.S. Fish and Wildlife Service.

Authority

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: June 9, 2010

Jeffrey L. Underwood,

Acting Director, U.S. Fish and Wildlife Service.

[FR Doc. 2010–15225 Filed 6–22–10; 8:45 am]

BILLING CODE 4310–55–S

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R3–ES–2010–0042]
[MO-92210–0–0009–B4]

RIN 1018–AW90

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Tumbling Creek Cavesnail

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), propose to designate critical habitat for the Tumbling Creek cavesnail (*Antrobia culveri*) under the Endangered Species Act of 1973, as amended (Act). We propose to designate as critical habitat approximately 25 acres (10.12 hectares) in one unit. The proposed critical habitat encompasses Tumbling Creek and associated springs, located near Protem, in Taney County, Missouri.

DATES: We will consider comments from all interested parties until August 23, 2010. We must receive requests for public hearings, in writing, at the address shown in the **FOR FURTHER INFORMATION CONTACT** section by August 9, 2010. Please note that if you are using the *Federal eRulemaking Portal* (see **ADDRESSES** section, below) the deadline for submitting an electronic comment is 11:59 p.m. Eastern Daylight Savings Time on August 23, 2010.

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

- Federal eRulemaking Portal: *http://www.regulations.gov*. In the box that reads "Enter Keyword or ID," enter the Docket number for this finding, which is FWS-R3-ES-2010-0042. Check the box that reads "Open for Comment/Submission," and then click the Search button. You should then see an icon that reads "Submit a Comment." Please ensure that you have found the correct rulemaking before submitting your comment.
- *U.S. mail or hand-delivery:* Public Comments Processing, Attn: FWS-R3-ES-2010-0042; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, Suite 222; Arlington, VA 22203.

We will not accept e-mail or faxes. We will post all comments on *http://www.regulations.gov*. This generally means that we will post any personal information you provide us (see the Public Comments section below for more information).

FOR FURTHER INFORMATION CONTACT: Charles M. Scott, Field Supervisor, Columbia Fish and Wildlife Office, U.S. Fish and Wildlife Service, 101 Park DeVille Dr., Suite A, Columbia, MO 65203; telephone: 573-234-2132; facsimile: 573-234-2181. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800-877-8339.

SUPPLEMENTARY INFORMATION:

Public Comments

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

(1) Population survey results for the Tumbling Creek cavesnail, as well as any studies that may show distribution, status, population size, or population trends, as they may pertain to critical habitat for the species.

(2) Pertinent aspects of life history, ecology, and habitat use of the Tumbling Creek cavesnail.

(3) Our "prudency" evaluation for the designation of critical habitat for Tumbling Creek cavesnail.

(4) The reasons why we should or should not designate habitat as "critical

habitat" under section 4 of the Endangered Species Act of 1973, as amended (Act) (16 U.S.C. 1531 *et seq.*), including whether there are threats to the species from human activity, the degree of which can be expected to increase due to the designation, and whether the benefit of designation would be outweighed by threats to the species caused by the designation.

(5) Comments or information that may assist us in identifying or clarifying the physical and biological features essential to the conservation of the species.

(6) Specific information on:

• The amount and distribution of Tumbling Creek cavesnail habitat,

• What areas occupied at the time of listing contain physical and biological features essential to the conservation of the species,

• What special management considerations or protections these features may require, and

• What areas not occupied at the time of listing are essential for the conservation of the species and why.

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

(8) Any probable economic, national security, or other relevant impacts of designating any area that may be included in the final designation. We are particularly interested in any impacts on small entities (for example, small businesses or small governments) or families, and the benefits of including or excluding areas that exhibit these impacts.

(9) Whether any specific areas we are proposing as critical habitat should be excluded under section 4(b)(2) of the Act, and whether the benefits of potentially excluding any particular area outweigh the benefits of including that area under section 4(b)(2) of the Act.

(10) Information on any quantifiable economic costs or benefits of the proposed designation of critical habitat.

(11) Information on the projected and reasonably likely impacts of climate change on the Tumbling Creek cavesnail, and any special management needs or protections that may be needed in the critical habitat area we are proposing.

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

You may submit your comments and materials concerning this proposed rule by one of the methods listed in the **ADDRESSES** section. We will not accept comments sent by e-mail or fax or to an address not listed in the **ADDRESSES** section.

We will post your entire comment—including your personal identifying information—on *http://www.regulations.gov*. If your written comments provide personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so.

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on *http://www.regulations.gov*, or by appointment, during normal business hours at the Columbia Ecological Services Office (see **FOR FURTHER INFORMATION CONTACT**).

Background

It is our intent to discuss only those topics directly relevant to the designation of critical habitat in this proposed rule. For more information on the Tumbling Creek cavesnail, refer to the final listing rule published in the **Federal Register** on August 14, 2002 (67 FR 52879), and the Tumbling Creek Cavesnail Recovery Plan (published in the **Federal Register** on September 22, 2003 (68 FR 55060)), available on the Internet at *http://ecos.fws.gov/docs/recovery_plans/2003/030922a.pdf*.

The Tumbling Creek cavesnail is a critically imperiled aquatic snail, endemic to a single cave stream and associated springs in Taney County, southwestern Missouri. The species is known only from Tumbling Creek and a few of its small tributaries and associated underground springs within Tumbling Creek Cave, and areas immediately downstream of the cave between the cave's natural exit and the confluence of Tumbling Creek with Big Creek at Schoolhouse Spring. Suitable habitat includes the underside of rocks, small stones, and cobble, and occasionally the upper surface of solid rock bottom within sections of Tumbling Creek that have moderate current (U.S. Fish and Wildlife Service 2003, p. 10). The Tumbling Creek cavesnail is dependent on good water quality and reduced sediment loads in Tumbling Creek (Aley and Ashley 2003, p. 20).

The Tumbling Creek cavesnail was emergency listed on December 27, 2001 (66 FR 66803) and subsequently listed as endangered on August 14, 2002 (67 FR 52879) because of a precipitous population decline and water degradation in Tumbling Creek. The primary threats related to the degradation of water quality in Tumbling Creek are increased siltation from overgrazing, tree removal, and other activities. Nonpoint source pollution within the recharge area of Tumbling Creek cave is also a threat to the species (Aley and Ashley 2003, p. 19; U.S. Fish and Wildlife Service 2003, pp. 14-18). The deposition of silt into Tumbling Creek from aboveground activities within the recharge area of Tumbling Creek Cave has likely contributed to the decline of the species by eliminating the species' habitat, covering egg masses, or adversely impacting the snail in other ways (Tom and Cathy Aley, 2001, pers. comm.; U.S. Fish and Wildlife Service 2001, p. 66806; Aley and Ashley 2003, p. 19; U.S. Fish and Wildlife Service 2003, pp. 14-18).

