

L Street NE, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the Petitioner as follows: M. Scott Johnson, Esq., Smithwick & Belendiuk, PC, 5028 Wisconsin Avenue NW, Washington, DC 20016.

FOR FURTHER INFORMATION CONTACT: Joyce Bernstein, Media Bureau, at (202) 418–1647; or Joyce Bernstein, Media Bureau, at Joyce.Bernstein@fcc.gov.

SUPPLEMENTARY INFORMATION: In support of its channel allotment request, the Petitioner states that Vernon is a community deserving of a new television broadcast service. According to the Petitioner, Vernon (pop. 5,551/2010 Census) has a mayor, Board of Registrars, Circuit Clerk, Judge Probate, Sheriff, and six-member City Council. The community also has police, fire, and utility departments, as well as a public library, regional hospital, airport, numerous businesses and places of worship, and its own Zip Code. In addition, the proposed allotment would allow the provision of noncommercial educational television service to areas not currently served by Alabama Educational Television Commission (AETC). The Petitioner states its intention to file an application for channel *4, if allotted, and take all necessary steps to obtain a construction permit. The Commission concludes the request to amend the Table of Allotments warrants consideration. The Petitioner’s proposal would result in a first local service to Vernon consistent with the Commission’s television allotment policies. Channel *4 can be allotted to Vernon, consistent with the minimum geographic spacing requirements for new digital television (DTV) allotments in § 73.623(d) of the Commission’s rules, at 33°54’44.26” N and 87°48’06.20” W. In addition, the allotment point complies with § 73.625(a)(1) of the rules as the entire community of Vernon is encompassed by the 35 dBμ contour.

This is a synopsis of the Commission’s *Notice of Proposed Rulemaking*, MB Docket No. 22–30; RM–11916; DA 22–30, adopted January 20, 2022, and released January 20, 2022. The full text of this document is available for download at <https://www.fcc.gov/edocs>. To request materials in accessible formats (braille, large print, computer diskettes, or audio recordings), please send an email to FCC504@fcc.gov or call the Consumer & Government Affairs Bureau at (202) 418–0530 (VOICE), (202) 418–0432 (TTY).

This document does not contain information collection requirements

subject to the Paperwork Reduction Act of 1995, Public Law 104–13. In addition, therefore, it does not contain any proposed information collection burden “for small business concerns with fewer than 25 employees,” pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4). Provisions of the Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, do not apply to this proceeding.

Members of the public should note that all *ex parte* contacts are prohibited from the time a notice of proposed rulemaking is issued to the time the matter is no longer subject to Commission consideration or court review, *see* 47 CFR 1.1208. There are, however, exceptions to this prohibition, which can be found in § 1.1204(a) of the Commission’s rules, 47 CFR 1.1204(a).

See §§ 1.415 and 1.420 of the Commission’s rules for information regarding the proper filing procedures for comments, 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Television.
Federal Communications Commission.
Thomas Horan,
Chief of Staff, Media Bureau.

Proposed Rule

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

■ 1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 155, 301, 303, 307, 309, 310, 334, 336, 339.

■ 2. In § 73.622(j), amend the Table of Allotments under Alabama by adding an entry for Vernon in alphabetical order to read as follows:

§ 73.622 Digital television table of allotments.

| | | | | |
|--------|----------------|---|-------------|---|
| * | * | * | * | * |
| (j) | * | * | * | |
| | Community | | Channel No. | |
| | ALABAMA | | | |
| | * | * | * | * |
| Vernon | | | *4 | |
| | * | * | * | * |

[FR Doc. 2022–02212 Filed 2–2–22; 8:45 am]
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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R8–ES–2020–0017; FF09E21000 FXES1111090FEDR 223]

RIN 1018–BF94

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Tiehm’s Buckwheat

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 Tiehm’s buckwheat (*Eriogonum tiehmii*), which the Service has proposed to list as endangered under the Endangered Species Act of 1973, as amended (Act). In total, we propose to designate approximately 910 acres (368 hectares) in one unit in Nevada as critical habitat for Tiehm’s buckwheat. We also announce the availability of a draft economic analysis of the proposed critical habitat designation.

DATES: We will accept comments received or postmarked on or before April 4, 2022. Comments submitted electronically using the Federal eRulemaking Portal (*see ADDRESSES, below*) must be received by 11:59 p.m. Eastern Time on the closing date. We must receive requests for a public hearing, in writing, at the address shown in **FOR FURTHER INFORMATION CONTACT** by March 21, 2022.

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

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

(2) *By hard copy:* Submit by U.S. mail to: Public Comments Processing, Attn: FWS–R8–ES–2020–0017, U.S. Fish and Wildlife Service, MS: PRB/3W, 5275 Leesburg Pike, Falls Church, VA 22041–3803.

We request that you send comments only by the methods described above.

We will post all comments on <https://www.regulations.gov>. This generally means that we will post any personal information you provide us (see Information Requested, below, for more information).

Availability of supporting materials: The coordinates or plot points or both from which the critical habitat maps are generated are included in the decision file and are available at <https://www.regulations.gov> under Docket No. FWS-R8-ES-2020-0017. Any additional supporting information that we developed for this critical habitat designation will be available at <https://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT:

Marc Jackson, Field Supervisor, U.S. Fish and Wildlife Service, Reno Ecological Services Field Office, 1340 Financial Boulevard, Suite 234, Reno, NV 89502; telephone 775-861-6337. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service at 800-877-8339.

SUPPLEMENTARY INFORMATION:

Executive Summary

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

What this document does. This document proposes to designate critical habitat for Tiehm's buckwheat, which the Service has proposed to list as an endangered species under the Act, in a portion of Esmeralda County, Nevada.

The basis for our action. Under section 4(a)(3) of the Act, if we determine that a species is an endangered or threatened species we must, to the maximum extent prudent and determinable, designate critical habitat. Section 3(5)(A) of the Act defines critical habitat as (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 4 of the Act, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protections; and (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 4 of the Act, upon a determination by the Secretary that such areas are essential for the conservation of the species. Section 4(b)(2) of the Act states that the

Secretary must make the designation on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impacts of specifying any particular area as critical habitat. The Secretary may exclude an area from the critical habitat designation if we determine that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless we determine, based on the best scientific data available, that the failure to designate such area will result in the extinction of the species.

Abbreviations and Acronyms Used in This Proposed Rule

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

Act = Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*), as amended
 BIA = Bureau of Indian Affairs
 BLM = Bureau of Land Management
 CBD = Center for Biological Diversity
 CFR = Code of Federal Regulations
 DEA = draft economic analysis
 DoD = Department of Defense
 FLPMA = Federal Land Policy and Management Act (43 U.S.C. 1701 *et seq.*)
 FR = Federal Register
 HCP = habitat conservation plan
 IEC = Industrial Economics, Incorporated
 IEM = incremental effects memorandum
 INRMP = integrated natural resources management plan
 Ioneer = Ioneer USA Corporation
 NDF = Nevada Division of Forestry
 NDNH = Nevada Division of Natural Heritage
 NDOW = Nevada Department of Wildlife
 NEPA = National Environmental Policy Act (42 U.S.C. 4321 *et seq.*)
 RMP = resource management plan
 Service = U.S. Fish and Wildlife Service
 SSA = species status assessment
 UNR = University of Nevada, Reno

Information Requested

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

We particularly seek comments concerning:

(1) The reasons why we should or should not designate habitat as "critical habitat" under section 4 of the Act (16 U.S.C. 1531 *et seq.*), including information to inform the following factors that the regulations identify as

reasons why designation of critical habitat may be not prudent:

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

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

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

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

(2) Specific information on:

(a) The amount and distribution of habitat for Tiehm's buckwheat;

(b) What areas, that were occupied at the time of proposed listing (86 FR 55775; October 7, 2021) and that contain the physical and biological feature essential to the conservation of the species and which may require special management considerations or protection, should be included in the designation and why;

(c) Any additional areas occurring within the range of the species (Esmeralda County, Nevada), that should be included in the designation because they (1) are occupied at the time of listing and contain the physical or biological features that are essential to the conservation of the species and that may require special management considerations, or (2) are unoccupied at the time of listing and are essential for the conservation of the species;

(d) Special management considerations or protections that may be needed in critical habitat areas we are proposing; and

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

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

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

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

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

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

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

(6) Information on the extent to which the description of probable economic impacts in the draft economic analysis (DEA) is a reasonable estimate of the likely economic impacts and any applicable additional information.