Previous Federal Actions

The Tumbling Creek cavesnail was emergency listed on December 27, 2001 (66 FR 66803) and subsequently listed as endangered on August 14, 2002 (67 FR 52879). At the time of listing, we determined that a delay in designating critical habitat would enable us to concentrate our limited resources on other actions that must be addressed and allow us to invoke immediate protections needed for the conservation of the species. We concluded that, if prudent and determinable, we would prepare a critical habitat proposal in the future at such time as our available resources and other listing priorities under the Act would allow. We approved a final recovery plan for the Tumbling Creek cavesnail on September 15, 2003, and made it available to the public through a notice published in the **Federal Register** on September 22, 2003 (68 FR 55060).

On August 11, 2008, the Institute for Wildlife Protection and Crystal Grace Rutherford filed a lawsuit against the Secretary of Interior for our failure to timely designate critical habitat for the Tumbling Creek cavesnail (*Institute for Wildlife Protection et al* v. *Kempthorne* (07-CV-01202-CMP)). In a court-approved settlement agreement, we agreed to submit to the **Federal Register** a new prudency determination, and if the designation was found to be prudent, a proposed designation of critical habitat, by June 30, 2010, and a final designation by June 30, 2011.

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.

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 under the Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management, such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

Critical habitat receives protection under section 7(a)(2) of the Act through the prohibition against Federal agencies carrying out, funding, or authorizing the destruction or adverse modification of critical habitat. Section 7(a)(2) requires consultation on Federal actions that may affect critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation does not allow the government or public to access private lands. Such designation does not require implementation of restoration, recovery, or enhancement measures by non-Federal landowners. Where a landowner seeks or requests Federal agency funding or authorization for an action that may affect a listed species or critical habitat, the consultation requirements of section 7(a)(2) would apply, but even in the event of a destruction or adverse modification finding, the Federal action agency's and the landowner's obligation is not to restore or recover the species, but to implement reasonable and prudent alternatives to avoid destruction or adverse modification of critical habitat.

To be considered for inclusion in a critical habitat designation, the habitat within the geographical area occupied by the species at the time it was listed must contain the physical or biological features that are essential to the conservation of the species. Areas supporting the essential physical or biological features are identified, to the extent known using the best scientific data available, as the habitat areas that provide essential life cycle needs of the species. Habitat within the geographical area occupied by the species at the time of listing that contains features essential to the conservation of the species meets the definition of critical habitat only if these features may require special management consideration or protection. Under the Act and regulations in the Code of Federal Regulations (CFR) at 50 CFR 424.12, we can designate critical habitat in areas outside the geographical area occupied by the species at the time it is listed only when we determine that the best available scientific data demonstrate that the designation of those areas is essential for the conservation of the species.

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

When we are determining which areas we should designate as critical habitat, our primary source of information is generally the information developed during the listing process for the species. Additional information sources may include the recovery plan for the species, articles in peer-reviewed journals, conservation plans developed by States and counties, scientific status surveys and studies, biological assessments, or other unpublished materials and expert opinion or personal knowledge.

Prudency Determination

Section 4(a)(3) of the Act, as amended, and implementing regulations (50 CFR 424.12) require that, to the maximum extent prudent and determinable, the Secretary designate critical habitat at the time the species is determined to be endangered or threatened. Our regulations at 50 CFR 424.12(a)(1) state that the designation of critical habitat is not prudent when one or both of the following situations exist: (1) The species is threatened by taking or other activity and the identification of critical habitat can be expected to increase the degree of threat to the species; or (2) the designation of critical habitat would not be beneficial to the species.

There is no documentation that the Tumbling Creek cavesnail is threatened by taking or other human activity that would be increased by the identification of critical habitat. In the absence of finding that the designation of critical habitat would increase threats to the species, if there are any benefits to a critical habitat designation, then a prudent finding is warranted. The potential benefits include:

(1) Triggering consultation, under section 7 of the Act, in new areas for action in which there may be a Federal nexus where consultation would not otherwise occur, because, for example, an areas is or has become unoccupied or the occupancy is in question;

(2) Identifying the physical and biological features essential to the conservation of the Tumbling Creek cavesnail and focusing conservation activities on these essential features and the areas that support them;

(3) Providing educational benefits to State or county governments or private entities engaged in activities or long-range planning in areas essential to the conservation of the species; and

(4) Preventing people from causing inadvertent harm to the species. Conservation of the Tumbling Creek cavesnail and the essential features of its habitat will require habitat protection and restoration, which will be facilitated by knowledge of habitat locations and the physical and biological features of those habitat locations.

Therefore, since we have determined that the designation of critical habitat will not likely increase the degree of threat to the species and may provide some measure of benefit, we find that the designation of critical habitat for the Tumbling Creek cavesnail is prudent.

Critical Habitat Determinability

As stated above, section 4(a)(3) of the Act requires the designation of critical habitat concurrently with the species' listing "to the maximum extent prudent and determinable." Our regulations at 50 CFR 424.12(a)(2) state that critical

habitat is not determinable when one or both of the following situations exist:

(1) Information sufficient to perform required analyses of the impacts of the designation is lacking, or

(2) The biological needs of the species are not sufficiently well known to permit identification of an area as critical habitat.

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

We reviewed the available information pertaining to the biological needs of the Tumbling Creek cavesnail, the historical distribution of the Tumbling Creek cavesnail, and the habitat characteristics where the species currently occurs. This and other information represents the best scientific and commercial data available and led us to conclude that the designation of critical habitat is determinable for the Tumbling Creek cavesnail.

Methods

As required by section 4(b) of the Act, we used the best scientific and commercial data available in determining which areas within the geographical area occupied by the species at the time of listing contain the features essential to the conservation of the Tumbling Creek cavesnail that may require special management considerations or protections, and which areas outside of the geographical area occupied at the time of listing are essential for the conservation of the species.

We reviewed the available information pertaining to historical and current distributions, life histories, and habitat requirements of this species. Our sources included peer-reviewed scientific publications; unpublished survey reports; unpublished field observations by Service, State, and other experienced biologists; notes and communications from qualified biologists or experts; and Service publications such as the final listing rule for the Tumbling Creek cavesnail (67 FR 52879) and the Recovery Plan for the Tumbling Creek cavesnail (U.S. Fish and Wildlife Service 2003).

Physical and Biological Features

In accordance with sections 3(5)(A)(i) and 4(b)(1)(A) of the Act and the regulations at 50 CFR 424.12, in determining which areas within the geographical area occupied at the time of listing to propose as critical habitat, we consider the physical and biological features that are essential to the conservation of the species which may require special management considerations or protection. These include, but are not limited to:

(1) Space for individual and population growth and for normal behavior;

(2) Food, water, air, light, minerals, or other nutritional or physiological requirements;

(3) Cover or shelter;

(4) Sites for breeding, reproduction, or rearing (or development) of offspring; and

(5) Habitats that are protected from disturbance or are representative of the historic, geographical, and ecological distributions of a species.

We consider the specific essential physical and biological features to be the primary constituent elements (PCEs; see **"Primary Constituent Elements"** below) laid out in the appropriate quantity and spatial arrangement for the conservation of the species. The PCEs required for the Tumbling Creek cavesnail are derived from biological needs of the species as described in the Background section of this proposed rule and in the final listing rule (67 FR 52879). Unfortunately, little is known of the specific habitat requirements for this species other than that the species requires adequate water quality, water quantity, water flow, a stable stream channel, minimal sedimentation, and energy input from the guano of bats, particularly gray bats (*Myotis grisescens*) that roost in Tumbling Creek Cave. To identify the physical and biological features essential to the Tumbling Creek cavesnail, we have relied on current conditions at locations where the species survives, and the limited information available on this species and its close relatives.

Space for Individual and Population Growth and for Normal Behavior

The specific space requirements for the Tumbling Creek cavesnail are unknown, but given that 15,118 snails were estimated in a 1,016 square meter area of Tumbling Creek in 1973 (Greenlee 1974, p. 10), space is not likely a limiting factor for the species. The loss of interstitial habitats for the species, however, likely contributed to the species decline (U.S. Fish and Wildlife Service 2003, p. 14).

Food, Water, Air, Light, Minerals, or Other Nutritional or Physiological Requirements

It is believed that the species feeds on biofilm, the organic coating and bacterial layer associated with the underside of rocks or bare rock stream bottom (Aley and Ashley 2003, p. 19). This biofilm is directly connected to energy input from the guano of a large colony of roosting bats in Tumbling Creek Cave, particularly the federally listed gray bat (*Myotis grisescens*) (Aley and Ashley 2003, p.18; U.S. Fish and Wildlife Service 2003, p. 11). The cavesnail is often found on rocks coated with manganese oxide (Aley and Ashley 2003, p. 18); however, the role manganese minerals play in the growth and survival of the cavesnail is unknown.

Based on the information above, we identified energy input from bat guano, which is essential in the development of biofilm that cavesnails use for food to be a PCE for this species.

Cover or Shelter

The Tumbling Creek cavesnail has been found on both the upper and lower surfaces of rocks and gravel (Greenlee 1974, p. 10; Aley and Ashley 2003, p. 18; U.S. Fish and Wildlife Service 2003, p. 12). Flow rates in Tumbling Creek can reach 150 cubic feet per second (cfs) during flash flood events (Aley 2010, pers. comm.), and such events may dislodge cavesnails from the upper surface of substrates. Consequently, it is likely that the underside of larger rocks provides some cover for cavesnails. Rocks and gravel are used by cavesnails for attachment (Greenlee 1974, p. 10; U.S. Fish and Wildlife Service, p. 12). Additionally, it is likely that a stable stream bottom and cave stream banks and riffle, run, and pool habitats are important components of the species' habitat.

Based on the information above, we identified stable stream bottoms and banks (stable horizontal dimension and vertical profile) in order to maintain bottom features (riffles, runs, and pools) and transition zones between bottom features to be a PCE for this species. We also identified bottom substrates consisting of fine gravel with coarse gravel or cobble, or bedrock with sand and gravel, with low amounts of fine sand and sediments within the interstitial spaces of the substrates, as a PCE.

Sites for Breeding, Reproduction, or Rearing

Like other members of the snail family Hydrobiidae, the Tumbling Creek cavesnail has separate male and female individuals (Aley and Ashley 2003, p. 19), but there is no information on the mating behavior of the species or what role the unknown sex ratio of the species may have on successful reproduction. Eggs are likely deposited in gelatinous egg masses, but to date, the occurrence of such egg masses has yet

to be documented (Aley and Ashley 2003, p. 19). Although little is known about the reproductive behavior and development of offspring of the Tumbling Creek cavesnail, it is likely that rock and gravel substrates that are free from silt are important elements necessary for successful propagation, especially for attachment of gelatinous egg masses. Aley and Ashley (2003, p. 19) postulated that silt deposited in Tumbling Creek could smother egg masses, and Ashley (2000, p. 8) suggested that silt could suffocate early developmental stages of the cavesnail. The life span of the Tumbling Creek cavesnail is unknown, but, if similar to other surface-dwelling hydrobid snails that have been studied, it is probably between 1 and 5 years (Aley and Ashley 2003, p. 19).

The cavesnail is dependent on good water quality (Aley and Ashley 2003, pp. 19-20; U.S. Fish and Wildlife Service 2003, pp. 13-22). Aley (2001, pers. comm.; U.S. Fish and Wildlife Service 2003, p. 22) noted that oxygen depletion could occur in Tumbling Creek during low flows; therefore, permanent flow of the stream is apparently important to the survival of the cavesnail. Aley (2010, pers. comm.) calculated that an average daily discharge of 0.07-150 cubic feet per second (cfs) was necessary to maintain good water quality for the cavesnail. Aley (2010, pers. comm.) also postulated that, to ensure good water quality for the Tumbling Creek cavesnail, water temperature of the cave stream should be between 55-62 °F (12.78-16.67 °C), dissolved oxygen levels should not exceed 4.5 milligrams per liter, and turbidity of an average monthly reading should not exceed 200 Neophelometric Units and should not persist for a period greater than 4 hours.

Based on the information above, we identified an instream flow regime with an average daily discharge between 0.07 and 150 cubic feet per second (cfs), inclusive of both surface runoff and groundwater sources (springs and seepages), and water quality with temperature between 55–62 °F (12.78–16.67°C), dissolved oxygen 4.5 milligrams or greater per liter, and turbidity of an average monthly reading of no more than 200 Nephelometric Turbidity Units (NTU; units used to measure sediment discharge) or less for a duration not to exceed 4 hours. to be PCEs for this species.

Primary Constituent Elements (PCEs) for the Tumbling Creek Cavesnail

Under the Act and its implementing regulations, we are required to identify the essential physical and biological features essential to the conservation of the Tumbling Creek cavesnail. The physical and biological features are the essential habitat components (PCEs) laid out in the appropriate quantity and spatial arrangement essential to the conservation of the species. Areas designated as critical habitat for the Tumbling Creek cavesnail contain only occupied areas within the species' current and historical geographic range, and contain the essential physical and biological features in sufficient quantity and arrangement to support the species' main life history functions.