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

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

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

(c) Who holds or manages the land;

(d) What management activities are conducted;

(e) What land uses are allowable; and

(f) If management activities are beneficial to Tiehm's buckwheat and its habitat.

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

Please include sufficient information with your submission (such as scientific journal articles or other publications) to allow us to verify any scientific or commercial information you include. If you request the exclusion of any areas from the final designation, please provide credible information regarding

the existence of a meaningful economic or other relevant impact supporting the benefit of exclusion of that particular area. Also, please note that submissions merely stating support for, or opposition to, the action under consideration without providing supporting information, although noted, will not be considered in making a determination, as section 4(b)(2) of the Act directs that the Secretary shall designate critical habitat on the basis of the best scientific information available.

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

If you submit information via <https://www.regulations.gov>, your entire submission—including any personal identifying information—will be posted on the website. If your submission is made via a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on <https://www.regulations.gov>.

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

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

Public Hearing

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

website, in addition to the **Federal Register**. The use of these virtual public hearings is consistent with our regulations at 50 CFR 424.16(c)(3).

Previous Federal Actions

It is our intent to discuss only those topics directly relevant to the designation of critical habitat for Tiehm's buckwheat in this document. For more information on the species, general information about Tiehm's buckwheat habitat, and previous Federal actions associated with listing Tiehm's buckwheat, refer to the 12-month finding published in the **Federal Register** on June 4, 2021 (86 FR 29975), the proposed listing rule published in the **Federal Register** on October 7, 2021 (86 FR 55775), and associated supporting documents available online at <https://www.regulations.gov> under Docket No. FWS-R8-ES-2020-0017.

Supporting Documents

The Service prepared a species status assessment (SSA) report (Service 2021a, entire), 12-month finding (86 FR 29975; June 4, 2021), and proposed listing rule (86 FR 55775; October 7, 2021) for Tiehm's buckwheat. The science provided in the SSA report, 12-month finding, and the proposed listing rule is the basis for this proposed critical habitat rule. The SSA report, 12-month finding, and proposed listing rule represent a compilation of the best scientific and commercial data available regarding a full status assessment of the species, including past, present, and future impacts (both negative and beneficial) affecting the species. The SSA report underwent independent peer review by scientists with expertise in botany, rare plant conservation, and plant ecology. The Service also sent the SSA report to three partner agencies, the Nevada Division of Forestry (NDF), the Nevada Division of Natural Heritage (NDNH), and the Bureau of Land Management (BLM), for review. We received comments from NDNH and BLM. Comments we received during peer and partner review were considered and incorporated into our SSA report.

Additionally, a team of Service biologists, in consultation with other species experts, collected and analyzed the best available information (including the information presented in the SSA report and proposed listing rule) to support this proposed critical habitat designation. As such, the science used and presented in this proposed rule represents a compilation of the best scientific information available.

In accordance with our joint policy on peer review published in the **Federal**

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

Background

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

(1) The specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 4 of 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 in accordance with the provisions of section 4 of the Act, 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). Additionally, our regulations at 50 CFR 424.02 define the word "habitat," for the purposes of designating critical habitat only, as the abiotic and biotic setting that currently or periodically contains the resources and conditions necessary to support one or more life processes of a 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 pursuant to the Act are no longer necessary.

Critical habitat receives protection under section 7 of the Act through the requirement that Federal agencies

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

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

Under the second prong of the Act's definition of critical habitat, we can designate critical habitat in areas outside the geographical area occupied

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

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

When we are determining which areas should be designated as critical habitat, our primary source of information is generally the information from an SSA report, listing rule, and other information developed during the listing process for the species. Additional information sources may include any generalized conservation strategy, criteria, or outline that may have been developed for the species; the recovery plan for the species, if one has been developed; articles in peer-reviewed journals; conservation plans developed by States and counties; scientific status surveys and studies; biological assessments; other unpublished materials; or experts' opinions or personal knowledge.

Habitat is dynamic, and species may move from one area to another over time. We recognize that critical habitat

designated at a particular point in time may not include all of the habitat areas that we may later determine are necessary for the recovery of the species. For these reasons, a critical habitat designation does not signal that habitat outside the designated area is unimportant or may not be needed for recovery of the species. Areas that are important to the conservation of the species, both inside and outside the critical habitat designation, may continue to be subject to: (1) Conservation actions implemented under section 7(a)(1) of the Act; (2) regulatory protections afforded by the requirement in section 7(a)(2) of the Act for Federal agencies to ensure their actions are not likely to jeopardize the continued existence of any endangered or threatened species; and (3) the prohibitions found in section 9 of the Act. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. These protections and conservation tools will continue to contribute to recovery of the species. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans (HCPs), or other species conservation planning efforts if new information available at the time of those planning efforts calls for a different outcome (*i.e.*, if new information sufficiently justifies the proposed conservation effort).

Prudency Determination

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

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

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

consultations under section 7(a)(2) of the Act;

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

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

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

There is currently no imminent threat of overutilization for commercial, recreational, scientific, or educational purposes (see 16 U.S.C. 1533(a)(1)(B)) identified for Tiehm's buckwheat, and identification and mapping of critical habitat is not expected to initiate any such threat. Threats of illegal collection or other human activity are not expected to increase due to the identification of critical habitat. Habitat impacts are a threat to the species, as noted in the proposed listing determination for Tiehm's buckwheat (86 FR 55775; October 7, 2021), and these impacts are from causes that can be addressed through management actions resulting from consultations under section 7(a)(2) of the Act. The species occurs solely within the United States, and available habitat, particularly those areas that meet the definition of critical habitat, provides significant conservation value.

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

Critical Habitat Determinability

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

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

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

When critical habitat is not determinable, the Act allows the Service

an additional year to publish a critical habitat designation (16 U.S.C. 1533(b)(6)(C)(ii)).

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

Physical or Biological Features Essential to the Conservation of the Species

In accordance with section 3(5)(A)(i) of the Act and regulations at 50 CFR 424.12(b), in determining which areas we will designate critical habitat from within the geographical area occupied by the species at the time of listing, we consider the physical or biological features that are essential to the conservation of the species and that may require special management considerations or protection.

The regulations at 50 CFR 424.02 define "physical or biological features essential to the conservation of the species" as the features that occur in specific areas and that are essential to support the life-history needs of the species, including, but not limited to, water characteristics, soil type, geological features, sites, prey, vegetation, symbiotic species, or other features. A feature may be a single habitat characteristic or a more complex combination of habitat characteristics. Features may include habitat characteristics that support ephemeral or dynamic habitat conditions. Features may also be expressed in terms relating to principles of conservation biology, such as patch size, distribution distances, and connectivity. For example, physical features essential to the conservation of the species might include gravel of a particular size required for spawning, alkali soil for seed germination, protective cover for migration, or susceptibility to flooding or fire that maintains necessary early-successional habitat characteristics. Biological features might include prey species, forage grasses, specific kinds or ages of trees for roosting or nesting, symbiotic fungi, or a particular level of nonnative species consistent with conservation needs of the listed species. The features may also be combinations of habitat characteristics and may encompass the relationship between characteristics or the necessary amount of a characteristic essential to support the life history of the species.

In considering whether features are essential to the conservation of the

species, the Service may consider an appropriate quality, quantity, and spatial and temporal arrangement of habitat characteristics in the context of the life-history needs, condition, and status of the species. These characteristics include, but are not limited to: (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.

Using the species' habitat, ecology, and life history, which are summarized below and are described more fully in the proposed listing rule (86 FR 55775; October 7, 2021) and the SSA report (Service 2021a, entire) that was developed to supplement the proposed listing rule, which are available at <https://www.regulations.gov> under Docket No. FWS-R8-ES-2020-0017, we considered the following habitat characteristics to derive the specific physical or biological features essential for the conservation of Tiehm's buckwheat.

Habitat Characteristics

Tiehm's buckwheat occurs between 5,906 and 6,234 feet (ft) (1,800 and 1,900 meters (m)) in elevation and on all aspects with slopes ranging from 0 to 50 degrees (Ioneer 2020a, p. 5; Morefield 1995, p. 11). The species occurs on dry, upland sites, subject only to occasional saturation by rain and snow, and is not found in association with free surface or subsurface waters (Morefield 1995, p. 11). Tiehm's buckwheat dominates the sparsely vegetated community in which it occurs, resulting in an open plant community with low plant cover and stature (Morefield 1995, p. 12). The vegetation varies from pure stands of Tiehm's buckwheat to sparse associations with a few other low-growing herbs and grass species, suggesting the species is not shade-tolerant and requires direct sunlight. The most common associates of Tiehm's buckwheat are species found in salt desert shrubland communities such as shadscale saltbush (*Atriplex confertifolia*), James' galleta (*Hilaria jamesii*), and alkali sacaton (*Sporobolus airoides*) (Morefield 1995, p. 12).