Based on our current knowledge of the life history, biology, and ecology of the Tumbling Creek cavesnail and the requirements of the habitat to sustain the essential life history functions of the species, we determined that the PCEs specific to the Tumbling Creek cavesnail are:

(1) Geomorphically stable stream bottoms and banks (stable horizontal dimension and vertical profile) in order to maintain bottom features (riffles, runs, and pools) and transition zones between bottom features; to continue appropriate habitat to maintain essential riffles, runs, and pools; to promote connectivity between Tumbling Creek and its tributaries and associated springs;

(2) Instream flow regime with an average daily discharge between 0.07 and 150 cubic feet per second (cfs), inclusive of both surface runoff and groundwater sources (springs and seepages);

(3) Water quality with temperature between 55–62 °F (12.78–16.67 °C), dissolved oxygen 4.5 milligrams or greater per liter, and turbidity of an average monthly reading of no more than 200 Nephelometric Turbidity Units (NTU; units used to measure sediment discharge) for a duration not to exceed 4 hours;

(4) Bottom substrates consisting of fine gravel with coarse gravel or cobble, or bedrock with sand and gravel, with low amounts of fine sand and sediments within the interstitial spaces of the substrates; and

(5) Energy input from guano that originates mainly from gray bats that roost in the cave; guano is essential in the development of biofilm (the organic coating and bacterial layer that covers rocks in the cave stream) that cavesnails use for food.

With this proposed designation of critical habitat, we intend to conserve the physical and biological features essential to the conservation of the species, through the identification of the appropriate quantity and spatial arrangement of the PCEs sufficient to support the life history functions of the species. The area proposed as critical habitat in this rule contains one or more PCEs to provide for the main life history functions of the Tumbling Creek cavesnail.

Special Management Considerations or Protections

When designating critical habitat, we assess whether the specific areas within the geographical area occupied by the species at the time of listing contain the physical and biological features that are essential to the conservation of the species and whether those features may require special management considerations or protection.

The one unit we are proposing for designation as critical habitat will require some level of management to address the current and future threats to the physical and biological features essential to the conservation of the species. Although no portion of the proposed critical habitat unit is presently under special management or protection provided by a legally operative plan or agreement for the conservation of the Tumbling Creek cavesnail, the cave owners Tom and Cathy Aley have been actively involved in implementing numerous conservation measures that continue to contribute to the recovery of the species. Various activities in or adjacent to the critical habitat unit described in this proposed rule may affect one or more of the PCEs. For example, features in the proposed critical habitat designation may require special management due to threats associated with management of water levels on Bull Shoals Reservoir (such as increased sedimentation or bank erosion from backwater flooding); by significant changes in the existing flow regime of Tumbling Creek, its tributaries, or associated springs; by significant alteration of water quality; by significant alteration in the quantity of groundwater and alteration of spring discharge sites; by alterations to septic systems that could adversely affect the water quality of Tumbling Creek; and by other watershed and floodplain disturbances that release sediments or nutrients into the water. Other activities that may affect PCEs in the proposed critical habitat unit include those listed in the " **Effects of Critical Habitat Designation**" section below.

The designation of critical habitat does not imply that lands outside of critical habitat do not play an important role in the conservation of the Tumbling Creek cavesnail. Activities with a Federal nexus that may affect areas outside of critical habitat, such as development; road construction and

maintenance; oil, gas, and utility easements; forest and pasture management; maintenance of Bull Shoals Reservoir; and effluent discharges, are still subject to review under section 7 of the Act if they may affect the Tumbling Creek cavesnail, because Federal agencies must consider both effects to the species and effects to critical habitat independently. The Service should be consulted regarding disturbances to areas both within the proposed critical habitat units as well as areas within the recharge area of Tumbling Creek cave, including springs and seeps that contribute to the instream flow in the tributaries, especially during times when stream flows are abnormally low (during droughts), because these activities may impact the essential features of proposed critical habitat. The prohibitions of section 9 of the Act against the take of listed species also continue to apply both inside and outside of designated critical habitat.

Criteria Used to Identify Proposed Critical Habitat

As required by section 4(b) of the Act, we used the best scientific and commercial data available in determining areas within the geographical area occupied at the time of listing that contain the physical and biological features essential to the conservation of the Tumbling Creek cavesnail, and areas outside of the geographical area occupied at the time of listing that are essential for the conservation of the Tumbling Creek cavesnail. In order to determine which sites were occupied at the time of listing, we used information from surveys conducted by Greenlee (1974, pp. 9-11) and Ashley (2010, pers. comm.), data summarized in the final listing rule (67 FR 52879), the Tumbling Creek Cavesnail Recovery Plan (U.S. Fish and Wildlife Service 2003, pp. 1-13), and personal observations by cave owners Tom and Cathy Aley. Currently, occupied habitat for the species is limited and isolated to Tumbling Creek, from its emergence in Tumbling Creek Cave to its confluence with Big Creek at Schoolhouse Spring.

Following the identification of the specific locations occupied by the Tumbling Creek cavesnail, we determined the appropriate length of occupied segments of Tumbling Creek by identifying the upstream and downstream limits of these occupied sections necessary for the conservation of the species. Because Tumbling Creek is intricately linked with fractures in chert rock and associated springs and underground portions that are inaccessible to humans, we determined that currently occupied habitat would include the area from the emergence of Tumbling Creek within Tumbling Creek Cave to its confluence with Big Creek at Schoolhouse Spring. This determination was made to ensure incorporation of all potential sites of occurrence. These portions of Tumbling Creek, Owens Springs, and Schoolhouse Springs were then digitized using 7.5' topographic maps and ArcGIS to produce the critical habitat map.

We are proposing to designate as critical habitat all portions of Tumbling Creek and the underground portions of Owens and Schoolhouse Springs as occupied habitat. We have defined "occupied habitat" as those stream reaches documented at the time of listing and all portions of Tumbling Creek between its emergence in Tumbling Creek Cave and its confluence with Big Creek at Schoolhouse Spring. Although there are underground portions of Tumbling Creek that are inaccessible to humans, the entire stream length is believed to be occupied by the Tumbling Creek cavesnail; thus, the entire stream is believed to comprise the entire known range of the Tumbling Creek cavesnail. We are not proposing to designate any areas outside of those mentioned above, because the species is still believed to be a site endemic, and surveys in other nearby cave streams and springs have failed to find additional populations (U.S. Fish and Wildlife Service 2003, p. 4).

The one proposed unit contains all of the PCEs in the appropriate quantity and spatial arrangement essential to the conservation of this species and supports all life processes for the Tumbling Creek cavesnail.

Although the above ground recharge area of Tumbling Creek Cave has been estimated to be 9 miles (14.5 kilometers) (U.S. Fish and Wildlife Service 2003, p. 14) and is important to maintain the condition of cavesnail habitat, such areas do not themselves contain the physical and biological features essential to the conservation of the species.

To the best of our knowledge, there are no unoccupied areas that contain one or more of the PCEs for the Tumbling Creek cavesnail. All of the areas proposed as critical habitat for the Tumbling Creek cavesnail are currently occupied by the species and contain the PCEs. All of the areas proposed as critical habitat are also within the known historical range of the species. Therefore, we are not proposing to designate any areas outside the geographical area occupied by the species at the time of listing. We believe that the occupied areas are sufficient for the conservation of the species.