Like most terrestrial plants, Tiehm's buckwheat requires soil for physical support and as a source of nutrients and water. Tiehm's buckwheat is restricted to dry, open, relatively barren, light-

colored, rocky clay soils derived from an uncommon formation of interbedded claystones, shales, tuffaceous sandstones, and limestones (Ioneer 2020a, p. 5; Morefield 1995, p. 10). The soils are poor, with little development, lack an A horizon (top layer of mineral soil horizons), and are full of broken pieces of the parent bedrock (Ioneer 2020a, p. 5; Morefield 1995, p. 11). Soils are characterized by a variety of textures, and include clay soils, sandy clay loams, sandy loams, and loams (McClinton et al. 2020, p. 29). This specialized substrate is called channery soil, which consists of 15 to 35 percent thin, flat fragments of sandstone, shale, slate, limestone, or schist (United States Department of Agriculture (USDA) 2015, p. 7).

Tiehm's buckwheat is distributed on these soils along an outcrop of lithium clay in exposed former lake beds (Ioneer 2020a, p. 5). Soil pH ranges from 7.64 to 8.76 (Ioneer 2020a, p. 6). Initial soil sample analyses demonstrate that boron and carbonates were commonly present at excessive levels and that sulfur, calcium, and potassium were commonly present at high levels (Ioneer 2020a, p. 6). Further analyses indicate that soils occupied by Tiehm's buckwheat have on average extremely low phosphorus, low nitrogen, high boron, and high pH (McClinton et al. 2020, p. 35). There were significant differences in soil characteristics between soils occupied and unoccupied by Tiehm's buckwheat, including potassium, zinc, sulfur, and magnesium, which were on average lower in occupied soils, and boron, silt, bicarbonate, and pH, which were, on average, higher, although there was variation among subpopulations and adjacent, unoccupied sites (McClinton et al. 2020, pp. 35, 53). For example, boron was higher in Tiehm's buckwheat subpopulations 1, 2, and 3 than in subpopulations 4, 5, 6, 7, and 8 (Shams et al. 2021, pp. 4–5; McClinton et al. 2020, p. 30). Taking all soil components into consideration as well as results of greenhouse propagation experiments (McClinton et al. 2020, p. 36), there is a unique envelope of soil conditions in which Tiehm's buckwheat thrives that is different from adjacent unoccupied soils (Service 2021a, pp. 16–18).

Tiehm's buckwheat is a perennial plant species that is not rhizomatous or otherwise clonal. Therefore, like other buckwheat species, reproduction in Tiehm's buckwheat is presumed to occur via sexual means (*i.e.*, seed production and recruitment). As with most plant species, Tiehm's buckwheat does not require separate sites for reproduction other than the locations in which parent plants occur and any area

necessary for pollinators and seed dispersal. The primary seed dispersal agents of Tiehm's buckwheat are probably gravity, wind, and water (Morefield 1995, p. 14). Upon maturation of the fruit, seeds are likely to fall to the ground in the immediate vicinity of the parent plant, becoming lodged in the soil surface (Ioneer 2020a, p. 4). The number of seeds produced by individual Tiehm's buckwheat plants is variable with research demonstrating it can range anywhere from 50 to 450 seeds per plant (Service 2021a, pp. 15–16; McClinton et al. 2020, p. 22). We have no information on the longevity and viability of Tiehm's buckwheat seed in the soil seed bank (*i.e.*, natural storage of seeds within the soil of ecosystems) or what environmental cues are needed to trigger germination. However, many arid plants possess seed dormancy, enabling them to delay germination until receiving necessary environmental cues (Jurado and Flores 2005, entire; Pake and Venable 1996, pp. 1432–1434).

Buckwheat, in general, are sexual reproducers and insects are the most common pollinators (Gucker and Shaw 2019, pp. 5–6). Some studies have shown that buckwheat flowers can be pollinated by everything from bees and closely related spider predators (the Acroceridae (Cyrtidae)) to specialist pollinators, while other buckwheat species are also capable of self-pollination (Neel and Ellstrand 2003, p. 339; Archibald et al. 2001, p. 612; Moldenke 1976, pp. 20–25). Primary pollinators and insect visitors (insects that visit a plant to feed on pollen, nectar, or other flower parts, but may not necessarily play a role in pollination) to Tiehm's buckwheat include bees, wasps, beetles, and flies, and have an abundance and diversity exceptionally high for a plant community dominated by a single plant species (Service 2021a, p. 16; McClinton et al. 2020, pp. 11–22).

Successful transfer of pollen among Tiehm's buckwheat subpopulations may be inhibited if subpopulations are separated by distances greater than pollinators can travel and/or a pollinator's nesting or foraging habitat and behavior is negatively affected (Dorchin et al. 2013, entire; BLM 2012, p. 2; Cranmer et al. 2012, p. 562). Flight distances are generally correlated with body size in bees; larger bees are able to fly farther than smaller bees (Greenleaf et al. 2007, pp. 592–594; Gathmann and Tscharntke 2002, entire). There is evidence to suggest that larger bees, which are able to fly longer distances, do not need their habitat to remain contiguous, but it is more important that

the protected habitat is large enough to maintain floral diversity (BLM 2012, p. 18). While researchers have reported long foraging distance for solitary bees, the majority of individuals remain close to their nest, thus foraging distance tends to be 1,640 ft (500 m) or less (Antoine and Forrest 2021, p. 152; Danforth et al. 2019, p. 207; BLM 2012, p. 19). Nest building is common in some solitary wasps (Sphecidae and Pompilidae). However, the distances between hunting sites and nests are unknown for wasps, but many wasps probably hunt close to their nest (within 3 to 66 ft (1 to 20 m)) (O'Neil 2019, pp. 108–111, 152). Most butterflies, flies, and beetles find egg laying and feeding sites as they move across the landscape. The most common bee and wasp pollinators have a fixed location for their nest, and thus their nesting success is dependent on the availability of resources within their flight range (Xerces 2009, p. 14).

Many insect communities are known to be influenced not only by local habitat conditions, but also the surrounding landscape condition (Klein et al. 2004, p. 523; Inouye et al. 2015, pp. 119–121; Dorchin et al. 2013, entire; Tepedino et al. 2011, entire; Xerces 2009, pp. 11–26). In order for genetic exchange of Tiehm's buckwheat to occur, insect visitors and pollinators must be able to move freely between subpopulations. Alternative pollen and nectar sources (other plant species within the surrounding vegetation) are needed to support pollinators during times when Tiehm's buckwheat is not flowering. Conservation strategies that maintain plant-pollinator interactions, such as maintenance of diverse, herbicide-free nectar resources, would serve to attract a wide array of insects, including pollinators of Tiehm's buckwheat (BLM 2012, pp. 5–6, 19; Cranmer et al. 2012, p. 567).

Summary

Based on our current knowledge of the physical or biological features and habitat characteristics required to sustain the species' life-history processes, we determine that the following physical and biological features are essential to the conservation of Tiehm's buckwheat:

1. *Plant community.* A plant community that supports all life stages of Tiehm's buckwheat includes:
 - a. Open to sparsely vegetated areas with low native plant cover and stature.
 - b. An intact, native vegetation assemblage that can include, but is not limited to, shadscale saltbush, James' galleta, and alkali sacaton to protect Tiehm's buckwheat from nonnative,

invasive plant species and provide the habitats needed by Tiehm's buckwheat's insect visitors and pollinators.

- c. A diversity of native plants whose blooming times overlap to provide insect visitors and pollinator species with flowers for foraging throughout the seasons and to provide nesting and egg-laying sites; appropriate nest materials; and sheltered, undisturbed habitat for hibernation and overwintering of pollinator species and insect visitors.

2. *Pollinators and insect visitors.*

Sufficient pollinators and insect visitors, particularly bees, wasps, beetles, and flies, are present for the species' successful reproduction and seed production.

3. *Hydrology.* Hydrology that is suitable for Tiehm's buckwheat consists of dry, open, relatively barren, upland sites subject to occasional precipitation from rain and/or snow for seed germination.

4. *Suitable soils.* Soils that are suitable for Tiehm's buckwheat consist of:
 - a. Light-colored, rocky soils derived from an uncommon formation of interbedded claystones, shales, tuffaceous sandstones, and limestones.
 - b. Soils that are poor, with little development; lack an A horizon; and are full of broken pieces of the parent bedrock.
 - c. Soils characterized by a variety of textures, and include clay soils, sandy clay loams, sandy loams, and loams.
 - d. Soils with pH ranges from 7.64 to 8.76.
 - e. Soils that commonly have on average boron and bicarbonates present at higher levels, and potassium, zinc, sulfur, and magnesium present at lower levels.

Special Management Considerations or Protection

When designating critical habitat, we assess whether the specific areas within the geographical area occupied by the species at the time of listing contain features which are essential to the conservation of the species and which may require special management considerations or protection. The area proposed for designation as critical habitat may require some level of management to address the current and future threats to the physical and biological features essential to the conservation of Tiehm's buckwheat

A detailed discussion of threats to Tiehm's buckwheat and its habitat can be found in the SSA report (Service 2021a, pp. 23–48). The features essential to the conservation of Tiehm's buckwheat (plant community, pollinators and insect visitors, and

suitable hydrology and soils, required for the persistence of adults as well as successful reproduction of such individuals and the formation of a seedbank) may require special management considerations or protection to reduce threats; these threats are more fully described in the proposed listing rule (86 FR 55775; October 7, 2021). The current range of Tiehm's buckwheat is subject to anthropogenic threats such as mineral development, road development and off-highway vehicle (OHV) activity, livestock grazing, nonnative and invasive plant species, and climate change, as well as natural threats such as herbivory and potential effects associated with small population size (Service 2021a, pp. 23–54).

Management activities that could ameliorate these threats include (but are not limited to): Treatment of nonnative, invasive plant species; minimization of OHV access and placement of new roads away from the species and its habitat; regulations or agreements to minimize the effects of mineral exploration and development where the species resides; minimization of livestock use or other disturbances that disturb the soil or seeds; minimization of habitat fragmentation; and monitoring for herbivory. These activities would protect the physical or biological features for the species by preventing the loss of habitat; protecting the plant's habitat, pollinator and insect visitors, and soils from undesirable patterns or levels of disturbance; and facilitating management for desirable conditions that are necessary for Tiehm's buckwheat to fulfill its life-history needs.

Tiehm's buckwheat occurs entirely on Federal lands managed by the BLM. As described in the Tonopah Resource Management Plan (RMP), habitat for all federally listed endangered and threatened species and for all Nevada BLM sensitive species will be managed to maintain or increase current species populations. The introduction, reintroduction, or augmentation of Nevada BLM sensitive species may be allowed in coordination with Nevada Department of Wildlife (NDOW) or the Service, if it is deemed appropriate. Such actions will be considered on a case-by-case basis and will be subject to applicable procedures (BLM 1997, p. 9).

BLM has issued policy guidance to implement its obligations under the Federal Land Policy and Management Act (FLPMA; 43 U.S.C. 1701 *et seq.*). These include BLM's Integrated Vegetation Management Handbook H–1740–2, which guides BLM's various programs to use an interdisciplinary and

collaborative process to plan and implement a set of actions that improve biological diversity and ecosystem function that promote and maintain native plant communities that are resilient to disturbance and invasive species (BLM 2008, p. 2).

Additionally, the BLM Manual section MS-6840, release 6-125 (BLM 2008, pp. 1-48), provides guidance with respect to sensitive species. Tiehm’s buckwheat is managed as a BLM sensitive species; BLM sensitive species are defined as “species that require special management consideration to avoid potential future listing under the [Act]” (BLM 2008, Glossary, p. 5). Under this policy, BLM can initiate proactive conservation measures, including programs, plans, and management practices, to reduce or eliminate threats affecting the status of BLM sensitive species, or to improve the condition of the species’ habitat on BLM-administered lands (BLM 2008, MS-6840.02, MS-6840.06.2.C., and definition of “conservation,” pp. 3, 37, and Glossary 2).

In response to the September 2020 herbivory event on Tiehm’s buckwheat subpopulations, BLM has been monitoring the species. Photo plots were established near undamaged plants in subpopulations 1, 3, and 6 to help determine whether herbivory is continuing (Crosby 2020a, pers. comm.; Crosby, 2020b, pers. comm.). Ocular estimates from the photo plots indicate that herbivory is not ongoing (Crosby, 2020b, pers. comm.). Game cameras that were installed by BLM when damage to the species was first reported were removed in mid-November 2020, but may be reinstalled if deemed necessary (Crosby, 2020a, pers. comm.).

Criteria Used To Identify Critical Habitat

As required by section 4(b)(2) of the Act, we use the best scientific data available to designate critical habitat. In accordance with the Act and our

implementing regulations at 50 CFR 424.12(b), we review available information pertaining to the habitat requirements of the species and identify specific areas within the geographical area occupied by the species at the time of listing and any specific areas outside the geographical area occupied by the species to be considered for designation as critical habitat. We are not currently proposing to designate any areas outside the geographical area occupied by the species because we have not identified any unoccupied areas that meet the definition of critical habitat. The occupied areas are sufficient for the conservation of the species because the physical and biological features that support the plant occur there. The areas outside of the occupied area do not support these physical and biological features and we are not confident that they would support populations of Tiehm’s buckwheat.

We are proposing to designate one occupied critical habitat unit for Tiehm’s buckwheat. The one unit is comprised of approximately 910 acres (ac) (368 hectares (ha)) in Nevada and is completely on lands under Federal (BLM) land ownership. The unit was determined using location information for Tiehm’s buckwheat from E.M. Strategies and the NDNH (Kuyper 2019, entire; Morefield 2010, entire; Morefield 2008, entire). These locations were classified into one discrete population, with eight subpopulations, based on mapping standards devised by NatureServe and its network of Natural Heritage Programs (NatureServe 2004, entire). This unit includes the physical footprint of where the plants currently occur, as well as their immediate surroundings out to 1,640 ft (500 m) in every direction from the periphery of each subpopulation. This area of surrounding habitat contains components of the physical and biological features (*i.e.*, the pollinator community and its requisite native vegetative assembly) necessary to

support the life-history needs of Tiehm’s buckwheat (Antoine and Forrest 2021, p. 152; O’Neil 2019, pp. 108-111, 152; Danforth et al. 2019, p. 207; BLM 2012, p. 19; Xerces 2009, p. 14; Greenleaf et al. 2007, pp. 592-594; Gathmann and Tschardtke 2002, entire). This essential habitat configuration was based on the best available nesting, egg-laying, and foraging information for the bee, wasp, beetle, and fly pollinators and insect visitors of Tiehm’s buckwheat (McClinton et al. 2020, p. 18), as most insect communities are known to be influenced not only by local habitat conditions, but also the surrounding landscape conditions (Klein et al. 2004, p. 523; Inouye et al. 2015, pp. 119-121; Dorchin et al. 2013, entire; Tepedino et al. 2011, entire; Xerces 2009, pp. 11-26).

The critical habitat designation is defined by the map, as modified by any accompanying regulatory text, presented at the end of this document under Proposed Regulation Promulgation. We include more detailed information on the boundaries of the critical habitat designation in the preamble of this document. We will make the coordinates or plot points or both on which the map is based available to the public on <https://www.regulations.gov> at Docket No. FWS-R8-ES-2020-0017, and at the field office responsible for the designation (see **FOR FURTHER INFORMATION CONTACT** above).

Proposed Critical Habitat Designation

We are proposing one unit as critical habitat for Tiehm’s buckwheat. The unit is considered occupied at the time of listing. The critical habitat area, the Rhyolite Ridge area of the Silver Peak Range in Esmeralda County, Nevada, that we describe below constitutes our current best assessment of areas that meet the definition of critical habitat for Tiehm’s buckwheat. Table 1(below) shows the proposed critical habitat unit and its approximate area.

TABLE 1—PROPOSED CRITICAL HABITAT UNIT FOR TIEHM’S BUCKWHEAT (ENGONUM TICHMII)
[Area estimates reflect all lands within the critical habitat boundary.]

| Unit name | Federally owned land * | | Total area | |
|---------------------------|------------------------|----------|------------|----------|
| | acres | hectares | acres | hectares |
| Rhyolite Ridge Unit | 910 | 368 | | |
| | 910 | 368 | | |

* These lands are Federal lands managed by the Bureau of Land Management (BLM).

We present brief a description of the critical habitat unit, and reasons why it meets the definition of critical habitat for Tiehm’s buckwheat, below.