Habitat is dynamic, and species may move from one area to another over time. In particular, we recognize that climate change may cause changes in the arrangement of occupied habitat stream reaches. Climate change may lead to increased frequency and duration of droughts (Rind *et al.* 1990, p. 9983; Seager *et al.* 2007, pp. 1181-1184; Rahel and Olden 2008, p. 526). Climate warming may increase the virulence of nonnative parasites and pathogens to native species (Rahel and Olden 2008, p. 525), decrease groundwater levels (Schindler 2001, p. 22), or significantly reduce annual stream flows (Moore *et al.* 1997, p. 925). Increased drought conditions and prolonged low flows associated with climate change may favor the establishment and spread of nonnative species (Rahel and Olden 2008, pp. 526, 529-530). In the Missouri Ozarks, it is projected that stream basin discharges may be significantly impacted by synergistic effects of changes in land cover and climate change (Hu *et al.* 2005, p. 9).

The information currently available on the effects of global climate change and increasing temperatures does not make sufficiently precise estimates of the location and magnitude of the effects. Nor are we currently aware of any climate change information specific to the habitat of the Tumbling Creek cavesnail that would indicate what areas may become important to the species in the future. Nonetheless, because the Tumbling Creek cavesnail is an aquatic snail that is totally dependent upon an adequate water supply, adverse effects associated with climate change that could significantly alter the quantity and quality of Tumbling Creek could impact the species in the future. Other than Tumbling Creek, we are currently unaware of any other cave stream inhabited by the Tumbling Creek cavesnail. Therefore, we are unable to determine which additional areas, if any, may be appropriate to include in the proposed critical habitat for this species; however, we specifically request information from the public on the currently predicted effects of climate change on the Tumbling Creek cavesnail and its habitat. Additionally, we recognize that critical habitat designated at a particular point in time may not include all of the habitat areas that we may later determine are necessary for the recovery of the species, especially if future surveys are successful in documenting the species' presence in another cave stream. For these reasons,

a critical habitat designation does not signal that habitat outside the designated critical habitat area is unimportant or may not be required for recovery of the species.

Areas that are important to the conservation of the species, but are outside the critical habitat designation, will continue to be subject to conservation actions we implement under section 7(a)(1) of the Act. They are also subject to the regulatory protections afforded by the section 7(a)(2) jeopardy standard, as determined based on the best available scientific information at the time of the agency action. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans (HCPs), section 7 consultations, or other species conservation planning efforts if new information available at the time of these planning efforts calls for a different outcome.

Proposed Critical Habitat Designation

We are proposing to designate one unit, totaling approximately 25 ac (10.12 ha), as critical habitat for the Tumbling Creek cavesnail. The critical habitat unit described below constitutes our best assessment of areas that currently meet the definition of critical habitat for the Tumbling Creek cavesnail.

We present a brief description for the one unit and reasons why it meets the definition of critical habitat below. The proposed critical habitat unit includes the stream channel of Tumbling Creek to the confluence of Schoolhouse Spring at Big Creek. For the one stream reach proposed as a critical habitat, the upstream and downstream boundaries are described generally below; more precise descriptions are provided in the Proposed Regulation Promulgation at the end of this proposed rule.

Unit 1: Tumbling Creek, Taney County, Missouri

Unit 1 includes the entire length of Tumbling Creek, from its emergence in Tumbling Creek Cave (SE of the intersection of Routes 160 and 125) downstream to its confluence at Big Creek at Schoolhouse Spring, encompassing 25 ac (10.12 ha). This section of Tumbling Creek and associated springs are under private ownership by Tom and Cathy Aley of the Ozark Underground Laboratory and contain all the PCEs for the Tumbling Creek cavesnail.

Threats that may require special management and protection of PCEs include: Actions associated with the management of water levels of Bull Shoals Reservoir (such as increased sedimentation or bank erosion on the terminal portions of Tumbling Creek from backwater flooding); significant changes in the existing flow regime of Tumbling Creek, its tributaries or associated springs; significant alteration of water quality; significant alteration in the quantity of groundwater and spring discharge sites; alterations to septic systems that could adversely affect the quality of Tumbling Creek; other watershed and floodplain disturbances that release sediments or nutrients into the water; or the accidental introduction of nonnative aquatic species into the stream due to backwater flooding of Bull Shoals Reservoir into Tumbling Creek.

Effects of Critical Habitat Designation

Section 7 Consultation

Section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that actions they fund, authorize, or carry out are not likely to destroy or adversely modify critical habitat. Decisions by the Fifth and Ninth Circuits Courts of Appeals have invalidated our definition of "destruction or adverse modification" (50 CFR 402.02) (see *Gifford Pinchot Task Force* v. *U.S. Fish and Wildlife Service*, 378 F.3d 1059 (9th Cir. 2004) and *Sierra Club* v. *U.S. Fish and Wildlife Service*, 245 F.3d 434, 442 (5th Cir. 2001)), and we do not rely on this regulatory definition when analyzing whether an action is likely to destroy or adversely modify critical habitat. Under the statutory provisions of the Act, we determine destruction or adverse modification on the basis of whether, with implementation of the proposed Federal action, the affected critical habitat would remain functional (or retain the current ability for the PCEs to be functionally established) to serve its intended conservation role for the species.

Section 7(a)(4) of the Act requires Federal agencies to confer with the Service on any action that is likely to jeopardize the continued existence of a species proposed for listing or result in destruction or adverse modification of proposed critical habitat. Conference reports provide conservation recommendations to assist the agency in eliminating conflicts that may be caused by the proposed action. We may issue a formal conference report if requested by a Federal agency. Formal conference reports on proposed critical habitat contain an opinion that is prepared according to 50 CFR 402.14, as if critical habitat were designated. We may adopt the formal conference report as the biological opinion when the critical habitat is designated, if no substantial new information or changes in the action alter the content of the opinion (see 50 CFR 402.10(d)). The conservation recommendations in a conference report or opinion are strictly advisory.

If a species is listed or critical habitat is designated, section 7(a)(2) of the Act requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of the species or to destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. As a result of this consultation, we document compliance with the requirements of section 7(a)(2) through our issuance of:

- A concurrence letter for Federal actions that may affect, but are not likely to adversely affect, listed species or critical habitat; or
- A biological opinion for Federal actions that may affect, and are likely to adversely affect, listed species or critical habitat.

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

- Can be implemented in a manner consistent with the intended purpose of the action,
- Can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction,
- Are economically and technologically feasible, and
- Would, in the Director's opinion, avoid jeopardizing the continued existence of the listed species or destroying or adversely modifying critical habitat.

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

Regulations at 50 CFR 402.16 require Federal agencies to reinitiate

consultation on previously reviewed actions in instances where we have listed a new species or subsequently designated critical habitat that may be affected and the Federal agency has retained discretionary involvement or control over the action (or the agency's discretionary involvement or control is authorized by law). Consequently, Federal agencies may sometimes need to request to reinitiate consultation with us on actions for which formal consultation has been completed, if those actions with discretionary involvement or control may affect subsequently listed species or designated critical habitat.