Rhyolite Ridge Unit

The Rhyolite Ridge Unit consists of approximately 910 ac (368 ha) of

Federal land. This unit is located approximately 13 miles (21 kilometers) west of Silver Peak in Esmeralda County, Nevada. Cave Springs Road, a

rural, county unpaved road, bisects the unit. One hundred percent of this unit is on Federal lands managed by the BLM. This unit is currently occupied and contains the single population comprised of eight subpopulations of Tiehm's buckwheat. This unit is essential to the conservation and recovery of Tiehm's buckwheat because it supports all of the habitat that is occupied by Tiehm's buckwheat across the species' range. This unit currently has all of the physical and biological features described above essential to the conservation of the species, including a plant community that supports all life stages of Tiehm's buckwheat; sufficient pollinators and insect visitors, particularly bees, wasps, beetles, and flies; hydrology suitable for Tiehm's buckwheat that consists of dry, open, relatively barren, upland sites subject to occasional precipitation from rain and/or snow; and soils that are suitable for Tiehm's buckwheat. Special management considerations or protection may be required to address mineral development, road development and OHV activity, livestock grazing, nonnative invasive plant species, and herbivory (see Special Management Considerations or Protection).

Effects of Critical Habitat Designation

Section 7 Consultation

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

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

If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. Examples of actions that are subject to the section 7 consultation process are actions on State, Tribal,

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

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

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

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

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

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

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

(3) Are economically and technologically feasible, and

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

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

Regulations at 50 CFR 402.16 set forth requirements for Federal agencies to reinstate formal consultation on previously reviewed actions. These requirements apply when the Federal

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

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

Application of the “Destruction or Adverse Modification” Standard

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

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

Activities that the Service may, during a consultation under section 7(a)(2) of the Act, consider likely to destroy or adversely modify the critical habitat of Tiehm's buckwheat include, but are not limited to, actions that are likely to cause large-scale habitat impacts, adversely affecting the physical and biological features at a scale and magnitude such that the designated critical habitat would no longer be able to provide for the conservation of the

species. Examples include removing corridors for pollinator movement and seed dispersal; significantly disrupting the native vegetative assemblage, seed bank, or soil composition and structure; or significantly fragmenting the landscape and decreasing the resiliency and representation of the species throughout its range (Service 2021b, p. 14). For such activities, the Service would likely require reasonable and prudent alternatives to ensure the implementation of project-specific conservation measures designed to reduce the scale and magnitude of these habitat impacts.

Exemptions

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

Section 4(a)(3)(B)(i) of the Act (16 U.S.C. 1533(a)(3)(B)(i)) provides that the Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense (DoD), or designated for its use, that are subject to an integrated natural resources management plan (INRMP) prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation. No DoD lands with a completed INRMP are within the proposed critical habitat designation.

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

Section 4(b)(2) of the Act states that the Secretary shall designate and make revisions to critical habitat on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude an area from designated critical habitat based on economic impacts, impacts on national security, or any other relevant impacts. In considering whether to exclude a particular area from the designation, we identify the benefits of including the area in the designation, identify the benefits of excluding the area from the designation, and evaluate whether the benefits of exclusion outweigh the benefits of inclusion. If the analysis indicates that the benefits of exclusion outweigh the benefits of inclusion, the Secretary may exercise discretion to exclude the area only if such exclusion would not result in the extinction of the species. In making the determination to exclude a particular area, the statute on its face, as well as the legislative history,

are clear that the Secretary has broad discretion regarding which factor(s) to use and how much weight to give to any factor. We describe below the process that we undertook for taking into consideration each category of impacts and our analyses of the relevant impacts.

Consideration of Economic Impacts

Section 4(b)(2) of the Act and its implementing regulations require that we consider the economic impact that may result from a designation of critical habitat. To assess the probable economic impacts of a designation, we must first evaluate specific land uses or activities and projects that may occur in the area of the critical habitat. We then must evaluate the impacts that a specific critical habitat designation may have on restricting or modifying specific land uses or activities for the benefit of the species and its habitat within the areas proposed. We then identify which conservation efforts may be the result of the species being listed under the Act versus those attributed solely to the designation of critical habitat for this particular species. The probable economic impact of a proposed critical habitat designation is analyzed by comparing scenarios both “with critical habitat” and “without critical habitat.”

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

For this particular designation, we developed an incremental effects

memorandum (IEM; Service 2021b, entire) considering the probable incremental economic impacts that may result from this proposed designation of critical habitat. The information contained in our IEM was then used to develop a screening analysis of the probable effects of the designation of critical habitat for Tiehm’s buckwheat (Industrial Economics Inc. (IEC) 2021, entire). We began by conducting a screening analysis of the proposed designation of critical habitat in order to focus our analysis on the key factors that are likely to result in incremental economic impacts. The purpose of the screening analysis is to filter out particular geographic areas of critical habitat that are already subject to such protections and are, therefore, unlikely to incur incremental economic impacts. In particular, the screening analysis considers baseline costs (i.e., absent critical habitat designation) and includes any probable incremental economic impacts where land and water use may already be subject to conservation plans, land management plans, best management practices, or regulations that protect the habitat area as a result of the Federal listing status of the species. Ultimately, the screening analysis allows us to focus our analysis on evaluating the specific areas or sectors that may incur probable incremental economic impacts as a result of the designation. If the proposed critical habitat designation contains any unoccupied units, the screening analysis assesses whether those units require additional management or conservation efforts that may incur incremental economic impacts. This screening analysis combined with the information contained in our IEM constitute what we consider to be our draft economic analysis (DEA) of the proposed critical habitat designation for Tiehm’s buckwheat; our DEA is summarized in the narrative below.

Executive Orders 12866 and 13563 direct Federal agencies to assess the costs and benefits of available regulatory alternatives in quantitative (to the extent feasible) and qualitative terms. Consistent with the Executive orders’ regulatory analysis requirements, our effects analysis under the Act may take into consideration impacts to both directly and indirectly affected entities, where practicable and reasonable. If sufficient data are available, we assess to the extent practicable the probable impacts to both directly and indirectly affected entities. As part of our screening analysis, we considered the types of economic activities that are likely to occur within the areas likely

affected by the critical habitat designation. In our evaluation of the probable incremental economic impacts that may result from the proposed designation of critical habitat for Tiehm's buckwheat, first we identified, in the IEM dated July 21, 2021 (Service 2021b, entire), probable incremental economic impacts associated with the following categories of activities: Mining and minerals exploration, livestock grazing, and recreation. We considered each industry or category individually. Additionally, we considered whether their activities have any Federal involvement. Critical habitat designation generally will not affect activities that do not have any Federal involvement; under the Act, designation of critical habitat only affects activities conducted, funded, permitted, or authorized by Federal agencies. Because the species is already proposed for listing, in areas where Tiehm's buckwheat is present, Federal agencies need to conference with the Service under section 7(a)(4) of the Act if it is determined that any activities they authorize, fund, or carry out are likely to jeopardize the continued existence of the species. Upon publication of this proposed critical habitat designation in the **Federal Register**, Federal agencies also need to conference with the Service under section 7(a)(4) if it is determined that any activities they authorize, fund, or carry out are likely to destroy or adversely modify the critical habitat.

In our IEM, we attempted to clarify the distinction between the effects that would result from the species being listed and those attributable to the critical habitat designation (*i.e.*, difference between the jeopardy and adverse modification standards) for Tiehm's buckwheat critical habitat. The following specific circumstances help to inform our evaluation: (1) The essential physical and biological features identified for critical habitat are the most important features essential for the life-history needs of the species, and (2) any actions that would result in sufficient adverse effect to the essential physical and biological features of critical habitat would also constitute jeopardy to Tiehm's buckwheat. The IEM outlines our rationale concerning this limited distinction between baseline conservation efforts and incremental impacts of the designation of critical habitat for Tiehm's buckwheat. This evaluation of the incremental effects has been used as the basis to evaluate the probable incremental economic impacts of this proposed designation of critical habitat.

The proposed critical habitat designation for Tiehm's buckwheat includes one critical habitat unit (Rhyolite Ridge Unit) totaling approximately 910 ac (368 ha), which was occupied by Tiehm's buckwheat at the time of proposed listing and is currently occupied. Any actions that may affect the species or its habitat would also affect critical habitat, and it is unlikely that any additional conservation efforts would be recommended to address the adverse modification standard over and above those recommended as necessary to avoid jeopardizing the continued existence of Tiehm's buckwheat. Therefore, the proposed critical habitat designation is expected to result in only administrative costs. While additional analysis will require time and resources by both the Federal action agency and the Service, it is believed that, in most circumstances, these costs would be relatively minor and administrative in nature.

This proposed critical habitat designation is expected to result in six consultations in 10 years (IEc 2021, p. 3). This additional administrative effort includes a projected estimate of five formal consultations and one programmatic consultation, which is aggregated into a given year to give a total annual incremental cost for the purpose of determining whether the rule is economically significant under Executive Order 12866 (IEc 2021, Exhibit 3, p. 12). The analysis forecasts no incremental costs associated with project modifications that would involve additional conservation efforts for Tiehm's buckwheat. The projected incremental costs for each programmatic, formal, informal, and technical assistance effort are estimated to be approximately \$5,300 (formal consultation), \$2,600 (informal consultation), \$9,800 (programmatic consultation), and \$420 (technical assistance). Analyzing the potential for adverse modification of the species' critical habitat during section 7 consultation will likely result in a total annual incremental cost of less than approximately \$37,000 (2021 dollars) in a given year for Tiehm's buckwheat (IEc 2021, Exhibits 4 and 5, p. 13); therefore, the annual administrative burden is extremely unlikely to generate costs exceeding \$100 million in a single year (*i.e.*, the threshold for an economically significant rule under Executive Order 12866).

We are soliciting data and comments from the public on the DEA discussed above, as well as on all aspects of this proposed rule and our required determinations. During the development

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

Consideration of National Security Impacts

Section 4(a)(3)(B)(i) of the Act may not cover all DoD lands or areas that pose potential national-security concerns (*e.g.*, a DoD installation that is in the process of revising its INRMP for a newly listed or proposed listed species or a species previously not covered). If a particular area is not covered under section 4(a)(3)(B)(i), then national-security or homeland-security concerns are not a factor in the process of determining what areas meet the definition of "critical habitat." However, the Service must still consider impacts on national security, including homeland security, on those lands or areas not covered by section 4(a)(3)(B)(i), because section 4(b)(2) requires the Service to consider those impacts whenever it designates critical habitat. Accordingly, if DoD, Department of Homeland Security (DHS), or another Federal agency has requested exclusion based on an assertion of national-security or homeland-security concerns, or we have otherwise identified national-security or homeland-security impacts from designating particular areas as critical habitat, we generally have reason to consider excluding those areas.

However, we cannot automatically exclude requested areas. When DoD,

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

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

section 4(b)(2) and our implementing regulations at 50 CFR 17.90.

Consideration of Other Relevant Impacts

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

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

After identifying the benefits of inclusion and the benefits of exclusion, we carefully weigh the two sides to evaluate whether the benefits of exclusion outweigh those of inclusion. If our analysis indicates that the benefits of exclusion outweigh the benefits of inclusion, we then determine whether exclusion would result in extinction of the species. If exclusion of an area from

critical habitat will result in extinction, we will not exclude it from the designation.

In the case of Tiehm's buckwheat, the benefits of critical habitat include public awareness of the presence of Tiehm's buckwheat and the importance of habitat protection, and, where a Federal nexus exists, increased habitat protection for Tiehm's buckwheat due to protection from destruction or adverse modification of critical habitat.

Conservation Plans

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

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

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

When we undertake a discretionary section 4(b)(2) analysis, we evaluate a variety of factors to determine how the benefits of any exclusion and the benefits of inclusion are affected by the existence of private or other non-Federal conservation plans or agreements and their attendant partnerships. The factors we consider may differ, depending on whether we are evaluating a conservation plan that involves permits under section 10 or a non-permitted plan (see 50 CFR 17.90(d)(3) and (4)).

There are no habitat conservation plans for the area in the proposed critical habitat designation for Tiehm's buckwheat.

Ioneer USA Corporation (Ioneer)

As part of the proposed Rhyolite Ridge Lithium-Boron project, Ioneer USA Corporation (Ioneer) is developing a conservation strategy for Tiehm's buckwheat to protect and preserve the continued viability of the species on a long-term basis. Currently, the conservation strategy is in the early stages (Ioneer 2020b, entire).

Ioneer has also implemented or proposed various protection measures for Tiehm's buckwheat. Ioneer funded the development of a habitat suitability model to identify additional potential habitat for Tiehm's buckwheat through field surveys (Ioneer 2020a, p. 12). In addition, a demographic monitoring program was initiated in 2019, to detect and document trends in population size, acres inhabited, size class distribution, and cover with permanent monitoring transects established in subpopulations 1, 2, 3, 4, and 6 (Ioneer 2020a, p. 16). Ioneer also funded collection of Tiehm's buckwheat seed in 2019 (Ioneer 2020a, pp. 13–14). Some of this seed was used by the University of Nevada, Reno (UNR), for a propagation trial and transplant study (Ioneer 2020a, p. 14). The remainder of this seed is in long-term storage at Rae Selling Berry Seed Bank at Portland State University (Ioneer 2020a, p. 13). As part of its proposed mining plan of operations, Tiehm's buckwheat protection plan, Ioneer also plans to avoid subpopulations 1, 2, 3, and 8 (Ioneer 2020a, p. 11), fence and place signage around subpopulations 1 and 2 (Ioneer 2020a, p. 11), and remove and salvage all remaining plants in subpopulations 4, 5, 6, and 7 and translocate them to another location (Ioneer 2020a, p. 15). However, the proposed Rhyolite Ridge Lithium-Boron project may or may not be permitted by the BLM, and these protection measures may or may not be fully implemented.

Tribal Lands

Several Executive orders, Secretarial Orders, and policies concern working with Tribes. These guidance documents generally confirm our trust responsibilities to Tribes, recognize that Tribes have sovereign authority to control Tribal lands, emphasize the importance of developing partnerships with Tribal governments, and direct the Service to consult with Tribes on a government-to-government basis. In addition, we look at the existence of Tribal conservation plans and

partnerships. In preparing this proposal, we have determined that the proposed designation of critical habitat does not include any Tribal lands or trust resources. We anticipate no impact on Tribal lands or partnerships from this proposed designation of critical habitat.

We may also consider areas not identified for inclusion or exclusion from the final critical habitat designation based on information we may receive during the public comment period. As noted above, we have requested that the entities seeking inclusion or exclusion of areas provide credible information regarding the existence of a meaningful economic or other relevant impact supporting a benefit of exclusion for that particular area (see 50 CFR 17.90). A final determination on whether the Secretary will exercise her discretion to include or exclude this area from critical habitat for Tiehm's buckwheat will be made at the time of our final determination regarding critical habitat. During the development of a final designation, we will consider any additional information we receive through the public comment period regarding other relevant impacts of the proposed designation and will determine whether any specific areas should be excluded from the final critical habitat designation under authority of section 4(b)(2) and our implementing regulations at 50 CFR 424.19.

Required Determinations

Clarity of the Rule

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

- (1) Be logically organized;
- (2) Use the active voice to address readers directly;
- (3) Use clear language rather than jargon;
- (4) Be divided into short sections and sentences; and
- (5) Use lists and tables wherever possible.

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

Regulatory Planning and Review (Executive Orders 12866 and 13563)

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

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

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

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

According to the Small Business Administration, small entities include small organizations such as independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; and small businesses (13 CFR 121.201). Small businesses include manufacturing and mining

concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than \$5 million in annual sales, general and heavy construction businesses with less than \$27.5 million in annual business, special trade contractors doing less than \$11.5 million in annual business, and agricultural businesses with annual sales less than \$750,000. To determine whether potential economic impacts to these small entities are significant, we considered the types of activities that might trigger regulatory impacts under this designation as well as types of project modifications that may result. In general, the term “significant economic impact” is meant to apply to a typical small business firm’s business operations.

Under the RFA, as amended, and as understood in light of recent court decisions, Federal agencies are required to evaluate the potential incremental impacts of rulemaking on those entities directly regulated by the rulemaking itself; in other words, the RFA does not require agencies to evaluate the potential impacts to indirectly regulated entities. The regulatory mechanism through which critical habitat protections are realized is section 7 of the Act, which requires Federal agencies, in consultation with the Service, to ensure that any action authorized, funded, or carried out by the agency is not likely to destroy or adversely modify critical habitat. Therefore, under section 7, only Federal action agencies are directly subject to the specific regulatory requirement (avoiding destruction and adverse modification) imposed by critical habitat designation. Consequently, it is our position that only Federal action agencies would be directly regulated if we adopt this proposed critical habitat designation. The RFA does not require evaluation of the potential impacts to entities not directly regulated. Moreover, Federal agencies are not small entities. Therefore, because no small entities would be directly regulated by this rulemaking, the Service certifies that, if made final as proposed, the critical habitat designation for Tiehm’s buckwheat will not have a significant economic impact on a substantial number of small entities.