Federal activities that may affect the Tumbling Creek cavesnail or its designated critical habitat will require section 7 consultation under the Act. Activities on State, Tribal, local, or private lands requiring a Federal permit (such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or a permit from us under section 10 of the Act or involving some other Federal action (such as funding from the Federal Highway Administration, Federal Aviation Administration, or the Federal Emergency Management Agency)) are subject to the section 7 consultation process. Federal actions not affecting listed species or critical habitat, and actions on State, Tribal, local, or private lands that are not federally funded, authorized, or permitted, do not require section 7 consultation.

Application of the "Adverse Modification" Standard

The key factor related to the adverse modification determination is whether, with implementation of the proposed Federal action, the affected critical habitat would continue to serve its intended conservation role for the species, or would retain its current ability for the essential features to be functionally established. Activities that may destroy or adversely modify critical habitat are those that alter the essential features to an extent that appreciably reduces the conservation value of critical habitat for the Tumbling Creek cavesnail.

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

Activities that, when carried out, funded, or authorized by a Federal agency, may affect critical habitat and therefore result in consultation for the Tumbling Creek cavesnail include, but are not limited to:

- Actions that would cause an increase in sedimentation to areas of Tumbling Creek, its tributaries, and associated springs occupied by the cavesnail. Such activities could include, but are not limited to, alteration or maintenance of pool levels on Bull Shoals Reservoir that causes backwater flooding of occupied habitat, or any discharge of fill materials. Such activities occurring within the recharge area of Tumbling Creek Cave may also impact the proposed critical habitat. These activities could eliminate or reduce habitats necessary for the growth and reproduction of the species by causing excessive sedimentation and burial of the species or their habitats or eliminate interstitial spaces needed by cavesnails.
- Actions that would significantly alter the existing flow regime of Tumbling Creek, its tributaries, and associated springs occupied by the cavesnail. Such activities could include, but are not limited to, alteration or maintenance of pool levels on Bull Shoals Reservoir that significantly reduces the movement of water through occupied cavesnail habitat. Such activities occurring within the recharge area of Tumbling Creek Cave may also impact the proposed critical habitat.
- Actions that would significantly alter water chemistry or water quality (for example, changes to temperature or pH, introduced contaminants, excess nutrients) in Tumbling Creek, its tributaries, and associated springs. Such activities could include, but are not limited to, the release of chemicals, biological pollutants, or heated effluents that are then introduced into Tumbling Creek, its tributaries, and associated springs occupied by the cavesnail through backwater flooding. Such activities occurring within the recharge area of Tumbling Creek Cave may also impact the proposed critical habitat. These activities could alter water conditions that are beyond the tolerances of the species and result in direct or cumulative adverse effects on the species and its life cycle. These activities could eliminate or reduce habitats necessary for the growth and reproduction of the species by causing eutrophication leading to excessive filamentous algal growth. Excessive filamentous algal growth can cause extreme decreases in nighttime dissolved oxygen levels through vegetation respiration, and cover the bottom substrates and the interstitial spaces needed by cavesnails.
- Actions that could accidentally introduce nonnative species into Tumbling Creek, its tributaries, and associated springs occupied by the cavesnail via backwater flooding from Bull Shoals Reservoir. Such activities occurring within the recharge area of Tumbling Creek Cave may also impact the proposed critical habitat. These activities could introduce a potential predator or outcompeting aquatic invertebrate (for example, another species of cavesnail or troglobitic invertebrate) or aquatic parasite.
- Actions that could significantly alter the prey base of bats. Energy input from bat guano is essential to the conservation of Tumbling Creek cavesnail, such that adverse impacts to gray bat populations in Tumbling Creek Cave could indirectly impact the cavesnail. Such activities could include, but are not limited to, alteration or maintenance of pool levels on Bull Shoals Reservoir that significantly reduces the life cycles of the aquatic insects that are needed by gray bats for food and the potential use of insecticides for mosquito control.

Exemptions

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

The National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108-136) amended the Act to limit areas eligible for designation as critical habitat. Specifically, section 4(a)(3)(B)(i) of the Act (16 U.S.C. 1533(a)(3)(B)(i)) now provides: "The Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation."

There are no Department of Defense lands within the proposed critical habitat designation for the Tumbling Creek cavesnail. As such, we are not exempting any lands owned or managed by the Department of Defense from this designation of critical habitat for the Tumbling Creek cavesnail.

Exclusions

Application of Section 4(b)(2) of the Act

Section 4(b)(2) of the Act states that the Secretary shall designate or 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 impacts of specifying

any particular area as critical habitat. 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 and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species. In making that determination, the legislative history is clear that the Secretary has broad discretion regarding which factor(s) to use and how much weight to give to any factor.

Under section 4(b)(2) of the Act, we may exclude an area from designated critical habitat based on economic impacts, impacts on national security, or any other relevant impacts. In considering whether to exclude a particular area from the designation, we must identify the benefits of including the area in the designation, identify the benefits of excluding the area from the designation, and determine whether the benefits of exclusion outweigh the benefits of inclusion. If based on this analysis, we determine that the benefits of exclusion outweigh the benefits of inclusion, we can exclude the area only if such exclusion would not result in the extinction of the species.

Economic Impacts

Under section 4(b)(2) of the Act, we consider the economic impacts of specifying any particular area as critical habitat. In order to consider economic impacts, we are preparing an analysis of the economic impacts of the proposed critical habitat designation and related factors.

We will announce the availability of the draft economic analysis as soon as it is completed, at which time we will seek public review and comment. At that time, copies of the draft economic analysis will be available for download from the Internet at the Federal eRulemaking Portal: *http://www.regulations.gov*, or by contacting the Columbia Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**). During the development of a final designation, we will consider economic impacts, public comments, and other new information, and as an outcome of our analysis of this information, we may exclude areas from the final critical habitat designation under section 4(b)(2) of the Act and our implementing regulations at 50 CFR 424.19.

National Security Impacts

Under section 4(b)(2) of the Act, we consider whether there are lands owned or managed by the Department of Defense (DOD) where a national security impact might exist. In preparing this proposal, we have determined that the lands within the proposed designation of critical habitat for the Tumbling Creek cavesnail are not owned or managed by the DOD, and we therefore anticipate no impact to national security. Therefore, there are no areas proposed for exclusion based on impacts to national security.

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 landowners have developed any conservation plans or other management plans for the area, or whether there are conservation partnerships that would be encouraged by designation of lands for, or exclusion of lands from, critical habitat. In addition, we look at any Tribal issues, and consider the government-to-government relationship of the United States with tribal entities. We also consider any social impacts that might occur because of the designation.