In summary, we have considered whether the proposed designation would result in a significant economic impact on a substantial number of small entities. For the above reasons and based on currently available information, we certify that, if made final as proposed, the critical habitat

designation for Tiehm’s buckwheat will not have a significant economic impact on a substantial number of small business entities. Therefore, an initial regulatory flexibility analysis is not required.

Energy Supply, Distribution, or Use—Executive Order 13211

Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) requires agencies to prepare Statements of Energy Effects when undertaking certain actions. There are no operation, management, and maintenance activities of utility facilities (e.g., hydropower facilities, powerlines, pipelines) that we are aware of or that have been known to occur within the range of Tiehm’s buckwheat and its proposed critical habitat unit. If proposed in the future, these are activities that the Service consults on with Federal agencies (and their respective permittees, including utility companies) under section 7 of the Act. As discussed in the DEA, the costs associated with consultations related to occupied critical habitat would be largely administrative in nature and are not anticipated to reach \$100 million in any given year based on the anticipated annual number of consultations and associated consultation costs, which are not expected to exceed \$37,000 per year (2021 dollars) (IEc 2021, p. 13). In our economic analysis, we did not find that this proposed critical habitat designation would significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

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

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

(1) This proposed rule would not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or Tribal governments, or the private sector, and includes both “Federal intergovernmental mandates” and “Federal private sector mandates.” These terms are defined in 2 U.S.C. 658(5)–(7). “Federal intergovernmental mandate” includes a regulation that “would impose an enforceable duty upon State, local, or Tribal governments” with two exceptions. It excludes “a condition of Federal assistance.” It also excludes “a duty arising from participation in a voluntary Federal program,” unless the regulation

“relates to a then-existing Federal program under which \$500,000,000 or more is provided annually to State, local, and Tribal governments under entitlement authority,” if the provision would “increase the stringency of conditions of assistance” or “place caps upon, or otherwise decrease, the Federal Government’s responsibility to provide funding,” and the State, local, or Tribal governments “lack authority” to adjust accordingly. At the time of enactment, these entitlement programs were: Medicaid; Aid to Families with Dependent Children work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement. “Federal private sector mandate” includes a regulation that “would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance or (ii) a duty arising from participation in a voluntary Federal program.”

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

(2) We do not believe that this rule would significantly or uniquely affect small governments because it is not anticipated to reach a Federal mandate of \$100 million in any given year; that is, it is not a “significant regulatory action” under the Unfunded Mandates Reform Act. The designation of critical habitat imposes no obligations on State or local governments. Small governments could be affected only to the extent that any programs having Federal funds, permits, or other authorized activities must ensure that

their actions will not adversely affect the critical habitat. By definition, Federal agencies are not considered small entities, although the activities they fund or permit may be proposed or carried out by small entities. Consequently, we do not believe that the proposed critical habitat designation would significantly or uniquely affect small government entities. Therefore, a Small Government Agency Plan is not required.

Takings—Executive Order 12630

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

Federalism—Executive Order 13132

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

habitat, either for States and local governments, or for anyone else. As a result, the proposed rule does not have substantial direct effects either on the States, or on the relationship between the Federal Government and the States, or on the distribution of powers and responsibilities among the various levels of government. The proposed designation may have some benefit to these governments because the areas that contain the features essential to the conservation of the species are more clearly defined, and the physical or biological features of the habitat necessary for the conservation of the species are specifically identified. This information does not alter where and what federally sponsored activities may occur. However, it may assist State and local governments in long-range planning because they no longer have to wait for case-by-case section 7 consultations to occur.

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

Civil Justice Reform—Executive Order 12988

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

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

This rule does not contain information collection requirements, and a submission to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995

(44 U.S.C. 3501 *et seq.*) is not required. We may not conduct or sponsor and you are not required to respond to a collection of information unless it displays a currently valid OMB control number.

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

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

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994 (Government-to-Government Relations with Native American Tribal Governments; 59 FR 22951), Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments), and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with Tribes in developing programs for healthy ecosystems, to acknowledge that Tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to Tribes. There are no Tribal lands included in this proposed designation of critical habitat.

References Cited

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

Authors

The primary authors of this proposed rule are the staff members of the Fish and Wildlife Service's Species

Assessment Team and the Reno Fish and Wildlife Office.

List of Subjects in 50 CFR Part 17

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

Proposed Regulation Promulgation

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

PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

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

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

■ 2. Amend § 17.96, in paragraph (a), by adding an entry for “Family Polygonaceae: *Eriogonum tiehmii* (Tiehm’s buckwheat)” in alphabetical order to read as follows:

§ 17.96 Critical habitat—plants.

(a) * * *

Family Polygonaceae: *Eriogonum tiehmii* (Tiehm’s buckwheat)

(1) The critical habitat unit is depicted for Esmeralda County, Nevada, on the map in this entry.

(2) Within these areas, the physical or biological features essential to the conservation of Tiehm’s buckwheat consist of the following:

(i) *Plant community.* A plant community that supports all life stages of Tiehm’s buckwheat includes:

(A) Open to sparsely vegetated areas with low native plant cover and stature.

(B) An intact, native vegetation assemblage that can include, but is not limited to, *Atriplex confertifolia* (shadscale saltbush), *Hilaria jamesii* (James’ galleta), and *Sporobolus airoides* (alkali sacaton) to protect Tiehm’s buckwheat from nonnative, invasive plant species and provide the habitats needed by Tiehm’s buckwheat’s insect visitors and pollinators.

(C) A diversity of native plants whose blooming times overlap to provide insect visitors and pollinator species with flowers for foraging throughout the seasons and to provide nesting and egg-laying sites; appropriate nest materials; and sheltered, undisturbed habitat for hibernation and overwintering of pollinator species and insect visitors.

(ii) *Pollinators and insect visitors.* Sufficient pollinators and insect visitors, particularly bees, wasps, beetles, and flies, are present for the species’ successful reproduction and seed production.

(iii) *Hydrology.* Hydrology that is suitable for Tiehm’s buckwheat consists of dry, open, relatively barren, upland sites subject to occasional precipitation from rain and/or snow for seed germination.

(iv) *Suitable soils.* Soils that are suitable for Tiehm’s buckwheat consist of:

(A) Light-colored, rocky soils derived from an uncommon formation of interbedded claystones, shales, tuffaceous sandstones, and limestones.

(B) Soils that are poor, with little development; lack an A horizon; and are full of broken pieces of the parent bedrock.

(C) Soils characterized by a variety of textures, and include clay soils, sandy clay loams, sandy loams, and loams.

(D) Soils with pH ranges from 7.64 to 8.76.

(E) Soils that commonly have on average boron and bicarbonates present at higher levels, and potassium, zinc, sulfur, and magnesium present at lower levels.

(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 [EFFECTIVE DATE OF THE FINAL RULE].

(4) Data layers defining the map unit were created by the Service, and the critical habitat unit was then mapped using Universal Transverse Mercator Zone 11N coordinates. The map in this entry, as modified by any accompanying regulatory text, establishes the boundaries of the critical habitat designation. The coordinates or plot points or both on which the map is based are available to the public at <https://www.regulations.gov> at Docket No. FWS–R8–ES–2020–0017 and at the field office responsible for this designation. You may obtain field office location information by contacting the Service regional office, the address of which is listed at 50 CFR 2.2.

(5) Rhyolite Ridge Unit, Esmeralda County, Nevada.