In preparing this proposed rule, we have determined that there are currently no conservation plans or other management plans for the Tumbling Creek cavesnail, and the proposed designation does not include any Tribal lands or trust resources. We anticipate no impact to Tribal lands, partnerships, or management plans from this proposed critical habitat designation. There are no areas proposed for exclusion from this proposed designation based on other relevant impacts.

Notwithstanding these decisions, as stated in the **Public Comments** section above, we are seeking specific comments on whether we should exclude any areas proposed for designation under section 4(b)(2) of the Act from the final designation.

Peer Review

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

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

Public Hearings

The Act provides for one or more public hearings on this proposal, if requested. Requests for public hearings must be made in writing within 45 days of the publication of this proposal (see **DATES** and **ADDRESSES** sections). We will schedule public hearings on this proposal, if any are requested, and announce the dates, times, and places of those hearings in the **Federal Register** and local newspapers at least 15 days before the first hearing.

Required Determinations

Regulatory Planning and Review—Executive Order 12866

The Office of Management and Budget (OMB) has determined that this rule is not significant under Executive Order 12866 (E.O. 12866). OMB bases its determination upon the following four criteria:

(a) Whether the rule will have an annual effect of $100 million or more on the economy or adversely affect an economic sector, productivity, jobs, the environment, or other units of the government.

(b) Whether the rule will create inconsistencies with other Federal agencies' actions.

(c) Whether the rule will materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients.

(d) Whether the rule raises novel legal or policy issues.

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 (SBREFA) of 1996), whenever an agency must 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 (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 RFA to

require Federal agencies to provide a statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities.

At this time, we lack the specific information necessary to provide an adequate factual basis for determining the potential incremental regulatory effects of the designation of critical habitat for the Tumbling Creek cavesnail to either develop the required RFA finding or provide the necessary certification statement that the designation will not have a significant impact on a substantial number of small business entities. On the basis of the development of our proposal, we have identified certain sectors and activities that may potentially be affected by a designation of critical habitat for the Tumbling Creek cavesnail. These sectors include industrial development and urbanization along with the accompanying infrastructure associated with such projects such as road, stormwater drainage, and bridge and culvert construction and maintenance. We recognize that not all of these sectors may qualify as small business entities. However, while recognizing that these sectors and activities may be affected by this designation, we are collecting information and initiating our analysis to determine (1) Which of these sectors or activities are or involve small business entities and (2) to what extent the effects are related to the Tumbling Creek cavesnail's being listed as an endangered species under the Act (baseline effects) or whether the effects are attributable to the designation of critical habitat (incremental). We believe that the potential incremental effects resulting from a designation will be small. As a consequence, following an initial evaluation of the information available to us, we do not believe that there will be a significant impact on a substantial number of small business entities resulting from this designation of critical habitat for the Tumbling Creek cavesnail. However, we will be conducting a thorough analysis to determine if this may in fact be the case. As such, we are requesting any specific economic information related to small business entities that may be affected by this designation and how the designation may impact their business. Therefore, we defer our RFA finding on this proposal designation until completion of the draft economic analysis prepared under section 4(b)(2) of the Act and E.O. 12866.

As discussed above, this draft economic analysis will provide the required factual basis for the RFA finding. Upon its completion, we will announce availability of the draft economic analysis of the proposed designation in the **Federal Register**, receive comments on it, and also reopen the public comment period for the proposed designation. We will include with this announcement, as appropriate, an initial regulatory flexibility analysis or a certification that the rule will not have a significant economic impact on a substantial number of small entities accompanied by the factual basis for that determination. We have concluded that deferring the RFA finding until completion of the draft economic analysis is necessary to meet the purposes and requirements of the RFA. Deferring the RFA finding in this manner will ensure that we make a sufficiently informed determination based on adequate economic information and provide the necessary opportunity for public comment.

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:

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

The designation of critical habitat does not impose a legally binding duty on non-Federal government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions do not jeopardize the continued existence of the species, or destroy or adversely modify critical habitat under section 7 of the Act. 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 listing these species or designating critical habitat shift the costs of the large entitlement programs listed above on to State governments.

(b) We do not believe that this rule would significantly or uniquely affect small governments because the Tumbling Creek cavesnail primarily occurs in a privately owned cave stream. As such, a Small Government Agency Plan is not required. However, we will further evaluate this issue as we conduct our economic analysis and review and revise this assessment as warranted.

Takings—Executive Order 12630

In accordance with E. O. 12630 ("Government Actions and Interference with Constitutionally Protected Private Property Rights"), we have analyzed the potential takings implications of designating critical habitat for the Tumbling Creek cavesnail in a takings implications assessment. The takings implications assessment concludes that this designation of critical habitat for the Tumbling Creek cavesnail 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), the rule does not have significant Federalism effects. A Federalism assessment is not required. In keeping with Department of the

Interior and Department of Commerce policy, we requested information from, and coordinated development of this proposed critical habitat designation with, appropriate State resource agencies in Missouri. The critical habitat designation may have some benefit to this government in that the areas that contain the features essential to the conservation of the species are more clearly defined, and the habitat features essential to the conservation of the species are specifically identified. While the identification of the specific areas as critical habitat does not alter where and what federally sponsored activities may occur, it may assist these local governments in long-range planning (rather than waiting for case-by-case section 7 consultations to occur).

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

Civil Justice Reform—Executive Order 12988

In accordance with E.O. 12988 (Civil Justice Reform), the Office of the Solicitor has determined that the rule does not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the Order. We have proposed designating critical habitat in accordance with the provisions of the Act. This proposed rule uses standard property descriptions and identifies the PCEs within the designated areas to assist the public in understanding the habitat needs of the Tumbling Creek cavesnail.

Paperwork Reduction Act of 1995

This rule does not contain any new collections of information that require approval by OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act (NEPA)

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 as defined by 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), cert. denied 516 U.S. 1042 (1996)).

Clarity of the Rule

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

(a) Be logically organized;

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

(c) Use clear language rather than jargon;

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

(e) Use lists and tables wherever possible.

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

Government-to-Government Relationship with Tribes

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

We have determined that there are no tribal lands occupied at the time of listing that contain the features essential for the conservation of the Tumbling Creek cavesnail, and no tribal lands that are unoccupied areas that are essential for the conservation of the species. Therefore, we have not proposed designation of critical habitat for the Tumbling Creek cavesnail on Tribal lands.

Energy Supply, Distribution, or Use

On May 18, 2001, the President issued an Executive Order (E.O. 13211; Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) on regulations that significantly affect energy supply, distribution, and use. E.O. 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. We do not expect this rule to significantly affect energy supplies, distribution, or use. The proposed unit is remote from energy supply, distribution, or use activities. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required. However, we will further evaluate this issue as we conduct our economic analysis, and review and revise this assessment as warranted.

References Cited

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

Authors

The primary authors of this document are the staff members of the Columbia Fish and Wildlife Office.