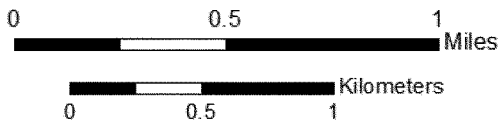
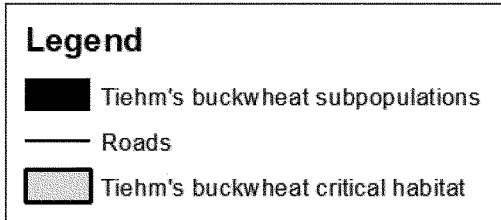
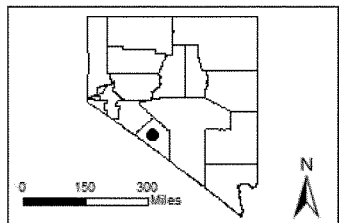
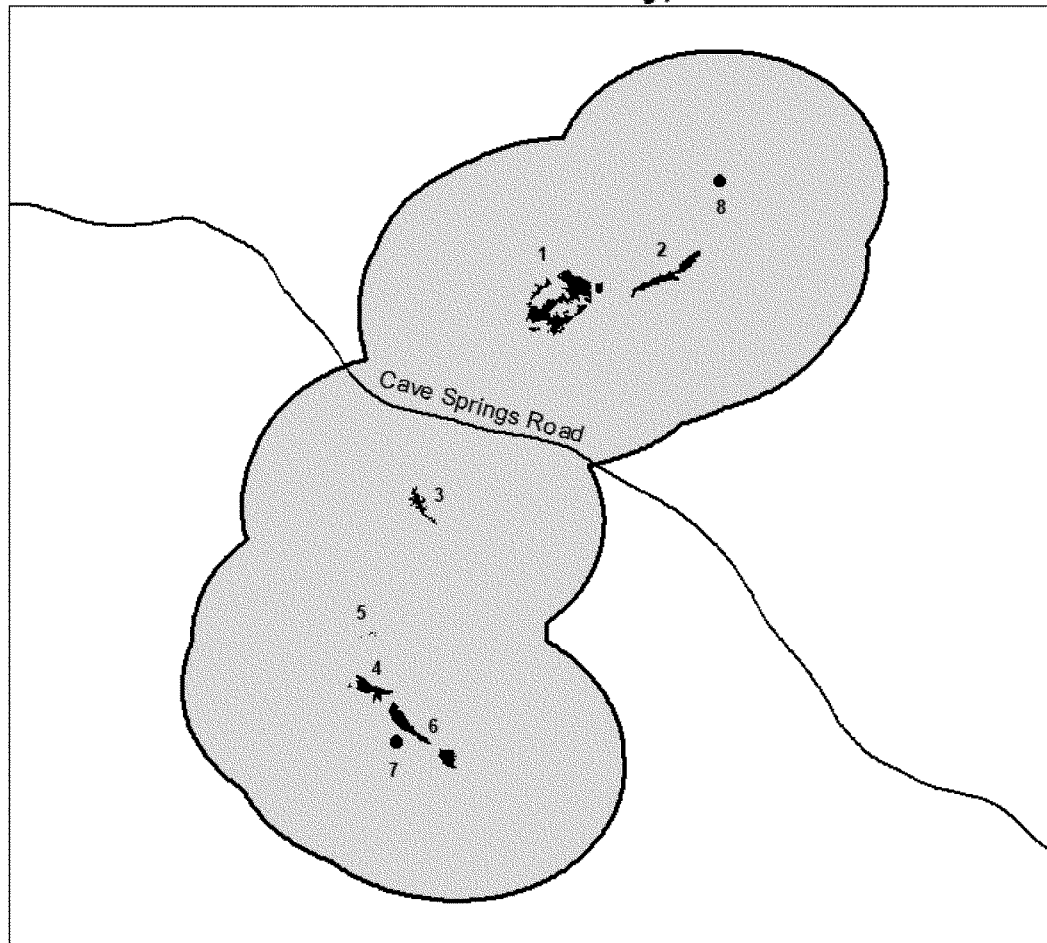
(i) The Rhyolite Ridge Unit consists of approximately 910 acres (368 hectares) of occupied habitat in the Rhyolite Ridge area of the Silver Peak Range in Esmeralda County, Nevada. All lands within this unit are under Federal ownership (Bureau of Land Management).

(ii) Map of the Rhyolite Ridge Unit follows:

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Figure 1 to *Eriogonum tiehmii* (Tiehm's buckwheat) paragraph (5)(ii)

Rhyolite Ridge Unit: Critical Habitat for Tiehm's buckwheat Esmeralda County, Nevada



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

[FR Doc. 2022-02298 Filed 2-2-22; 8:45 am]

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DEPARTMENT OF THE INTERIOR**Fish and Wildlife Service****50 CFR Part 17****[Docket No. FWS-R4-ES-2019-0018; FF09E22000 FXES1113090FEDR 223]****RIN 1018-BE09****Endangered and Threatened Wildlife and Plants; Reclassification of the Red-Cockaded Woodpecker From Endangered to Threatened With a Section 4(d) Rule****AGENCY:** Fish and Wildlife Service, Interior.**ACTION:** Proposed rule; revisions and reopening of comment period.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce the reopening of the comment period on our October 8, 2020, proposed rule to reclassify the red-cockaded woodpecker (*Dryobates borealis*) as a threatened species with a rule issued under section 4(d) of the Endangered Species Act of 1973 (Act), as amended. This action will allow all interested parties the opportunity to comment on the revised proposed section 4(d) rule language set forth in this document, which addresses concerns raised in the public comments we received on the October 8, 2020, proposed rule. Comments previously submitted on the proposed reclassification of the red-cockaded woodpecker and previously proposed section 4(d) rule need not be resubmitted, as they will be fully considered in preparation of the final determination.

DATES: The public comment period on the proposed rule that published on October 8, 2020, at 85 FR 63474, is reopened. We will accept comments received or postmarked on or before March 7, 2022. Comments submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES**, below) must be received by 11:59 p.m. Eastern Time on the closing date.

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

(1) *Electronically:* Go to the Federal eRulemaking Portal: <https://www.regulations.gov>. In the Search box,

enter FWS-R4-ES-2019-0018, which is the docket number for this rulemaking. Then, click on the Search button. On the resulting page, in the panel on the left side of the screen, under the Document Type heading, check the Proposed Rule box to locate this document. You may submit a comment by clicking on "Comment."

(2) *By hard copy:* Submit by U.S. mail to: Public Comments Processing, Attn: FWS-R4-ES-2019-0018, U.S. Fish and Wildlife Service, MS: PRB/3W, 5275 Leesburg Pike, Falls Church, VA 22041-3803.

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

Availability of supporting materials: This document and supporting materials (including the species status assessment report and references cited) are available at <https://www.regulations.gov> under Docket No. FWS-R4-ES-2019-0018 and at the Southeast Regional Office (see **FOR FURTHER INFORMATION CONTACT**).

FOR FURTHER INFORMATION CONTACT: Aaron Valenta, Chief, Division of Restoration and Recovery, U.S. Fish and Wildlife Service, Southeast Regional Office, 1875 Century Boulevard, Atlanta, GA 30345; telephone 404-679-4144. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service at 800-877-8339.

SUPPLEMENTARY INFORMATION:**Information Requested**

We intend that any final action resulting from the October 8, 2020, and 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 and information from other governmental agencies, Native American Tribes, the scientific community, industry, or any other interested party concerning these proposed rules.

We particularly seek comments or information on regulations that are necessary and advisable for the conservation and management of the red-cockaded woodpecker, including whether the measures outlined in this document for the revised proposed section 4(d) rule are necessary and advisable for the conservation of the red-cockaded woodpecker. Specifically, we seek comments on:

(1) Whether the included prohibitions in the revised proposed section 4(d) rule would adequately and appropriately provide for the conservation of the red-cockaded woodpecker;

(2) Whether it is appropriate to except incidental take that results from red-cockaded woodpecker management and military training activities on Department of Defense (DoD) installations with a Service-approved integrated natural resources management plan (INRMP);

(3) Whether different or additional conditions, if any, should be applied to the exception for DoD installations in order to provide adequately for the conservation of the red-cockaded woodpecker;

(4) Whether it is appropriate to except incidental take that results from habitat management activities intended to restore or maintain red-cockaded woodpecker habitat on Federal land management agency properties;

(5) Whether different or additional conditions, if any, should be applied to the exception for Federal land management agency properties in order to provide adequately for the conservation of the red-cockaded woodpecker;

(6) Whether it is appropriate to except incidental take associated with prescribed burns and the application of herbicides on private lands when compatible with maintaining any known red-cockaded woodpecker populations;

(7) Whether different or additional conditions, if any, should be applied to the exception for prescribed burns and the application of herbicides on private lands in order to provide adequately for the conservation of the red-cockaded woodpecker;

(8) Whether it is appropriate to except incidental take that results from the installation of artificial cavity inserts and drilled cavities on public and private lands;

(9) Whether different or additional conditions, if any, should be applied to the exception for the installation of artificial cavities in order to provide adequately for the conservation of the red-cockaded woodpecker;

(10) Whether we should provide additional clarity on the minimum diameter of trees that are appropriate for selection for installation of artificial cavities and, if so, what the best available science indicates regarding a universally applicable minimum tree diameter;

(11) Whether any other forms of take should be excepted from the prohibitions in the revised proposed section 4(d) rule;