List of Subjects in 50 CFR Part 17

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

Proposed Regulation Promulgation

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

PART 17—[AMENDED]

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

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

2. In § 17.11(h), revise the entry for "Cavesnail, Tumbling Creek" under "SNAILS" in the List of Endangered and Threatened Wildlife to read as follows:

§ 17.11 Endangered and threatened wildlife.

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(h) * * *

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
*	*	*	*	*		*	*
SNAILS							
*	*	*	*	*		*	*
Cavesnail, Tumbling Creek	*Antrobia culveri*	U.S.A. (MO)	NA	E	731	17.95(f)	NA
*	*	*	*	*		*	*

3. In § 17.95(f), add an entry for "Tumbling Creek cavesnail (*Antrobia culveri*)" in the same alphabetical order as the species appears in the table at § 17.11(h), to read as follows:

§ 17.95 Critical habitat—fish and wildlife.

* * * * *

(f) *Clams and Snails.*

* * * * *

Tumbling Creek cavesnail (*Antrobia culveri*)

(1) The critical habitat unit is depicted for Taney County, Missouri, on the map below.

(2) The primary constituent elements of critical habitat for the Tumbling Creek cavesnail are:

(i) Geomorphically stable stream bottoms and banks (stable horizontal dimension and vertical profile) in order to maintain bottom features (riffles, runs, and pools) and transition zones between bottom features; to continue appropriate habitat to maintain essential riffles, runs, and pools; to promote connectivity between Tumbling Creek and its tributaries and associated springs; and to maintain gene flow throughout the population;

(ii) Instream flow regime with an average daily discharge between 0.07 and 150 cubic feet per second (cfs), inclusive of both surface runoff and groundwater sources (springs and seepages);

(iii) Water quality with temperature between 55–62 °F (12.78–16.67°C), dissolved oxygen 4.5 milligrams or greater per liter, and turbidity of an average monthly reading of no more than 200 Nephelometric Turbidity Units (NTU; units used to measure sediment discharge) for a duration not to exceed 4 hours;

(iv) Bottom substrates consisting of fine gravel with coarse gravel or cobble, or bedrock with sand and gravel, with low amounts of fine sand and sediments within the interstitial spaces of the substrates; and

(v) Energy input from guano that originates mainly from gray bats that roost in the cave; guano is essential in the development of biofilm (the organic coating and bacterial layer that covers rocks in the cave stream) that cavesnails use for food.

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

(4) *Critical habitat map unit.* Data layers defining the map unit were created using 7.5' topographic quadrangle maps and ArcGIS (version 9.3.1) mapping software.

(5) Tumbling Creek Cavesnail Critical Habitat Unit: Tumbling Creek, Taney County, Missouri.

(i) [Reserved for textual description of Tumbling Creek Cavesnail Critical Habitat Unit]

(ii) *Note*: Map of Tumbling Creek Cavesnail Critical Habitat Unit follows:

[insert Map: Tumbling Creek Cavesnail Critical Habitat Unit]

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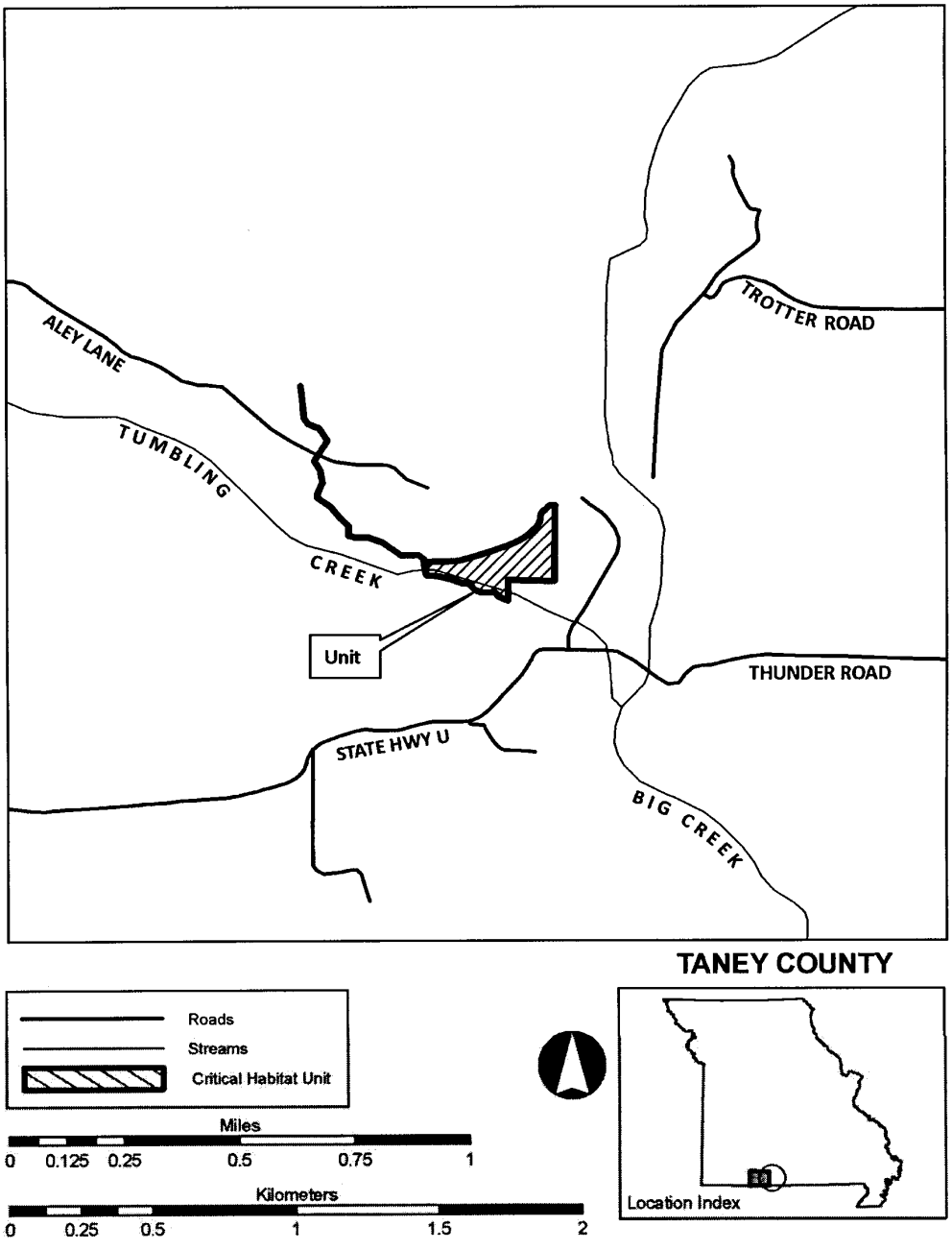
Tumbling Creek Cavesnail Critical Habitat Unit



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Dated: June 15, 2010

Thomas L. Strickland,

Assistant Secretary for Fish and Wildlife and Parks.

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